In November of 2004, Justice O’Connor, writing on behalf of a unanimous United States Supreme Court settled many important points of law regarding domestic transportation under the Carriage of Goods By Sea Act and International Bills of Lading, and, in its wake, overturned a number of District Court, and Circuit Court of Appeals decisions on two other related aspects of transportation law. Although many articles have been written concerning the effect of Norfolk So. Ry. Co. v. Kirby, 125 S.Ct.385 (U.S. Nov.9, 2004), most have missed the mark in explaining the significance of the first Supreme Court decision, in over 50 years, settling many of the mundane liability details of maritime international transportation law. While some articles have downplayed the importance of this monumental decision, in fact, Kirby, supra, may have long lasting effects on U.S. transportation law principles.

In Kirby, an Australian machinery manufacturer sold to General Motors at Huntsville, Alabama all of the machinery necessary to set up a new catalytic converter manufacturing plant for $1.4 million dollars. All of the machinery was packed in ten containers, one machine per container, to be transported from Sydney, Australia to Huntsville, Alabama. In Australia, Kirby put up bid for the local freight forwarding industry the opportunity to arrange this transportation on behalf of Kirby. Kirby, in selecting the low bidder, ICC, chose a company that described itself as an “international freight forwarder,” but, under U.S. terminology, an NVOC, to make all the transportation arrangements on behalf of Kirby. ICC issued to Kirby its Bill of Lading Contract in a standard format provided by an international organization known as FIATA. Under this Bill of Lading Contract, Kirby had the opportunity to declare a higher value than the minimum $500 per package on shipments to and from the United States, but instead chose to purchase insurance for 110% of its invoice value to General Motors.

Further, under the ICC Bill of Lading, Kirby authorized ICC to arrange actual transportation under any terms and conditions that it would make, and, further, provided to “any” party that assisted in the transportation all of the defenses available to ICC under the ICC Bill of Lading Contract, including the $500 package limitation. The language contained in this “Himalaya Clause” did not specifically identify “land carriers” in the United States, but the “any” provision, seemed to clearly cover all those who would participate in the actual transportation of the shipment.

ICC, in turn, arranged transportation with the ocean carrier, Hamburg-Sud, that issued its bill of lading to ICC, showing ICC as the shipper, and showing General Motors in Huntsville, Alabama as the consignee. Hamburg-Sud's bill of lading, a through bill of lading from origin to destination, also contained the provisions of the Carriage of Goods By Sea Act covering shipments to and from the United States. Both the ICC bill of lading and the Hamburg-Sud bill of lading extended the provisions of the Carriage of Goods By Sea Act, as authorized in that statute, to cover anything that occurred prior to the ocean voyage, and anything that occurred with respect to transportation services after the ocean voyage.

Hamburg-Sud, who operates in the United States under the trade name of Columbus Line, arranged inland transportation from the Port of Savannah to Huntsville, Alabama via the Norfolk Southern Railroad. Under the arrangements between Norfolk Southern, and Hamburg-Sud, it was agreed that Norfolk Southern's liability to indemnify Hamburg-Sud, contained in its Exempt Circular, was limited to a maximum of $250,000 per shipment.

The transit from Alabama to Huntsville, Alabama went without incident until the time Norfolk Southern was handling the ten containers on a train as it approached Huntsville, Alabama. At that point, the train was involved in a derailment, and all ten containers were destroyed. Kirby's insurance carrier, under its subrogation rights, having paid Kirby's claim, filed suit both in Australia and in the State of Georgia claiming that it was entitled to indemnity for the negligence of Norfolk Southern. Skillfully, attorneys for the insurance company did not sue Hamburg-Sud nor ICC in the U.S. action although all parties were named in the Australian action. Norfolk Southern removed the Georgia state court action to Federal Court.

In the district court, Norfolk Southern moved for summary judgment on the ground that Hamburg-Sud's liability was limited to $500 per package, as was ICC's liability, and, pursuant to the provisions of the Himalaya Clauses, Norfolk Southern, who was mentioned specifically in the Hamburg-Sud bill of lading Himalaya Clause as an "inland carrier," and who was mentioned in the ICC bill of lading as "any party that participated in the actual transportation of the shipment," liability was also limited to $500 per package, or $5,000 for the destroyed ten containers of machinery. The district court, following well established precedent in that court, and in other courts of the United States, held that under the ICC and Hamburg-Sud bills of lading, Norfolk Southern was a protected party under their Himalaya Clauses, and that their liability was limited to $500 per package, and granted summary judgment to Norfolk Southern limiting its total liability to $5,000.

The parties agreed, with the courts' assent, to appeal the District Court's decision to the Eleventh Circuit to decide the issue of "liability." The Eleventh Circuit, in a 2-1 decision, reversed the district court, holding that Norfolk Southern was liable for the full amount of the loss. Kirby v. Norfolk So. Ry., 300 F.3d 1300 (11th Cir 2002)

