Admiralty

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The cases discussed herein represent decisions the United States Court of Appeals for the Eleventh Circuit issued in 2014 and 2015. While not an all-inclusive list of maritime decisions from the court during that timeframe, the Author identified and provided summaries of key decisions which should be of interest to the maritime practitioner.[1]

I. Cruise Line Passenger Claims

A. *Medical Negligence*

In *Franza v. Royal Caribbean Cruises, Ltd.*,[2] the Eleventh Circuit—specifically rejecting longstanding jurisprudence from its sister circuit—held a cruise ship passenger can sue a shipowner for medical negligence under the doctrine of respondeat superior and the principles of apparent authority and apparent agency.[3]

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1. Many of the decisions were not identified by the court for publication. However, the West National Reporter System "publishes" these non-published opinions in the Federal Appendix. Pursuant to Rule 32.1 of the Federal Rules of Appellate Procedure, citation to an unpublished opinion is allowed. FED. R. APP. P. 32.1. Further, Eleventh Circuit Rule 36-2 notes that, while not binding precedent, unpublished opinions "may be cited as persuasive authority." 11th CIR. R. 36-2.

2. 772 F.3d 1225 (11th Cir. 2014).

3. *Id*. at 1228. The Eleventh Circuit declined to adopt the rule set out in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), which effectively "immunize[d] a shipowner from respondeat superior liability whenever a ship's employees render negligent medical care to its passengers." *Franza*, 772 F.3d at 1228.

Pasquale Vaglio was a passenger aboard the Royal Caribbean cruise ship EXPLORER OF THE SEAS. On July 23, 2011, while attempting to board a trolley at a port call[4] in Bermuda, Vaglio fell and suffered a severe head injury.[5] The court pointed out that the complaint alleged Vaglio "was required to go to the ship's medical center to be seen for his injuries."[6] It does not explain why this was the case, but it is important to note the posture of the matter on appeal. The suit was dismissed pursuant to a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure[7] motion filed by the defendant cruise line.[8] Thus, the appellate court was compelled to "accept the well-pled allegations in the complaint and construe them in the light most favorable to the plaintiff."[9] Accordingly, the factual recitation in the appellate decision is straight from the plaintiff's complaint, which obviously presents a one-sided version of the underlying narrative.

Following his fall and presentation at the ship's infirmary, Vaglio received a cursory exam from a nurse, "allegedly employed full-time by Royal Caribbean."[10] Observing the knot and abrasion on Vaglio's head, the nurse nevertheless conducted no diagnostic tests and advised Vaglio and his family to return to their cabin. However, Vaglio's condition deteriorated. He returned to the ship's infirmary but faced another delay, as the medical providers would not examine him until the ship's personnel obtained Vaglio's credit card information.[11] Vaglio was finally seen by Dr. Rogelio Gonzales ("allegedly an employee of Royal Caribbean") some four hours after first coming to the infirmary.[12] The dire nature of Vaglio's condition must have been apparent to Dr. Gonzales, as he ordered Vaglio be transferred to a shoreside hospital in Bermuda. Vaglio was eventually airlifted to a hospital in New York, but sadly died approximately one week after his fall in Bermuda.[13]

Patricia Franza, Pasquale Vaglio's daughter, filed suit against the cruise line in the United States District Court for the Southern District of Florida. Franza advanced a trio of liability theories in her original complaint: (1) Negligence and/or misconduct for which Royal Caribbean

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4. "A port at which a ship stops during a voyage." *See Port of Call*, BLACK'S LAW DICTIONARY (10th ed. 2014).
5. *Franza*, 772 F.3d at 1228.
6. *Id.* at 1229.
7. FED. R. CIV. P. 12(b)(6).
8. *Franza*, 772 F.3d at 1228.
9. *Id.*
10. *Id.* at 1229.
11. *Id.*
12. *Id.*
13. *Id.*

was liable under the doctrine of actual agency (respondeat superior), (2) the alternative theory of apparent agency, by which Royal Caribbean led Vaglio to believe the doctor or nurse were the company's employees or agents, and (3) a theory of negligent hiring, retention, and training.[14] In granting Royal Caribbean's motion to dismiss, the court made short work of the actual agency/respondeat superior claim: "[T]he district court applied the *Barbetta* rule to conclude that Franza's actual agency claim was 'predicated on duties of care which are not recognized under maritime law.'"[15] The district court dismissed Franza's claims involving apparent agency as inadequately pled, holding Ms. Franza had not "plausibly claimed that Vaglio ever relied on the appearance of an agency relationship."[16]

In beginning its legal analysis, the Eleventh Circuit first stated, "Neither the Supreme Court nor this Court has ever decided, in binding precedent, whether a passenger may hold a shipowner vicariously liable for the medical negligence of the ship's employees."[17] The court continued by observing that federal courts are constitutionally charged with developing fair and equitable principles to address maritime claims.[18] Following this vein of reasoning, it was observed that the Supreme Court—in other contexts under the general maritime law—has imposed vicarious liability upon "maritime principals to answer for the negligence of their onboard agents."[19]

The court then discussed the factors which can demonstrate actual agency, the underpinning of the respondeat superior doctrine.[20] Recall the allegation that the treating nurse and physician were employees of Royal Caribbean, and that the court accepted the averments as true (since the appeal followed a Rule 12(b)(6) dismissal of the plaintiff's complaint).[21] Establishing an agency relationship requires: (1) ac-

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14. *Id.* at 1229-30. Franza dropped the negligent hiring, retention, and training claim on appeal. *Id.* at 1230 n.2.

15. *Id.* at 1230 (quoting Franza v. Royal Caribbean Cruises, Ltd., 948 F. Supp. 2d 1327, 1331 (S.D. Fla. 2013)).

16. *Id.*

17. *Id.* at 1231.

18. *Id.* at 1232.

19. *Id.* at 1233 (citing examples). Federal courts routinely allow passengers to invoke the doctrine of respondeat superior in maritime negligence suits (i.e., suit against an individual tortfeasor's employer). *Id.* at 1234. The Eleventh Circuit could not identify any logical reason to carve out claims for onboard medical negligence from this practice: "We can see nothing inherent in onboard medical negligence, when committed by full-time employees acting within the course and scope of their employment, that justifies suspending the accepted principles of agency." *Id.* at 1235.

20. *Id.* at 1236.

21. *Id.*

knowledgement by the principal that the agent will act for it; (2) acceptance by the agent of the undertaking; and (3) the principal's control of the purported agent's actions.[22]

The facts, again taken from the complaint and accepted as true, suggested Royal Caribbean held out the nurse and doctor to act on its behalf, as well as an acceptance of the medical personnel to proceed with such a role.[23] Turning to the right of control, the court again easily parsed the complaint to conclude sufficient facts were alleged that plausibly demonstrated control by Royal Caribbean over its medical personnel.[24]

> On balance, then, Franza's complaint unambiguously establishes an agency relationship between the employer, Royal Caribbean Cruises, Ltd., and its full-time employees, Nurse Garcia and Dr. Gonzales . . . . [W]e are compelled to hold that Franza's complaint sets out a plausible basis for imputing to Royal Caribbean the allegedly negligent conduct of its onboard medical employees.[25]

The court then conducted a more abbreviated review and analysis of the alternative liability theory of apparent authority.[26] Distinguishing respondeat superior, which derives from a principal's right of control over the conduct of its agents, the Eleventh Circuit explained that liability under apparent authority flows from equitable concerns: "[L]iability may be appropriate under apparent agency principles when a principal's conduct could equitably prevent it from denying the existence of an agency relationship."[27] In *Barbetta v. S/S Bermuda Star*,[28] the United States Court of Appeals for the Fifth Circuit evidently did not address the question of apparent agency.[29] This distinction has supported decisions from multiple district courts within the Eleventh Circuit to recognize a shipowner's liability under apparent agency principles for onboard medical negligence.[30]

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22. *Id.* (internal citations and quotations omitted). The court explained that the right of control is the "fulcrum of respondeat superior." *Id.*
23. *Id.* at 1236-37.
24. *Id.* at 1237.
25. *Id.* at 1238.
26. *Id.* at 1249-51.
27. *Id.* at 1249, 1250.
28. 848 F.2d 1364 (5th Cir. 1988).
29. *Franza*, 772 F.3d at 1250.
30. *Id.* (citing multiple cases). Indeed, the Eleventh Circuit observed that it was "the first circuit to address whether a passenger may use apparent agency principles to hold a cruise line vicariously liable for the onboard medical negligence of its employees." *Id.* at 1249.

