# Admiralty

**by John P. Kavanagh, Jr.***

The cases discussed herein represent decisions the United States Court of Appeals for the Eleventh Circuit issued in 2016 and 2017.[1] While not an all-inclusive list of maritime decisions from the court during that timeframe, the Author identified and provided summaries of key rulings of interest to the maritime practitioner.[2]

## I. ADMIRALTY JURISDICTION

*Tundidor v. Miami–Dade County*,[3] addresses subject matter jurisdiction under 28 U.S.C. § 1333;[4] specifically, the case addresses whether a canal is "navigable" for purposes of admiralty or maritime jurisdiction if it is blocked by artificial obstructions preventing it from being used to conduct interstate commerce.[5] In a case of apparent first impression, the appellate court agreed with the trial court's decision to dismiss the case for lack of subject matter jurisdiction.[6]

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1. For an analysis of admiralty law during the prior survey period, see John P. Kavanagh, Jr., *Admiralty*, *Eleventh Circuit Survey*, 67 MERCER L. REV. 789 (2016).

2. 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 Pursuant to Rule 32.1 of the Federal Rules of Appellate Procedure, citation to an unpublished opinion is allowed.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 Further, Eleventh Circuit Rule 36-2 notes that, while not binding precedent, unpublished opinions "may be cited as persuasive authority." 11TH CIR.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.

3. 831 F.3d 1328 (11th Cir. 2016).

4. 28 U.S.C. § 1333(1) (2018) (vesting federal district courts with "original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction").

5. *Tundidor*, 831 F.3d at 1330.

6. *Id.*

The plaintiff, a passenger aboard a recreational vessel, suffered serious injuries while the vessel was operating on the Coral Park Canal in Miami, Florida. The canal is traversed by a number of low-lying bridges. After ducking to pass underneath such a structure, the plaintiff raised his head only to strike a water pipe, causing serious injury.[7] Suit was filed in the United States District Court for the Southern District of Florida, invoking the admiralty jurisdiction of the court.[8]

The test for admiralty tort jurisdiction is twofold: "(1) there must be a significant relationship between the alleged wrong and traditional maritime activity (the nexus requirement) and (2) the tort must have occurred on navigable waters (the location requirement)."[9] In the instant case, the trial court found that the Coral Park Canal was not navigable, and thus, failed to satisfy the location requirement.[10]

The test for navigable waters was set forth in *The DANIEL BALL*.[11] The Supreme Court of the United States held that navigable waters must be "navigable in fact" and capable of being used in interstate commerce.[12]

The Coral Park Canal does connect to the Tamiami Canal, which in turn connects to the Miami River and eventually leads to the Atlantic Ocean. However, the Coral Park Canal is restricted by a series of artificial obstructions, including a water control structure (S-25B), which prevents navigation from the western side of the structure to the Miami River.[13] Coral Park Canal is not navigable because this water control structure prevents vessels from traveling outside of the State of Florida.[14] "Because the Coral Park Canal cannot support interstate commerce, it cannot satisfy the location requirement of admiralty jurisdiction."[15]

Whether Coral Park Canal might have once been navigable had no bearing on the issue of whether the waterway was presently navigable in fact. Discussing the issue of "historical navigability," the Eleventh Circuit noted that "[e]very circuit court to consider the issue has ruled that when artificial obstructions on a waterway block interstate commercial travel, the waterway cannot support admiralty

7. *Id.*

8. *Tundidor*, 831 F.3d at 1331.

9. *Id.* at 1331–32 (quoting Aqua Log, Inc. v. Lost & Abandoned Pre–Cut Logs & Rafts of Logs, 709 F.3d 1055, 1059 (11th Cir. 2013)).

10. *Id.*

11. 77 U.S. (10 Wall.) 557 (1871).

12. *Id.* at 563.

13. A sign next to the structure states, "DANGER—NO BOATING BEYOND THIS POINT."

14. *Tundidor*, 831 F.3d at 1330–31.

15. *Id.* at 1332.

jurisdiction."[16] The appellant concluded his arguments in support of subject matter jurisdiction by citing cases purportedly endorsing historic navigability. The Eleventh Circuit noted that "these decisions do not involve admiralty jurisdiction" and went through some length to differentiate navigability for jurisdictional purposes from other scenarios involving navigable waters or navigability.[17] The twin touchstones of uniformity and promotion of marine commerce underlie the historical scope of navigability for jurisdictional purposes. In the absence of these concerns, the court held that "extending jurisdiction to waters incapable of commercial activity serves no purpose of admiralty jurisdiction."[18]

## II. ARBITRATION OF SEAFARERS' CLAIMS

The decision in *Suazo v. NCL (Bahamas) Ltd.*,[19] is another in a line of Eleventh Circuit decisions enforcing arbitration clauses in seafarers' employment contracts. Willman Suazo, a Nicaraguan citizen, was employed by Norwegian Cruise Lines (NCL) aboard the *M/V NORWEGIAN EPIC*, a Bahamian-flagged vessel. Suazo was injured while lifting heavy garbage bins as part of his duties aboard the vessel. He eventually returned to his home country to seek medical care and treatment which, at some point, NCL discontinued and declined to reinstate. Suazo retained private counsel and filed suit against NCL in the Miami–Dade County Circuit Court. NCL removed the case to federal court and sought to compel arbitration as required by Suazo's employment contract.[20]

The NCL employment agreement dictated that all claims arising out of shipboard employment would be resolved pursuant to the New York Convention via arbitration in the seafarer's country of citizenship or, in the alternative, in Nassau, Bahamas. The agreement was silent as to who would bear the costs of arbitration, but reference was made to the collective bargaining agreement (CBA) between NCL and the Norwegian Seafarers' Union (NSU). The CBA provided that the union would bear the costs of arbitration for its member if a NSU legal representative

16. *Id.* (internal citations omitted).

