

Articles

Admiralty

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The United States Court of Appeals for the Eleventh Circuit published four opinions dealing with Admiralty issues in 2002. While the total number of opinions is not as high as in recent years, the court addressed numerous issues that are relevant and important in today's Admiralty practice. The court dealt with coverage under the Longshore and Harbor Workers' Compensation Act ("LHWCA"),¹ cargo liability limitation by inland carriers through a Himalaya clause in an ocean bill of lading,

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1. 33 U.S.C. §§ 901-950 (2000).

protection and indemnity coverage for cargo damage claims, the doctrine of forum non conveniens, and the applicable law to be used by federal courts sitting in diversity. In addition to these four Eleventh Circuit cases, there were two Supreme Court cases involving preemption in the maritime arena that will be very important to Admiralty practitioners.

I. THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

The LHWCA is a federal compensation scheme promulgated for the purpose of providing compensation in lieu of tort damages for workplace injuries sustained by land-based workers commonly referred to as "longshoremen."² In order to obtain coverage under the LHWCA, a claimant must satisfy both the "status" test,³ by showing that she was engaged in maritime employment at the time she was injured,⁴ and the "situs" test,⁵ by showing that the injury occurred in a location customarily used for maritime activities.⁶ In *Bianco v. Georgia Pacific Corp.*,⁷ the Eleventh Circuit Court of Appeals confronted the question of whether an employee injured at a manufacturing plant that is indirectly connected to a marine terminal can recover under the LHWCA.⁸

Appellant-petitioner Linda Bianco was a Georgia Pacific Corporation ("GPC") employee injured on two separate occasions at the gypsum products plant in Brunswick, Georgia. Bianco's first injury occurred in May 1993 while she worked as a knife operator in the sheetrock production department, and her second injury occurred in July 1995 while operating a palletizer on the gypcrete production line.⁹ While neither of these production departments is situated in an area contiguous to the East River at the Port of Brunswick, they are both supplied with gypsum via a system of three separate conveyor belts from the nearby Lanier dock, which is situated on the East River.¹⁰ Bianco filed

2. See generally 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 7-1, at 380 (Practitioner Treatise Series, 3d ed. 2001).

3. 33 U.S.C. § 902(3).

4. *Id.* § 903(a).

5. *Id.*

6. *Id.* The situs test is satisfied by showing that the injury occurred "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." *Id.*

7. 304 F.3d 1053 (11th Cir. 2002).

8. *Id.* at 1057.

9. Gypcrete is a flooring material manufactured by GPC at the Brunswick facility. *Id.* at 1054.

10. Raw gypsum arrives by ship at the Lanier dock, where the ship's own conveyor belt unloads the gypsum into a hopper. The gypsum is then transferred from the hopper onto

two LHWCA claims for the injuries she sustained in the production plant on the theory that the area where she was working was connected to the gypsum-loading terminal by virtue of the system of conveyor belts. Both claims were denied by the administrative law judge (“ALJ”) for failure to satisfy the maritime situs test for LHWCA coverage, and the Benefits Review Board summarily affirmed. Bianco appealed this denial of benefits to the Eleventh Circuit.¹¹

In order to determine whether the sheetrock facility had the requisite situs¹² for LHWCA coverage, the Eleventh Circuit considered whether the GPC plant was an “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.”¹³ Despite the fact that the facility is separated from navigable waters by city- and county-owned property, Bianco argued that the GPC sheetrock production department “adjoins” the navigable waterways of the United States.¹⁴ The court ultimately did not need to decide the question of whether the area “adjoins” the waterway because it was clear that the area of the facility where Bianco had been injured had never been used for any of the enumerated types of maritime activity.¹⁵

Bianco next argued that the LHWCA should be applicable throughout the entire facility based on the fact that maritime activity took place in certain parts of the GPC plant.¹⁶ Bianco argued that “to hold otherwise would result in workers walking in and out of coverage,”¹⁷ a concern Congress had expressed prior to the 1972 amendments modifying the LHWCA situs definition.¹⁸ The court in *Bianco* held that “the facts in this case [did] not implicate that limited concern”¹⁹ for workers engaged

a second conveyor belt, owned by Glynn County and the City of Brunswick, that conveys the gypsum to Transfer House No. 2. The gypsum is then loaded onto a third conveyor belt, operated by GPC employees, and moved along to GPC’s rock shed at the production plant. *Id.* at 1054-55.

11. *Id.* at 1055-56.

12. The court noted, without explanation, that Bianco never challenged the ALJ’s finding of no maritime status for the 1995 injury. *Id.* at 1057. Because this integral element of LHWCA coverage was not challenged or appealed, the court of appeals considered only the question of whether the sheetrock production facility where Bianco was injured in May 1993 was a covered situs under the LHWCA. *Id.*

13. *Id.* (quoting 33 U.S.C. § 903(a)).

14. *Id.*

15. *Id.* at 1057-58.

16. *Id.* at 1058-59.

17. *Id.* at 1059.

18. For a general discussion of the “checkered coverage” that existed prior to 1972, see *Herb’s Welding Inc. v. Gray*, 470 U.S. 414, 426 (1985).

