

Maritime Contract Law Moves Inland: The *Kirby* Decision

By Carl R. Neil*

Kirby's Expansion of Admiralty Contract Jurisdiction

On November 9, 2004, the United States Supreme Court handed down a landmark decision extending the reach of maritime contract law to govern carrier liability for damage to cargo shipped under a through bill of lading during an inland carriage leg of over 350 miles from the ocean carriage terminal. The case is *Norfolk Southern R. Co. v. James N. Kirby Pty, Ltd.*¹ Specifically, the Court held that liability of a rail carrier performing the inland transportation under through bills of lading calling for carriage from Australia to Huntsville, Alabama, via the Port of Savannah, Georgia, for damage to the cargo occurring in that leg will be determined under maritime common law, because the entire contract of carriage, and not just the ocean segment of it, is a maritime contract. The decision may rank in admiralty jurisprudence with such seminal cases as *Executive Jet*² and *Moragne*³. Until *Kirby*, the law seemed firmly established by lower court decisions that an agreement for intermodal transportation of goods (usually under a “through” bill of lading) was a type of “mixed contract.” If inland carriage under such a contract involved more than “incidental” land transportation to complete delivery after ocean carriage, the contract was not maritime, so far as it involved inland carriage, and that portion of it was not governed by admiralty law.⁴ Thus, lower courts deciding issues

* Partner at Lindsay, Hart, Neil & Weigler, LLP, Portland, Oregon. Adjunct Professor of Law, Northwestern Law School of Lewis and Clark College. B.A. 1955, Yale University; LL.B. 1958, Columbia University.

¹ 543 US ____, 125 S. Ct. 385, 160 L.Ed. 2d. ____, 2004 A.M.C. 2705 (Nov. 9, 2004).

² *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 US 249, 1973 A.M.C. 1 (1972), narrowing admiralty tort jurisdiction by adding a maritime nexus requirement to the previous requirement of the tort occurring in a maritime locality.

³ *Moragne v. States Marine Lines, Inc.*, 398 US 375, 1970 A.M.C. 967 (1970), creating a maritime common law remedy for wrongful death.

⁴ *E.g.*, *Hartford Fire Ins. Co. v. Orient Overseas Container Lines*, 230 F.3d 549, 2001 A.M.C. 25 (2d Cir. 2000).

of carrier liability for loss occurring during a substantial inland carriage segment often recognized that such issues were not governed by admiralty law.⁵

A similar reluctance to move the scope of maritime transportation contract law inland is evidenced in many cases where a court was asked, but declined to extend the point of “proper delivery” by the ocean carrier under the Harter Act⁶ to the consignee’s premises far inland from the ocean carrier’s discharge terminal.⁷

The Supreme Court in *Kirby* overruled the “mixed contract” doctrine, at least as it pertained to through bills of lading issued by ocean carriers. It stated a new rule:

“Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce – and thus it is a maritime contract.”⁸

The Supreme Court opinion does not so much as mention the Harter Act, nor reflect any of the concern expressed in several lower court decisions about the apparent intent of Congress in COGSA and the Harter Act to limit the applicability of maritime transportation law to carriage by water, plus shoreside activity “incidental” to it.⁹ Instead, the Court states that its ruling is consistent with “the apparent purpose of

⁵ *E.g.*, *Kuehne & Nagel (Ag & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989).

⁶ 46 USC app §§190, 191 (2000).

⁷ *E.g.*, *Mannesman Demag Corp. v. M/V CONCERT EXPRESS*, 225 F.3d 587, 2000 A.M.C. 2935 (5th Cir. 2000); *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 1993 A.M.C. 2842 (4th Cir. 1993); *Jagenberg, Inc. v. Georgia Ports Authority*, 882 F.Supp 1065, 1995 A.M.C. 2333 (S.D. Ga 1995). Compare *PT Indonesia Epsom Industry v. Ocean Overseas Line, Inc.*, 219 F.Supp 2d 1265 (S.D. Fla 2002), applying COGSA terms incorporated in a through bill of lading to liability for a loss during trucking occurring in Florida after discharge of the goods from the vessel at a U.S. west coast port, on the ground that Harter Act delivery had not yet occurred to the consignee in Florida.

⁸ Slip op. at 10.

⁹ In *Jagenberg, Inc. v. Georgia Ports Authority*, cited *supra* at n.7, for example, the court stated:

“[T]he Harter Act is at its core a maritime law; the Court is unwilling to rule that simply because private parties enter an intermodal agreement federal maritime legislation is thus extended far beyond its congressionally intended bounds.”

