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THE SUPREMACY OF UNITED STATES (MARITIME) LAW REVISITED

ANDREW BROWN*

I. THE DAY THE EARTH AND SEA *SUBSTANTIALLY* BECAME ONE

Then God said, 'Let the water under the sky be gathered into a single basin, so that the dry land may appear.' And so it happened: the water under the sky was gathered into its basin, and the dry land appeared.

God called the dry land 'the earth,' and the basin of the water he called 'the sea.' God saw how good it was.¹

In the Supreme Court's 2004 *Norfolk S. Ry. Co. v. Kirby*² decision, the Court sought to simplify the controlling-law question in multi-modal transportation contract disputes: "Our cases do not draw clean lines between maritime and non-maritime contracts. We have recognized that '[t]he boundaries of admiralty jurisdiction over contracts – as opposed to torts or crimes – being conceptual rather than spatial, have always been difficult to draw.'"³ Previous to the *Kirby* decision, a Federal Court hear-

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1. *Genesis* 2:9-10 (THE NEW AMERICAN BIBLE).

2. 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004) [hereinafter *Kirby*].

3. *Kirby*, 125 S. Ct. at 393 (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961)).

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ing this case would first answer the question of whether federal admiralty law governed.⁴

In the 1961 *Kossick v. United Fruit Co.*⁵ decision, the Supreme Court held that a purported maritime case must be subject to federal admiralty jurisdiction before federal maritime law was applicable.⁶ Ten years later in the *Victory Carriers, Inc. v. Law*⁷ decision, the Court similarly held that “[w]hether federal maritime law govern[s] an accident ... depends on whether [the case is] within the admiralty and maritime jurisdiction conferred on the district courts by the Constitution and the jurisdictional statutes.”⁸ However previous to the *Kirby* decision, the *multi-modal* nature of the contract(s) would require additional consideration before it could be classified as a “maritime” contract governed by the federal admiralty and maritime law.⁹

In the federal maritime case law preceding the *Kirby* decision, contracts for carriage of goods that involved more than water transportation: air and water or land and water (hence “multi-modal”), were “regarded as ‘mixed’ contracts.”¹⁰ Pre-dating the Civil War, the long-standing Supreme Court precedent precluded federal maritime jurisdiction over mixed contracts, because they were not purely maritime.¹¹ Following suit, the lower federal courts uniformly refused to grant admiralty jurisdiction to plaintiffs who brought suit related to their mixed contracts.¹² However, during the last 150 years, the lower courts created two exceptions to the mixed contract exclusion rule.¹³

The first exception came into play when the “maritime and non-maritime elements of a mixed contract [we]re separable, admiralty jurisdiction would exist over the maritime element.”¹⁴ The second exception applied when the “non-maritime element of the contract [was] merely ‘inciden-

4. See Michael F. Sturley, *Rewriting Maritime Law: The Supreme Court's November Surprise*, 2-4 BENEDICT'S MAR. BULL. 295, 299 (2004).

5. 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961).

6. Sturley, *supra* note 4, at 299.

7. 404 U.S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971).

8. Sturley, *supra* note 4, at 299 (quoting *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204 (1971)). Remember, the U.S. Constitution grants the Supreme Court (and all inferior federal courts) jurisdiction over “all Cases of admiralty and maritime Jurisdiction.” U.S. CONST. art. III, § 2, cl. 1.

9. *Id.*

10. *Id.* at 300.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

tal' to the maritime element;" here, the federal courts recognized that admiralty jurisdiction controlled.¹⁵

In *Kirby*, the contract(s) at issue contained both ocean and rail carriage, so the mixed contract doctrine would normally apply. And, since the maritime elements of the contract(s) *were* at issue, and because the several hundred mile rail traverse was *not* incidental, the two exceptions to the mixed contract doctrine were not applicable.¹⁶ However, the Court tipped its hand when it stated that "under a conceptual rather than spatial approach, ... the[se] are essentially maritime ... contracts."¹⁷ To overcome the mixed contract doctrine's unquestionable applicability to the *Kirby* contract, the Court over-ruled it, "at least in the context of the multimodal contract at issue in *Kirby*."¹⁸ However, before the Court did so, it sought to prove that the mixed contract doctrine was in opposition to federal precedent that required courts to conceptually determine the nature of the contract at issue.