17. *Id.* at 1332–34 (referencing, *inter alia*, congressional power under the Commerce Clause, ownership of submerged lands, and navigational servitudes, etc.).

18. *Id.* at 1333.

19. 822 F.3d 543 (11th Cir. 2016).

20. *Id.* at 549. Suazo's employment contract fell within the reach of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards." *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517 [hereinafter The New York Convention]. *See generally* 9 U.S.C. §§ 201–208 (recognizing The New York Convention and codifying its application and enforcement federally).

represented the seafarer. However, if the seafarer rejected the NSU's legal representative, the employee and NCL (employer) would each bear one-half the costs of arbitration until the arbitrator determined the issue.[21]

Suazo opposed the foreign arbitration because of economic hardship. He provided an affidavit stating that he was from a poor community in Nicaragua where he could not find work and that he did not have money to pay for arbitration.[22] The district court rejected this argument, finding that a "public policy" defense of economic hardship was not available at the arbitration-enforcement stage under the New York Convention. Suazo appealed.[23]

There are different defenses available under the New York Convention (applicable to foreign arbitrations) versus the Federal Arbitration Act (FAA)[24] (applicable to domestic arbitrations). When faced with a motion to compel under the FAA, there is a "broad array of defenses to the enforcement of arbitration agreements."[25] Specifically, the party opposing a motion to compel domestic arbitration has all defenses existing "at law or in equity for the revocation of any contract."[26] Courts have interpreted the "effective vindication doctrine" as one defense available in the context of domestic arbitration.[27] This is a public policy consideration which assesses whether or not forcing a party into arbitration would deprive that party of statutory claims otherwise available in civil litigation.[28]

In contrast, when a party seeks to enforce arbitration subject to the New York Convention, available defenses to oppose such efforts are very limited. Article II of the New York Convention provides that a court shall enforce the arbitration provision, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[29]

In the instant case, the appellate court faced an issue of first impression: "We have never determined whether a cost-based effective vindication defense can be raised under the 'incapable of being performed' clause of Article II [of the New York Convention] . . . ."[30] The

21. *Suazo*, 822 F.3d at 548–49.

22. *Id.* at 549–50.

23. *Id.* at 550.

24. U.S.C. tit. 9 (2018).

25. *Suazo,* 822 F.3d at 547.

26. 9 U.S.C. § 2 (2018).

27. *Suazo*, 822 F.3d at 547.

28. *Id.*

29. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(3) Dec. 29, 1970, 21 U.S.T. 2517.

30. *Suazo*, 822 F.3d at 553.

court went on to state, however, that "we need not resolve that question today because Suazo has fallen far short of establishing that enforcing the arbitration agreement in this case will effectively deny him access to the arbitral forum."[31]

The Eleventh Circuit did provide guidance for the next litigant to use the cost-based effective vindication defense to oppose a motion to compel arbitration subject to the New York Convention. Citing a fairly recent case (which actually seemed to be directly on point), the court noted that a party seeking to invoke an effective vindication doctrine based on the expense of arbitration must present evidence of (1) the amount of fees he or she is likely to incur and (2) an inability to pay those fees.[32] In the instant case, the Eleventh Circuit held that Suazo failed to present sufficient evidence of the amount of fees he would likely incur in the putative arbitration.[33] Moreover, the court also cited the fact that Suazo could have received free representation from his union to pursue his rights in the foreign arbitration.[34]

In *Alberts v. Royal Caribbean Cruises, Ltd.*,[35] the plaintiff, a United States citizen, was employed by Royal Caribbean as a trumpet player aboard the *M/V OASIS OF THE SEAS*. The vessel sailed once a week from Florida, calling on various foreign ports.[36] Alberts signed two employment agreements, both of which contained arbitration clauses requiring that all disputes "be referred to and resolved exclusively by mandatory binding arbitration pursuant to the United Nations Conventions [*sic*] on the Recognition and Enforcement of Foreign Arbitral Awards."[37]

After becoming ill while working for Royal Caribbean, and based on his belief that his employer failed to provide proper care, Alberts sued for unseaworthiness, negligence, maintenance and cure, and other relief. The district court granted Royal Caribbean's request to compel arbitration.[38]

On appeal of the order compelling arbitration, the Eleventh Circuit first observed that a district court is required by law to compel arbitration if four jurisdictional prerequisites are met: (1) an agreement in writing; (2) arbitration is in the territory of a signatory to the New York