19. 304 F.3d at 1059 (citing *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 510 n.8 (5th Cir. 1980) (en banc)).

in maritime activity walking in and out of coverage at or near the water's edge because no maritime activity was going on in the "area" where Bianco was injured.²⁰ The broad interpretation of "adjoining area" urged by Bianco would ignore "language in the statute indicating that a *functional nexus* to maritime activity must nonetheless exist."²¹ The court of appeals therefore affirmed the denial of LHWCA benefits.²²

II. CARGO

The case of *Kirby v. Norfolk Southern Railway Co.*²³ presented the court with an opportunity to clarify Eleventh Circuit law on when a "Himalaya clause"²⁴ contained in an ocean bill of lading will extend an ocean-going carrier's defenses and limitations of liability to an inland carrier.²⁵ The case stemmed from the shipment of ten containers of machinery from Sydney, Australia to Huntsville, Alabama via the port of Savannah, Georgia. The shipment involved the issuance of two separate bills of lading as the Australian freight forwarder, International Cargo Control Pty. Ltd. ("ICC"), issued the first bill of lading (the "ICC Bill") to the shipper, James N. Kirby Pty. Ltd. ("Kirby").²⁶ ICC then arranged to have the shipping line, Hamburg Sud,²⁷ perform the ocean transport of the ten containers from Australia to the United States. A second bill of lading (the "Hamburg Sud Bill") was issued to ICC by Hamburg Sud, which subcontracted with the rail carrier, Norfolk Southern Railway Company ("Norfolk Southern"), to transport the machinery inland to Huntsville. After a derailment of the train between Savannah and Huntsville caused \$1.5 million of damage, the shipper, Kirby, brought suit in the United States District Court for the Northern

20. *Id.* at 1058-59.

21. *Id.* at 1060 n.10 (citing *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 221 (4th Cir. 1998)).

22. *Id.* at 1054.

23. 300 F.3d 1300 (11th Cir. 2002), *rehearing and rehearing en banc denied by* No. 01-13776, 2002 WL 31415803 (11th Cir. Oct. 7, 2002), *petition for cert. filed*, 71 U.S.L.W. 3476 (Jan. 6, 2003).

24. A Himalaya clause is a provision inserted into the contract of carriage that extends to a carrier's agents, employees, and contractors those limitations of liability to which the carrier is entitled. *See generally* 2 SCHOENBAUM, *supra* note 2, § 10-8, at 48-56. Such clauses get their name from the ship involved in the landmark English case of *Adler v. Dickinson*, 1 Q.B. 158 (1955), in which such clauses were first honored.

25. *See* 300 F.3d at 1302.

26. *Id.*

27. Hamburg Sudamerikanische Dampfschifahrts-Gesellschaft Eggert & Amsink, which translates to "Hamburg South American Steam Shipping Company." *Id.* at 1303 n.2.

District of Georgia to recover for damage done to the goods in the course of the inland carriage.²⁸

The inland carrier, Norfolk Southern, moved for partial summary judgment, arguing that it was entitled to the protections of the Carriage of Goods by Sea Act²⁹ (“COGSA”) and its \$500 per package liability limitation,³⁰ pursuant to the Himalaya clauses contained in the two bills of lading. The District Court for the Northern District of Georgia agreed and limited Norfolk Southern’s liability to \$5,000, or \$500 for each of Kirby’s ten containers.³¹ On appeal the Eleventh Circuit considered both bills of lading and whether the Himalaya clauses contained therein operated to limit the liability of Norfolk Southern to the shipper, Kirby.³²

The court first concluded that the Himalaya clause contained in the Hamburg Sud Bill did not bind Kirby.³³ The court focused on the role played by the freight forwarder, ICC, vis-a-vis Kirby in receiving the Hamburg Sud Bill.³⁴ If ICC were acting as Kirby’s agent in receiving the Hamburg Sud Bill, then the shipper, Kirby, would be bound by the contractual provisions contained therein.³⁵ The court looked to the language of the bill of lading, as well as the overall structure of the transaction, to conclude that ICC was acting as a principal and not as Kirby’s agent.³⁶ The Hamburg Sud Bill listed ICC, not Kirby, as the party with whom Hamburg Sud had contracted.³⁷ Further, the fact that there were two bills of lading for this shipment transaction showed that the freight forwarder, ICC, was acting as a principal because “if ICC had been acting as Kirby’s agent, there would have been only one bill of lading[,] issued by Hamburg Sud to Kirby and listing Kirby as the

28. *Id.* at 1303.

29. 46 U.S.C. app. §§ 1300-1315 (2000).

30. 300 F.3d at 1304 (citing 46 U.S.C. § 1304(5)). This “package limitation” limits the liability of a COGSA “carrier” to \$500 per package or customary freight unit, unless the value of such goods has been declared and a correspondingly higher freight rate has been paid. 46 U.S.C. § 1304(5). For a general discussion of the COGSA package limitation, see 2 SCHOENBAUM, *supra* note 2, § 10-33, at 155-66.