882 F.Supp at 1077.

COGSA, to facilitate efficient contracting in contracts for carriage by sea,”¹⁰ by including inland transportation under an ocean carrier’s through bill of lading as part of a single, maritime contract.

It is not clear why the Supreme Court in *Kirby* found it necessary to address the subject of the applicable law regime on the issues before it. The petition for certiorari raised only questions of interpretation of the bill of lading Himalaya Clauses (did they benefit the rail carrier?) and whether the freight forwarder which issued the first bill of lading had authority under agency principles to bind the cargo shipper to the terms of the second bill of lading issued by the ocean carrier.¹¹ Shortly before oral argument, the Court requested supplemental briefs on whether “federal or state substantive law govern[s] the question presented.”¹² Seemingly, the issues originally presented involved interpretation of bill of lading terms and exposition of agency law principles which were unlikely to be decided differently under any possible substantive law regime. The case was filed under diversity jurisdiction,¹³ so that application of maritime substantive law was not needed as a jurisdictional basis for the case.

The *Kirby* case did not seem to present the situation in which there is a possible conflict in the substantive law of arguably applicable regimes, which might lead to a different result depending on the regime held to govern the case. That situation has frequently occurred in cargo damage cases involving loss during an inland segment of carriage under a through bill of lading. In such cases, the carrier liability principles laid down by incorporating COGSA and other provisions in the ocean carrier’s bill of lading may vary from the non-maritime substantive law otherwise governing carrier liability for inland carriage loss. Examples include:

¹⁰ Slip op. at 13.

¹¹ Michael F. Sturley, *Rewriting Maritime Law: The Supreme Court’s November Surprise*, 2 *Benedict’s Mar. Bull.* 295 (Fourth Quarter 2004) at 1. Professor Sturley was counsel for the cargo interests in the *Kirby* case. His insights in this article are very helpful in understanding the legal impact of the court’s decision, as well as the procedural aspects of the case before the Supreme Court.

¹² *Id.* at 1.

¹³ Slip op. at 4.

- COGSA’s \$500 per package liability limitation may be less than that required by the otherwise-applicable body of law;¹⁴
- COGSA’s one-year statute of limitations may be shorter than the otherwise-applicable time limitation;¹⁵
- The bill of lading may impose a shorter statute of limitations than either COGSA or the otherwise applicable law;¹⁶
- The way in which fault is apportioned among liable defendants may differ under COGSA from otherwise-applicable law;¹⁷
- Less obviously, but of potentially great practical significance, a foreign forum clause might be valid under COGSA, but not under the alternative law that COGSA would displace.¹⁸

The court in one recent case even went so far as to uphold a clause in an ocean carrier’s through bill of lading which completely exonerated the inland carrier from any liability, a ruling likely to be inconsistent with carrier liability under any applicable legal regime.¹⁹

Does *Kirby* Rule Out Federal Non-Maritime Common Law in Deciding Inland Carrier Liability?

The *Kirby* opinion is notable for apparently not considering whether the applicable federal common law it announced could have been non-maritime federal

¹⁴ See, e.g., *Mannesman Demag Corp v. M/V CONCERT EXPRESS*, 225 F.3d 587, 2000 A.M.C. 2935 (5th Cir. 2000); *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 1993 A.M.C. 2842 (4th Cir. 1993).

¹⁵ See, e.g., *Atlantic Mut. Cos. v. Orient Overseas Container Line*, 1992 A.M.C. 2002 (W.D. Wash 1992); *Miller Export Corp. v. Hellenic Lines, Ltd.*, 534 F.Supp. 707,710-11, 1982 A.M.C. 1890 (S.D.N.Y. 1982).

¹⁶ E.g., *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d. 565 (6th Cir. 2003).

¹⁷ See, e.g., *Project Hope v. M/V/ IBN SINA*, 250 F.3d. 67, 2001 A.M.C. 1910 (2d Cir. 2001).

¹⁸ *Kyodo U.S.A., Inc. v. Cosco N. Am., Inc.*, 2001 U.S. Dist. LEXIS 24360 (C.D. Cal. 2001). The court held that a foreign forum clause that would be valid under maritime law was invalid under the Carmack Amendment. It stated that Carmack applied to damage resulting from error in handling a refrigerated container during the “domestic” portion of carriage under a through bill of lading, via land transportation from Mexico to Long Beach, California. On the applicability of Carmack to the shipment, the later decision of the Ninth Circuit in *Sea-Land Service, Inc. v. Lozen International, L.L.C.*, 285 F3d 808, 2002 AMC 913 (9th Cir. 2002), is to the contrary.