The Eleventh Circuit agreed with this approach, observing that imposition of liability via apparent agency has a long history in the maritime context and cited examples of liens arising by virtue of an agent's ordering repairs, supplies, or necessaries for its principal's ship.[31] Based largely on its election to eschew the *Barbetta* rule, the court found "no sound basis for allowing a special exception for onboard medical negligence, particularly since we have concluded that actual agency principles ought to be applied in this setting as well."[32] The determination is a fact-intensive inquiry, and the decision summarized the litany of points raised with respect to apparent authority in Franza's complaint.[33] The case was reversed and remanded for further proceedings.[34]

It was evident the Eleventh Circuit was not going to follow the lead of its sister circuit, or any of the other circuits which continue to shield shipowners from claims arising out of alleged onboard medical negligence. "[T]he roots of the *Barbetta* rule snake back into a wholly different world . . . . [D]espite its prominence, the *Barbetta* rule now seems to prevail more by the strength of inertia than by the strength of its reasoning."[35]

B. Cruise Line's Duty to Warn of Shore-Based Hazards

There were a couple of cases decided by the Eleventh Circuit in 2014 and 2015 which continued the reasoning and analysis from *Chaparro v. Carnival Corporation*.[36] While the Carnival cruise ship M/V VICTORY was at a port call in St. Thomas, Virgin Islands, the Chaparro family was caught in a gang-related shooting during their return bus ride from a local beach recommended by a Carnival employee. One of the family members was struck by a stray bullet and killed. The family sued Carnival under a failure to warn theory.[37]

On appeal, the Eleventh Circuit reversed the district court's summary dismissal under Fed. R. Civ. P. 12(b)(6).[38] The court discussed the duty of a cruise line to use reasonable care under the circumstances, "which requires, as a prerequisite to imposing liability, that the carrier have

31. *Id.* at 1250-51 (collecting cases).
32. *Id.* at 1251.
33. *Id.* at 1252-53.
34. *Id.* at 1254.
35. *Id.* at 1239.
36. 693 F.3d 1333 (11th Cir. 2012). See discussion of the court's decision in the 2013 summary prepared by Colin McRae, Edgard Smith & Kate Lawson, *Admiralty*, *Eleventh Circuit Survey*, 64 MERCER L. REV. 829, 832 (2013).
37. *Chaparro*, 693 F.3d at 1335.
38. *Id.*

had actual or constructive notice of the risk-creating condition, at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure."[39] The lower court's order dismissing the suit was reversed, as there was evidence presented which suggested Carnival had knowledge of potential gang-related activity, including shootings, in or around the beach where the family was visiting.[40]

In the 2014 case *Burdeaux v. Royal Caribbean Cruises, Ltd.*,[41] a cruise ship passenger was sexually assaulted while shopping in Cozumel.[42] The plaintiff departed the Royal Caribbean vessel OASIS OF THE SEAS and was provided a shopping map by the cruise line which depicted "[c]ertain 'guaranteed and recommended shops.'"[43] The plaintiff stopped at a jewelry cart not identified on the map and was told by the vendor that he had additional merchandise in a nearby store. The plaintiff left the designated shopping area and followed the man to his store where she was assaulted. Suit was filed in the United States District Court for the Southern District of Florida. Following discovery, the court granted the cruise line's motion for summary judgment, holding there was no evidence that Royal Caribbean had actual or constructive knowledge of a heightened risk for sexual assault in the area where the attack took place.[44]

On appeal, the plaintiff argued: (1) the trial court erred by focusing on the exact type of crime involved (sexual assault or rape), rather than violent crime in general; and (2) considering only evidence specific to the location where Royal Caribbean passengers were invited to visit (the recommended shopping district), rather than Cozumel generally.[45] The Eleventh Circuit dispatched the first issue in swift fashion, holding the plaintiff's complaint and summary judgment pleadings themselves were narrowly focused only on the issue of sexual assault or rape.[46] With respect to the second issue—warning of dangers outside the recommended shopping district—the court held there was inadequate evidence to support an inference that the cruise line knew or should have known of a heightened risk of sexual assault or rape in Cozumel.[47] The evidence

39. *Id.* at 1336 (alteration in original) (quoting Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989)).
40. *Id.* at 1337.
41. 562 F. App'x 932 (11th Cir. 2014).
42. *Id.* at 934.
43. *Id.*
44. *Id.*
45. *Id.* at 935.
46. *Id.* at 936.
47. *Id.*

presented by the plaintiff included State Department warnings and affidavits from a former cruise ship employee, as well as a local resident. However, the State Department warnings did not address sexual assault in Cozumel, and the affidavits consisted largely of anecdotal evidence.[48]

A second case, *Moseley v. Carnival Corp.*,[49] involved personal injury to a cruise ship passenger when a bathroom sink dislodged and fell on her at the Freeport Harbor, Bahamas, during a port call. This lawsuit attempted to impose liability upon Carnival for failure to warn about dangerous conditions in the on-shore bathroom facilities. Alternatively, the plaintiff claimed Carnival was vicariously liable for the negligence of Freeport Harbor Company, the operator of the bathroom facilities. The district court granted Carnival's Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim.[50]

The Eleventh Circuit agreed that the complaint failed to state a claim upon which relief can be granted under either theory.[51] The complaint failed to allege any facts to support Carnival's actual or constructive notice of a danger at the bathroom facility in the Freeport Harbor.[52] Likewise, the complaint failed to demonstrate that Freeport Harbor Company knew or should have known of a risk of harm and failed to correct the problem with the bathroom sink.[53] Consequently, Moseley's efforts to impose vicarious liability on Carnival for the negligence of Freeport failed as well.[54]

II. Seamen's Claims

A. Assignment of Wages

In *Jurich v. Compass Marine, Inc.*,[55] four plaintiffs filed a putative class action against the employment agency which placed them in their jobs as seamen. The employment agency received payment for its services by taking a portion of wages earned by the seamen; one of the documents signed by the individuals included a "Paycheck Mailing Agreement." The Paycheck Mailing Agreement required each seaman's employer to mail paychecks directly to the employment agency so the agency could take its cut. This practice continued until the underlying

48. *Id.*
49. 593 F. App'x 890 (11th Cir. 2014).
50. *Id.* at 891.
51. *Id.* at 893.
52. *Id.*
53. *Id.*
54. *Id.* at 1303.
55. 764 F.3d 1302 (11th Cir. 2014).

debt (charge for finding employment) was paid in full. The paycheck mailing Agreement's terms stated that it was irrevocable until the debt had been fully discharged.[56]

Even though both parties received the benefit of the bargain—the mariners were placed in jobs, and the agency received its agreed upon fee—the seamen filed suit asserting a claim for wages under general maritime law and alleged the wage assignments were invalid under 46 U.S.C. § 11109(b),[57] which states that a seaman's "assignment . . . of wages . . . made before the payment of wages does not bind the party making it . . . ."[58] In affirming summary judgment for the employment agency, the Eleventh Circuit specifically adopted *Smith v. Seaport Marine, Inc.*[59] and *Jurich v. Compass Marine, Inc.*,[60] two opinions issued by the district court.[61]

In *Smith*, the district court explained that "§ 11109(b) does not provide a private right of action or purport to create any remedy (in damages or otherwise) for a seaman who has executed a non-binding assignment of wages."[62] The district court pointed out that the statute, in relevant part, was fairly straightforward and simple: "[A]n assignment or sale of wages . . . made before the payment of wages does not bind a party making it."[63] It does not say such assignment is unlawful or any contract making such an assignment is void.[64] It merely provides an assignment—such as those contained in the Paycheck Mailing Agreements at issue—does not bind the party making it.[65]