31. 300 F.3d at 1304. While the issue of whether a container is to be considered a “package” for the purposes of COGSA is an oft-litigated dispute, *see, e.g.*, *Fireman’s Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 997 (11th Cir. 2001), that issue was not taken up by the court in *Kirby* because the package limitation was determined not to apply to Norfolk Southern. 300 F.3d at 1304.

32. *Id.*

33. *Id.* at 1307.

34. *Id.* at 1304-05.

35. *Id.* at 1305.

36. *Id.* at 1305-06.

37. *Id.* at 1305.

shipper.³⁸ Because the freight forwarder, ICC, was not acting as Kirby's agent in accepting the bill of lading, Kirby was not bound by the Himalaya clause contained in the Hamburg Sud Bill.³⁹

The court next scrutinized the ICC Bill to determine if its Himalaya clause would operate to limit Norfolk Southern's liability to the shipper, Kirby.⁴⁰ As a backdrop, the court reviewed the situation in the context of the Supreme Court case of *Robert C. Herd & Co. v. Krawill Machinery Corp.*⁴¹ and its admonition that "contracts purporting to grant . . . limitation of [] liability must be strictly construed and limited to [their] intended beneficiaries."⁴² The court also noted that the Eleventh Circuit has developed a "clarity of language" test for determining whether a third party is effectively identified as a member of the group of beneficiaries to whom a Himalaya clause will extend.⁴³ The "clarity of language" test allows the enforcement of a Himalaya clause only when it is drafted with "language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons."⁴⁴

The Himalaya clause in the ICC Bill extended ICC's limitations of liability to "any servant, agent, or . . . independent contractor[s] whose services have been used in order to perform the contract."⁴⁵ Such language in a bill of lading has been previously interpreted by the court in *Certain Underwriters at Lloyds' v. Barber Blue Sea Line*⁴⁶ to include "all those persons engaged by the carrier to perform the functions and duties of the carrier."⁴⁷ However, as the freight forwarder, ICC, was listed as the carrier on the ICC Bill, the inland carrier, Norfolk Southern, could not be said to have been "engaged by the carrier" because Norfolk Southern was engaged by the ocean carrier, Hamburg Sud.⁴⁸ The court therefore deemed Norfolk Southern a "sub-sub-contractor."⁴⁹ The court succinctly concluded that "if Kirby and ICC had intended for the protections of the ICC Bill to extend to sub-sub-

38. *Id.*

39. *Id.* at 1306-07.

40. *Id.* at 1307-11.

41. 359 U.S. 297 (1959).

42. *Id.* at 305.

43. 300 F.3d at 1308 (citing *Generali v. D'Amico*, 766 F.2d 485, 488 (11th Cir. 1985); *Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982)).

44. *Id.* (quoting *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1465 (11th Cir. 1998)).

45. *Id.*

46. 675 F.2d 266 (11th Cir. 1982).

47. *Id.* at 270 (emphasis added).

48. 300 F.3d at 1308.

49. *Id.*

contractors, they could have said so.”⁵⁰ In *Kirby* the court acknowledged that a different standard has been developed by the Ninth Circuit, which looks to “the nature of the services performed [by the defendant who seeks to invoke the clause] compared to the carrier’s responsibility under the carriage contract.”⁵¹ In the Eleventh Circuit, however, the “*Certain Underwriters* limitation of Himalaya clause protections to those parties [actually] ‘engaged by the carrier,’ together with the *Herd* principle of narrow construction, requires privity between the [shipper] and the party seeking shelter in the Himalaya clause.”⁵²

The court expressed concerns about the policy implications of a contrary holding in which the inland carrier, Norfolk Southern, would be granted the COGSA package limitation by stating that “[w]e should be cautious about extending the reach of a Himalaya clause, and with it the reach of COGSA, inland.”⁵³ The court also noted, “In all of our prior Himalaya clause cases, the defendant invoking the Himalaya clause has been a stevedore or other provider of port services.”⁵⁴ While the court’s opinion in *Kirby* leaves open “the question of whether and when an inland carrier can claim the benefit of a Himalaya clause,”⁵⁵ it cautions that extending the protections of a Himalaya clause to an inland carrier should be done only through “a special degree of linguistic specificity.”⁵⁶

50. *Id.* (citing *Uncle Ben’s v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 218 n.2 (5th Cir. 1988); *Gebr. Bellmer KG v. Terminal Servs. Houston, Inc.*, 711 F.2d 622, 625 (5th Cir. 1983)).

51. *Id.* at 1308-09 (quoting *Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998)). This Ninth Circuit standard has been deemed the “comparison-of-services” test. *Id.* at 1309 n.10. As of the time of the writing of this Article, certiorari had been filed with the United States Supreme Court, perhaps with a thought towards seeking a resolution of this circuit split. 71 U.S.L.W. 3476 (Jan. 6, 2003).

52. 300 F.3d at 1309. The court qualified this holding by stating that privity of contract is not required when the term used in the Himalaya clause is descriptive, such as “stevedore,” “terminal operator,” or presumably “inland rail carrier.” *Id.* at 1309 n.11.

53. *Id.* at 1310.

54. *Id.* at 1309 (citing *Fireman’s Fund*, 254 F.3d at 992 (stevedore); *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1510 (11th Cir. 1989) (stevedore); *Certain Underwriters*, 675 F.2d at 269 (stevedore and terminal operator)).

