Admiralty

**by Colin A. McRae*
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I. THE SUPREME COURT OF THE UNITED STATES: BILLS OF LADING

In *Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*,[1] the Supreme Court of the United States had the opportunity to clarify whether 49 U.S.C. §§ 14706-14711[2] (the Court refers to these sections as the Carmack Amendment) applies to the inland rail transit portion of the international shipment of an intermodal container under a through bill of lading.[3] The factual circumstances giving rise to the dispute were quite similar to the facts in the recent cargo case of *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*,[4] as both cases involved international shipment of cargo to the United States under a through bill of lading during which the cargo was damaged on the inland rail leg of the shipment.[5] The cargo interests–owners–in this case shipped on a "K" Line vessel. Certain containerized goods from China were damaged when the Union Pacific train carrying them from Long Beach to the Midwestern United States derailed in Oklahoma.[6]

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1. 130 S. Ct. 2433 (2010).
2. 49 U.S.C. §§ 14706-14711 (2006).
3. *Kawasaki*, 130 S. Ct. at 2442.
4. 543 U.S. 14 (2004).
5. *Compare id.* at 18, *with Kawasaki*, 130 S. Ct. at 2438-39.
6. *Kawasaki*, 130 S. Ct. at 2439.

The bill of lading documentation covering the subject shipment contained, among other provisions, a forum selection clause requiring that any action relating to the rail carriage of the cargo be brought in Tokyo, Japan. Despite this forum selection clause, the cargo interests filed suit in the Superior Court of Los Angeles County, California for the damage to the cargo. The defendants, including both vessel interests and the rail carrier, removed the litigation to the United States District Court for the Central District of California and filed a motion to dismiss based on the Tokyo forum selection clause.[7]

After the district court granted the motion to dismiss, the United States Court of Appeals for the Ninth Circuit reversed on the grounds that "the Carmack Amendment applied to the inland portion of an international shipment under a through bill of lading" and concluded that the Carmack Amendment invalidated the parties' forum selection clause.[8] Noting that this interpretation of the scope of the Carmack Amendment was inconsistent with the stance taken by United States Courts of Appeals for the Fourth, Sixth, Seventh, and Eleventh Circuits, the Supreme Court granted certiorari to resolve the circuit split.[9]

The Supreme Court began with an examination of the Carriage of Goods by Sea Act (COGSA),[10] which does *not* limit the parties' ability to adopt forum selection clauses, before turning its attention to the Carmack Amendment.[11] While acknowledging that the Carmack Amendment does limit the parties' ability to choose the venue of their suit, the Court took a closer look at the scope of the Carmack Amendment's applicability and rejected the cargo interests' contention that the Carmack Amendment applied to the domestic inland segment of the carriage in this case.[12]

The Court focused on the Carmack Amendment's three different classifications of carriers: "(1) receiving rail carriers; (2) delivering rail carriers; and (3) connecting rail carriers."[13] "A 'receiving rail carrier' is one that 'provid[es] transportation or service . . . for property it receives for transportation under this part.'"[14] "A 'delivering rail carrier'" is one that "delivers the property and is providing transportation or service subject to the jurisdiction of the [Surface Transportation Board]

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7. *Id.* at 2439-40.
8. *Id.* at 2440 (citing Regal-Beloit Corp. v. Kawasaki Kisen Kaisha, Ltd., 557 F.3d 985, 994-95 (9th Cir. 2009)).
9. *Id.*
10. 46 U.S.C. §§ 30701-30707 (2006).
11. *Kawasaki*, 130 S. Ct. at 2440.
12. *Id.* at 2441-42.
13. *Id.* at 2442.
14. *Id.* (alteration in original); *see also* 49 U.S.C. § 11706(a).

under this part,"[15] while "[a] connecting rail carrier is 'another rail carrier over whose line or route the property is transported in the United States . . . under a through bill of lading.'"[16] Only a receiving rail carrier is required to issue a Carmack-compliant bill of lading. Therefore, the important question became whether a rail carrier transporting goods during the inland portion of a through bill of lading shipment constituted a receiving rail carrier for the purpose of the Carmack Amendment.[17]

The text of the Carmack Amendment provides that a receiving rail carrier must be one that "receives" the cargo "for domestic rail transportation at the journey's point of origin."[18] Under a through bill of lading, in which the cargo is received at an overseas location for transport to an inland location in the United States, there is no receiving rail carrier that receives the property at the journey's point of origin for domestic rail transportation.[19] Accordingly, the rail carrier was not required to issue a Carmack-compliant bill of lading.[20]

In the case at bar, since defendant "K" Line was not a receiving rail carrier and Union Pacific constituted a delivering carrier who was not required to issue a Carmack bill of lading, no Carmack bill of lading was required.[21] Since the Carmack Amendment's limitation on the parties' ability to agree to a forum selection did not apply to this shipment, the forum selection clause was enforceable, and the judgment of the Ninth Circuit was reversed.[22]