Further, the district court opined that characterizing the Paycheck Mailing Agreements as "irrevocable" was inconsistent with the text of § 11109(b).[66] In this case, however, there was no evidence either the seamen or the employment agency attempted to rely on that word, or the

56. *Id.*
57. 46 U.S.C. § 11109(b) (2012).
58. *Id.*
59. 981 F. Supp. 2d 1188 (S.D. Ala. 2013).
60. No. 12-0176-WS-B, 2013 U.S. Dist. LEXIS 159557 (S.D. Ala. Nov. 7, 2013).
61. *Jurich*, 764 F.3d at 1304.
62. 981 F. Supp. 2d at 1195.
63. *Id.* at 1198 (alteration in original) (quoting 46 U.S.C. § 11109(b)).
64. *Id.* at 1198-99.
65. *Id.* at 1199.
66. *Id.* at 1199-1200. Interestingly, both the trial and appellate courts agreed that the inclusion of the word "irrevocable" in the wage assignment "was improper and contrary to the plaintiffs' clear statutory right under § 11109(b), which provides that the seamen were not bound by those agreements." *Jurich*, 764 F.3d at 1304 ("[I]f Compass and Seaport continue using the word 'irrevocable' in their Paycheck Mailing Agreements, they may do so at their eventual peril.").

ostensible irrevocability of the contract.[67] Specifically, there was no evidence that the employment agency ever tried to enforce the irrevocable contract term, that the seamen ever attempted to revoke the agreement, or that the seamen ever inquired whether the agreement was binding or revocable.[68]

Finally, the district court seemed troubled by the inequity of the seamen's position; they wanted the benefits of the employment agencies' efforts but now sought to renege on their obligation to pay for the same. Such result would be wholly inconsistent with the equitable principles of maritime law.[69]

This case should be carefully reviewed and discussed with clients providing employment services to mariners. Certainly, some contractual mechanism is needed to ensure payment for services rendered. Care must be taken, however, in light of the Eleventh Circuit's admonition that characterizing an agreement as "irrevocable" is inconsistent with the text of 46 U.S.C. § 11109(b).[70]

B. Personal Injury Claims

In *Skye v. Maersk Line, Ltd.*,[71] the plaintiff, William C. Skye, served as the chief mate aboard the Maersk vessel SEALAND PRIDE between 2000 and 2008. His work duties were arduous. This caused Skye a great deal of stress and wreaked havoc on his sleeping patterns.[72] Skye was diagnosed with arrhythmia which later evolved into left ventricular hypertrophy, described in the opinion as "a thickening of the heart wall of the left ventricle."[73] His cardiologist attributed this malady to hypertension. Eventually, Skye's cardiologist advised him to stop working on the vessel.[74]

Skye filed suit under the Jones Act,[75] alleging that Maersk negligently failed to provide him with reasonable working hours and instead worked him past the point of fatigue, which ultimately caused his physical ailments. A jury agreed and awarded Skye $2,362,299, but it also found Skye was seventy-five percent at fault for his injuries. The

67. *Smith*, 981 F. Supp. 2d at 1200.
68. *Id.*
69. *Id.* at 1203-04.
70. *See Jurich*, 764 F.3d at 1304.
71. 751 F.3d 1262 (11th Cir. 2014), *cert. denied*, 2015 U.s. LEXIS 3032 (May 4, 2015).
72. *Id.* at 1263.
73. *Id.* at 1264.
74. *Id.* at 1263.
75. 46 U.S.C. § 30104 (2012).

court reduced the verdict accordingly and awarded Skye $590,574.75. Maersk's motion for judgment as a matter of law was denied.[76]

Relying upon *Consrail v. Gottshall*,[77] the Eleventh Circuit reversed and rendered judgment in favor of Maersk, holding "[t]he Jones Act does not allow seaman to recover for injuries caused by work-related stress because work-related stress is not a 'physical peril.'"[78] The decision in *Gottshall* involved the Federal Employers' Liability Act (FELA),[79] the case law of which informs Jones Act jurisprudence.[80] In *Gottshall*, the United States Supreme Court held injuries caused by work-related stress are not cognizable under FELA absent a physical impact or fear from the threat of physical impact.[81] In reaching this conclusion, the Supreme Court adopted a zone of danger test for injuries not directly caused by physical impact, holding such injuries would be compensable "only if [plaintiff] was injured when he was within the zone of danger of a physical impact caused by his employer's negligence."[82]

The Eleventh Circuit followed the Supreme Court's lead in *Gottshall* and emphasized the statutory focus on protecting employees from physical perils: "An arduous work schedule and an irregular sleep schedule are not physical perils. That Skye developed a 'physical injury' is no matter; the *cause* of his injury was work-related stress."[83] This conclusion was justified, in part, on the need to establish a bright-line test and avoid the "'flood of trivial suits, the possibility of fraudulent claims . . . and the specter of unlimited and unpredictable liability' because there is no way to predict what effect a stressful work environment—compared to a physical accident such as an exploding boiler—would have on any given employee."[84]

While creating a bright-line rule, putative plaintiffs whose working conditions create legitimate physical ailments are left without recourse for damages as a result of the *Skye* decision (save, perhaps, for maintenance and cure should the illness manifest itself while aboard ship). Some commentators have suggested that the Eleventh Circuit

76. *Skye*, 751 F.3d at 1264-65.
77. 512 U.S. 532 (1994).
78. *Skye*, 751 F.3d at 1266 (quoting *Gottshall*, 512 U.S. at 555).
79. 45 U.S.C. §§ 51-60 (2012).
80. *Skye*, 751 F.3d at 1265. "The Jones Act incorporated the remedial scheme of the Federal Employers' Liability Act, and case law interpreting the latter statute also applies to the Jones Act." *Id.*
81. *Gottshall*, 512 U.S. at 558.
82. *Skye*, 751 F.3d at 1266.
83. *Id*.
84. *Id.* at 1267.

went too far in extending the physical injury/zone of danger test from *Gottshall*:

> But the *Skye* court might not have been right in attributing a broad rule against work-stress-caused injuries to *Gottshall*. A more conservative reading of the *Gottshall* work-stress rule would rule out *emotional* trauma resulting from work-place stresses but not necessarily *physical* trauma such as Skye's . . . . Quite possibly the issue presented by Skye's case—can FELA or Jones Act plaintiffs ever maintain viable actions for *physical* trauma induced by negligently severe work-place stresses?—would be seen by the Supreme Court as *res nova*.[85]

C. *Arbitration of Foreign Seafarer's Claims*

The decision in *Martinez v. Carnival Corp*.[86] is an example of the Eleventh Circuit's continuing enforcement of arbitration clauses found in foreign seafarer's arbitration contracts. There, cruise ship worker Melvin Martinez sustained back injuries during the course of his employment aboard Carnival's vessel, the FASCINATION. Suit was filed in Florida State Court but removed to the Southern District of Florida where the trial court granted Carnival's motion to compel arbitration. All other pending motions were deemed moot and the case was closed for administrative purposes.[87]

Carnival first challenged whether the order compelling arbitration was a non-appealable, interlocutory order.[88] The court observed that the Federal Arbitration Act[89] provides for appeal of "a final decision with respect to an arbitration."[90] Appealable final orders are such that there is nothing left for the court to do other than execute the judgment.[91] The wrinkle here was the trial court's decision to "administratively" close the matter, which ostensibly could permit the lower court to reopen it.[92] In the instant case, however, the Eleventh Circuit deemed the order

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85. David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 39 TUL. MAR. L.J. 471, 543 (2015).

86. 744 F.3d 1240 (11th Cir. 2014).

87. *Id*. at 1242-43. *Martinez* was one of several cases decided by the Eleventh Circuit during the survey period which addressed arbitration of foreign seafarer's claims. *See, e.g.*, Sierra v. Cruise Ships Catering & Servs. Int'l, N.V., No. 14-14940, 2015 U.S. App. LEXIS 19535, at *1 (11th Cir. Nov. 10, 2015); Naverette v. Silversea Cruises Ltd., 620 F. App'x 793 (11th Cir. 2015).

88. *Martinez*, 744 F.3d at 1243.