31. *Id.*
32. *Id.* at 554.
33. *Id.*
34. *Id.* at 555.
35. 834 F.3d 1202 (11th Cir. 2016).
36. *Id.* at 1203–04.
37. *Id.* at 1204.
38. *Id.*

Convention; (3) the agreement must arise out of a commercial relationship; and (4) the party to the agreement is either not an American or the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[39] The issue at hand was whether or not Alberts's performance as a musician aboard vessels in international waters "envisages performance . . . abroad."[40]

Alberts argued that "abroad" required his performance take place within a foreign country and not merely in international waters.[41] Royal Caribbean argued that abroad meant anywhere outside of the country.[42] The Eleventh Circuit adopted an intermediate position, holding that abroad meant "in or traveling to or from a foreign state."[43] Conversely, performance in international waters on a voyage from a domestic port to another domestic port would not be considered abroad.[44] Here, however, because Alberts's musical performances occurred during travel in international waters to foreign ports, the arbitration clause was enforceable.[45]

## III. CRUISE LINE PASSENGER CLAIMS

In *Chang v. Carnival Corp.*,[46] the Eleventh Circuit affirmed the trial court's decision to dismiss a passenger's late-filed personal injury lawsuit, declining to apply the doctrine of equitable tolling.[47] The plaintiff alleged that she slipped and fell on a Carnival cruise ship on December 9, 2012. Chang retained California counsel, who engaged in communication with Carnival's claims personnel. On at least two occasions, Carnival's claims personnel specifically told Chang's attorney that Carnival would not waive any rights under the forum selection clause in the passenger's cruise ticket. The ticket required any litigation be pursued in the United States District Court for the Southern District of Florida, as long as there was subject matter jurisdiction to do so. Only if federal subject matter jurisdiction was lacking could the plaintiff then

39. *Id.* (quoting 9 U.S.C. § 202).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 1205.
44. *Id.*
45. *Id.*
46. 839 F.3d 993 (11th Cir. 2016).
47. *Id.* at 996.

pursue claims in state court, and then the forum was contractually specified to be the Circuit Court of Miami–Dade County, Florida.[48]

After switching to Florida counsel, the plaintiff filed a slip-and-fall claim in a Florida state court on December 4 or 6, 2013.[49] Carnival moved to dismiss the state court action, asserting a violation of the ticket's forum selection clause. Shortly thereafter, on March 4, 2014, and before the state court action had been dismissed, the plaintiff filed the instant suit in federal court. The federal lawsuit was filed almost three months after the expiration of the one-year time bar in the passenger ticket.[50] The district court dismissed the suit as untimely.[51] On appeal, the plaintiff argued for an equitable tolling of the contractual limitation found in her passenger ticket.[52]

The Eleventh Circuit first noted that equitable tolling is an extraordinary remedy to be applied only sparingly.[53] Four factors are appropriately considered when assessing the application *vel non* of equitable tolling when a suit was filed timely, albeit in the wrong forum: (1) the state court possessed subject matter jurisdiction concurrently with the federal court; (2) the state suit was dismissed solely on grounds of improper venue; (3) the defendant was aware prior to the expiration that the plaintiff intended to file suit; and (4) the plaintiff was entitled to believe that the state court filing might be sufficient given the fact that defendants often waive their defense of improper venue.[54]

*Booth v. Carnival Corp.*[55] was a remarkably similar case. The plaintiff therein filed suit in state court sixteen days before the expiration of the limitations period. A later federal action in the proper forum was initiated after the expiration of the contractual limitation period.[56] The district court in *Booth*, however, allowed the case to proceed, and the Eleventh Circuit affirmed the court's ruling by holding that equitable tolling was appropriately applied.[57]

The clear distinction between *Booth* and *Chang* was Carnival's unequivocal notice that it would insist on adherence to the forum

48. *Id.* at 994–95.

49. *Id.* at 995. The decision does not explain why there is an ambiguity in the filing date, but either date would be before the contractual time limitation of one year from the date of the injury.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 996.

54. *Id.* at 996–97.

55. 522 F.3d 1148 (11th Cir. 2008).

56. *Id.* at 1149–50.

57. *Id.* at 1149–53.

selection clause, followed by Chang's deliberate actions in ignoring the admonition: "Instead of complying with a provision of the contract that Defendant had explicitly and timely brought to Plaintiff's attention, Plaintiff instead chose to file her suit in the wrong forum. This was not the conduct of the plaintiff in *Booth*."[58]

## IV. THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT CLAIMS

In *Miller v. Navalmar (UK) Ltd.*,[59] a longshoreman filed suit against a vessel owner and time charterer claiming that the negligence of the defendants precipitated his accident and injury while loading cargo aboard the *M/V CARRARA CASTLE*.[60] The United States District Court for the Southern District of Georgia granted summary judgment in favor of the defendants, rejecting the plaintiff's arguments that the vessel interests: (1) maintained active control over the vessel and cargo loading operations, or (2) failed to intervene and remediate a dangerous condition after the stevedore (the injured longshoreman's employer) failed to do so.[61]

