Admiralty

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I. INTRODUCTION

The Eleventh Circuit Court of Appeals presented practitioners of maritime law with important new admiralty case law in 2004. Although the Eleventh Circuit published only four admiralty opinions in 2004, the United States Supreme Court handed down two decisions in the areas of cargo and longshore law that will have a far-reaching impact on maritime law. The Eleventh Circuit dealt with two passenger cruise line cases and a salvage dispute, both of which serve as the subject of considerable litigation in the Eleventh Circuit. In addition, the Eleventh Circuit Court of Appeals handed down an important decision involving the enforcement of arbitration clauses, which has become an increasingly popular procedure for resolving maritime disputes.

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II. UNITED STATES SUPREME COURT OPINIONS

A. Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.

On November 9, 2004, the United States Supreme Court decided *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*,[1] a landmark opinion that will have far-reaching effects on maritime cargo law. In *Kirby* the Court reversed the Eleventh Circuit and held that Himalaya Clauses[2] in both a Non-Vessel Operating Common Carrier's ("NVOCC") bill of lading and a Vessel Operating Common Carrier's ("VOCC") bill of lading extended the bill of lading's package limitation[3] to the participating inland carrier, the Norfolk Southern Railway Co.[4] The Supreme Court's opinion also upheld the enforcement of the package limitation contained in the VOCC's bill of lading, even though no strict privity of contract between Kirby, the cargo interest, and the VOCC existed.[5]

Kirby involved a shipment of cargo from Australia to Athens, Alabama by way of Huntsville, Alabama. Kirby received a bill of lading from a NVOCC, International Cargo Control, for the carriage from Australia to Huntsville. The NVOCC in turn contracted with Hamburg Süd, the VOCC, to perform the ocean carriage. The VOCC issued its bill of lading for the same carriage from Australia to Huntsville.[6]

The cargo was discharged in good condition in Savannah, Georgia and was delivered to the Norfolk Southern Railway to carry the cargo from Savannah to Huntsville, Alabama. The cargo was damaged during the rail carriage.[7]

Kirby sued Norfolk Southern Railway in tort and argued that the railroad could not limit its liability because no contractual relationship existed between the cargo interest and the VOCC carrier, which was necessary to give the railroad the package limitation protection available under the VOCC bill of lading. The railroad maintained that its liability

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1. 125 S. Ct. 385 (2004).

2. A Himalaya Clause is an exculpatory provision that extends the protections that are available to the ocean carrier under the Carriage of Goods by Sea Act ("COGSA") to other entities (46 App. U.S.C. §§ 1300-15). 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-8, at 40-41 (Practitioners Treatise Series, 2d ed. 1994).

3. The "package limitation" is a provision under COGSA that will, under certain circumstances, limit an ocean carrier's liability for cargo damage to $500 per package or "customary freight unit." 46 U.S.C. § 1304(5) (2000).

4. *Kirby*, 125 S. Ct. at 400.

5. *Id.* at 397.

6. *Id.* at 390.

7. *Id.* at 391.

was limited under the Carriage of Goods by Sea Act ("COGSA") through the Himalaya Clause.[8]

The district court agreed with the railroad, but the Eleventh Circuit reversed, holding there was no privity of contract between the shipper and the railroad as required by state law.[9] The Eleventh Circuit granted Kirby complete recovery against the railroad without applying the COGSA and bill of lading package limitations.[10] The United States Supreme Court reversed on appeal.[11]

The Supreme Court, citing *North Pacific S.S. Co. v. Hall Bros. Marine Railway & Shipbuilding Co.*,[12] first examined whether the contract of inland carriage was an admiralty contract, which "'depends upon . . . the nature and character of the contract,' and whether it had 'reference to maritime service of maritime transactions.'"[13] The Court determined the contract was maritime in nature, and the need for a uniform maritime approach was not affected by the fact that the damage was incurred during the inland portion of the transit.[14] The Court explained that state interests in this matter could be accommodated without defeating the more important federal interest in efficient maritime commerce.[15] The Supreme Court thus held that Himalaya Clauses in both the NVOCC and the VOCC bill of lading were sufficient to extend the respective carrier defenses to the railroad.[16]