89. 9 U.S.C. §§ 1-16 (2012).

90. *Martinez*, 744 F.3d at 1243 (quoting 9 U.S.C. § 16(a)(3) (2012)).

91. *Id.* at 1243-44.

92. *Id.* at 1244.

final and thus appealable: "In this case, the district court not only administratively closed the case, but it also denied all pending motions as moot and compelled arbitration. The district court's order was a functionally final and appealable decision because it left nothing more for the court to do but execute the judgment."[93]

Turning to the arbitration issue, Martinez first argued that the agreement expired when he disembarked the vessel. The particular Seafarer's Agreement terminated automatically, by its terms, when the seaman made an unscheduled departure from the ship (e.g., for illness or injury), lasting more than one full voyage.[94] However, the Seafarer's Agreement also contemplated it would embrace "any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination . . . ."[95] Because parties can arbitrate the very question of arbitrability in the first instance, the court held an arbitrator could decide whether the contract had been terminated.[96] Acknowledging the federal policy favoring arbitration of labor disputes, the court held the seaman's dispute with Carnival clearly arose out of his service aboard the vessel, which was governed by the Seafarer's Agreement.[97]

III. SALVAGE

In *Martin v. One Bronze Rod*,[98] plaintiff Francisco Martin extricated a bronze rod buried in the Peace River Basin (De Soto County, Florida) and claimed to have pinpointed the location of three nearby treasure chests believed to contain "piratical cargo buried by the Gasparilla Pirates over 150 years ago . . . ."[99] To obtain control of the property, Martin filed a verified complaint in the United States District Court for the Middle District of Florida, attaching to the complaint a 3.5 inch segment of the recovered bronze rod.[100] Martin's verified complaint included a claim pursuant to the general maritime law of salvage, forfeiture claims pursuant to 33 U.S.C. §§ 383,[101] 384,[102] and

93. *Id.* at 1245.
94. *Id.*
95. *Id.* at 1245 (quoting the Seafarer's Agreement).
96. *Id.* at 1246.
97. *Id.* at 1246, 1247.
98. 581 F. App'x 744 (11th Cir. 2014).
99. *Id.* at 745.
100. *Id.* at 747 n.4. Martin claimed that he was prevented from securing the buried chests because they were located on private property and state-owned lands. *Id.* at 745.
101. 33 U.S.C. § 383 (2012).
102. 33 U.S.C. § 384 (2012).

385,[103] and possessory and ownership claims pursuant to the law of finds.[104] Martin also moved for "a warrant of arrest *in rem* against the rod and the chests under Rules C and G of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions . . . ."[105] The district court awarded Martin full title to the rod as payment for his salvage efforts, but denied the requests for *in rem* relief against the three still-buried treasure chests.[106]

On appeal, the Eleventh Circuit recounted the familiar standards to pursue a salvage claim: (1) a maritime peril; (2) a voluntary act—as opposed to contractual salvage; and (3) success in helping, at least in part, to save the imperiled property.[107] The court further noted, "'Success is essential to the claim; as if the property is not saved, or if it perish, or in case of capture if it is not retaken, no compensation can be allowed.'"[108] Success is inherent in being able to present the *res* to the court in order to establish custody and control of the property.[109] Holding Martin failed to demonstrate the requisite control or success in salving the buried treasure, the court affirmed dismissal of his salvage claim.[110]

Turning to Martin's forfeiture claims, the appellate court first observed that the provisions relied upon by plaintiff dealt with regulations to suppress piracy and were otherwise distinguishable from the claims at hand.[111] Likewise, these regulations required "capture" of the subject property (be it a pirate ship, or in this case, buried pirate treasure). The

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103. 33 U.S.C. § 385 (2012).

104. *Martin*, 581 F. App'x at 745.

105. *Id.* at 745-46. If the court determines a prima facie case for an *in rem* action exists, it is compelled to "'issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.'" *Id.* at 746 n.3 (quoting FED. R. CIV. P. Supp. C(3)(a)(i)). Rule G works "in conjunction with Rule C and governs forfeiture actions *in rem* arising from a federal statute." *Id.* (quoting FED. R. CIV. P. Supp. R. G(3)(b)(ii)).

106. *Id.* at 747.

107. *Id.* at 748.

108. *Id.* (quoting The Blackwall, 77 U.S. 1, 12 (1869)).

109. *Id.* The Eleventh Circuit noted that certain cases do exist where in rem jurisdiction is exercised over property not before the court; the ability to do so is based upon a fiction that the property is part of an undivided res (for example, a shipwreck), and therefore "possession of some of it is constructively possession of all." *Id.* (quoting R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 964 (4th Cir. 1999)). Martin repeatedly said in his pleadings that the rod and the chests were not from the same shipwreck, and that the chests were intentionally buried. See *id.* at 749 n.6.

110. *Id.* at 749.

111. *Id.*

chests were still buried, and Martin could not demonstrate he "captured" them in sufficient fashion to pursue a forfeiture claim.[112]

IV. FORUM NON CONVENIENS

In *Vasquez v. YII Shipping Co.*,[113] the plaintiff was severely burned while working aboard the M/V YEOCOMICO. The accident and injuries occurred while the vessel was docked in Freeport, Bahamas.[114] YII Shipping owned the YEOCOMICO, which "had sailed exclusively inter-island routes in the Bahamas when Vasquez's accident occurred and had done so for the previous two years."[115] The plaintiff, Franklin Vasquez, a resident of the Dominican Republic, filed a Jones Act suit in the Southern District of Florida.[116]

The district court dismissed the case based on the doctrine of forum non conveniens.[117] On appeal, the Eleventh Circuit first observed that, "[i]f a plaintiff files a complaint that invokes admiralty jurisdiction, a district court may not dismiss the complaint based on forum non conveniens if federal maritime law applies."[118] However, "[i]f federal maritime law does not apply, then the district court considers the traditional criteria of forum non conveniens to determine whether it should exercise jurisdiction over the case."[119]

The appellate court identified and briefly discussed the seven factors identified by the U.S. Supreme Court in *Lauritzen v. Larsen*[120] to determine whether federal maritime law applied to Mr. Vasquez's claims: (1) place of the wrongful act; (2) the ship's flag state; (3) domicile of the injured party; (4) domicile of the defendant ship owner; (5) place of any contract between the injured party and the shipowner; (6) the accessibility of a foreign forum; and (7) the law of the forum.[121] The appellate court added an eighth factor considered by the Supreme Court in *Hellenic Lines Ltd. v. Rhoditis*;[122] to wit, whether the putative defendant had a "substantial base of operations" in the United

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112. *Id.* at 750. The court ruled that Martin abandoned his claim under the law of "finds." *Id.* at 745 n.2.
113. 559 F. App'x 841 (11th Cir. 2014).
114. *Id.* at 842.
115. *Id.*
116. *Id.* at 841-42.
117. *Id.* at 841-43.
118. *Id.* at 843.
119. *Id.*
120. 345 U.S. 571 (1953).
121. *Vasquez*, 559 F. App'x at 843.
122. 398 U.S. 306 (1970).