The plaintiff's claims against the vessel interests were governed by the familiar trio of duties announced by *Scindia Steam Navigation Co. v. De Los Santos*,[62] and its progeny. Specifically, a vessel owner's duties to the longshoremen working aboard its ship during cargo operations are fairly narrow and well-defined by case law. These duties are generally referred to as (1) the turnover duty; (2) the active control duty; and (3) the duty to intervene.[63]

In *Miller*, the plaintiff argued that both the active control duty and duty to intervene were breached. With respect to the active control argument, the plaintiff and his counsel employed a frequent tactic in § 905(b) litigation by relying on the vessel's internal procedures or guidelines in an effort to impose duties vis-à-vis longshoremen working aboard the ship.[64] In this case, Grieg (the time charterer) had detailed

58. *Chang*, 839 F.3d at 997.

59. 685 F. App'x 751 (11th Cir. 2017).

60. *Id.* at 752. The plaintiff pursued his claims under 33 U.S.C. § 905(b), which permits injured longshoremen to sue vessel interests for damages arising from "the negligence of a vessel." 33 U.S.C. § 905(b) (2018).

61. *Miller*, 685 F. App'x at 753–54.

62. 451 U.S. 156 (1981).

63. Howlett v. Birkdale Shipping Co., 512 U.S. 92, 98 (1994) (naming the three primary duties created by the Supreme Court in *Scindia*).

64. *Miller*, 685 F. App'x at 755–56.

loading procedures in place. There was no evidence, however, that Grieg actually required the stevedore to adhere to such procedures.[65]

Nevertheless, the plaintiff argued that the charterer was actively involved in the cargo operations by virtue of the written procedures, as well as a stow plan furnished to the stevedoring company and the presence of Grieg's port captain aboard the vessel during loading operations.[66] The appellate court rejected these positions, noting that the provision of a stow plan is common in the industry, and it is incumbent upon the stevedore—an independent contractor hired for such expertise—to carry it out.[67] Likewise, the passive presence of supervisory personnel during cargo operations is insufficient to create an active involvement duty.[68]

With respect to the duty to intervene, it is implicated only upon showing that the vessel owner has "actual knowledge of a dangerous condition and actual knowledge that the stevedore, in the exercise of 'obviously improvident' judgment, has failed to remedy it."[69] This is an exceedingly narrow duty and is violated only by the most egregious of circumstances. Here, the plaintiff attempted to show the stow plan necessarily made the vessel interests aware of a dangerous condition (a void in the corner of the stow). Assuming *arguendo*, that the defendants had knowledge of the dangerous condition resulting from use of the plan, the plaintiff still failed to show the vessel had actual knowledge of the stevedore's failure to remedy the problem.[70] In fact, the stevedores loaded the cargo before and after the accident and never brought any problem to the attention of the vessel interests.[71]

*Dixon v. NYK Reefers, Ltd.*[72] is another suit arising from the death of a longshoreman during stevedoring operations.[73] The focus was on the vessel owner's purported duty to intervene in cargo operations. Generally, the ship owner is not required to monitor or inject itself into the work of a stevedore. However, a duty to intervene can be triggered if the owner "becomes aware that the ship or its gear poses a danger to the

65. *Id.* at 756.

66. *Id.* at 755–56.

67. *Id.*

68. *Id.* There was no evidence that the port captain participated in the loading process. *Id.* at 756–57.

69. *Id.* at 757 (quoting Greenwood v. Societe Fancaise De, 111 F.3d 1239, 1248 (5th Cir. 1997)).

70. *Id.* at 757–58.

71. *Id.*

72. 705 F. App'x 819 (11th Cir. 2017).

73. Dixon was killed in the hold of the *M/V WILD LOTUS* when the crane operator accidently landed a 5,500-pound tray on him. *Id.* at 821.

longshoremen and that the stevedore is failing, unreasonably, to protect the longshoreman."[74]

The United States District Court for the Middle District of Florida granted summary judgment in favor of the vessel owner, holding that the plaintiff failed to show that the defendants had a duty to intervene.[75] This appeal ensued. The plaintiff identified three specific examples of an alleged unreasonably dangerous condition, of which the vessel should have been aware. Specifically, the plaintiff cited to (1) the lack of a "header," the stevedore employee who was supposed to oversee the hatch to make sure the landing area is clear; (2) the lack of a "lander," another stevedore employee who clears the deck and communicates with the crane operator; and (3) the lack of radio communication between the longshoremen and crane operator.[76] It was undisputed that there were no defects with the vessel or its appurtenant equipment.[77]

On appeal, the Eleventh Circuit pointed out that there was no evidence the vessel was aware of any of the foregoing problems, and rejected out of hand that the mere presence of the ship's crew in the area was sufficient to impart constructive knowledge of a possible hazard.[78] Further, even if the plaintiff had demonstrated actual knowledge of a potentially unreasonably hazardous condition, the plaintiff failed to show that the ship, its officers, or its crew knew of the stevedore's failure to remedy the problem.[79] The court pointed out that neither the stevedore nor any of its employees or longshoremen ever complained to the vessel interests about unsafe conditions before or during cargo operations.[80]

This holding is consistent with the general proposition that a vessel owner, operator, or charterer is entitled to rely on a stevedore to perform its tasks without supervision. The presence of crewmembers aboard a ship—even if on deck to observe cargo operations—does not translate into a supervisory obligation or duty.[81] Similarly, the fact that the vessel owner, operator, or charterer may have internal documents which address loading operations (such as a stow plan or pre-cargo operation checklist) does not create a duty outside of the narrow confines of *Scindia*

74. *Id.* at 822 (quoting Clark v. Bothelho Shipping Corp., 784 F.2d 1563, 1565 (11th Cir. 1986)).