55. *Id.* at 1309-10.

56. *Id.* at 1310. By requiring textual support for extension of this limitation of liability, *Kirby* falls in line with recent Eleventh Circuit jurisprudence in that the court has increasingly relied upon the language contained on the face of the bill of lading or charter party document to determine the parties’ rights and obligations. *See, e.g.*, *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956 (11th Cir. 2001) (surveyed by Robert S. Glenn, Jr. & Colin A. McRae, *Admiralty*, 53 MERCER L. REV. 1167, 1172-75 (2002)).

The court rejected Norfolk Southern's final argument that the ICC Bill was identified on its face as a "through bill," providing for transport to an inland destination, thereby indicating an intention to extend the Himalaya clause to an inland carrier.⁵⁷ The court disagreed, reasoning that the simple fact that the bill of lading was a "through bill" did not necessarily mean that the bill of lading "also envisioned that the liability regime for the inland leg of the journey would be provided by COGSA via the Himalaya clause."⁵⁸ The court insisted that "if [a] Himalaya clause is to extend inland, it must say so with specificity."⁵⁹

III. PROTECTION AND INDEMNITY COVERAGE

The case of *Achille Lauro Lines S.R.L. v. West Indies Transport Limitada*⁶⁰ involved a dispute over Protection and Indemnity⁶¹ ("P&I") coverage for the loss of cargo⁶² on board the M/V MAR when she sank during a transatlantic tow. The P&I Club denied coverage for failure of the member shipowner to comply with the rules of the P&I policy on reporting damages and following surveyor's instructions. The district court found that the shipowner had complied with the Club rules.⁶³ The Eleventh Circuit reversed on appeal, holding that the shipowner had provided inaccurate information regarding the condition of the vessel and the circumstances of the tow and had failed to follow the instructions of the surveyor.⁶⁴ The district court's damage award was overturned because the Eleventh Circuit held that P&I coverage for the damages had been properly denied.⁶⁵

During a transoceanic voyage from South America to southern Europe, the M/V MAR experienced difficulties with its fuel system and had to detour to St. Martin for repairs. After the replacement of the fuel pump

57. 300 F.3d at 1310.

58. *Id.*

59. *Id.* at 1311.

60. No. 00-11085, 2002 WL 31431559 (11th Cir. July 16, 2002) (unpublished).

61. Protection and Indemnity Associations, also called "clubs," function as mutual insurance companies for ship owners, operators, and charterers. The court in *Achille Lauro* noted the difference between a P&I Club and an insurance company—the members of a P&I Club share the cost of any liability claim, as opposed to an insurance company, which covers such claims itself. 2002 WL 31431559, at *2 n.3. For a general overview of the role played by P&I Clubs, see 2 SCHOENBAUM, *supra* note 2, § 19-5, at 449-53.

62. While P&I coverage addresses liability claims against the vessel, the actual damages to the vessel itself would be covered by a hull and machinery policy, which is a completely separate policy. See *Achille Lauro*, 2002 WL 31431559, at *2 n.3.

63. *Id.* at *4-5.

64. *Id.* at *7.

65. *Id.*

failed to remedy the difficulties, the vessel owner decided to send a tug to tow the vessel—laden with cargo and unmanned—across the Atlantic to Gibraltar.⁶⁶ A representative of the owner, West Indies Transport Limitada⁶⁷ (“West Indies”), contacted a marine surveyor named Eugene Tesoriero, who was affiliated with the classification society American Bureau of Shipping (“ABS”).⁶⁸ After being told that the vessel was to be towed, Tesoriero instructed the owners to “get a surveyor.”⁶⁹ Tesoriero was not informed, however, where the cargo-laden, unmanned vessel was to be towed, nor was he informed of the seriousness of the vessel’s problems.⁷⁰ The owner’s representatives then contacted an independent surveyor (i.e., not affiliated with ABS) named James Moore to conduct the survey of the MAR. After replying that he was too busy to survey the vessel at that time, Moore provided towing recommendations that had been used for another vessel. After these initial contacts, the owner’s representative sent a facsimile to its hull underwriters,⁷¹ informing them, somewhat inaccurately, that the owner’s independent surveyor had approved the use of a tug to tow the vessel to Gibraltar and that the ABS had been notified and was in accord. The vessel sank during the tow to Gibraltar.⁷²

The charterer of the vessel, Achille Lauro, received a payment of \$1.75 million in connection with claims for the lost cargo.⁷³ West Indies’s P&I Club, The Standard Steamship Owners Protection and Indemnity Association (“The Standard”), denied coverage, and the two subsequently became embroiled in litigation over whether West Indies had abided by the requirements of The Standard Club’s Rule 21(1). Rule 21(1) requires that an owner keep a ship “in class,” promptly call to the classification society’s attention any incident or condition that might cause the classification society to recommend repairs, and to comply with all

66. *Id.* at *1.

67. The court refers to the owner alternatively as West Indies and James Oelsner, Sr. but clarified that for the purpose of this litigation, West Indies should be considered the proper party to represent the interests of the owner of the vessel. *Id.* at *2 n.4.