States.[123] The appellate court concluded the district court did not abuse its discretion in applying the above-listed factors and dismissing Vasquez's complaint on forum non conveniens grounds.[124]

V. MARINE INSURANCE

A. *Doctrine of Uberrimae Fidei*

The case *AIG Centennial Insurance Co. v. O'Neill*[125] addressed a dispute over marine insurance for the BRYEMERE, a 66 foot sport-fishing vessel purchased by Bryan O'Neill for $2.125 million. The vessel was financed by Bank of America, NA (BOA), which obtained a preferred ship mortgage to cover its interests in the vessel. BOA required insurance on the vessel, but mistakes were made during efforts to secure coverage on the BRYEMERE which ultimately resulted in voiding the marine insurance policy *ab initio.*[126]

Specifically, O'Neill delegated the task of obtaining insurance to his secretary, who made three errors on the application: (1) incorrectly listing O'Neill as the owner of the vessel, as opposed to the title owner Carolina Acquisition, LLC;[127] (2) mistakenly responding to inquiry about prior losses; and (3) incorrectly listing the purchase price as $2.35 million, instead of the correct adjusted purchase price of $2.125 million.[128]

During transit from Palm Beach, Florida to Newport, Rhode Island in June 2007, the vessel experienced considerable flexing in its hull. A survey determined the BRYEMERE suffered serious structural defects, rendering it unseaworthy. O'Neill submitted a claim to AIG Centennial Insurance Company (AIG) for coverage under his insurance policy.[129]

AIG filed a declaratory judgment action seeking to void the policy *ab initio* (from the outset) as to both O'Neill and the BOA, who held an interest in the insurance policy pursuant to the contract's mortgage clause. Following an eight-day bench trial, the district court found the misrepresentations made during the application process "rendered the policy void ab initio under the maritime doctrine of *uberrimae fidei*, or utmost good faith."[130]

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123. *Vasquez*, 559 F. App'x at 843.
124. *Id*. at 844.
125. 782 F.3d 1296 (11th Cir. 2015).
126. *Id.* at 1299-1300.
127. O'Neill was the only shareholder of Carolina Acquisition, LLC. *Id.* at 1299.
128. *Id.* at 1300.
129. *Id.* at 1301.
130. *Id.* at 1301-02.

The Eleventh Circuit adheres to the longstanding principle of *uberrimae fidei* as a controlling doctrine regarding marine insurance.[131] The obligation of good faith imposes the duty on the insured to fully disclose all material facts relevant to the calculation of the insurance risks.[132] A fact is material if it could "possibly influence the mind of a prudent and intelligent insurer in determining whether he would accept the risks."[133] The concept of materiality is "broadly defined."[134] Moreover, a misrepresentation can act to void a policy regardless of whether it is willful, accidental, made as a result of mistake, negligence, or voluntary ignorance.[135]

The district court determined O'Neill misrepresented the purchase price of his vessel to the tune of a $225,000 difference.[136] Stressing that the purchase price has a significant impact on the amount and issuance of hull insurance, the Eleventh Circuit held the lower court did not clearly err in determining this was a material misrepresentation which voided the policy *ab initio* vis-à-vis O'Neill.[137] The court did not turn to the other alleged misrepresentations, deeming one is all that is necessary to void the policy.[138]

The Eleventh Circuit next turned to BOA's interests as the mortgage holder for the BRYEMERE. This is an issue governed not by maritime law but by state law, in this case Pennsylvania.[139] Examining Pennsylvania law, the court deemed that the policy contained a "union" or "standard" mortgage clause.[140] This provided additional protection to a mortgagee such that the policy "shall not be invalidated by any act or neglect of the mortgagor or owner of the property."[141] BOA argued its

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131. *Id.* at 1302-03. *Cf.* Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 889 (5th Cir. 1991) (rejecting notion of *uberrimae fidei* as entrenched doctrine of federal maritime law).

132. *AIG Centennial Ins. Co.*, 782 F.3d at 1303.

133. *Id.* (quoting Kilpatrick Marine Piling v. the Fireman's Fund Ins. Co., 795 F.2d 940, 942-943 (11th Cir. 1986).

134. *Id.*

135. *Id.*

136. *Id.* at 1303-04.

137. *Id.* at 1305.

138. *Id.* at 1305-06.

139. *Id.* at 1306-07. It is not clear from the opinion why Pennsylvania law applied to this marine insurance contract. There is no choice-of-law clause cited or quoted in the Eleventh Circuit's opinion. The order simply notes, "The District Court concluded, and the parties do not currently dispute, that Pennsylvania law should guide our analysis." *Id.* at 1306.

140. *Id.* at 1307.

141. *Id.* (quoting Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 244 F. App'x 424, 429 (3d. Cir. 2007)).

interests were protected by the insurance coverage regardless of any act or omission of O'Neill in the application process due to the (essentially) separate and independent contract of insurance created between the mortgagee and creditor by virtue of the "union" or "standard" mortgage clause.[142]

The court, however, disagreed and summarized the dispositive issues as follows: "[W]e are confronted with a scenario in which the named insured is neither the owner of the property insured by the policy nor the mortgagor on the loan for which the property serves as collateral."[143] This was important, in the court's view, inasmuch as the governing jurisprudence conflated the identity of the mortgagor with the named insured.[144] The difference between O'Neill (individually) and the boat-owning corporate entity (Carolina Acquisition, LLC) was "no mere technicality."[145] In concluding its analysis, the Eleventh Circuit emphasized "AIG and Carolina never entered into an insurance contract at all. O'Neill signed the mortgage in his capacity as managing member of Carolina; the insurance policy, by contrast, is in O'Neill's name alone."[146] This supported the district court's conclusion that O'Neill was acting on his own behalf, not on behalf of the vessel-owning limited liability company in procuring the insurance policy.[147]

There was a concurring opinion by Judge Kristi DuBose, United States District Judge for the Southern District of Alabama, sitting by designation. Judge DuBose made reference to O'Neill's status perhaps as an agent of the owner/limited liability company.[148] This appears to be a valid point inasmuch as the mortgage clause specifically said the interests of BOA would not be "impaired or invalidated by any act or omission, or neglect of the mortgagor, owner, master, agent or crew of the vessel(s) insured by this policy, or by failure to comply with any warranty or condition over what the Mortgagee has no control."[149] The majority seemed to dispatch this idea by noting the insurance application lacked any mention of O'Neill's role as an agent or his position as managing member of Carolina Acquisition, LLC.[150] "More still, the insurance application stands in stark contrast to the mortgage, which

142. *Id.*
143. *Id.* at 1308.
144. *Id.*
145. *Id.*
146. *Id.* at 1309.
147. *Id.*
148. *Id.* at 1310-11 (Dubose, J., concurring).
149. *Id.* at 1306 (majority opinion).
150. *Id.* at 1309 n.13.

O'Neill *did* sign in his capacity as Carolina's managing member."[151] The moral of this story is applications for marine insurance should not be delegated without some follow-up, as clerical errors may constitute material misrepresentations sufficient to void the policy under the doctrine of *uberrimae fidei.*

B. "All Risk" Marine Policy

The decision in *LaMadrid v. National Union Fire Insurance Co.*[152] required interpretation of an all-risk marine policy covering an eighty-five foot yacht, the ALICIA, which suffered catastrophic engine failure during normal operations.[153] The district court granted summary judgment, but the Eleventh Circuit reversed, holding the trial court improperly placed the burden of establishing the precise cause of engine failure on the insured.[154]

While en route from the Bahamas to Miami, the ALICIA's starboard engine began billowing smoke. Upon return to dock, it was discovered that the engine was beyond repair. LaMadrid (insured) reported the loss to his agent and filed an insurance claim. The insurer sent an adjuster to investigate, but he made the conclusory decision that the loss was simply due to wear, tear, and corrosion.[155] Citing the policy's wear and tear exclusion, coverage for the loss was denied.[156] The insured's expert concluded the cause of the failure was "a relief valve in the oil system that was fixed in the open position."[157] The district court granted the insurance company's motion for summary judgment, concluding plaintiffs failed to present evidence "to establish that a fortuitous event [was] the cause of the damage to the relief valve."[158]

The Eleventh Circuit began its analysis by exploring which law to apply: federal maritime law or Florida state law.[159] The starting point of such analysis is the familiar holding of *Wilburn Boat Co. v. Fireman's Fund Insurance Co*.[160] *Wilburn Boat Co.*, and its progeny, held marine insurance policies are to be construed according to state law in the

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151. *Id.* (emphasis in original).
152. 567 F. App'x 695 (11th Cir. 2014), *motion denied by* 2015 U.S. Dist. LEXIS 15162 (S. D. Fla. Feb. 9, 2015).
153. *Id.* at 696.
154. *Id*. at 701-02, 703.
155. *Id.* at 696-97.
156. *Id.* at 697.
157. *Id.*
158. *Id.* at 701.
159. *Id.* at 698.
160. 348 U.S. 310 (1955).

absence of controlling federal maritime precedent.[161] In the instant case, this was a distinction without a difference as "Florida law and federal maritime law are not materially different with regard to the narrow question[s] present[ed] before the Court."[162]