First, the Court reiterated that the federal precedent for determining if a contract was "maritime" was based not on geography (spatial) but on ultimate purpose (conceptual).¹⁹ The Court stated that in rigidly applying the mixed contract rule, the lower courts were conducting a spatial analysis when "[holding] that admiralty jurisdiction does not extend to contracts which require maritime and non-maritime transportation, unless the non-maritime transportation is merely incidental—and that long-distance travel is not incidental."²⁰ The Court cited several examples of this spatial abuse.

In *Hartford Fire Ins. co. v. Orient Overseas Containers Lines*,²¹ the court held that "transport by land under a bill of lading [was] not 'incidental' to transport by sea if the land segment involves great and substantial distances, and land transport of over 850 miles across four countries [was] more than incidental."²² Similarly, in *Sea-Land Serv., Inc. v. Danzig*,²³ the court held that "intermodal transport contracts were not maritime contracts because they called for 'substantial transportation between inland locations and ports both in this country and the Middle East' that

15. *Id.*

16. *Id.*

17. *Kirby*, 125 S. Ct. at 393 (emphasis added).

18. *Sturley*, *supra* note 4, at 300.

19. *See Kirby*, 125 S. Ct. at 394.

20. *Id.*

21. 230 F.3d 549 (2nd Cir. 2000).

22. *Id.* at 555-56.

23. 211 F.3d 1373 (D.C. Cir. 2000).

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was not incidental to the transportation by sea.”²⁴ In response to these cases, the *Kirby* Court felt that labeling a non-maritime leg “incidental” was “imprecise” because “each leg of the [multi-modal] journey [was] essential to accomplishing the contract’s purpose.”²⁵ Additionally, the Court cited *Kossick* as precedent for their preferred “conceptual” over “spatial” approach.²⁶ The Court then announced its purported solution to the lower federal courts’ break from the conceptual precedent:

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. Its character as a maritime contract is not defeated simply because it also provides for some land carriage. Geography, then, is useful in a conceptual inquiry only in a limited sense: If a bill’s sea components are insubstantial, then the bill is not a maritime contract.²⁷

On paper, this re-affirmation of the “conceptual” approach serves to open the door for federal courts to unabashedly analyze multi-modal “maritime” contracts, but also opens the doors to new controversy.

In his article: “*Kirby v. Norfolk Southern: The Salty Train Wreck*,” transportation lawyer Andrew D. Kehagiaras stated the obvious with regard to the jurisdiction section of the *Kirby* decision: “The Court’s ruling on ‘substantial’ carriage by sea begs the question as to what qualifies as being ‘substantial.’ Does ‘substantial’ mean that the carriage by sea is substantial in and of itself? Or is the carriage by sea ‘substantial’ when compared to the accompanying inland transportation?”²⁸ Because of these obvious unanswered issues, the *Kirby* Court’s jurisdiction question is clearly out of tune with the Court’s purported reason for creating a rule that would permit the application of federal maritime law in this case: uniformity.²⁹

24. *Kirby*, 125 S. Ct. at 394 (quoting *Sea-Land Serv., Inc. v. Danzig*, 211 F.3d 1373, 1378 (D.C. Cir. 2000)).

25. *Id.*

26. *Id.* at 395 (citing *Kossick*, 365 S. Ct. at 735) (“Furthermore, to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires”).

27. *Id.*

28. Andrew D. Kehagiaras, *Kirby v. Norfolk Southern: The Salty Train Wreck*, 2-4 BENEDICT’S MAR. BULL. 295, 306 (2004).

29. See *Kirby*, 125 S. Ct. at 396 (noting that “[w]e have explained that Article III’s grant of admiralty jurisdiction ‘must have referred to a system of law coextensive with and operating uniformly in, the whole country.’”) (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (some citations omitted)).