¹⁹ *Allianz CP Gen. Ins. Co. Ltd. v. Blue Anchor Line*, 2004 WL 1048228 (S.D.N.Y. 2004).

common law. The liability of interstate rail and truck carriers has historically been regulated by the so-called Carmack Amendment to the Interstate Commerce Act.²⁰ Most of the lower federal court cases addressing the point, however, have held that Carmack is inapplicable to inland carriage under a through bill of lading issued by an ocean carrier, unless the inland carrier issues a separate bill of lading for its segment of the transportation.²¹ The Supreme Court's opinion in *Kirby* does not mention Carmack or any issue of its applicability to the inland carrier's liability.

A number of lower federal court cases have considered creating federal non-maritime common law on issues of interstate carrier liability for cargo damage when no Congressional statute applies. The most significant line of such cases is that involving liability of interstate air carriers. When covered by neither the Warsaw Convention nor any federal statute, several lower federal courts have created federal common law to arrive at the governing principles of carrier liability.²² Where damage occurs during U.S. rail or truck carriage in interstate or foreign transportation, however, and the court holds Carmack inapplicable, there are very few cases considering whether federal common law should be developed to formulate the rules of carrier liability. Instead, courts in several cases have found that state law governs carrier liability under those circumstances, without considering federal law. For example in *New York Marine & Gen. Ins. Co. v. S/S MING PROSPERITY*²³, the court, after ruling that Carmack does not apply, held that state law governed liability of an ocean through bill of lading issuer and of a rail carrier for damage during inland rail carriage. The court also held that COGSA limitations on the carrier's liability in the ocean carriage bill of lading were invalid under state law.²⁴

²⁰ 49 USC §11706.

²¹ *E.g.*, *Sea-Land Service, Inc. v. Lozen International, L.L.C.*, 285 F.3d 808 at 817, 2002 A.M.C. 913 (9th Cir. 2002). Compare the earlier decision in *Neptune Orient Lines, Ltd. v. Burlington N. and Santa Fe Ry. Co.*, 213 F.3d 1118, 2000 A.M.C. 1785 (9th Cir. 2000), purportedly distinguished in *Lozen*.

²² *E.g.*, *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999); *Sam L. Majors Jewelry v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997); *King Jewelry, Inc. v. Fed. Express Corp.*, 316 F.3d 961 (9th Cir. 2003).

²³ 920 F.Supp. 416, 1996 A.M.C. 1161 (S.D.N.Y. 1996).

²⁴ 920 F.Supp at 423, 425-426.

One of the few cases considering whether to create non-maritime federal common law to define inland carrier liability for damage to cargo covered under a through bill of lading is *Indemnity Insurance of North American v. Hanjin Shipping Co.*²⁵ There, the district court declined to follow air carrier decisions creating federal common law in the absence of statutory regulation, and questioned the degree of uniformity that would result if federal common law became the applicable regime. Instead, it held that state law should apply to carrier liability for inland loss in interstate or foreign transportation until Congress decides to legislate on that subject.

“The better course of action is to resist the invitation to create a federal common law remedy against an ocean carrier for cargo damage that occurs during substantial inland transit. An important factor is that the court must recognize the claim for relief in the absence of action from Congress....

Congress has the constitutional authority to legislate an appropriate scheme to address the liability of an ocean carrier under foreign through bills of lading. Shippers are presently not without recourse, because state courts and state laws are perfectly capable of providing relief. The court recognizes that applying state law to through bills of lading may lead to some inconsistency or non-uniformity that runs against the express intent of Congress. If so, Congress and not the court should legislate change. The specter of limited non-uniformity is not enough for the court to create federal common law. The best method of assuring uniformity of federal law is through congressional, not judicial, action.”²⁶

²⁵ 206 F.Supp 2d. 927, 2002 A.M.C. 1704 (N.D. Ill 2002), *rev'd on other grounds* 348 F.3d 628, 2003 A.M.C. 2705 (7th Cir. 2003).

²⁶ 206 F.Supp. at 938 (citations omitted).