68. *Id.* at *1. A vessel classification society such as ABS serves as an approved agency for surveying vessels and certifying their seaworthiness.

69. *Id.* at *5.

70. *Id.* at *6.

71. *Id.* at *1. The facsimile sent to the hull underwriters was passed along to West Indies’s P&I Club. *Id.*

72. *Id.* at *1-2.

73. *Id.* at *2. In damage claims that fall under P&I coverage, the member (e.g., the shipowner West Indies) pays the claim in the first instance and then seeks indemnity from the Club. In the case at bar, West Indies paid the claim initially and sought indemnity from The Standard for the amount paid to Achille Lauro. For the entire procedural background of the payments made, see *id.*

classification society rules, recommendations, and requirements.⁷⁴ After a bench trial, the district court concluded that the owner's consultation with James Moore had satisfied subsection (ii)'s requirement to call to the attention of the ABS a condition within the meaning of Rule 21(1)(ii) and, therefore, rejected The Standard's affirmative defense on this issue. The district court entered judgment in favor of West Indies for the \$1.75 million cargo payment plus "sue and labor" damages of \$835,310.52 in connection with the tow and attorney fees and costs of \$377,333.26.⁷⁵

After the parties stipulated that the district court had erred in holding that the owner's communication with James Moore satisfied the obligation under Rule 21(1)(ii) to contact an ABS representative, the issues on appeal were whether the owner had properly reported the condition of the vessel under subsection (ii) and whether the owner properly complied with all instructions from the ABS.⁷⁶ The court of appeals reviewed the testimony of Tesoriero and concluded that West Indies's representative had understated the seriousness of the vessel's problems and had omitted important details concerning the imminent tow, such as the fact that the vessel was laden with cargo and would be unmanned during a transoceanic towage.⁷⁷ Because West Indies did not provide ABS with a fair and adequate account of the deteriorating condition of the vessel and the planned trans-Atlantic tow, the court

74. *Id.* at *3. The Standard's Club Rules are essentially the terms and conditions that members must abide by in order to assure P&I coverage. The relevant portion of Rule 21(1) reads as follows:

Unless otherwise agreed in writing between the Owner and the Managers, the following conditions are terms of the insurance of every ship entered in the Club;

- (i) The ship must be and remain throughout the period of entry classed with a Classification Society approved by the Managers.
- (ii) The Owner must promptly call to the attention of the Classification Society or its officers any incident or condition which has given rise or might give rise to damage in respect of which the Society might make recommendations as to repairs or other action to be taken by the Owner.
- (iii) The Owner must comply with all of the Rules, recommendations and requirements of the Classification Society relating to the entered ship within a time or times specified by the Society.

...
Unless and to the extent that the Committee otherwise decides, and Owner shall not be entitled to any recovery from the Club in respect of any claim arising during a period when the Owner is not fulfilling or has not fulfilled any conditions referred to in this Rule 21(1).

Id.

75. *Id.* at *2-3.

76. *Id.* at *4-6.

77. *Id.* at *5-6.

concluded that West Indies had not complied with Rule 21(1)(ii).⁷⁸ Furthermore, the owner's mere consultation with James Moore did not comply with the ABS representative's instruction to "get a surveyor" because such an instruction necessarily contemplated that an attending surveyor be present at the vessel either before or during the tow.⁷⁹ Because West Indies "did not fully comply with club rule 21(1)(ii) and did not at all comply with rule 21(1)(iii)," the court of appeals reversed the district court's refusal to sustain The Standard's affirmative defense on this point.⁸⁰

IV. FORUM NON CONVENIENS

In *Esfeld v. Costa Crociere, S.P.A.*,⁸¹ the Eleventh Circuit took the opportunity to clarify the law to be applied in the context of forum non conveniens by federal courts sitting in diversity.⁸² The case involved suits brought by three American couples who were injured while on a guided van tour of Da Nang, Vietnam. The van tour had been arranged by defendant Costa Crociere, S.P.A. ("Costa"), the owner/operator of a western Pacific cruise ship on which the couples were passengers. Plaintiffs first filed suit in Florida state court, contending that although defendant Costa is an Italian corporation, its sales, advertising, and marketing were all done through a Miami office listed on a brochure as the cruise line's address. Costa filed a motion to dismiss based on the doctrine of forum non conveniens, which was ultimately successful.⁸³

After this initial setback, plaintiffs then filed a diversity suit in the United States District Court for the Southern District of Florida. Defendant again filed a motion to dismiss on the basis of both collateral estoppel and forum non conveniens. The district court rejected the collateral estoppel argument, reasoning that the forum non conveniens analysis undertaken by the Florida state court focused on the connections between the lawsuit and the *State of Florida*, while the federal inquiry must focus on the connections between the suit and the *entire United States*. The district court concluded that because the issues

78. *Id.* at *6.

79. *Id.*

80. *Id.* at *7.

81. 289 F.3d 1300 (11th Cir. 2002).

82. *Id.* at 1301. Although the court in *Esfeld* was not acting pursuant to Admiralty jurisdiction, forum non conveniens is a doctrine often employed by Admiralty practitioners representing foreign shipping interests.