Specifically, the court determined that under an all-risk policy, the insured can carry its burden to show that a loss is covered if they demonstrate the loss was accidental and fortuitous.[163] The district court had improperly required the insured to demonstrate a specific cause of loss.[164] "By requiring Appellants to pinpoint 'why' the relief valve failed, the District Court, in essence, required Appellants to demonstrate the precise cause of the starboard engine's failure in order to meet their burden of establishing a fortuitous loss."[165] This was inappropriate, and the insured met their "light burden by presenting expert testimony on the cause of the engine's failure" (sticky relief valve) and by establishing an otherwise unexplained loss occurred before the end of the engine's anticipated lifecycle.[166] Requiring an insured to prove much more would run contrary to the purposes of an all-risk insurance policy.[167]

VI. LIMITATION OF LIABILITY

The court's decision in *Offshore of the Palm Beaches, Inc. v. Lynch*[168] reaffirms the right of a single claimant in a limitation action to proceed with a state court suit once appropriate protective stipulations have been filed.[169] Lisa Lynch was injured when the recreational boat in which she was riding struck a wave. The accident happened on October 31, 2011. An attorney wrote to the vessel owner (Offshore of the Palm Beaches, Inc.) on February 6, 2012, advising that he represented Lynch and requesting insurance information. Offshore of the Palm Beaches, Inc. filed a limitation action six months later on August 6, 2012. Lynch was the only party to file a claim in the limitation action.[170] She also filed "detailed stipulations designed to protect Offshore's right to litigate any limitation of liability in federal district court."[171] In light of these

161. *LaMadrid*, 567 F. App'x at 699.
162. *Id.* at 700.
163. *Id.* at 701.
164. *Id.*
165. *Id.*
166. *Id.* at 701-02.
167. *Id.* at 702.
168. 741 F.3d 1251 (11th Cir. 2014).
169. *Id.* at 1259.
170. *Id.* at 1253.
171. *Id.* at 1253-54.

stipulations, the federal district court stayed the limitation action, thus allowing Lynch to proceed with her personal injury claims in state court. Offshore appealed from the order granting Lynch's request to stay the limitation action.[172]

The Eleventh Circuit dispatched Lynch's argument that the order was non-appealable as a non-final order: "Our case precedent instead compels the conclusion that we have jurisdiction under [28 U.S.C.] § 1292(a)(1) to review the trial court's order modifying or dissolving an injunction."[173]

The substantive issue on appeal highlighted, once again, the tension between a vessel owner's right to seek protection under the Limitation of Liability Act (Limitation Act)[174] and the right of tort claimants to have their day in the forum of their selection (usually a state court with a jury requested).[175] The Eleventh Circuit observed that the Supreme Court has "limited the tension between the Limitation Act and the 'saving to suitors' clause by carving out an *exception* when a vessel owner faces only a single claimant."[176] In a single claimant situation—such as that presented by Lynch's claim—the federal court retains jurisdiction to decide issues unique to its admiralty jurisdiction, while allowing the claimant to proceed with her tort claim in a state court venue. This is essentially an automatic result once the claimant agrees to protective stipulations, the terms of which are well-settled by precedent.[177]

One note with respect to timing of a limitation action: the vessel owner filed suit six months after receiving a letter from Lynch's attorney advising of representation and asking for insurance information.[178] The Limitation Act requires the vessel owner to bring an action in district court "within [six] months after a claimant gives the owner written notice of a claim."[179] This requirement is jurisdictional, and the failure to abide by this time limit will result in a limitation action being dismissed as time barred.[180] Courts have held that letters and/or emails from litigants or their counsel to a vessel owner can constitute sufficient notice if the exchanges reveal a "reasonable

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172. *Id.* at 1254.
173. *Id.* at 1255; *see* 28 U.S.C. § 1292(a)(1) (2012).
174. 46 U.S.C. §§ 30501-30512 (2012).
175. *See Offshore of the Palm Beaches, Inc.*, 741 F.3d at 1257-58.
176. *Id.* at 1258 (emphasis in original).
177. *Id*. Another exception which may allow erstwhile claimants return passage to state court exists in a multiple claimant—adequate limitation fund scenarios. *Id*.
178. *See id.* at 1254.
179. 46 U.S.C. § 30511(a) (2012).
180. *See, e.g.*, RLB Contr., Inc. v. Butler, 773 F.3d 596, 600 (5th Cir. 2014).

possibility" that a claim could exceed the value of the vessel, thus triggering the six-month time limit within which to file suit under the Limitation Act.[181]

VII. Maritime Liens and Attachment Proceedings

A. *D & M Carriers LLC v. M/V THOR SPIRIT*

In the case of *D & M Carriers LLC v. M/V THOR SPIRIT*,[182] D & M Carriers LLC (D&M) was a motor carrier which filed suit in an attempt to assert a maritime lien against a vessel which it transported from Missouri to Georgia. D & M also filed a breach of contract action against the vessel owner. The district court dismissed both claims, and this appeal followed.[183]

Inan Taptik, a citizen of Turkey, contracted with Able Boat Transport, LLC to move a fifty-seven foot yacht from Missouri to Florida. Unbeknownst to Taptik, Able Boat then subcontracted with D & M to actually transport the vessel. Because of the boat's size, the inland transport was more difficult, much longer, and more expensive than anticipated.[184] A dispute arose over payment, with D & M failing to receive the promised amount and reimbursement for extraordinary expenses. D & M filed a complaint in the Southern District of Florida seeking to establish a maritime lien on the M/V THOR SPIRIT and arrest the vessel.[185] The district court ultimately ruled D & M was not entitled to maritime lien on the M/V THOR SPIRIT because "it had failed to prove that it had provided necessaries to the yacht 'on the order of the owner or a person authorized by the owner.'"[186]

The Federal Maritime Lien Act[187] defines "necessaries" to include "repairs, supplies, towage."[188] Note that the appellate court did not reach the issue of whether the overland transport constituted "necessaries" under the Maritime Lien Act.[189] Certain individuals are presumed to have authority to procure necessaries for a vessel, including

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181. *Id.* at 604.

182. 586 F. App'x 564 (11th Cir. 2014).

183. *Id*. at 565-66, 567.

184. *Id.* at 565-66. For example, the opinion notes that the trucking company could not use interstate highways, and the escort crew "had to lift more than 20,000 power lines, tree limbs, and street lights over the course of the trip." *Id.* at 566.

185. *Id.* at 567.

186. *Id.* (quoting 46 U.S.C. § 31342(a) (2012)).

187. 46 U.S.C. §§ 31301-31343 (2012).

188. *D & M Carriers LLC*, 586 F. App'x at 567 n.5 (quoting 46 U.S.C. § 31301(4) (2012)).

189. *Id.* at 567 n.5.

an owner, master, person entrusted with the management of a ship, and agents or officers appointed by an owner or charterer.[190] In this case, the issue preserved for appeal was whether Able Boat had authority to obtain necessaries for the M/V THOR SPIRIT in its ostensible capacity as the owner's agent.[191] D & M also contended it was acting pursuant to directions from Taptik (owner).[192] Taking these issues in reverse order, the Eleventh Circuit agreed that Taptik did not personally authorize D & M to transport the vessel.[193] Taptik's only contract was with Able Boat, which never told Taptik that it had subcontracted the work to D & M.[194]

Likewise, the court held Able Boat was not acting as Taptik's agent with respect to its interactions with D & M.[195] The court determined Able Boat did not have the express authority to act in this capacity, nor was the company cloaked with apparent authority to act as Taptik's agent.[196] Evidence demonstrated Taptik never spoke to anybody affiliated with D & M and the contract for transport of the vessel existed only between Taptik and Able Boat.[197] Additionally, there was no agreement which ever authorized Able Boat to act as Taptik's agent.[198]

This is an interesting case, one which would present a good law school exam question. Assume that Taptik (owner) had engaged D & M directly to transport his boat. Would maritime jurisdiction exist in the first instance? If the vessel was not in navigable waters at any point in time during provision of the services, jurisdiction based on a contract claim would seem to be missing, as would the right to use a maritime lien to secure payment for purely land-based services.