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. The Public Vessels Act vs. The Suits in Admiralty Act

In *Uralde v. United States*,[23] the United States Coast Guard (Coast Guard) was sued by the estate of a deceased Cuban national in a case that called upon the Eleventh Circuit to examine the extent to which the

15. *Kawasaki*, 130 S. Ct. at 2442 (internal quotation marks omitted); *see also* 49 U.S.C. § 11706(a).
16. *Kawasaki*, 130 S. Ct. at 2443; *see also* 49 U.S.C. § 11706(a)(3).
17. *Kawasaki*, 130 S. Ct. at 2443.
18. *Id.* (internal quotation marks omitted); *see also* 49 U.S.C. § 11706(a).
19. *Kawasaki*, 130 S. Ct. at 2444.
20. *Id.*
21. *Id.* at 2444-45.
22. *Id.* at 2449.
23. 614 F.3d 1282 (11th Cir. 2010).

Public Vessels Act (PVA)[24] and the Suits in Admiralty Act (SAA)[25] allow waiver of sovereign immunity.[26] The plaintiff, Augustin Uralde, and his wife, Anay, attempted to enter the United States illegally as passengers on board a speedboat. After a high speed chase, the Coast Guard successfully disabled the speedboat by firing two shotgun rounds into its engine. The sudden stop of the vessel caused Anay to forcefully hit her head on the side of the boat, leading to her loss of consciousness and bleeding from her head, nose, and ears.[27]

Augustin pleaded with responding Coast Guard personnel to evacuate Anay to a hospital immediately by using one of the Coast Guard aircraft hovering over the scene. This request was allegedly sent up the chain of command to Station Key West on two occasions but was denied both times. Once a physician's assistant arrived on board the speedboat an hour after the accident, he evaluated Anay's condition and recommended she be immediately airlifted to a medical facility. That recommendation was also denied, and Anay was ultimately taken ashore by way of an inflatable boat. She died in transit before reaching land.[28]

Augustin sued the Coast Guard under the SAA and the Federal Tort Claims Act (FTCA)[29] for negligence in failing to provide proper on-scene care or timely transportation to medical facilities and for unreasonably delaying a proper diagnosis of his deceased wife's medical needs.[30] The United States District Court for the Southern District of Florida found that the case fell under the PVA, rather than the SAA, and that the plaintiff failed to make a proper showing that the circumstances of his case provided for a waiver of the Coast Guard's sovereign immunity under the PVA.[31] The PVA contains a requirement that, to overcome the sovereign immunity enjoyed by agencies of the United States government, the plaintiff must show that his country of citizenship would reciprocally allow a United States citizen to sue under similar circumstances.[32] As Mr. Uralde was not able to prove that Cuba offers such reciprocity to United States citizens, the district court dismissed for lack of subject matter jurisdiction under the PVA.[33]

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24. 46 U.S.C. §§ 31101–31113 (2006).
25. 46 U.S.C. §§ 30901–30918 (2006).
26. *Uralde*, 614 F.3d at 1283-84.
27. *Id.* at 1284.
28. *Id.*
29. 28 U.S.C. §§ 1346, 2671–2680 (2006).
30. *Uralde*, 614 F.3d at 1284.
31. *Id.* at 1284-85.
32. 46 U.S.C. § 31111.
33. *Uralde*, 614 F.3d at 1285.

The Eleventh Circuit reversed on the grounds that the case did in fact fall under the SAA, which has no reciprocity prerequisite to jurisdiction, rather than the PVA.[34] The court explained that the PVA is more narrowly drafted to govern only those "[c]laims seeking relief for damages caused *directly* by a public vessel, or by the negligent operation thereof," while "[t]he SAA covers all remaining admiralty claims, including those simply '*involving* public vessels.'"[35] The plaintiff's claims of negligence on the part of the Coast Guard did not stem from the operation of a public vessel but instead involved the Coast Guard's decisions regarding how, and whether, to provide medical treatment to a passenger on a private vessel.[36] Since these claims are distinct from the operation of a public vessel, the PVA–and its somewhat onerous "reciprocity requirement"–did not apply to the plaintiff's claims, and the district court's dismissal of Mr. Uralde's claims was therefore reversed.[37]

B. Salvage

The issue of sovereign immunity was once again a central dispute in the case of *Aqua Log, Inc. v. Georgia*,[38] in which the plaintiff salvor filed in rem claims seeking title to, or a salvage award for, certain submerged logs that had been lost in the Altamaha River while being transported to coastal markets in the nineteenth and twentieth centuries. The State of Georgia claimed ownership of these old growth "deadhead" logs despite the fact that no action had been taken to recover the logs until the State commissioned a sonar survey of the Altamaha River in 2000. The State therefore intervened in the actions filed by Aqua Log, alerting the courts to the State's claim of ownership and filing motions to dismiss the in rem actions.[39] The State argued that the immunity conferred by the Eleventh Amendment to the United States Constitution[40] prohibited the federal courts from adjudicating the State's interest in the logs.[41]