If “uniformity” was the *raison d’être* for the *Kirby* decision, how does deriding a federal doctrine that was uniformly applied by the lower federal courts (the mixed contract doctrine) to create a confusing new standard (“substantial” carriage) not “undermine the uniformity of general maritime law?”³⁰ The Court went so far as to criticize the imprecise quality of the word “incidental” as used by the lower courts in applying the mixed contract doctrine.³¹ However, the Court has not achieved much by itself employing an “imprecise” adjective like substantial. Obviously in the *Kirby* case, the transportation of machinery from Australia to Georgia by sea is substantial. But, as Mr. Kehagiaras lamented, what about a contract that calls for equal land and sea travel? Or, what about a contract that calls for more land travel than sea? By creating a “soft”³² rule, the Court has all but assured that the lower federal courts will struggle to determine what “substantial” actually means. Despite this obvious shortcoming, some see this particular extension of admiralty jurisdiction as a limited advancement.

In his article “Rewriting Maritime Law: The Supreme Court’s November Surprise,”³³ Professor Michael F. Sturley opined that “[t]his new rule is a welcome addition to the general maritime law. In essence, the Court has judicially created one of the suggestions that the Maritime Law Association advocated in its proposed COGSA amendments.”³⁴ However, despite Professor Sturley’s acceptance of the *Kirby* Court’s holding on admiralty jurisdiction, he too questions the wisdom of a rule so poorly defined:

The breadth of this rule is reinforced by the narrow exception – in essence a restatement from the opposite perspective – that the Court recognized: “If a bill’s sea components are insubstantial, then the bill is not a maritime contract.” But, did the Court really mean to be so broad? Other parts of the opinion suggest a more restrictive test. The opening paragraph of the discussion on this issue for example, argues that the bills of lading at issue in the case “are maritime contracts because their primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States.” The next paragraph (echoing the rejected “incidental” exception mini-

30. *Id.*

31. *Id.* at 394-95.

32. With the adjective “soft,” the author does not mean to suggest “soft-law” as in the sense of a soft rule on international human rights, promulgated by an NGO, but merely a rule without clear definition, that will inevitably lead to future confusion and absence of uniformity.

33. Sturley, *supra* note 4, at 299.

34. *Id.*

mizes the rail journey as “a ‘fringe’ portion of the intercontinental journey promised in the [bills of lading].” And the paragraph after that speaks of “focusing our inquiry on whether the principal objective of a contract is maritime commerce.”³⁵

This author agrees with Professor Sturley’s better solution to multi-modal jurisdiction choice of law issue: the Supreme Court should have simply limited the mixed contract doctrine to non-multi-modal contracts.³⁶ This holding would have been an advancement for multi-modal law, as it would have brought all multi-modal, maritime contracts under the purview of federal admiralty law.³⁷ However, in arriving at that holding, the Court would have eliminated all questions regarding application, instead of creating new ones.³⁸

Under the Supreme Court’s *Kirby* holding on federal admiralty jurisdiction, geographical or spatial analysis still exists, as does the potential for a “maritime” contract that sees the majority of the cargo transportation carried out on terra firma. Contrast this with the precedent set forth by the Supreme Being in *Genesis*, where the land and the water are two distinct realities, no: if’s, and’s, or substantial’s, about it.

II. THE AFTERMATH OF THE *KIRBY* UNIFORMITY TRAINWRECK IN THE FEDERAL APPELLATE COURTS

After reaching very questionable conclusions on both maritime jurisdiction and agency, *Kirby* then cited a Ninth Circuit Court of Appeals case – *Kukje Hwajae Ins. Co. v. The M/V Hyundai Liberty*³⁹ – implying initially that the *Kukje* Court reached the wrong conclusion.⁴⁰ It is important to note that the Ninth Circuit’s agency holding was in harmony with the prevalent international view on the agency status of an intermediary or non-vessel operating common carrier.⁴¹ Ultimately, however, the Supreme Court vacated the Ninth Circuit’s decision and remanded the case back to the Circuit Court for a re-hearing in light of *Kirby*’s holding on

35. *Id.*

36. *See id.* at 301.

