

Court of Appeals Decision Could Alter Rules on Liability for Inland Carriers

Special to the Savannah Business Report

By: Colin McRae

A recent decision by the U.S. Court of Appeals for the Second Circuit essentially torpedoed the Supreme Court's attempt in 2004 to establish a uniform policy for dealing with loss and damage claims on intermodal shipments moving in international commerce.

"This is an important decision that will impact a number of area companies," said Colin McRae, a maritime attorney and partner at the law firm of Hunter Maclean. "Transportation of cargo is big business in coastal Georgia."

The conflicting decisions have muddied the waters for the average 2,850 truckers that each day pick up cargo at the Port of Savannah and deliver it to several major distribution centers in Savannah such as Target, Home Depot and Wal-Mart, and to other destinations throughout the Southeast.

The 2004 Supreme Court case, *Norfolk Southern Railway Co. v. James N. Kirby Pty. Ltd.*, extended (in certain circumstances) the \$500 per package liability limitation to inland carriers, a privilege previously enjoyed only by ocean carriers and certain direct contractors.

The Kirby case involved a shipment of cargo from Australia to Athens, Ala., by way of Huntsville, Ala. Kirby, the cargo owner, hired International Cargo Control, a Non-Vessel Operating Common Carrier (NVOCC), which then contracted with Hamburg Süd, a Vessel Operating Common Carrier (VOCC), for the ocean carriage. The shipment arrived safely in Savannah and was delivered to the rail carrier for passage to Huntsville. The cargo was damaged during the rail carriage.

In the interest of efficient maritime commerce, the Supreme Court decided that the Himalaya Clause of the Carriage of Goods by Sea Act ("COGSA"), which extends protections given to ocean carriers to certain subcontractors, applied in this case. The Supreme Court reasoned that it would be nearly impossible for an ocean carrier, such as Hamburg, to know if it were dealing with an intermediary or the cargo owner or how many intermediaries came before or after. It also concluded that if Hamburg and other VOCCs could not rely on their liability limitations, they would likely charge higher freight rates to NVOCCs, such as International Cargo, to protect themselves in the event that the VOCC was sued by cargo interests.

However, the Second Circuit Court of Appeals last month in *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company* substantially limited the effect of the Kirby case when it concluded that Union Pacific's attempt to take advantage of COGSA's package limitations could not be justified.

Essentially, the Court of Appeals held that the liability of railroads or motor carriers participating in through, intermodal traffic of cargo moving in international commerce was governed by the

provisions of the so-called Carmack amendment, which holds that railroads are responsible for all actual loss or injury to property they may cause (unless the shipper has specifically agreed to some lower limit of liability).

Finding that the Supreme Court never addressed the Carmack amendment in the Kirby decision (because the issue was never raised by the insurance company petitioner in that proceeding), the Court of Appeals concluded that the railroad was fully liable for all damages it caused to the cargo.

While the Kirby Court sought a bright-line efficient rule, the battle for clarity on this issue is not over. One or more of the various parties may seek Supreme Court review of the decision.

In the meantime, maritime attorney McRae advises that cargo interests and inland carriers obtain a clear understanding of their liability limits. "Those involved in the international shipment of cargo should take these new decisions into account now when they decide who to use and whether they want additional insurance," he said.

To protect one's interests, McRae said that cargo shippers and receivers should inquire about the costs of insuring the full value of the cargo being shipped.. On the inland carrier side, he said they should make sure they know about any limit of liability that may exist, especially if they are receiving cargo from ocean-going vessels.

McRae expects the debate to continue because of the amount at stake, in light of the \$500 per package limitation. He said there are discussions worldwide about raising the \$500 limit, which can apply equally to a package of widgets as it does to a car, or other "customary freight unit." He explained that the Kirby case has highlighted the package-limitation issue, which many people shipping or receiving goods internationally probably didn't know existed.