The Court of Appeals in that case reversed the district court's opinion, but did not discuss the possible application of federal common law.²⁷

A rare case actually applying non-maritime common law as to liability of an inland carrier under a through bill of lading is *Ingram Micro, Inc. v. Airoute Cargo Express, Inc.*²⁸ There, after holding Carmack inapplicable, the court found that federal common law governed the trucking company's liability. It reasoned:

“[M]ost forms of interstate transportation are governed by federal law that has entirely preempted state regulation of common carriers. Federal common law has also been held to cover contracts for air carriage that fall within the gap left between the Warsaw Convention and interstate carriage. Moreover, courts have held that federal common law is properly applied where the particular facts of a case may fall outside the literal coverage of a federal statute, but the use of common law will fill gaps in the congressional statutory pattern. In sum, common law principles have long been used to fill gaps in or supplement the Interstate Commerce Act. Therefore, federal common law may be applied to this carriage of goods, rather than the laws of any of the relevant states.”²⁹

Another such rare case creating and applying non maritime common law to inland carrier liability under a through bill of lading is *Levi Strauss & Co. v. Sea-Land Service, Inc.*³⁰ There, a container of clothing shipped from Honduras to Arkansas via ocean carriage to Florida was stolen from a trucker's premises in Florida. The court applied

²⁷ 348 F.3d 628, 2003 A.M.C. 2705 (7th Cir. 2003).

²⁸ 154 F.Supp 2d. 834 (S.D.N.Y. 2001).

²⁹ *Id.* at 839 (citations omitted).

³⁰ 2003 WL 21108311, 2003 A.M.C. 1447 (S.D.N.Y. 2003).

COGSA to measure the recoverable damage against the ocean carrier, apparently because COGSA was incorporated in the bill of lading, and found the damages to be \$243,651.³¹ As to the ocean carrier's third-party complaint against the trucker, the court held Carmack inapplicable.³² Citing only air carrier cases, the court went on to apply federal common law as to the enforceability of a provision in the trucker's tariff purporting to limit its liability to \$100,000.³³ The court held the trucker's tariff provision limiting the amount of its liability to be invalid because of failure to afford the shipper a reasonable opportunity to obtain a higher limit by declaring a greater value and paying more freight, which the court held was required by federal common law.³⁴

Similarly, but without analysis, the court in *Tokio Marine & Fire Ins. Co., Ltd. v. Nippon Yusen Kaisha*³⁵ applied federal common law to a cross-claim by an ocean carrier against an inland carrier for a loss incurred during cargo carriage from Japan to Chicago via Los Angeles under a through bill of lading.³⁶

The *Kirby* opinion says nothing explicit about whether the U.S. Supreme Court considered creating and applying federal *non-maritime* common law to govern carrier liability for inland carriage not controlled by Carmack. Indeed, the Supreme Court in *Kirby* seems to use the term "federal common law" without any distinction between maritime and non-maritime common law. The *Kirby* opinion, however, in the course of noting that application of maritime common law means that a case falls within the admiralty jurisdiction of federal courts under Art. III, Section 2 of the Constitution, makes this statement:

“[F]or federal common law to apply in these circumstances,
this suit *must* also be sustainable under the admiralty

³¹ *Id.* at *2n2.

³² *Id.* at *4.

³³ *Id.* at *3.

³⁴ *Id.* at *3-4.

³⁵ 25 F.Supp.2d 1071, 1998 A.M.C. 1558 (C.D. Cal. 1997).

³⁶ *Id.* at 1081-82.

jurisdiction. See *Stewart Organization, Inc. v. Ricoh Corp.*,
487 U.S. 22, 28 (1988).” (Emphasis by the court).³⁷

Query whether the court in this language was rejecting *sub silentio* the possibility of federal non-maritime common law, such as some lower courts had developed concerning liability of unregulated air carriers for cargo damage?³⁸ The court’s citation to a page of its decision in the *Stewart* case does little to answer that question.

The Impact of *Kirby* on Admiralty Practice.

Thus, *Kirby* is a somewhat surprising extension of traditional notions of maritime subject matter that cause a contract to be governed by admiralty law. The Court’s opinion, however, has much to commend it, from the standpoint of lower courts and admiralty practitioners. Most importantly, it clearly decides what substantive law regime – admiralty law – will govern the liability of all carriers for damage to cargo carried under international through bills of lading, and eliminates any distinction between damage arising during water carriage and loss during an inland segment. Moreover, *Kirby* lays down a relatively black-and-white test to determine which bills of lading are governed by admiralty law: those providing for “substantial carriage of goods by sea.”³⁹ The possible jurisdictional confusion and multiplicity of legal regimes of the mixed contract doctrine are eliminated for claims arising out of carriage under through bills of lading.