On appeal, the Eleventh Circuit focused its discussion on a line of cases dating back to the nineteenth century, in which the courts have

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34. *Id.* at 1288.
35. *Id.* at 1286 (emphasis added) (quoting Marine Coatings v. United States, 71 F.3d 1558, 1562 n.5 (11th Cir. 1996)).
36. *Id.* at 1286.
37. *Id.* at 1288.
38. 594 F.3d 1330 (11th Cir. 2010).
39. *Id.* at 1331-33.
40. U.S. CONST. amend. XI.
41. *Uralde*, 594 F.3d at 1333.

concluded that a governmental entity can assert the defense of sovereign immunity from an in rem admiralty proceeding, such as this one, only when it can demonstrate that "it is in possession of the res."[42] The court then acknowledged, however, that case law had not provided a comprehensive definition of what constitutes "possession."[43] After surveying three seminal cases on the topic,[44] the court summarized the state of the law as "requir[ing] something more than mere ownership or legal control of the res" and "possession by some act of physical dominion or control."[45]

In light of these requirements, the court turned its attention to the level of possession and physical dominion over the deadhead logs that had been exerted by the State prior to its assertion of sovereign immunity.[46] The State's claims of possession emanated principally from its use of sonar to survey the location of the logs; its enactment of a statute granting itself ownership of the logs; its ownership of the land on which the logs sit; and its patrolling of the rivers where the logs are located.[47] These instances of "control" amounted to, "at most, . . . *constructive* possession" over the logs and did not rise to the level of *physical* control required by case law.[48] The court therefore agreed with the United States District Court for the Middle District of Georgia's conclusion that the State did not enjoy sovereign immunity from adjudication of its rights over these logs and affirmed the denial of the motions to dismiss.[49]

C. Maritime Jurisdiction

1. "Vessel" Status. The question of what constitutes a "vessel" is an ever-changing topic that has become a popular subject of maritime litigation over the last decade. In the case of *Crimson Yachts v. Betty Lyn II Motor Yacht*,[50] the Eleventh Circuit weighed in on the debate by determining whether a yacht, subject to major overhaul-type repairs,

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42. *Id.* at 1334.
43. *Id.*
44. *Id.* at 1334-35 (discussing California v. Deep Sea Research, Inc., 523 U.S. 491 (1998), The Davis, 77 U.S. 15, 10 Wall. 15 (1869), and Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938)).
45. *Id.* at 1335-36 (quoting *Compania Espanola*, 303 U.S. at 75) (internal quotation marks omitted).
46. *Id.* at 1337.
47. *Id.*
48. *Id.* (emphasis added).
49. *Id.* at 1338.
50. 603 F.3d 864 (11th Cir. 2010).

should be considered a vessel for maritime jurisdiction purposes.[51] The shipyard plaintiff, Crimson Yachts, filed suit to enforce a maritime lien against the *Betty Lyn II* motor yacht after her owner failed to pay for repairs to her decks, engines, generators, electronics, navigation equipment, propellers, generators, and furniture, among other things.[52] The United States District Court for the Southern District of Alabama determined that because a ship must be "in navigation" to qualify as a vessel for maritime lien purposes, the major overhaul of the *Betty Lyn II* motor yacht had taken the vessel out of navigation and therefore divested the court of admiralty jurisdiction over the shipyard's in rem claims.[53]

The Eleventh Circuit opinion began with an extensive refresher course on the history and purpose behind the development of maritime liens in American jurisprudence.[54] The court explained that the concept of the maritime lien developed as a method of protecting both vessel owners and repairmen alike; the court noted that the availability of in rem recourse against the vessel has historically encouraged vendors to provide necessary services to vessels whose owners would otherwise have been unable to make immediate payment.[55]

The ability of a repairman or service provider to proceed in rem has throughout the history of maritime liens depended on the characterization of a ship as a "vessel."[56] Both the statutory definition[57] and the Supreme Court's recent formulation in *Stewart v. Dutra Construction Co*.[58] focus on whether the watercraft is "capable of being used as a means of transportation on water."[59] As legions of interpreting courts will attest, however, this seemingly straightforward definition is susceptible to many nuanced distinctions.[60] Citing *Stewart*, the Eleventh Circuit noted that the dispositive consideration in making this determination is "whether the watercraft's use as a means of transporta-