83. *Id.* at 1301-02. Although the Miami-Dade County State Court initially denied the motion to dismiss, Florida's Third District Court of Appeals reversed the trial court, holding that Italy provided a more proper forum for the litigation. *Pearl Cruises v. Bestor*, 678 So. 2d 372, 372 (Fla. Dist. Ct. App. 1996).

raised in the two forum non conveniens inquiries were not identical, plaintiffs were not collaterally estopped by the state court's dismissal on forum non conveniens grounds. The court also denied the motion to dismiss under the federal forum non conveniens argument because plaintiffs were U.S. citizens, several of their treating physicians reside in the United States, and Costa transacts a significant amount of business in the United States. In light of these interests, the court decided that the United States was an appropriate forum for the lawsuit.⁸⁴

After consolidation of the three couples' lawsuits and the retirement of the judge assigned to one of the couples' cases, the new district judge, the Honorable Shelby Highsmith, raised an issue sua sponte regarding whether, under the *Erie*⁸⁵ doctrine, federal or state law on forum non conveniens should apply. While acknowledging that a vast majority of other circuits that have addressed this *Erie* issue have concluded that federal law on forum non conveniens applies in the diversity context, Judge Highsmith distinguished the case at bar and concluded that Florida state law on forum non conveniens would apply.⁸⁶ Judge Highsmith then reasoned that the earlier state court decision dismissing on forum non conveniens grounds should be followed, and he accordingly dismissed all three couples' suits "without prejudice to their refileing in an appropriate forum (i.e., the courts of Italy, Vietnam, or plaintiffs respective home states)."⁸⁷

On appeal the Eleventh Circuit Court of Appeals undertook the *Erie* analysis to determine whether the district court had properly applied Florida state law on forum non conveniens in dismissing the complaints of the three couples.⁸⁸ Because the parties stipulated that application of Florida law was "outcome-determinative," the court reasoned that the state law standard must be applied unless affirmative, "countervailing

84. 289 F.3d at 1303-05.

85. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

86. 289 F.3d at 1305-06.

87. *Id.* at 1306 (citations omitted).

88. *Id.* at 1306-08. This multi-step analysis determines (1) whether state and federal law conflict on the disputed issue; (2) if they conflict, the court must ask whether a congressional statute or Federal Rule of Civil Procedure covers the disputed issue; and (3) if there is no such federal statute or rule on point, then the court must determine whether federal judge-made law rather than state law should be applied. If application of state law would be "outcome-determinative," the court must apply that state law unless affirmative "countervailing federal interests" are at stake that warrant application of federal law. *Id.* at 1306-07 (citing *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

federal interests” are at stake that would warrant application of federal law.⁸⁹

The court of appeals acknowledged that there was an Eleventh Circuit case, *Sibaja v. Dow Chemical Co.*,⁹⁰ on point that the district court erred in not following.⁹¹ Following the rationale from *Sibaja*, the court of appeals determined that the case implicated the following federal interests: (1) ensuring the U.S. citizens’ access to the courts of this country, (2) foreign relations and international comity, and (3) protection of a national, unified set of venue rules within the federal system.⁹² The court of appeals held that these were sufficient countervailing federal interests to warrant application of federal law in the *forum non conveniens* context.⁹³ The court therefore reversed the judgment of dismissal and remanded the case to the district court for application of federal law.⁹⁴

V. PREEMPTION

The United States Supreme Court decided two preemption cases in 2002 that will be particularly noteworthy to Eleventh Circuit Admiralty practitioners. In the first case, *Chao v. Mallard Bay Drilling, Inc.*,⁹⁵ the Court dealt with the question of whether United States Coast Guard (“Coast Guard”) safety regulations for “uninspected vessels” preempts the applicability of the Occupational Safety and Health Act⁹⁶ (“the Act”) to such vessels.⁹⁷ In the second case, *Sprietsma v. Mercury Marine*,⁹⁸ the Court centered on the issue of whether state law claims arising out of injuries caused by the absence of propeller guards are preempted by the Federal Boat Safety Act of 1971 (“FBSA”).⁹⁹ These cases evidence the frequent interplay of maritime law with other federal statutes and with state common law, as well as the Supreme Court’s ongoing efforts to define the border of these often overlapping areas of the law.

89. *Id.* at 1308. *See also Gasperini*, 518 U.S. at 432.

90. 757 F.2d 1215 (11th Cir. 1985).

91. 289 F.3d at 1308.

92. *Id.* at 1311-14.

93. *Id.* at 1314.

94. *Id.* The court left the door open to a possible contrary holding in a suit brought by a foreign national because the deference to the “plaintiff’s choice of forum is much less pronounced when the plaintiff is not an American resident or citizen.” *Id.* at 1312 n.15 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)).

95. 534 U.S. 235 (2002).

96. 29 U.S.C. §§ 651-678 (2000).

97. 534 U.S. at 238-39, 240.

98. 123 S. Ct. 518 (2002).

99. *Id.* at 522. 46 U.S.C. §§ 4301-4311 (2000).