75. *Id.* at 821.

76. *Id.* at 822–23.

77. *Id.* at 823.

78. *Id.* at 823–24.

79. *Id.* at 824.

80. *Id.*

81. *Id.*

and its progeny.[82] The plaintiff made such an argument almost as an afterthought, citing to the captain's testimony about a pre-cargo operation checklist.[83] Courts appear to uniformly reject this idea, refusing to expand the parameters of *Scindia* and its progeny.[84]

In *Seaboard Spirit, Ltd. v. Hyman*,[85] a longshoreman was killed during the course of cargo operations. The vessel involved was the *SEABOARD SPIRIT*, a "roll-on/roll-off" vessel.[86] At the load port, a third-party stevedore brought the cargo of wheeled containers aboard the vessel. Once aboard the ship, however, the *SEABOARD SPIRIT*'s crew secured the containers.[87] While unloading the cargo at the Port of Miami, Hyman stepped into a pinch point next to a container still aboard the ship. The container's chassis shifted and Hyman was crushed against the vessel's bulkhead.[88]

The vessel owner filed a limitation action seeking exoneration from, or limitation of, liability arising out of Hyman's death.[89] The personal representative of Hyman's estate filed claims in the limitation action, arguing against exoneration and asserting claims under 33 U.S.C. §§ 905(b)[90] and 933[91] of the Longshore and Harbor Workers' Compensation Act.[92]

After a three-day bench trial, the District Court for the Southern District of Florida entered judgment in favor of the vessel owner and against the claimants on the § 905(b) claim.[93] The court left open the possibility that the claimants could pursue a separate negligence action against Seaboard (vessel owner) arising from its actions as the loading

82. *Id.* at 825.

83. *Id.* at 825–26.

84. *See, e.g.*, Horton v. Maersk Line, Ltd., 603 F. App'x 791 (11th Cir. 2015) (rejecting the plaintiff's position that the vessel's Safety Management System Manual required the vessel's officers to supervise and insure safe cargo operations).

85. 672 F. App'x 935 (11th Cir. 2016).

86. *Id.* at 936.

87. *Id.*

88. *Id.* at 937.

89. *Id.*

90. 33 U.S.C. § 905(b) (2018) (providing that longshoremen or their representatives may bring suit for damages caused by the "negligence of a vessel").

91. 33 U.S.C. § 933 (2018) (providing, *inter alia*, that injured workers or their representatives need not elect between receipt of compensation under The Longshore and Harbor Workers' Compensation Act and pursuing a third-party claim).

92. *Seaboard Spirit*, 672 F. App'x at 937.

93. *Id.* at 937–38.

stevedore; recall the ship's crew secured the container trailers after they were brought aboard the *SEABOARD SPIRIT*.[94]

The Eleventh Circuit reversed, holding that the district court erred by allowing the decedent's family an opening to pursue a subsequent action against the vessel owner in its role as stevedore.[95] By its terms, § 905(b) provides the exclusive means of relief against vessel interests for negligence claims advanced by longshoremen.[96] This is the case even if the vessel's crew provided stevedoring services during cargo operations.[97] When this factual situation occurs, the injured longshoreman pursues a claim under § 905(b), but the vessel owner is held to a heightened standard of care; that is, the heightened standard applicable to a stevedore versus the fairly narrow duties generally imposed on a vessel owner by *Scindia* and its progeny.[98]

Evidently, the appellants failed to argue that the district court should be reversed for applying the wrong standard of care. Finding that the claimants abandoned this argument, the Eleventh Circuit affirmed judgment for the vessel owner.[99]

## V. MARINE REPAIR CONTRACTS

In *Mount Sage, Ltd. v. Rolls-Royce Commercial Marine, Inc.*,[100] the Eleventh Circuit reiterated that limitation-of-liability clauses are enforceable in marine repair contracts. The plaintiff was the owner of the *M/Y DOLCE VITA II*, a yacht equipped with a water jet propulsion system. The vessel owner contracted with Rolls-Royce Commercial Marine, Inc. (Rolls-Royce) to purchase parts, perform service, and complete an overhaul of the vessel's water jets.[101] The work was never completed to the owner's satisfaction, and he continued to complain of vibrations and deterioration in the vessel's equipment. The cause was eventually discovered to be misalignment between the engines and water jets.[102] The plaintiff filed suit against the repair shop asserting claims for

94. *Id.* at 938.

95. *Id.* at 941.

96. *Id.* at 940–41. Section 905(b) states, in pertinent part: "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act." 33 U.S.C. § 905(b).