There may be some interesting byproducts from the *Kirby* decision for lower courts and transportation law practitioners. Claims arising under through bills of lading issued by ocean carriers may be brought against any carrier on the admiralty side of U.S. district courts – depriving the defendant of a jury trial – located far inland from any ocean carriage terminal. More attorneys handling rail and motor carrier cargo damage claims

³⁷ Slip op. at 6.

³⁸ See cases cited *supra* n.22.

³⁹ Slip op. at 10.

may now need to become conversant with maritime law principles and ocean bill of lading terminology.

Kirby, however, leaves open questions of the scope of maritime contract law which will probably need to be addressed in the lower courts and by practitioners. For example, does *Kirby* require application of maritime law if the loss occurs during an inland carriage segment much longer than the 366-mile⁴⁰ leg between Savannah and Huntsville in the *Kirby* case? Many claims have arisen out of inland carriage between a U.S. west coast port and Chicago or New York as part of through bill of lading transportation.⁴¹ Chief Justice Rehnquist raised this point during oral argument in the *Kirby* case.⁴² The language of *Kirby* seemingly contains no exception for much longer inland carriage segments. Instead, it focuses on sea carriage: if that is “substantial,” the entire through bill of lading carriage is pursuant to a maritime contract.

What about loss during inland transportation segments in a foreign country, under a through bill of lading calling for some ocean carriage and some U.S. and foreign inland transportation? In *Hartford Fire Ins. Co. v. Orient Overseas Container Lines*,⁴³ carriage under a through bill of lading involved transportation of goods from Wisconsin to The Netherlands via truck to Chicago, rail to Montreal, vessel to Belgium, and truck from an ocean port through Belgium to the consignee’s premises in The Netherlands. The cargo was stolen in Belgium during a truck segment of carriage. The case against the carrier was brought in federal court under diversity jurisdiction. Applying the forum state’s choice of law rules, the court construed ambiguous and apparently conflicting terms of the bill of lading to call for application of Belgian law (Convention on the Contract for

⁴⁰ Slip op. at 15.

⁴¹ *E.g.*, *Indemnity Insurance Co. of North America v. Hanjin Shipping Co.*, 348 F.3d. 628, 2003 A.M.C. 2705 (7th Cir. 2003) (U.S. west coast to Indiana via Chicago); *Sea-Land Service, Inc. v. Lozen International, LLC*, 285 F.3d. 808, 2002 A.M.C. 913 (9th Cir. 2002) (Long Beach, California to New Jersey); *PT Indonesia Epsilon Industry v. Ocean Overseas Line, Inc.*, 219 F.Supp. 2d. 1265 (S.D. Fla 2002)(west coast to southern Florida).

⁴² Sturley, *supra*, n.11 at p.6.

⁴³ 230 F.3d 549, 2001 A.M.C. 25 (2nd Cir. 2000).

the International Carriage of Goods by Road),⁴⁴ rather than COGSA, which was also incorporated by the bill of lading. Would the result be any different under *Kirby*, applying U.S. maritime law, including its choice of law rules?

Another question as to the impact of *Kirby* on otherwise applicable law grows out of the normal application of the Carmack Amendment to regulate liability of interstate rail and motor carriers. There is a conflict in the lower courts as to whether Carmack applies to inland carriage under a through bill of lading shipment from a foreign country to the U.S. Most courts have interpreted Carmack as not applicable to the U.S. inland segment of carriage unless the inland carrier issues a separate bill of lading.⁴⁵ The *Kirby* decision did not address any issue of Carmack application. If the Supreme Court in the future were to adopt the apparent minority position that Carmack applies to inland interstate rail and motor carriage under a through bill of lading, irrespective of whether the inland carrier issues a separate bill of lading, or if Congress should amend Carmack to make it so apply, there may be a conflict between admiralty law and Carmack principles. For example, in *Kyodo U.S.A., Inc. v. Cosco N.A.M., Inc.*,⁴⁶ the court held that Carmack applied to the inland segment of carriage under a through bill of lading, and further held that the foreign forum clause in the bill of lading, although valid under maritime law, was void under Carmack. In such situations, should the court, in applying admiralty substantive law, defer to otherwise applicable federal non-maritime law, or would admiralty law apply at all, since Congress would be regulating inland carriage under its Commerce Clause powers?

Another and more practical question about the scope of *Kirby* is whether it applies to liability of non-carrier warehousemen and other bailees who have possession of cargo being transported under a through bill of lading, before delivery to the inland destination.