51. *Id.* at 867.
52. *Id.*
53. *Id.* at 867-68 (internal quotation marks omitted).
54. *Id.* at 868-72. A practitioner seeking helpful language supporting the policy reasons behind the maritime lien procedure should strongly consider reviewing this case for helpful passages and case citations, as the opinion acts as a veritable playbook for drafting briefs advocating in favor of a maritime lienor's position.
55. *Id.* at 869.
56. *Id.* at 871-72.
57. 1 U.S.C. § 3 (2006).
58. 543 U.S. 481 (2005).
59. *Id.* at 489 (internal quotation marks omitted); *see also* 1 U.S.C. § 3.
60. *See, e.g.*, *Crimson Yachts*, 603 F.3d at 872.

tion on water is a practical possibility or merely a theoretical one."[61] The court readily admitted that the "novel or unusual situations" so often present in these cases often lead to a "case-by-case approach" to determining vessel status.[62]

Adopting a broad view of when a watercraft should be considered "capable of [being used for] transportation on water," the court pointed out that vessel status has been found in instances when the craft had no means of self-propulsion;[63] had only "*residual* navigational capacity";[64] or had been drydocked for repairs.[65] In that regard, the court was quick to note that "all serious repairs upon the hulls of vessels are made in dry docks" and, thus, to exempt drydocked ships "from admiralty jurisdiction would 'deprive the admiralty courts of [the] largest and most important'" repair disputes.[66]

The opinion last deals with the difficult concept of overhaul-type repairs on a vessel.[67] Acknowledging that there are some overhauls so great that they transform "repair work into new-ship construction"–for which there is no maritime jurisdiction–the court distinguished the repair work in the case at bar.[68] Since the purpose behind the maritime-lien concept is to protect maritime-repair providers, the court refused to adopt a narrow view of vessel status that would effectively strip the repairer of this important remedy in his time of greatest need.[69] The court therefore reversed the district court decision and confirmed that the *Betty Lyn II* motor yacht was "a vessel subject to maritime liens."[70]

2. Maritime Attachment. In *McDermott Gulf Operating Co. v. Con-Dive, LLC*,[71] the Eleventh Circuit reviewed the trial court's "vacatur of a maritime attachment" and its dismissal of an *in personam* defendant for lack of personal jurisdiction.[72] McDermott owned a vessel

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61. *Id.* (quoting Bd. of Comm'rs v. M/V Belle of Orleans, 535 F.3d 1299, 1310 (11th Cir. 2008)) (internal quotation marks omitted).

62. *Id.* at 875 (quoting Nehring v. Steamship M/V Point Vail, 901 F.2d 1044, 1050 (11th Cir. 1990)) (internal quotation marks omitted).

63. *Id.*

64. *Id.* (citing United States v. Templeton, 378 F.3d 845, 850-51 (8th Cir. 2004)).

65. *Id.* (citing N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 128 (1919)).

66. *Id.* at 875-76 (quoting Simmons v. The S.S. Jefferson, 215 U.S. 130, 143 (1909)).

67. *Id.* at 876.

68. *Id.*

69. *Id.*

70. *Id.*

71. 371 F. App'x 67 (11th Cir. 2010).

72. *Id.* at 68.

that provided support to extended underwater operations. McDermott was providing support for Con-Dive and its affiliate, Oceanografia (OSA), which were constructing a pipeline beneath the Gulf of Mexico for the state-owned Mexican oil company PEMEX.[73] As Con-Dive was a startup company, "OSA paid McDermott $1.8 million as security for Con-Dive's lease."[74] The "charter party," or lease, provided the vessel, captain, and crew for $32,500 per day.[75] Con-Dive installed $7 million worth of equipment on McDermott's vessel to further the construction of the pipeline but claimed that the equipment was ultimately transferred to OSA.[76] Con-Dive fell behind on the "charter hire," or lease payments, under the charter party.[77] OSA paid McDermott $900,000 in back hire, but once McDermott determined that no additional payments were expected, "McDermott shut down the operation, claiming $5 million in unpaid hire."[78] Further, McDermott refused to turn the equipment back over to OSA, "claiming the equipment was security for the debt."[79]

OSA filed a criminal complaint with the district attorney for the State of Campeche, Mexico, claiming theft of the equipment by McDermott. The district attorney verbally ordered McDermott to turn over the equipment pending further investigation into the dispute.[80] As McDermott disputed the vitality of the district attorney's verbal order due to the fact that the vessel was apparently in international waters at the time of the order, upon the vessel's arrival at the Port of Mobile, Alabama, "McDermott filed an *in rem* claim against the equipment . . . [and] *in personam* claims against Con-Dive, OSA, and OSA's manager."[81] The Southern District of Alabama concluded that "OSA owned the equipment," that the "verbal order to surrender the equipment was valid, . . . that McDermott was aware of the order, and . . . that [he] had violated the order."[82] As such, the district court vacated the attachment. Subsequently, Con-Dive moved to dismiss for lack of personal