B. World Wide Supply OU v. Quail Cruises Ship Management

The underlying facts of *World Wide Supply OU v. Quail Cruises Ship Management*,[199] are confusing. Of some passing interest is the fact that the litigants were embroiled in a dispute involving the vessel

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190. 46 U.S.C. § 31341(a)(1)-(4) (2012).
191. *D & M Carriers LLC*, 586 F. App'x at 569.
192. *Id.* at 569-70.
193. *Id.*
194. *Id.* at 570-71.
195. *Id.* at 571.
196. *Id.*
197. *Id.*
198. *Id.* The appellate court also affirmed the district court's decision that Taptik's assistant/interpreter (Murat Varol) was not acting as Taptik's agent with respect to either instructions or authority for transport of the vessel. *Id.*
199. 802 F.3d 1255 (11th Cir. 2015).

featured on "The Love Boat" television program. At bottom, however, the case is instructive on jurisdiction for appeals involving Rule B attachments.[200]

The plaintiff, World Wide Supply OU, contracted with Quail Cruises Ship Management to supply necessaries to the M/V GEMINI. When it was not paid, World Wide Supply OU filed an emergency motion to attach and garnish funds allegedly belonging to Quail. The money was held in a law firm's trust account for distribution to third-parties as a result of a settlement agreement Quail had reached with said entities. The district court vacated the attachment (for reasons discussed below), and this appeal followed.[201]

The recipients of the settlement funds (designated as "interested parties—appellees"), argued the appellate court lacked jurisdiction because the res (funds) had been transferred out of the district through the ordinary course of business (i.e., the recipients of the settlement funds had already received the money).[202] The Eleventh Circuit observed that appeals from in rem forfeiture actions are not mooted by the prevailing party's removal of the res from the original district.[203]

The Eleventh Circuit followed this logic and declined to hold the departure of the res from the district court necessarily mooted the case.[204] Rather, departure would moot the case only if further proceedings would essentially be useless.[205] The plaintiff, World Wide Supply OU, upon reversal of the decision, could obtain a judgment and then attempt to enforce it against the debtor in another forum where funds or the defendant could be located.[206] This potential outcome was sufficient such that an appeal would not be an exercise in futility.

With respect to the underlying vacation of the Rule B attachment,[207] the court noted that the property (funds) being held by the law firm was not the property of the debtor; rather, it was being held in trust for the recipients of the settlement funds.[208] Accordingly, the prerequisites for the use of Rule B were not met in the first instance.[209]

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200. *Id*. at 1257.
201. *Id.*
202. *Id.* at 1259.
203. *Id.* at 1260. "Other circuits have applied this holding to Rule B attachments, determining that the departure of the attached *res* does not destroy jurisdiction." *Id.*; *see* FED. R. CIV. P. Supp. B.
204. *World Wide Supply OU*, 802 F.3d at 1260.
205. *Id.* at 1261.
206. *Id.*
207. FED. R. CIV. P. Supp. B.
208. *World Wide Supply OU*, 802 F.3d at 1263.
209. *Id.*; *see also* FED. R. CIV. P. Supp. B(1)(a) (requiring that property of the absent defendant be found within the district for purposes of garnishment under Rule B).

C. A/S Dan-Bunkering Ltd. v. M/V CENTRANS DEMETER

In *A/S Dan-Bunkering Ltd. v. M/V CENTRANS DEMETER*,[210] M/V CENTRANS DEMETER is a seagoing vessel owned by Aries Shipping Co. (Aries). Aries entered into a voyage charter with Zhenhua International Shipping Co. (Zhenhua) for a single voyage of the M/V CENTRANS DEMETER. Bunkers were ordered from and delivered to the ship by the plaintiff, A/S Dan-Bunkering Ltd. Anyone who is familiar with the vagaries of international bunker sales knows how the story ends: A/S Dan-Bunkering was not paid, and the company arrested the vessel when it arrived in the Port of Mobile, Alabama.[211]

Dan-Bunkering argued the terms and conditions of its sales contract with Zhenhua allowed it to seek a maritime lien under U.S. law. Aries moved to vacate the arrest and dismiss the suit; in response, Dan-Bunkering moved for summary judgment on its lien claim. The district court ultimately dismissed the action under the doctrine of forum non conveniens, with the condition that Aries submit itself to the jurisdiction of a Hong Kong court.[212] On appeal, Dan-Bunkering did not challenge the application of Hong Kong law to the issue of contract formation, but rather challenged the forum non conveniens dismissal made after the choice of law determination.[213]

The bunkering contract entered between Dan-Bunkering and Zhenhua called for application of Danish law.[214] However, it went on to provide that the seller was entitled to rely on other legal regimes, including the right to the following:

> [E]njoy full benefit of local rules granting the Seller maritime lien in the vessel and/or providing for the right to arrest the vessel. Nothing in this Bunker Contract shall be construed to limit the rights or legal remedies that the Seller may enjoy against the Vessel or Buyer in any jurisdiction.[215]

To dismiss a suit based on the doctrine of forum non conveniens, the following factors must be demonstrated: (1) an adequate alternative forum; and (2) the private and public interest factors collectively weigh in favor of dismissal.[216] The need to resolve and apply foreign law

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210. No. 15-11541, 2015 U.S. App. LEXIS 21449, at *1 (11th Cir. Dec. 11, 2015).

211. *Id.* at *1-2.

212. *Id.* at *4-6. The ship was a Hong Kong-flagged vessel, and the bunkers were delivered while the ship was in the Port of Hong Kong. *Id.* at *6-7, *11.

213. *Id.* at *2.

214. *Id.* at *4-5, *4 n.2.

215. *Id.* at *4 n.2.

216. *Id.* at *8.

generally supports dismissal.[217] To avoid prejudice to the plaintiff, the district court can attach conditions (i.e., consent to jurisdiction in Hong Kong) to which the defendant must submit before suit can be dismissed.[218]

The court determined Hong Kong was an adequate forum in which to resolve the dispute, rejecting Dan-Bunkering's position it might not be able to secure its claim by use of a maritime lien and in rem claim against the ship.[219] Turning to the public and private factors, the Eleventh Circuit likewise determined these weighed in favor of dismissal based on forum non conveniens.[220] Relevant private factors included the availability of evidence, access to witnesses, ability to view the premises, "and all other practical problems that make trial of a case easy, expeditious and inexpensive."[221] The public factors included court congestion, having a controversy decided by local court, and application of foreign law.[222] At the end of the day, the district court's dismissal based on forum non conveniens was affirmed.[223]

Frankly, this outcome poses problems for vendors seeking to enforce contractual provisions which permit use of local law to secure claims and enforce lien rights. The Eleventh Circuit ignored one of the fundamental principles underlying *in rem* process: the need to obtain security and payment for maritime debts in the face of the realities of global commerce (i.e., vessels leave jurisdictions and never return, owners are often difficult to locate, and expenses of enforcing foreign judgments). Further, this decision seems contrary to precedent on the topic. For example, in *Liverpool & London S.S. Protection & Indemnity Association v. MV QUEEN OF LEMAN*,[224] the United States Court of Appeals for Fifth Circuit upheld a maritime lien asserted by an English underwriter against a vessel for unpaid insurance premiums.[225] The insurance contract at issue provided for application of English law, but also allowed the insurer to "enforce its right of lien in any jurisdiction in accordance with local law in such jurisdiction."[226] The Fifth Circuit held the underwriter was entitled to seek a maritime lien under U.S. law by filing suit in Louisiana, concluding "there is nothing absurd about

217. *Id.*
218. *Id.* at *9.
219. *Id.* at *10.
220. *Id.*
221. *Id.* (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
222. *Id.*
223. *Id.* at *12.
224. 296 F.3d 350 (5th Cir. 2002).
225. *Id.* at 355.
226. *Id.* at 353.

applying the law of the jurisdiction to which the ship sails, as the ship's presence in the jurisdiction represents a substantial contact."[227]