In perhaps the most significant aspect of the opinion, the Court in *Kirby* held that privity of contract is not necessary between cargo interests and the VOCC for the VOCC to enjoy the package limitation contained in its own bill of lading.[17] The Court reasoned that the NVOCC, although not an agent of the cargo interests, acted as a limited agent of cargo for the purpose of accepting the liability limit in the contract with the VOCC.[18]

The Court held strict privity of contract was not necessary for three reasons. First, binding the cargo interests to the limits its NVOCC negotiated with the VOCC tracks industry practices.[19] The Court

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8. *Id.* at 392.
9. *Id.*
10. *Id.*
11. *Id.*
12. 249 U.S. 119 (1919).
13. *Kirby*, 125 S. Ct. at 393 (quoting *Hall Bros.*, 249 U.S. at 125).
14. *Id.* at 395.
15. *Id.* at 396.
16. *Id.* at 398.
17. *Id.* at 397.
18. *Id.* at 399.
19. *Id.*

explained that in intercontinental ocean shipping, carriers may not know whether they are dealing with an intermediary or the cargo owner.[20] Moreover, even if the carriers know that they are dealing with an intermediary, the Court explained they might not know how many other intermediaries came before or what obligations may be outstanding among them.[21] According to the Supreme Court, the "task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation."[22]

Second, the Supreme Court concluded that if the VOCC could not depend on its bill of lading limits, it would likely charge higher freight rates to the NVOCCs to protect itself in the event the VOCC was not protected in suits brought by cargo interests.[23] Finally, the Court explained that granting the VOCC the package limitation—and extending the coverage of the VOCC's Himalaya Clause as well as the NVOCC's Himalaya Clause to the railroad—produced an equitable result.[24] That is, the cargo interests retained the option of suing the NVOCC for any loss suffered by cargo because the NVOCC had allowed the VOCC to lower its liability limits below the limit agreed upon between the cargo and the NVOCC.

In its conclusion, the Supreme Court declared that its task was not to structure the international shipping industry but to ensure that "[f]uture parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate."[25] Indeed, the decision in *Kirby* should help unify United States law governing the multimodal carriage of goods.

B. Stewart v. Dutra Construction Co.

The United States Supreme Court granted *certiorari* in the personal injury case of *Stewart v. Dutra Construction Co.*,[26] to clarify what the Longshore and Harbor Workers' Compensation Act ("LHWCA")[27] considers a "vessel."[28] In *Stewart* defendant employed plaintiff aboard

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 399-400.
25. *Id.* at 400.
26. 125 S. Ct. 1118 (2005).
27. 33 U.S.C. § 901 (2000).
28. *Stewart*, 125 S. Ct. at 1121.

its vessels as a marine engineer. Although he spent the majority of his time aboard the SUPER SCOOP, a dredge with a clamshell bucket, Stewart was occasionally required to perform maintenance tasks aboard the SCOW 4, which transported dredged material and dumped it at sea. In July 1993 the SCOW 4's engine was replaced.[29] During the process of loading the new engine, Stewart was "precariously perched above the hatch" when the SUPER SCOOP's crew moved the SCOW 4, causing a jolt that threw Stewart headfirst to a deck below, resulting in serious injuries.[30] Stewart filed suit against his employer for damages under the Jones Act,[31] alleging that he was a seaman injured by Dutra's negligence and also under § 905(b) of the LHWCA,[32] which authorizes covered employees to sue a vessel owner as a third party for an injury caused by the owner's negligence.[33]