73. *Id.* at 68-69.
74. *Id.* at 69.
75. *Id.* (internal quotation marks omitted).
76. *Id.*
77. *Id.* (internal quotation marks omitted).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* The "*in rem* claim against the equipment [sought] arrest of the equipment under Rule C of the Supplemental Rules for Admiralty or Maritime Claims . . . [while the] *in personam* claims [sought] attachment of the equipment under Supplemental Rule B." *Id.*
82. *Id.*

jurisdiction, citing the district court's ruling that OSA owned the equipment. The district court dismissed Con-Dive.[83]

The Eleventh Circuit reviewed the district court's exercise of equitable power in maritime cases only for an abuse of discretion and for clear error of factual findings.[84] The Eleventh Circuit confirmed the district court's rulings, specifically holding that

> [t]he appellants have not shown (1) that the district court clearly erred in its fact findings or (2) that the district court abused its discretion in concluding that the totality of the facts, as found in the district court's order, warrant an equitable exception to the general rule upholding maritime attachments.[85]

D. Cruise Ship Tickets

1. Forum Selection Clauses. The case of *Seung v. Regent Seven Seas Cruises, Inc*.[86] presented the Eleventh Circuit with another opportunity to rule on the application of a forum selection clause contained in a cruise ship passenger ticket.[87] California resident Nina Seung sued cruise ship defendants Regent Seven Seas and M/V Paul Gauguin Shipping Ltd. in the Southern District of Florida for injuries she sustained while on a cruise aboard the M/S *Paul Gauguin* in Tahiti and French Polynesia.[88] The plaintiff's passenger ticket contained a forum selection clause that required the lawsuit to be brought in one of two places: if the cruise included "a port of the United States of America," the agreed-upon forum would be the Southern District of Florida, while disputes arising from cruises that did not include a port of the United States were required to be litigated in the courts of Paris, France.[89] The plaintiff appealed the district court's enforcement of the forum selection clause and corresponding dismissal of her lawsuit.[90]

On appeal, the plaintiff challenged both the enforceability of the forum selection clause and its applicability to the case at bar.[91] The plaintiff first argued that "the forum selection clause was unfair and unreasonable" due to (1) her financial inability to bring a lawsuit in Paris; (2) her

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83. *Id.* at 69-70.
84. *Id.* at 70.
85. *Id.*
86. 393 F. App'x 647 (11th Cir. 2010).
87. *Id.* at 649.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 649-50.

medical situation that limited her ability to travel to Paris; and (3) the remoteness of the forum, which she argued was "chosen merely as a means of discouraging passengers from bringing legitimate claims."[92] After noting that forum selection clauses are presumptively valid and enforceable absent a "strong showing" by the plaintiff that enforcement would be unfair or unreasonable, the Eleventh Circuit dealt with each of the plaintiff's arguments in turn.[93]

The court first noted that "[t]he financial difficulty that a party might [experience] in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause."[94] The plaintiff's argument that she would not be able to communicate with healthcare providers or receive free medical treatment through Medicare if she traveled to Paris was similarly unavailing, as the court was unconvinced that this rose to the level of a "strong showing" of unreasonableness.[95] Finally, the notion that Paris is a remote and alien forum was given little credit, as the court cited to a Florida state court case upholding the selection of Paris as a proper "neutral location" in another case involving injuries aboard the M/S *Paul Gauguin*.[96]

The plaintiff's most novel–although ultimately unavailing–argument played on the term "port of the United States of America" contained in the forum selection clause.[97] Although the M/S *Paul Gauguin* departed from a maritime port in French Polynesia, the plaintiff attempted to argue against the applicability of the Paris forum selection clause to this case because she traveled to meet the vessel by departing on an airplane from Los Angeles International Airport, "a port of the United States of America."[98] The court disagreed and noted that the plain language of the contract focused on the cruise itself, and not the plaintiff's particular "cruise package."[99] The court therefore affirmed the district court's dismissal of the plaintiff's complaint.[100]

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92. *Id.* at 650.

93. *Id.* at 649-51 (internal quotation marks omitted).

94. *Id.* at 650 (first alteration in original) (quoting P & S Bus. Machs., Inc. v. Canon U.S.A., Inc., 331 F.3d 804, 807 (11th Cir. 2003)) (internal quotation marks omitted).

95. *Id.* at 651 (internal quotation marks omitted).

96. *Id.* (quoting Burns v. Radisson Seven Seas Cruises, Inc., 867 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 2004)) (internal quotation marks omitted).

97. *Id.* (internal quotation marks omitted).

98. *Id.* (internal quotation marks omitted).

99. *Id.* (internal quotation marks omitted).