97. *Seaboard Spirit*, 672 F. App'x at 940–41.

98. *Id.* at 939.

99. *Id.* at 941.

100. 635 F. App'x 833 (11th Cir. 2016).

101. *Id.* at 834–35.

102. *Id.* at 835.

breach of express and implied warranties, as well as claiming a violation of the Magnuson–Moss Warranty Act.[103]

Following a jury trial, the district court entered judgment in favor of the vessel owner, but reduced the damages awarded pursuant to the contractual limitation-of-liability clause. Both parties were unhappy with the result, and this appeal followed.[104]

The Eleventh Circuit applied the three-part test set out in *Diesel "Repower," Inc. v. Islander Investments, Ltd.*,[105] to determine whether the limitation of liability clause was enforceable. The clause must: (1) demonstrate clear and unequivocal indication of the parties' intentions; (2) not work to totally absolve the repair shop of all liability but still provide an effective deterrent to negligence; and (3) show that the contracting parties possessed relatively equal bargaining power so as to avoid any overreaching.[106] Determining that there was no evidence of unconscionability or overreaching, and the other prerequisites having been met, the appellate court affirmed the enforcement of the repairer's contractual limitation clause.[107] This limited the vessel owner's relief to (1) the necessary labor and replacement parts to complete warranty repairs and (2) monetary damages capped at 20% of the purchase order price.[108]

## VI. MARINE INSURANCE

### *A. All-Risk Policies*

In *Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*,[109] a marine insurer filed a declaratory judgment action in an attempt to avoid paying a claim following the sinking of its insured's yacht (the *M/Y KAN-DO*). Great Lakes argued that its "all-risk" marine insurance policy should not apply to the sinking of the vessel because (1) the loss was not "accidental or fortuitous," and (2) an exclusion otherwise barred coverage.[110] Finding

103. 15 U.S.C. §§ 2301–12 (2018). The appellate court agreed with the trial court that Magnuson–Moss Act claims were inapplicable to the instant repair transaction. *Mount Sage*, 635 F. App'x at 838.

104. *Mount Sage*, 635 F. App'x at 836. The limitation clause excluded "indirect, consequential, special, or incidental damages of any kind" and capped the repairer's monetary liability to "twenty percent (20%) of that total price of the purchase order that gives rise to the claim." *Id.* at 835.

105. 271 F.3d 1318 (11th Cir. 2001).

106. *Mount Sage*, 635 F. App'x at 836–37.

107. *Id.* at 837.

108. *Id.*

109. 639 F. App'x 599 (11th Cir. 2016).

110. *Id.* at 600.

that the cited exclusionary language was ambiguous, the District Court for the Middle District of Florida entered judgment in favor of the vessel owner. This appeal followed.[111]

On November 5, 2012, the *M/Y KAN-DO* sank in its slip due to water intrusion. It was determined that the bilge pump failed, allowing the boat to take on water and sink. The bilge pump failed because of a blown fuse. The cause of the blown fuse was never determined. It was agreed, however, that the cause of the loss was not due to excessive wear and tear or lack of maintenance.[112]

An all-risk policy is what the name implies: an insurance policy to "cover all 'fortuitous' losses, 'unless the policy contains a specific provision expressly excluding the loss from coverage.'"[113] To recover under an all-risk policy, the insured must show that a loss occurred because of a fortuitous event.[114] This burden is light, as the purpose of an all-risk policy is to protect the insured "in those cases where difficulties of logical explanation or some mystery surround the (loss of or damage to) property."[115] Thus, the insured is not obligated to prove the precise cause of loss or damage.[116] The Eleventh Circuit agreed with the district court that the vessel owner met its initial burden of establishing a fortuitous loss.[117] This shifted the burden of proof to Great Lakes to demonstrate that the otherwise covered loss was excluded by some policy language.[118]

Great Lakes argued the policy excluded damage to the vessel's engines and its mechanical and electrical parts, "*unless caused by an accidental external event*, such as collision, impact with a fixed or floating object, grounding, stranding, ingestion of a foreign object, lightning strike or fire."[119] The district court concluded that the referenced exclusion, when read in conjunction with the scope of coverage in another part of the policy, created ambiguity.[120] Thus, it was appropriate to construe the

111. *Id.*

112. *Id.*

113. *Id.* at 601 (quoting Dow Chem. Co. v. Royal Indem. Co., 635 F.2d 379, 386 (5th Cir. 1981)).

114. *Id.*

115. *Id.* (quoting Morrison Grain Co. v. Utica Mut. Ins. Co., 632 F.2d 424, 430 (5th Cir. 1980)).

116. *Id.*

117. *Id.* at 602.