At trial Stewart argued his employer was negligent in (1) causing the SCOW 4 to crash suddenly into the SUPER SCOOP; (2) failing to sound a warning blast prior to moving the SCOW 4; and (3) creating an unsafe work environment by removing the protective railing around the hatch.[34] Dutra responded with motions for summary judgment on these counts. With respect to the Jones Act count, the district court concluded that because the SUPER SCOOP was not a "vessel," as defined by the Jones Act, defendant was entitled to summary judgment. Stewart appealed to the First Circuit, which affirmed, concluding the SUPER SCOOP was not "a vessel in navigation" as that term has developed in the jurisprudence of the Jones Act.[35] Following the decision in *Stewart I*, Dutra renewed its motion for summary judgment on Stewart's LHWCA claim. The district court granted the motion, and Stewart again appealed to the First Circuit.[36]

The key issue before the First Circuit was whether defendant's negligence was committed in its capacity as employer (for which it is immune from tort liability under § 905(a) of the LHWCA) or vessel owner (for which it may be held liable pursuant to § 905(b) of the

29. Stewart v. Dutra Constr. Co., 343 F.3d 10, 12 (1st Cir. 2003).

30. *Id.* at 13.

31. 46 App. U.S.C. § 688(a) (2000).

32. 33 U.S.C. § 905(b) (2000). This section provides, in pertinent part: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . ." *Id.*

33. *Stewart*, 343 F.3d at 13.

34. *Id.*

35. *Id.* (citing Stewart v. Dutra Constr. Co., 230 F.3d 461, 469 (1st Cir. 2001) (*Stewart I*)).

36. *Id.*

LHWCA).[37] The First Circuit applied the functional dual capacity test and rejected tort liability on the part of defendant employer and vessel owner. Citing *Morehead v. Atkinson-Kiewit*,[38] the First Circuit noted that maritime employees "'were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade.'"[39] In affirming summary judgment, the First Circuit noted that Dutra had conceded the SUPER SCOOP was a vessel under § 905(b), but decided that Dutra's alleged negligence had been committed in its capacity as an employer and not as the vessel's owner.[40]

On February 23, 2004, the Supreme Court granted certiorari in *Stewart* to clarify the legal standard for determining whether a special purpose watercraft, such as a dredge, is a "vessel" for purposes of the LHWCA.[41] Oral argument was held on November 1, 2004,[42] and the Supreme Court issued a unanimous decision on February 22, 2005, reversing the First Circuit and holding that a dredge is a "vessel" under the LHWCA.[43]

Because the term "vessel" is not defined in the LHWCA, the Supreme Court based its holding in *Stewart* on sections 1 and 3 of the Revised Statutes of 1873,[44] which define "vessel."[45] Section 3 defines "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[46] The Court explained that it is "often said that dredges and comparable watercraft qualify as vessels under the Jones Act and LHWCA."[47]

Reviewing the holding from the court of appeals, the Supreme Court noted that the First Circuit relied on its previous decision in *DiGiovanni v. Traylor Bros.*[48] in concluding that the SUPER SCOOP was not a vessel "because its primary purpose [was] not navigation or commerce,

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37. *Id.* at 14.
38. 97 F.3d 603 (1st Cir. 1996).
39. *Stewart,* 343 F.3d at 14 (quoting Morehead v. Atkinson-Kiewit, 97 F.3d 603).
40. *Id.* at 13.
41. Stewart v. Dutra Constr. Co., 540 U.S. 1177 (2004)
42. Stewart v. Dutra Const. Co., 125 S. Ct. 1118 (2005).
43. *Id.* at 1129.
44. 18 Stat., pt. 1, p. 1 (1873). Section 3 was repealed and recodified in 1947 as part of the Rules of Construction Act, 1 U.S.C. § 3 (2000).
45. *Stewart*, 125 S. Ct. at 1120.
46. 1 U.S.C. § 3.
47. *Stewart*, 125 S. Ct. at 1126.
48. 959 F.2d 1119 (1st Cir. 1992).