100. *Id.*

2. Statute of Limitations. In the case of *Racca v. Celebrity Cruises, Inc.*,[101] the Eleventh Circuit determined "whether a contractual provision in a cruise ticket which limits a passenger's right to sue for personal injuries to one year was reasonably communicated to the plaintiff Ray Racca."[102] On April 22, 2008, Racca filed a suit against Celebrity Cruises, Inc. and Royal Caribbean Cruises, Ltd., seeking damages for injuries suffered on board the cruise ship on April 30, 2006. The Southern District of Florida granted summary judgment in favor of the defendants, holding that Racca's suit, which was filed outside the cruise ticket's one-year limitation, was time barred.[103]

The contract included and the passenger ticket required that any plaintiff or potential plaintiff provide written notice of the claim to the defendants within six months of the date of the injury, and all law suits "shall be commenced (filed) within one (1) year from the day when the cause of action occurred and process was served within thirty (30) days after filing, notwithstanding any provision of law of any state or country to the contrary."[104] There was no dispute that cruise lines are specifically authorized by 46 U.S.C. § 30508(b)(2)[105] to place a one-year limitation on a passenger's right to file personal injury lawsuits.[106] Further, the Eleventh Circuit noted that "[c]ourts will enforce such a limitation if the cruise ticket provided the passenger with reasonably adequate notice that the limit existed and formed part of the passenger contract."[107]

With respect to the limitations provision, Racca contended that the provision "was not reasonably communicated to him" because the passenger ticket was about 100 pages, and the "font directing the guest to the specific [limitation] section(s) [did] not stand out from the other words . . . nor [was] the language distinguishable by any highlight, bolding, italics or underlines."[108] Racca further noted that he was in his late seventies.[109]

The Eleventh Circuit reviewed the district court's findings that "the ticket contract [was] only three (3) pages within the entire . . . [b]ro-

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101. 376 F. App'x 929 (11th Cir. 2010).
102. *Id.* at 930.
103. *Id.*
104. *Id.*
105. 46 U.S.C. § 30508(b)(2) (2006).
106. *Racca*, 376 F. App'x at 930-31.
107. *Id.* at 931 (quoting Nash v. Kloster Cruise A/S, 901 F.2d 1565, 1566 (11th Cir. 1990)) (internal quotation marks omitted).
108. *Id.* (internal quotation marks omitted).
109. *Id.*

chure" presented to Racca; the warning of important limitations "appear[ed] on the face of the . . . [b]rochure;" the brochure index provided that the ticket contract was on a specific page of the brochure; and that Racca never provided the written notice within the six months as required by the contract.[110] The Eleventh Circuit, in affirming the district court's grant of summary judgment, held that "[a] passenger's failure to actually read the contractual provision at issue does not preclude his being bound."[111] Further, the Eleventh Circuit determined that it was not unreasonable to expect Racca to read the three-page contract, which the face of the brochure directed him to do, after his injury or after one of his multiple surgeries.[112]

E. Attorney Fees in Maritime Cases

The case of *Misener Marine Construction, Inc. v. Norfolk Dredging Co*.[113] afforded the court an opportunity to clarify when a prevailing party to an admiralty dispute can collect attorney fees.[114] The parties entered into a contract arising out of Misener Marine's construction of a new dock in the Port of Savannah. Misener Marine's contract called for the river to be dredged in the vicinity of the dock construction area, for which Misener Marine subcontracted with Norfolk Dredging.[115] The scope of work for the dredging subcontract called for Norfolk Dredging to dredge in the area of two temporary mooring dolphins. While the *Steven N* was secured to these dolphins, they were pulled partially from the riverbed, causing the vessel to release from its moored position.[116] After Misener Marine sued Norfolk Dredging in the United States District Court for the Southern District of Georgia for negligence, breach of contract, and breach of warranty, Norfolk Dredging counterclaimed for payment under the Georgia Prompt Pay Act (GPPA)[117] for the dredging work and attorney fees.[118]

Further investigation of the cause of the failure of the mooring dolphins led Misener Marine to conclude that Norfolk Dredging was not

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110. *Id.* (internal quotation marks omitted).

111. *Id.*

112. *Id.* The court did "not consider Racca's argument . . . under Texas Consumer Protection Statutes because he failed to raise it in the district court." *Id.*

113. 594 F.3d 832 (11th Cir. 2010).

114. *Id.* at 834.

115. *Id.* at 834-35. It is significant to note that the dredging subcontract between Misener Marine and Norfolk Dredging did not contain a clause providing for the award of attorney fees. *Id.* at 835.

116. *Id.* at 835.