37. *Id.*

38. *See id.*

39. 294 F. 3d 1171 (9th Cir. 2002).

40. *Kirby*, 125 S. Ct. at 398-99 (citing *Kukje* 294 F.3d 1171, 1175-77).

41. *See* Andrew Brown, *The Supremacy of United States (Maritime) Law*, JOURNAL OF TRANSPORTATION, LOGISTICS AND POLICY, IQ 2006.

agency.⁴² The stage was set for the first real world application of *Kirby*'s new agency decision.⁴³

The *Kukje* Court quickly dismissed the speculation about their application of the *Kirby* precedent as they announced at the beginning of the opinion:

In particular, the Supreme Court criticized our 'agency' analysis with respect to the forum selection clause. As subsequent briefing has clarified, however, there is a completely separate, preserved and properly argued route by which we reach the same answer to the first question, that is, the binding effect of the forum-selection clause. ... We again affirm.⁴⁴

The Ninth Circuit executed a graceful spin-move, completely dodging the *Kirby* agency issue. After the Ninth Circuit's re-hearing of the *Kukje* case, two other lower federal courts, the Second Circuit Court of Appeals, and the Federal District Court of South Carolina, both "examined" the *Kirby* case in the course of their decisions.⁴⁵

In *BDL International v. Sodetal USA, Inc.*,⁴⁶ a district court was presented the admiralty jurisdiction issue that the Supreme Court had recently molested in *Kirby*.⁴⁷ The *BDL* court held that a contract was maritime in nature where it included ocean shipment from France to Charleston, South Carolina, and over-land shipment within South Carolina.⁴⁸ However, the District of South Carolina, much like the Ninth Circuit in *Kukje*, dodged the thorny issue by entirely avoiding the "substantial" question.⁴⁹

Similarly, in *Folksamerica Reinsurance Co., v. Clean Water of N.Y., Inc.*,⁵⁰ the Second Circuit also was presented the issue of whether an insurance contract could be classified as "maritime," under the precedent set in *Kirby*.⁵¹ During its analysis, the appellate court commented that in

42. See *Kukje*, 408 F.3d at 1252.

43. See Kehagiaras, *supra* note 26, at 307.

44. *Kukje*, 408 F.3d at 1252.

45. According to the "Citing History" feature on Westlaw, the *Kirby* decision has been at least "cited" in more than twenty cases since its inception. The two cases discussed in this comment were the only two in which the Westlaw editors felt that the respective courts "examined" the *Kirby* precedent.

46. 377 F. Supp. 2d 518 (D.S.C. 2005).

47. See *id.*

48. See *id.* at 520-24.

49. See *id.* at 520-24.

50. 413 F.3d 307 (2nd Cir. 2005).

51. See *id.* at 312.

Kirby “the Supreme Court exercised admiralty jurisdiction over a contract with non-maritime components deemed to be *more* than ‘incidental.’”⁵² However, ultimately the Second Circuit determined that the applicable test, fashioned from the *Kirby* precedent, was “whether the principal objective of a contract is maritime commerce.”⁵³ Based on the various provisions in the insurance contract, the court ultimately held that the principal objective *was* maritime commerce, so the contract was subject to federal admiralty law.⁵⁴ The Second Circuit did not have cause to consider the “substantial” issue.

Based on these three recent cases, it is apparent that the only uniformity that the *Kirby* case has spawned in the lower federal courts is a uniform reluctance to apply the new limited-agency rule or the new substantial-spatial rules. For a “maritime case about a trainwreck,” purported to be a catalyst for the standardization of federal admiralty law,⁵⁵ the *Kirby* case itself can be characterized as a *trainwreck* maritime case about a trainwreck.

52. *Id.* at 315 (emphasis in original).

53. *Id.* (quoting *Kirby*, 125 S. Ct. at 394).

54. *See id.* at 323-24.

55. *See Kirby*, 125 S. Ct. 385.