VIII.LHWCA CLAIMS

Horton v. Maersk Line, Ltd.[228] is a longshoreman's lawsuit against Maersk Line, Ltd. (Maersk), the owner of the M/V SEALAND CHAMPION, and A.P. Moller–Maersk, A/S (Moller), the owner of a shipping container loaded aboard the SEALAND CHAMPION. While performing stevedoring services aboard the vessel, Plaintiff John Horton was struck in the head by a falling twist lock[229] which had become dislodged from a shipping container. Horton sustained a broken neck. Horton sued both Maersk (vessel owner) and Moller (shipping container owner), but the district court granted summary judgment for both defendants. With respect to the container owner (Moller), the court first excluded the plaintiff's expert witnesses and then determined there was no genuine issue of material fact precluding summary judgment on liability.[230] With respect to Maersk, the court found the plaintiff failed to demonstrate any violation of the fairly narrow duties imposed upon a vessel owner vis-à-vis longshoremen performing work aboard ship.[231]

This case is important because it rebuffs efforts to expand the narrowly-cabined obligations a ship owner owes to longshoremen working aboard a vessel.[232] The plaintiff argued the International Safety Management Code (ISM Code)[233]—which vessels and their crew are obligated to follow as part of the International Convention for Safety of Life at Sea (SOLAS)—imposed duties upon a vessel owner vis-à-vis longshoreman.[234] Specifically, the ISM Code Manual on the SEALAND

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227. *Id.* at 354; *accord* World Fuel Servs. Singapore, PTE v. BULK JULIANA M/V, No. 13-5421, 2015 U.S. Dist. LEXIS 16829, at *1, *13 (E.D. La. Feb. 11, 2015).

228. 603 F. App'x 791 (11th Cir. 2015).

229. "A twist lock is a locking device for securing large containers to the trailers on which they are transported." *Id.* at 793 n.1.

230. *Id.* at 793, 794.

231. *Id.* at 795. *See, e.g.*, Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 166-67 (1981) (outlining duties shipowner owes to longshoremen working aboard the vessel).

232. 33 U.S.C. § 905(b) (2012) (providing in pertinent part that "[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party.").

233. *See International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management (ISM) Code)*, *reprinted in* 6D BENEDICT ON ADMIRALTY, Doc. 14-2 (2015).

234. *Horton*, 603 F. App'x at 795. The United States expressly adopted the provisions of the ISM Code and charged the U.S. Coast Guard with enforcement of same. *See* U.S.C.

CHAMPION required the ship's officers to supervise and ensure safe cargo operations.[235]

The Eleventh Circuit appears to be the first circuit to address the issue of whether the ISM Code imposed duties running from the vessel to longshoremen besides those enumerated in the Longshore and Harbor Workers' Compensation Act (LHWCA)[236] and its interpretive jurisprudence.[237] The appellate court rejected this position, as it found no authority which recognized the Code as modifying the duties set out in the LHWCA and recognized in Scindia.[238] Additionally, the Eleventh Circuit was reluctant to impose duties to supervise cargo loading operations upon the vessel owner that ran "contrary to the Supreme Court's interpretation of the [LHWCA]: namely, that a duty to supervise the stevedore would 'saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate[.]'"[239]

IX. CRIMINAL LAW—FAILURE TO "HEAVE TO"

The decision in *United States v. Rodriguez*,[240] seemed unique, in that rarely do we see a prosecution for failure to "heave to" upon order of a maritime law enforcement official (at least in the Author's practice). Antonio Rodriguez appealed his conviction for the knowing failure to obey a law enforcement official's order to "heave to." In September 2013, a Customs and Boarder Protection airplane spotted two jet skis without navigation lights approximately thirty nautical miles off the coast of Florida. The jet skis were not moving, so the personnel aboard the airplane presumed them to be in distress and called the United States Coast Guard (USCG). A Coast Guard cutter was deployed, but the jet skis began to move away from the USCG vessel upon its approach even after the cutter activated its blue lights. A small boat was deployed, but the jet skis continued their evasive maneuvers. The USCG officers in the smaller vessel hailed the jet ski operators, repeatedly advising them to stop in both English and Spanish.[241]

After three to five minutes of pursuit, the jet skis stopped. The riders explained their actions were based on fear that the Coast Guard was actually the Cuban military, which had purportedly fired on these jet

§§ 3201-3205 (2012) and regulations adopted at 33 C.F.R. §§ 96.200-96.390 (2015).

235. *Horton*, 603 F. App'x at 795.

236. 33 U.S.C. §§ 901-950 (2012).

237. *Horton*, 603 F. App'x at 795-97.

238. *Id*. at 797.

239. *Id*. (second brackets in original) (quoting *Scindia*, 451 U.S. at 169).

240. 596 F. App'x 753 (11th Cir. 2014).

241. *Id.* at 754-55.

skis earlier in the evening. The duo also explained they were trying to go camping, but there was no camping equipment aboard the jet skis. There was also the explanation of lobster fishing, although no such equipment was found for this endeavor, either.[242]

Eventually, the jet ski riders were arrested and charged with violation of 18 U.S.C. § 2237(a)(1),[243] which provides in pertinent part that an offence is punishable by law when the following occurs:

> [t]he master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States,. . . knowingly fail[s] to obey an order by an authorized Federal law enforcement officer to heave to that vessel.[244]

The jury convicted Rodriguez of violating 18 U.S.C. § 2237(a)(1), and he appealed the decision based on the sufficiency of the evidence.[245] Given the fairly deferential standard of review—all evidence considered in the light most favorable to the government and all reasonable inferences and credibility of the evaluations in favor of jury's verdict—the Eleventh Circuit did not expend too much effort to affirm the conviction and sixteen-month sentence imposed on Rodriguez.[246]

X. MARITIME TORTS

In *Middleton v. M/V GLORY SKY I*,[247] the Eleventh Circuit dealt with the tort of conversion in the marine context. David Middleton stored a large quantity of black beans in a warehouse owned and operated by Emile Destin. Eventually, Destin absconded with 3800 bags of the beans, loading them aboard the M/V GLORY SKY I, a ship Destin operated, for transport to Haiti. Learning of the unauthorized removal of the beans, Middleton met Destin aboard the M/V GLORY SKY I and demanded return of his legumes. Destin refused, and the ship sailed to Haiti where the beans were sold without compensation to Middleton. Middleton eventually obtained a judgment in state court against Destin and his operating company.[248] A federal action was then filed seeking arrest of the M/V GLORY SKY I pursuant to Rule C of the Supplemental Rules for Admiralty or Maritime Claims.[249] The district court dis-

242. *Id.* at 755.
243. 18 U.S.C. § 2237(a)(1) (2012).
244. *Rodriguez*, 596 F. App'x at 755 (quoting 18 U.S.C. § 2237(a)(1)).
245. *Id.*
246. *Id.* at 755, 756-57.
247. 567 F. App'x 811 (11th Cir. 2014).
248. *Id.* at 812-13.
249. FED. R. CIV. P. Supp. C.

missed the suit for lack of subject matter jurisdiction, finding no maritime tort had occurred.[250]

On appeal, Middleton argued the tort of conversion had a sufficient nexus with maritime commerce: recall that a party seeking to invoke federal admiralty jurisdiction for a tort claim has to satisfy conditions of location and connection with maritime activity.[251] The location inquiry asks whether the tort occurred on navigable water.[252] This was the dispositive issue on appeal. The Eleventh Circuit held the conversion was complete when the beans were removed from the warehouse without permission.[253] The appellate court rejected the argument that Middleton's attendance on board the vessel and the subsequent refusal to return the beans constituted a "new" conversion.[254]

There was an argument advanced for the first time on appeal that the loading of the beans onto the vessel constituted an independent "maritime" conversion.[255] There was no authority cited for this proposition, however, and the court rejected the idea the vessel—as a separate legal entity under maritime law—could "re-appropriate the beans for its own purposes and thereby commit a new conversion separate from Destin's."[256] No new maritime conversion, therefore, occurred when the beans were loaded onto the M/V GLORY SKY I.[257]"

250. *Middleton*, 567 F. App'x at 812-13.
251. *Id.* at 813.
252. *Id.*
253. *Id.* at 813-14.
254. *Id.* at 814.
255. *Id.*
256. *Id.* at 814-15.
257. *Id.* at 815.