A. *Chao v. Mallard Bay Drilling, Inc.*

The United States Supreme Court's first foray in 2002 into the maritime preemption arena was the case of *Chao v. Mallard Bay Drilling, Inc.*, which arose out of an explosion on board defendant's oil and gas exploration barge ("Rig 52") within the territorial waters of Louisiana, leading to the deaths of four crewmembers.¹⁰⁰ The Coast Guard conducted an investigation pursuant to its statutory authority under 46 U.S.C. §§ 6101-6104, 6301-6308.¹⁰¹ The Coast Guard determined that the barge was an "uninspected vessel" under the definition of 46 U.S.C. § 2101(43),¹⁰² and thus subject to minimal Coast Guard regulation, rather than an "inspected vessel" under 46 U.S.C. § 3301, subject to comprehensive regulation. The investigation resulted in no citations for any violations of Coast Guard regulations aboard Rig 52.¹⁰³

Using much of the information the Coast Guard had obtained during its own investigation, the Occupational Safety and Health Administration ("OSHA") conducted a follow-up investigation and cited defendant barge company Mallard Bay Drilling Co., Inc. ("Mallard Bay") for three violations of the Act.¹⁰⁴ Mallard Bay disputed the jurisdiction of OSHA to issue the citations, arguing that the Coast Guard had exclusive authority to prescribe and enforce standards concerning occupational safety and health on vessels in navigable waters, thereby preempting OSHA jurisdiction under § 4(b)(1) of the Act.¹⁰⁵ The ALJ assigned to the case rejected Mallard Bay's challenge to the citations, and the Occupational Safety and Health Review Commission ("OSHRC") declined

100. 534 U.S. at 237.

101. *Id.* (citing 46 U.S.C. §§ 6101-6104, 6301-08 (1994 & Supp. V 1999)).

102. *Id.* at 238 (citing 46 U.S.C. § 2101(43)). Uninspected vessels are defined by what they are not—that is to say, they are those vessels that are not enumerated under 46 U.S.C. § 3301 as being subject to Coast Guard inspection. Vessels that are subject to Coast Guard inspection include: "(1) freight vessels[,] (2) nautical school vessels[,] (3) offshore supply vessels[,] (4) passenger vessels[,] (5) sailing school vessels[,] (6) seagoing barges[,] (7) seagoing motor vessels[,] (8) small passenger vessels[,] (9) steam vessels[,] (10) tank vessels[,] (11) fish processing vessels[,] (12) fish tender vessels[,] (13) Great Lakes barges[,] and (14) oil spill response vessels." *Id.* at 242 n.8 (quoting 46 U.S.C. § 3301). An uninspected vessel is one that is not listed above and is not a recreational vessel. 46 U.S.C. § 2101(43).

103. 534 U.S. at 237-38 (citing 46 U.S.C. § 3301).

104. *Id.* at 238. The three OSHA violations were (1) failure "promptly to evacuate employees," (2) failure "to develop and implement an emergency response plan," and (3) "failure to train employees in emergency responses." *Id.* The overall amount of the penalties for the citations was \$13,230. *Id.* at 238-39.

105. *Id.* at 238-39 (citing 29 U.S.C. § 653(b)(1) (1994 & Supp. V 1999)).

to review the ALJ's decision.¹⁰⁶ On appeal to the United States Court of Appeals for the Fifth Circuit, the decisions of the ALJ and the OSHRC were overturned¹⁰⁷ on the ground that the court of appeals determined that § 4(b)(1) of the Act did indeed encompass uninspected vessels because the Coast Guard had exercised its authority to issue safety regulations for such vessels.¹⁰⁸ The United States Supreme Court granted certiorari to resolve the disagreement between the Fifth Circuit and other circuits on the scope of the preemptive force of § 4(b)(1) of the Act.¹⁰⁹

The Supreme Court reversed the holding of the Fifth Circuit, finding that OSHA's regulatory jurisdiction over the working conditions aboard the barge in question, an uninspected vessel, had not been preempted by Coast Guard regulations on marine safety.¹¹⁰ The Court focused on the language of the preemption section of the Act, which states, "Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."¹¹¹ In its parsing of the statutory language, the Court emphasized the difference between a fellow agency's mere *possession* of potential authority to regulate as compared to such an agency's *actual exercise* of such authority.¹¹² Upon examination of the extent to which the Coast Guard had actually exercised its authority by promulgating regulations for uninspected vessels, the Court concluded that the Coast Guard had limited its regulations concerning uninspected vessels solely to marine safety issues (i.e., life preservers, emergency locating equipment, engine ventilation, etc.), and not occupational safety concerns.¹¹³ Because the Coast Guard's exercise of its authority to regulate uninspected vessels has remained limited in this way, OSHA's authority to regulate occupational safety and health concerns aboard uninspected vessels is not preempted under § 4(b)(1).¹¹⁴

106. *Id.* at 239.

107. *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898, 900 (5th Cir. 2000).

108. 534 U.S. at 240.

109. *Id.*

110. *Id.*

111. *Id.* at 241 (quoting 29 U.S.C. § 653(b)(1)).

112. *Id.* at 241-42.

113. *Id.* at 243-44.