⁴⁴ May 19, 1956, 399 UNTS. 189.

⁴⁵ *E.g.*, *Sea-Land Services, Inc. v. Lozen International, LLC*, *supra*, 285 F.3d. at 813, interpreting 49 USC §10501(a)(2)(2000); *Indemnity Insurance Co. of North America v. Hanjin Shipping Co.*, *supra*, 348 F.3d. 628 at 633; *cf* *Neptune Orient Lines, Ltd. v. Burlington N. and Santa Fe Ry. Co.*, 213 F.3d. 1118, 1119, 2000 A.M.C. 1785 (9th Cir. 2000), holding Carmack applicable to inland carriage of a shipment originating in a foreign country to be delivered to a U.S. inland destination.

⁴⁶ 2001 U.S. Dist. LEXIS 24360 (CD Cal. 2001).

Many Himalaya Clauses can be construed to benefit non-carrier bailees, as well as carriers. The lower courts are in conflict as to whether admiralty law governs liability of such non-carrier bailees for cargo damage.⁴⁷ As to bailee liability, would the admiralty common law developed by *Kirby* apply to typically state law-regulated entities such as warehousemen? Or, would a court apply admiralty law under *Kirby*, but defer to substantive state law? The *Kirby* opinion leaves room for that possibility:

“For not ‘every term in every maritime contract can only be controlled by some federally defined admiralty rule’ [citing *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310 (1955)]. A maritime contract’s interpretation may so implicate local interest as to beckon interpretation by state law.”⁴⁸

Many more issues result from the scope of the *Kirby* rulings on “the merits” of the disputes before the Court. There will be questions about the scope of its “limited agency” concept as to the authority of NVOCCs to contract with ocean carriers on behalf of shippers.⁴⁹ The *Kirby* opinion also modifies the doctrine of *Herd v. Krawill*⁵⁰ which had called for strict construction of Himalaya Clauses, and may well lead to redrafted clauses expanding their coverage. These substantive law questions will be important in the development of U.S. maritime transportation law, but are not explored here.⁵¹

⁴⁷ The Fourth Circuit cases hold that maritime law, not state law governs bailee liability, at least up to Harter Act “proper delivery.” *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 1993 A.M.C. 2842 (4th Cir. 1993). The Second Circuit cases are to the contrary. *E.g.*, *Colgate Palmolive Co. v. S/S DART CANADA*, 724 F.2d 313, 1984 A.M.C. 305 (2d Cir. 1983).

⁴⁸ Slip op. at 10.

⁴⁹ In *Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY*, 294 F.3d 1171 (9th Cir. 2002), *vacated sub nom. Green Fire & Marine Ins. Co. v. M/V HYUNDAI LIBERTY*, 543 U.S. _____, _____ S. Ct. _____, _____ L.Ed. 2d. _____ (Nov. 15, 2004), the Ninth Circuit Court of Appeals enforced against cargo interests a foreign forum clause in an ocean carrier’s bill of lading, negotiated by an NVOCC, which conflicted with a U.S. forum clause in the NVOCC’s bill of lading. The Supreme Court six days after its *Kirby* decision vacated the Ninth Circuit’s judgment and remanded the case “for further consideration in the light of” *Kirby*. A strong inference is that the Supreme Court viewed its “limited agency” ruling in *Kirby* as not necessarily applicable to the different facts and bill of lading terms in *Kukje*.

⁵⁰ *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 US 297, 1959 A.M.C. 879 (1959).

⁵¹ They are explored by Prof. Sturley, however. See his article cited *supra*, n.11.

Conclusion

Commentators and practitioners have often complained about uncertainties in determining the scope of maritime law in other contexts, such as the maritime nexus element required for application of maritime law to tort cases.⁵² No such criticism can be leveled at *Kirby*. If it radically expands the definition of a maritime contract in the context of carriage under through bills of lading, it lays down a comparatively certain outer boundary for application of maritime law: any claim growing out of transportation requiring “substantial carriage of goods by sea.”⁵³

⁵² See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 US 527, 1995 A.M.C. 913 (1995), calling for the criterion of potential for an incident to disrupt maritime commerce to turn, at least in part “on a description of the incident at an intermediate level of possible generality” (513 US at 538), and an approach to the criterion of whether the incident has a substantial relationship to traditional maritime activity by determining the “general character” of the activity at an appropriate level of generality (513 US at 534).

⁵³ Slip op. at 10.