117. O.C.G.A. §§ 13-11-1 to -11 (2010).

118. *Misener Marine,* 594 F.3d at 835.

to blame, so they dismissed their claims against Norfolk Dredging. Norfolk Dredging subsequently filed a motion for summary judgment on its counterclaim, which the district court granted. In ruling that Norfolk Dredging should be awarded its attorney fees on top of the principal amount, the district court initially found that there is no established federal rule respecting attorney fees in maritime disputes, and that recovery by Norfolk Dredging under the GPPA would not be inconsistent with established maritime law.[119]

The district court reserved ruling on the amount of attorney fees to which Norfolk Dredging was entitled. Before conducting a hearing to determine that amount, however, the presiding judge who initially ruled in Norfolk Dredging's favor passed away.[120] The judge to whom the case was transferred reversed the ruling and held that "the GPPA conflicted with a general principle of maritime law, that each party bears its own attorneys' fees."[121]

In affirming the final ruling of the district court, the court of appeals was quick to point out that the American Rule[122] is the prevailing law in the Eleventh Circuit regarding attorney fees in maritime disputes–to wit, "[t]he prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course."[123] Of course, there are exceptions to this general rule, such as when attorney fees "are provided by the statute governing the claim," or the losing party "acted in bad faith," or if "there is a contract providing for the indemnification of attorneys' fees."[124] The court disagreed with Norfolk Dredging's assertion that the GPPA was the "statute governing the claim" since it is not a federal statute.[125] The court further noted that the applicable contract between the parties was silent on the issue of attorney fees.[126] Finally, the court denied Norfolk Dredging's request "to incorporate the GPPA into substantive maritime law" because the American Rule has ensconced itself as "a characteristic feature of maritime law."[127] The

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119. *Id.* at 836.

120. *Id.*

121. *Id.*

122. *Id.* at 840 n.17 ("The idea that each party should bear its own attorneys' fees is referred to as the American Rule in contrast to the English standard wherein the prevailing party is awarded attorneys' fees.").

123. *Id.* at 838 (quoting Natco Ltd. P'ship v. Moran Towing of Fla., Inc., 267 F.3d 1190, 1193 (11th Cir. 2001)) (internal quotation marks omitted).

124. *Id.* (quoting Natco Ltd. P'ship v. Moran Towing of Fla., Inc., 267 F.3d 1190, 1193 (11th Cir. 2001)) (internal quotation marks omitted).

125. *Id.* at 838-39 (internal quotation marks omitted).

126. *Id.* at 839.

127. *Id.* at 839-41.

ruling of the district court denying Norfolk Dredging its attorney fees was therefore affirmed.[128]

F. Marine Insurance

1. Proximate Cause of a Loss. In *New Hampshire Insurance Co. v. Krilich*,[129] the Eleventh Circuit addressed the proximate cause of the partial sinking of a vessel "at her berth in clear weather and calm seas."[130] After the 110-foot yacht sank, the insurer sought a declaratory judgment as to whether it was liable to the owner and additional insured under a marine insurance policy.[131] "'[A]ny loss or damage arising out of . . . lack of reasonable care or due diligence . . . in the operation or maintenance' of the vessel" was expressly excluded from the policy.[132] The insurer argued that the failure to maintain the vessel was the cause of loss, while the insured argued that a fracture in the vessel's keel was the cause of loss. The Southern District of Florida found that there was indeed a fracture in the keel but ultimately ruled that the damaged keel was not the proximate cause of loss.[133] Instead, the district court found that the failure to maintain, among other things, bilge pumps and alarms "was the proximate, efficient cause of the vessel's submersion," and therefore was not covered by the marine insurance policy.[134] The district court determined that the keel fracture allowed water to enter the vessel's black water holding tank, which was not securely closed, causing it to overflow. The overflow filled the bilges and engine room causing the vessel to slowly sink. When the water line reached the sea chests, which were also unsecured, the engine room flooded. The bilge pumps were inoperable, and the bilge alarms never sounded.[135]

The parties' pretrial stipulations stated that the insurance policy was governed by maritime law, Florida law, or both.[136] Therefore, on appeal the Eleventh Circuit addressed the issue of proximate cause under both maritime law and Florida law.[137] "Under federal maritime law 'the proximate cause is the efficient cause and not a merely

128. *Id.* at 841.
129. 387 F. App'x 940 (11th Cir. 2010).
130. *Id.* at 941.
131. *Id.*
132. *Id.* (citation omitted).
133. *Id.* at 941-42.
134. *Id.* at 942 (internal quotation marks omitted).
135. *Id.* at 941.
136. *Id.* at 942.
137. *Id.*

incidental cause which may be nearer in time to the result.'"[138] The Florida concurrent cause doctrine "permits coverage when the injury is caused by multiple causes and one of the causes is an insured risk."[139] However, the doctrine applies only "when the causes are not related and dependent, but rather involve separate and distinct risks."[140]

Upon review of the evidence, the Eleventh Circuit held that the "keel fracture was not a separate and distinct risk" but was one of several related causes.[141] As such, it made no difference whether general maritime law or Florida law was applied. The keel fracture was not the proximate cause of loss under either.[142]