118. *Id.*

119. *Id.*

120. *Id.* at 603. For clarity, it is worth quoting the trial court's reasoning:

> Here, the district court concluded that Exclusion r created ambiguity in the policy because, giving the ordinary meaning to the operative terms in both

contact against Great Lakes and in favor of extending coverage to the insured.[121]

The Eleventh Circuit disagreed, and held that the district court erred in finding an ambiguity based on the fact that the same terms appeared in both a coverage section and an exclusionary clause.[122] It is, as the appellate court pointed out, the "very nature of an insurance contract" that "exclusions in coverage are expressly intended to modify coverage clauses and to limit their scope."[123] The appellate court remanded the case for further factual development, pointing out that the scope of the cited exclusion (vessel's engines and its mechanical and electrical parts), was narrower than the extent of the policy's coverage (the vessel itself).[124]

### *B. Bad Faith Claims*

*Atlantic Specialty & Co. v. Mr. Charlie Adventures, LLC*,[125] is a marine insurance case involving a fire aboard the *M/Y MR. CHARLIE*. The vessel was insured by Atlantic Specialty & Co. (Atlantic) which, after investigating the claim, denied coverage. Atlantic also filed the instant declaratory judgment action, which prompted the insured to pursue a counterclaim for bad faith and breach of contract.[126] After striking the expert reports tendered by the insurance company, the United States District Court for the Southern District of Alabama granted judgment in favor of the vessel owner, finding coverage existed for the loss.[127] In doing so, the court rejected a theory advanced by the insurance company—supported by its now discredited experts—that marine growth on the starboard intake screen restricted the flow of seawater needed to cool the engine, thus causing it to overheat.[128] Despite striking the expert reports, the district court found that the reports did provide the insurance company with an arguable basis to deny the claim.[129] Summary judgment

> Coverage A and Exclusion r—such as "mechanical parts," "machinery," and "equipment"—"many of the same parts of the *Kan-Do* could reasonably fall under either Coverage 'A' or Exclusion 'r,' thus creating ambiguity."

*Id.*

121. *Id.*

122. *Id.*

123. *Id.* (quoting Ajax Bldg. Corp. v. Hartford Fire Ins. Co., 358 F.3d 795, 798–99 (11th Cir. 2004)).

124. *Id.* at 604.

125. 644 F. App'x 922 (11th Cir. 2016).

126. *Id.* at 923.

127. *Id.* at 925.

128. *Id.*

129. *Id.* (holding that plaintiff offered "no evidence showing that, at the time it denied his claim, Atlantic knew or had reason to know that the expert reports were unreliable").

was granted in favor of the insurance company on the insured's bad faith claims.[130]

On appeal, the Eleventh Circuit reversed. The case is governed by Alabama law and the decision provides an overview of the state's jurisprudence on alleged bad faith failure to investigate and pay first-party property claims. The question is whether the carrier had an arguable reason to deny the claim in the first instance.[131] Running through a litany of obvious errors with the expert reports, the Eleventh Circuit held that the plaintiff had "proffered sufficient evidence to create a triable issue as to whether Atlantic had an arguable reason to deny his claim."[132] The case was remanded back to the trial court for further proceedings.[133]

The decision presents a cautionary tale with respect to insurance claims and reliance on experts to make coverage determinations. The mistakes made by the two experts involved were discussed in some detail by the appellate court.[134] Closer scrutiny might have prompted additional investigation, or a decision to simply pay the claim in the first instance.

## VII. MARITIME LIENS AND ATTACHMENT PROCEEDINGS

The Eleventh Circuit weighed in on the O.W. Bunker bankruptcy proceedings, and the ensuing chaotic fallout therefrom, in the decision *Barcliff, LLC v. M/V DEEP BLUE*.[135] The dispositive question, as in almost all of the related litigation, turns on who is entitled to a lien for bunker fuel supplied to a vessel.[136] Is it the physical supplier, which actually delivered the product and remains unpaid? Or, as more often than not, is it a distant creditor that took a security interest in accounts receivable from the now defunct parent company (O.W. Bunker Group)?

The *M/V DEEP BLUE* is a pipe-laying vessel owned by Technip UK Ltd. To obtain bunkers (marine fuel) for the *M/V DEEP BLUE*, Technip requested bids from various fuel suppliers. The low bid came from O.W. Bunkers UK Ltd. (O.W. UK). O.W. UK did not physically supply the fuel

130. *Id.* The insured alleged that the insurance company intentionally (1) failed to properly investigate the claim and (2) failed to pay the claim in the absence of any reasonable or arguable basis for such refusal. *Id.* at 925–26 (discussing Alabama law, which governed the bad-faith claims).

131. *Id.* at 925–27.

132. *Id.* at 927.

133. *Id.*

134. *Id.* at 924–25.

135. 876 F.3d 1063 (11th Cir. 2017).

136. *See, e.g.*, Clearlake Shipping PTE, Ltd. v. O.W. Bunker (Switzerland) SA, 239 F. Supp. 3d 674 (S.D.N.Y. 2017).

to the vessel. Instead, it contracted with its U.S. counterpart, O.W. Bunker USA, Inc. (O.W. USA) to take up this task. In turn, O.W. USA contracted with Barcliff, LLC d/b/a Radcliff/Economy Marine Services (Radcliff) to actually deliver bunkers to the *M/V DEEP BLUE* in Mobile, Alabama. Invoicing for the sale worked in reverse, Radcliff billed O.W. USA, which billed O.W. UK, which then billed Technip for the fuel supplied to the *M/V DEEP BLUE*.[137]

