

**U.S. Supreme Court Expands Admiralty Law  
to Cover Inland Damage to Cargo  
Shipped Under a Through Bill of Lading**

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Lawyers bringing or defending cargo damage claims against rail and truck carriers may need to become practitioners of admiralty law, when the claim is based on loss occurring during inland carriage of imported cargo under a through bill of lading issued by an ocean carrier.

The development of modern intermodal transportation arrangements for cargo shipped to the U.S. from abroad has led to the increasingly common use of through bills of lading. By this means, a carrier (usually a vessel operating ocean carrier, but often a NVOCC or non-vessel operating common carrier) contracts to provide not only the ocean transportation of the goods, but also rail and/or truck carriage from the seller's inland location to the ocean port of shipment and from the U.S. port of discharge from the vessel inland to the buyer's location. Through bills of lading are usually modeled on those which have been issued only for ocean carriage. Therefore, they include terms like the \$500 per package carrier liability limitation incorporated into the bill of lading from the U.S. Carriage of Goods by Sea Act (COGSA), which by its terms applies only to ocean carriage. The Himalaya Clause in the bill of lading extends all the ocean carrier's defenses and liability limitations to anyone contracting with the issuer of the bill of lading to accomplish any portion of the carriage (*i.e.*, railroads, truckers, terminals and other cargo handlers).

Cargo damage occurring during ocean carriage of shipments to the U.S. has always been governed by U.S. admiralty law. Until November 2004, however, it has been unclear what law governed damage to cargo occurring during inland carriage under a through bill of lading. Most lower court decisions had held that a through bill of lading was a type of mixed contract. Under that doctrine, any damage to cargo occurring during ocean carriage was governed by admiralty law, but loss during inland carriage, if the carriage was more than incidental to the ocean carriage (*e.g.*, from the ocean carrier's dock to a nearby warehouse), was not controlled by admiralty law. The applicable non-admiralty law in instances of inland loss might be the Carmack Amendment to the Interstate Commerce Act (49 USC ' 11706 (2004)) governing

interstate rail and truck carriage, or it might be state law. When lower courts expressly addressed that issue, their choice of the governing law regime for inland damage to cargo transported under a through bill of lading was far from uniform.

This uncertainty as to the applicable law in such cases was clarified, if not fully resolved, by the U.S. Supreme Court's November 9, 2004 decision in *Norfolk R. Co. v. James N. Kirby Pty, Ltd.*, 543 U.S. \_\_\_\_\_, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). There, a shipper contracted with a NVOCC for carriage of goods from Australia to Huntsville, Alabama via the ocean port of Savannah, Georgia. The NVOCC in turn contracted for the carriage with a vessel operating ocean carrier. Both carriers issued through bills of lading, although with different limitations of the amount of carrier liability for damage to the cargo. The ocean carrier contracted for the inland rail carriage. The train carrying the goods from Savannah to Huntsville derailed, causing substantial damage. When the cargo shipper sued the railroad for the loss, the railroad pleaded the liability limitation provisions from both through bills of lading, one of which was more favorable to the railroad than the other. In the courts below, the primary issue was whether the rail carrier could assert defenses in the NVOCC's through bill of lading, when the railroad had contracted for the U.S. inland carriage only with the ocean carrier.

Before reaching that issue, however, the U.S. Supreme Court first addressed the question of what law applied to the inland carrier rights and responsibilities when the carriage was pursuant to a through bill of lading. It rejected the *Amixed contract* doctrine, and stated a new rule:

A[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce B and thus it is a maritime contract.@ (125 S.Ct. at 394-395, 160 L.Ed.2d at 296).

Thus, interpretation and application of through bill of lading terms in a claim against the carrier for cargo damage is a matter of admiralty law, even when the cargo damage occurs, as in this case, during carriage to a destination 366 miles inland from the ocean terminal. If no federal statute governs the inland carrier's rights and responsibilities, the courts in such cases will develop and apply federal common law. The *Kirby* decision on the merits determined the rail carrier's liability as a matter of federal common law.

The practical significance of *Kirby* is that various well-established maritime law

principles will now apply in actions against inland carriers for loss during an inland carriage segment of carriage under a through bill of lading, such as:

- § The COGSA \$500 per package limitation incorporated in a bill of lading will be enforced;
- § The COGSA one-year statute of limitations if incorporated in a bill of lading will be applied;
- § Apportionment of fault among two or more liable defendants (*e.g.*, the ocean carrier which hired the inland carrier and contracted for a through transportation, and the inland carrier which caused the loss) will follow maritime common-law on this point, as set forth in *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994).
- § Forum selection clauses in a bill of lading requiring the claim to be litigated in a foreign country will be enforced, per *Vimar Seguros, etc. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995).

Since such claims against inland carriers are now clearly maritime, plaintiffs have an additional forum option: the admiralty side of U.S. District Court, which sits without a jury, under 28 USC ' 1333.

*Kirby* may also lead to increased pressure on the U.S. Supreme Court to decide the issue of whether the Carmack Amendment applies to carrier liability for loss during inland carriage by rail or truck under a through bill of lading. Most courts addressing that issue prior to *Kirby* had held that Carmack does not apply to inland carriage under a through bill of lading unless the inland carrier issues a separate bill of lading. *E.g.*, *Sea-Land Services, Inc. v. Lozen International, LLC*, 285 F.3d 808 (9<sup>th</sup> Cir. 2002). If the U.S. Supreme Court were to decide that Carmack applies to such inland segments of carriage under a through bill of lading by an interstate rail or truck carrier, there is a significant potential for Carmack rules conflicting with the otherwise applicable maritime common law principles. For example, see *Kyodo U.S.A., Inc. v. Cosco N.Am., Inc.*, 2001 U.S. Dist. Lexis 24360 (C.D. Cal. 2001). There, the court held that a foreign forum selection clause that would be valid under maritime law was an invalid contractual limitation of carrier=s liability imposed by Carmack. That court=s application of Carmack to include carrier liability for carriage under through a through bill of lading may conflict with the

later decision of the Ninth Circuit in *Sea-Land Services, Inc. v. Lozen International, LLC*, *supra*, but illustrates the potential conflict point between Carmack and maritime law.

A question remains about the scope of *Kirby*, since it addressed only the applicability of maritime law to the liability of an inland carrier under a through bill of lading. Does maritime law also apply to non-carrier warehousemen and other bailees who may have temporary possession of cargo being transported under a through bill of lading, prior to delivery to the inland destination? Himalaya clauses are often construed to benefit non-carrier bailees, as well as carriers. If admiralty law does not apply to non-carrier bailees having possession of cargo being transported under a through bill of lading, the liability of such entities would normally be regulated by state law, which might prohibit or limit contractual limitations of liability. The court in *Kirby* may have left room for application of non-admiralty law in such situations:

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, 75 S.Ct. 368, 99 L.Ed.2d 337 (1955)]. A maritime contract's interpretation may so implicate local interest as to beckon interpretation by state law. (125 S.Ct. at 395, 160 L.Ed.2d at 297).

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