2. Interpretation of Marine Policies under State Law. In the case of *Contender Fishing Team, LLC v. City of Miami*,[143] the Eleventh Circuit addressed coverage issues under the City of Miami's marine insurance policy.[144] Vessels owned by Contender Fishing Team, LLC (Contender) and the City collided in Biscayne Bay. An occupant of the Contender vessel filed suit against the City and several other parties to recover for bodily injuries sustained in the collision with the City's police boat.[145] The City's insurance policy at issue was entitled "Marina Operators Legal Liability Policy."[146] After the Southern District of Florida determined that the policy did not offer coverage to accidents involving city police boats, the Eleventh Circuit addressed the grant of summary judgment and whether the court had jurisdiction.[147] On the issue of jurisdiction, the court summarily held that the summary judgment was appealable under 28 U.S.C. § 1292(a)(3)[148] because this is an "appeal of an order determining rights and liabilities in an admiralty case."[149]

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138. *Id.* (quoting Lanasa Fruit S.S. & Imp. Co. v. Universal Ins. Co., 302 U.S. 556, 562 (1938)).

139. *Id.* (quoting Hrynkiw v. Allstate Floridian Ins. Co., 844 So. 2d 739, 745 (Fla. Dist. Ct. App. 2003)) (internal quotation marks omitted).

140. *Id.* at 942-43 (quoting Hrynkiw v. Allstate Floridian Ins. Co., 844 So. 2d 739, 745 (Fla. Dist. Ct. App. 2003)) (internal quotation marks omitted).

141. *Id.* at 943.

142. *Id.*

143. No. 10-10454, 2010 WL 5095873 (11th Cir. Dec. 15, 2010).

144. *Id.* at *1.

145. *Id.*

146. *Id.*

147. *Id.* at *1-2.

148. 28 U.S.C. § 1292(a)(3) (2006).

149. *Contender Fishing Team*, 2010 WL 5095873, at *1.

The Eleventh Circuit then addressed the district court's conclusion that the City was not covered under the policy.[150] The Eleventh Circuit reiterated its position that marine insurance policies are to be interpreted under state law.[151] Under Florida law, the policy limited the types of city employees and vessels covered.[152] The court held that "the City's interpretation that this Policy includes all boats operated by a city employee acting in his or her capacity as a city employee for *all* city business is completely unreasonable."[153]

G. Forum Non Conveniens

In *Popescu v. CMA-CGM*,[154] the court addressed jurisdictional and forum issues under 46 U.S.C. § 30104[155] (referred to as the Jones Act), the Death on the High Seas Act,[156] and general maritime law.[157] A wrongful death action was filed in the Southern District of Florida based upon a seaman's death while at port in Malaysia. The deceased seaman was a Romanian citizen who worked on board the *Rigoletto*, a French-owned, French-flagged vessel. CMA CGM moved to dismiss the complaint based upon forum non conveniens.[158] In a short, five-paragraph opinion, the Eleventh Circuit affirmed the district court's dismissal of the action.[159]

The Eleventh Circuit noted the application of the "*Lauritzen-Rhoditi*s factors" in the district court's "well-reasoned order."[160] The district court noted that the parties "conceded [that] the *Lauritzen* factors weigh against the application of United States law."[161] The *Lauritzen* factors "determine when courts should apply the maritime law of the United States, including the Jones Act and the Death on the High Seas Act."[162] "*Lauritzen* identified seven relevant factors: (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of contract, (6)

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150. *Id.* at *1-2.
151. *Id.* at *1.
152. *Id.* at *2.
153. *Id.*
154. 384 F. App'x 902 (11th Cir. 2010).
155. 46 U.S.C. § 30104 (2006).
156. 46 U.S.C. §§ 30301-30308 (2006 & Supp. III 2009).
157. *Popescu*, 384 F. App'x at 903.
158. *Id.*
159. *Id.*
160. *Id.*
161. Popescu v. CMA CGM, No. 09-20860-CIV, 2009 WL 5606131, at *7 (S.D. Fla. Nov. 5, 2009).
162. *Id.* at *6.

inaccessibility of a foreign forum, and (7) law of the forum."[163] Because the parties conceded that the *Lauritzen* factors weighed against application of United States law, the district court focused primarily on the remaining *Rhoditis* factor.[164]

The district court, in order "[t]o effectuate the liberal purposes of the Jones Act . . . must consider the 'real nature of the operation' and take a 'cold objective look at the actual operational contacts that [the] ship and [the] owner have with the United States.'"[165] Because "the [*Rigoletto*] had no contact with the United States[] and . . . CMA CGM's contacts with the United States were insufficient to constitute a substantial base of operations," the Eleventh Circuit affirmed the district court's dismissal on forum non conveniens grounds.[166]

163. *Id.* (citing Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953)).

164. *Id.* at *7.

165. *Id.* at *7 (alterations in original) (quoting Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310 (1970)).

166. *Id.* at *1-2.