The Eleventh Circuit reasoned that ICC, under the FIATA bill of lading, was an independent contractor, and, therefore, Kirby was not bound to any transportation arrangements made by ICC. Thus, despite the fact that the Himalaya Clause in the Hamburg-Sud bill of lading specifically mentioned "inland carriers," that Norfolk Southern was not entitled to avail itself of the $500 package limitation contained in the Hamburg-Sud bill of lading. The majority in the Eleventh Circuit further rationalized, in denying Norfolk Southern the $500 limitation of liability, that under the Supreme Court's decision in Hird v. Krawitt Machinery Corp., 359 U.S. 297 (1959), the Supreme Court mandated that Himalaya Clause language is to be strictly construed, and because the language did not specifically mention "inland carriers," that the ICC bill of lading likewise did not give Norfolk Southern limited liability. The Eleventh Circuit ignored the fact that Kirby, in entering into the ICC bill of lading, and ICC in entering into the Hamburg-Sud bill of lading, had an opportunity to declare a higher value and pay higher transportation charges, but because Kirby had insured via its own insurance carrier, it did not declare such a value to ICC, and in turn, because Kirby had not declared a value to ICC, ICC did not declare a value to Hamburg-Sud when it entered into its bill of lading, opting to ship at Hamburg-Sud's lowest released rate authorized by the Carriage of Goods By Sea Act.

Norfolk Southern, supported by many of the transportation organizations representing land, sea, air carriers in the United States, petitioned for certiorari before the Supreme Court. The Supreme Court issued an Order asking the Solicitor General to comment as to the United States' position as to the importance of this case for U.S. transportation law interests, and the Solicitor General indicated, in a well-written brief, that it was the government's position that the Supreme Court should accept certiorari, which it did.

Before the Supreme Court, Kirby's counsel expanded their arguments greatly beyond those made in the district court and in the Eleventh Circuit Court of Appeals. They argued, for the first time, that this inland accident was governed by state law so that the federal courts did not have
Kirby's attorneys argued that Columbus Lines was an agent of Hamburg-Sud, and since the Hamburg-Sud bill of lading did not provide protection to sub-agents of the ocean carrier, that the Himalaya Clause would not benefit Norfolk Southern. Further, Kirby's counsel argued that since the loss occurred on land, that maritime law and the Carriage of Goods By Sea Act should not apply.

Finally, Kirby's counsel argued the two main arguments that they used with success before the Eleventh Circuit. First, Kirby was not bound to any deals made beyond ICC because ICC was not its agent, and Second, based upon the terms of the ICC bill of lading, the lack of specificity of "inland carriers" prevented Norfolk Southern from benefitting from the Himalaya Clause based upon the Supreme Court's precedent in Herald, supra.

In Justice O'Connor's 9-0 decision, the Supreme Court clearly struck down prior lower court precedent that indicated that losses involving international transportation under through bills of lading would not be governed by maritime law, and the provisions of the Carriage of Goods By Sea Act. This overruled Second and Fifth Circuit decisions, and many district court decisions, which held to the contrary that state law would govern the carrier's liability.

Additionally, the Supreme Court Indicated that even if Columbus Lines was a separate entity and acted as an agent for Hamburg-Sud, the term "inland carrier" contained in the Hamburg-Sud bill was broad enough to cover Norfolk Southern.

In its most important holding, the Supreme Court ruled, based upon a 150 year record of an unbroken line of Supreme Court cases, that when a party gives authority to a third party to make transportation arrangements on behalf of the cargo owner, that the cargo owner is bound by the terms of the transportation arrangements made on its behalf. The Court reasoned that whether the party was for all aspects the agent of the shipper was immaterial, because as to this particular issue, it certainly was acting as the agent of the shipper, and bound the shipper to the deal that was made. If, as stated in prior Supreme Court precedent, the party had a complaint as to the terms of transit, its objections should be raised at the time of the parties making the transit arrangements, if those arrangements are contrary to the cargo owner's specifications, but nevertheless, the carrier who transports the cargo will be allowed to enforce any contractual limitations of liability contained in the contract of carriage.

Finally, the Supreme Court indicated that it is not required for the Himalaya Clause to specifically identify those it protects by name, and the word "any" is certainly encompassing enough to cover all of the parties who would participate in the actual transportation of the shipment from origin to destination.

In conclusion, whether the shipments originate in the United States and go to foreign countries, or whether the shipments originate in foreign countries and go to the United States, or whether the shipments are merely domestic shipments, when someone arranges transportation on behalf of the cargo owner, the cargo owner is going to be bound by the terms of the contract of carriage entered into by the party actually transporting the shipment. Had the Eleventh Circuit not been challenged by Norfolk Southern, and supported by most of the U.S. transportation industry, it would have resulted in chaos, as U.S. domestic carriers would not have been in a position to enforce their limitations of liability which contributed to the low rates they were able to offer the shipping public. The conclusion is that the unanimous Supreme Court reasoned that it would be very unfair to allow the cargo owner to have someone operating on its behalf to make transit arrangements at a low fare or rate, only to repudiate that low fare or rate after a loss occurs, on the ground that the party who made those arrangements was not authorized to do so on behalf of the cargo owner, and, in effect, provide a windfall for an insurance company that was paid a full value rate for its insurance.

With thanks to Hyman Hillenbrand of DeOechs Hillenbrand & Wiener, LLP, Miami for preparing this article. Hy Hillenbrand was co-counsel for Norfolk Southern in the District Court and was co-counsel in the successful Supreme Court briefs as part of the appellate team.

Contrast this decision with the Canadian Federal Court decision in Boutique Jacob (a case on virtually identical facts).

1 Eventually Norfolk Southern would ignore the Australian action, and subsequently a confidential settlement was entered into between all of the remaining parties in Australia.

2 See e.g. Colgate Palmolive Co. v. S/S Dart Canada, 724 F.2d 313 (2d Cir 1983).