114. *Id.* It is important to note that the Court in *Chao* acknowledged "that OSHA's regulations have been pre-empted with respect to *inspected* vessels because the Coast Guard has broad statutory authority to regulate the occupational health and safety of [workers] aboard inspected vessels . . . , and it has exercised that authority." *Id.* at 243 (citations omitted).

B. Sprietsma v. Mercury Marine

While the court in *Chao* dealt with preemption in the area of competing federal agencies operating pursuant to federal statutory schemes, the case of *Sprietsma* involved the altogether different question of when a federal statute preempts state common law. Jeanne Sprietsma was a motorboat passenger who suffered fatal injuries after falling overboard during a turn and being struck in the head by a motorboat's propeller. The administrator of Sprietsma's estate brought suit in Illinois state court under the theory that the motor was an unreasonably dangerous product because it was manufactured without a propeller guard. Defendant Mercury Marine moved to dismiss for lack of subject matter jurisdiction, arguing that the Illinois state law cause of action was preempted by either the FBSA or by the Coast Guard's decision in 1990 not to promulgate a regulation requiring propeller guards on motorboat engines.¹¹⁵ The trial court granted Mercury Marine's motion to dismiss, which was affirmed by both the Illinois Court of Appeals¹¹⁶ and the Illinois Supreme Court.¹¹⁷ Because the Illinois Supreme Court's decision added to the already existing split of authority on the precise issue of preemption of state common law tort causes of action by the FBSA,¹¹⁸ the Supreme Court granted certiorari to resolve this question.¹¹⁹

The Court in *Sprietsma* determined that neither the FBSA nor the 1990 decision by the Coast Guard not to require propeller guards on outboard motors acted as a preemption of state common law court claims for injuries caused by such propellers.¹²⁰ The Court first looked to the express language of the FBSA preemption clause, which states: "[A] State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel

115. 123 S. Ct. at 522.

116. *Sprietsma v. Mercury Marine*, 729 N.E.2d 45, 46 (Ill. App. 2000).

117. *Sprietsma v. Mercury Marine*, 757 N.E.2d 75, 87 (Ill. 2001). The Illinois Supreme Court rejected the idea that the Illinois common law tort cause of action was *expressly* preempted, but affirmed on the grounds that it had been *impliedly* preempted. *Id.* at 81, 86.

118. 123 S. Ct. at 522. The opinion lists several cases (including four suits in which Mercury Marine's parent company, Brunswick Corporation, is listed as defendant) in which various circuits have held that the FBSA did indeed preempt state common law causes of action. *Id.* at 522 n.3 (citing *e.g.*, *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998)).

119. *Id.* at 522.

120. *Id.* at 527.

or associated equipment performance or other safety standard. . . .”¹²¹ In a discussion that borders on an exercise in defining what the meaning of the word “is” is, the Court first focused on the article “a” modifying “law or regulation” in the preemption clause.¹²² The Court concluded that “a law or regulation” could not be read so broadly as to include the common law, as the article “a” implies a discreteness and singularity that could not describe the collective common law of a state.¹²³

The Court next looked to surrounding statutory provisions to arrive at a harmonious interpretation that would give effect to all sections of the FBSA.¹²⁴ The FBSA contains a “savings” clause, which states that “[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.”¹²⁵ This savings clause addresses a separate and independent interest from the preemption clause’s focus on the authority to regulate. The savings clause focuses primarily on preserving the FBSA’s remedial role of compensating accident victims, as opposed to the preemption clause’s central concern with establishing legislative and regulatory authority.¹²⁶

The Court then addressed Mercury Marine’s argument that the Coast Guard’s 1990 consideration of propeller guards amounted to an exercise of authority that preempted state common law in this area.¹²⁷ The Court was not persuaded. It reasoned that “[t]he decision in 1990 to accept the subcommittee’s recommendation to ‘take no regulatory action,’ . . . left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation.”¹²⁸ The Court went on to note, “[A]lthough the Coast Guard’s decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an ‘authoritative’ message of a federal policy against propeller guards.”¹²⁹

In *Sprietsma* the Court dismissed Mercury Marine’s final argument that preemption would foster uniformity in manufacturing regulations.¹³⁰ Uniformity is an overriding policy often cited by Admiralty practitioners, and the Court conceded that “[u]niformity is undoubtedly

121. *Id.* at 524 (quoting 46 U.S.C. § 4306 (2000)).

122. *Id.* at 526.

123. *Id.*

124. *Id.*

125. *Id.* (quoting 46 U.S.C. § 4311(g)).

126. *Id.* at 526-27.

127. *Id.* at 527-29.

128. *Id.* at 527.

129. *Id.* at 528.

130. *Id.* at 530.

important to the industry.”¹³¹ However, the Court reiterated the remedial and compensatory purpose behind the FBSA: “[T]he concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act’s more prominent objective, emphasized by its title, of promoting boating safety.”¹³² Therefore, having concluded that the FBSA did not expressly preempt state common law tort claims for propeller accidents and that the field of boat safety was not implicitly preempted by this statutory scheme, the Court reversed the finding of the Illinois Supreme Court and overturned the grant of dismissal.¹³³

131. *Id.*

132. *Id.*

133. *Id.*