Radcliff delivered bunkers to the ship on November 1, 2014. Less than a week later, on November 7, 2014, the O.W. entities' parent company (O.W. Bunker Group) filed bankruptcy in Denmark.[138] The fallout was widespread and immediate, with the American entity (O.W. USA) filing bankruptcy in Connecticut on November 13, 2014.[139] Radcliff was left holding the proverbial bag, in this case, an unpaid invoice in the amount of $699,550.[140]

Filing suit in the District Court for the Southern District of Alabama and asserting a maritime lien against the *M/V DEEP BLUE*, Radcliff demanded payment for the necessaries delivered to the vessel.[141] Joining the fray at this point was ING Bank, N.V. (ING). ING had entered into a credit agreement to loan money to the O.W. Bunker Group, and the credit was secured by O.W. Bunker Group's receivables due from various and sundry customers around the world.[142] In the district court, ING opposed Radcliff's assertion of a maritime lien, claiming that ING actually possessed a lien on the *M/V DEEP BLUE*. Specifically, ING alleged that O.W. UK supplied bunkers to the *M/V DEEP BLUE* through subcontractors. Technip had not yet paid O.W. UK, so O.W. UK held the lien on the vessel pending payment.[143] Coupled with ING's security interest in the accounts receivable, ING claimed that it, not Radcliff, was entitled to be paid for the bunkers supplied to the *M/V DEEP BLUE*. Technip, understandably, just wanted to pay once for the fuel, so it deposited the balance due ($705,529.50) into the registry of the court.[144]

Following a bench trial, the district court determined that Radcliff was not entitled to a lien under the Federal Maritime Lien Act.[145] Further,

137. *Barcliff*, 876 F.3d at 1065–66.

138. *Id.* at 1066.

139. *Id.* at 1066–67.

140. *Id.* at 1066.

141. *Id.* at 1067.

142. *Id.*

143. *Id.*

144. *Id.*

145. 46 U.S.C. § 31342 (2018) (now codified under the heading "Commercial Instruments and Maritime Liens"). The Federal Maritime Lien Act requires a claimant

the district court found that ING, by virtue of its standing in the shoes of the "supplier" and having received assignment of accounts receivable from O.W. Bunker Group, was entitled to the lien and receipt of the funds in the court's registry.[146] Understandably upset by the fact that it was not paid for the fuel it sold, Radcliff appealed.[147]

The decision about Radcliff's standing to assert a maritime lien is actually fairly straightforward under Eleventh Circuit precedent. Although Radcliff physically supplied the fuel to the *M/V DEEP BLUE*, it did so only at the end of a buy-and-sell chain strung together by various subcontractors working between the vessel owner and the end result (for example, Radcliff's physical supplying of fuel). The Eleventh Circuit surmised the law in this regard as follows: "[w]here the owner directs a general contractor to provide necessaries to its vessel, a subcontractor retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien."[148] Under the general rule, therefore, Radcliff did not have a maritime lien on the *M/V DEEP BLUE*.[149]

Turning to the status of ING as proper lien holder having received assignment rights pursuant to its credit agreement with the O.W. Bunker Group, the Eleventh Circuit again affirmed the decision of the trial court awarding payment to ING. First, it was clear that O.W. UK obtained a lien on the *M/V DEEP BLUE* because it "provided" fuel to the vessel within the meaning of the Federal Maritime Lien Act.[150] This analysis comports with basic contractual principles, inasmuch as a party can delegate performance that, once this occurs, satisfies the principal's obligations.[151] Indeed, this issue seems to have already been decided by *Galehead, Inc. v. M/V ANGLIA*,[152] which was cited and relied upon in *Barcliff* as controlling precedent.[153]

Likewise, the assignment question was easily disposed of. A review of the security agreement between ING and the debtor reflected an intent

asserting a maritime lien to demonstrate that it supplied "necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342(a) (2018).

146. *Barcliff*, 876 F.3d at 1067.

147. *Id.*

148. *Id.* at 1071. Absent facts indicating the owner designated the general contractor to act as its agent and procure necessaries on its behalf, a general contractor does not have the authority to bind the ship or its owner. *Id.* In the instant case, the parties stipulated that none of the O.W. entities were Technip's agents. *Id.* at 1068.

149. *Id.* at 1071.

150. *Id.* at 1073–74.

151. *Id.*

152. Galehead, Inc. v. M/V ANGLIA, 183 F.3d 1242, 1245 (11th Cir. 1999).

153. *Barcliff*, 876 F.3d at 1073–74.

to include all monetary sums owed for "supply receivables," such as the money owed by Technip for delivery of fuel.[154] It was reasonable, when viewed in the proper context, that any security for the debt (like a maritime lien) would follow this assignment as well.[155] Accordingly, the Eleventh Circuit upheld the district court's determination that O.W. UK had a lien on the vessel, such right had been properly assigned to ING, and that ING was entitled to collect the money from Technip.[156]

The plaintiffs in *SCL Basilisk AG v. Agribusiness United Savannah Logistics, LLC*[157] attempted to attach the defendants' assets to obtain security in aide of London arbitration.[158] The defendants were the voyage charterers of the *M/V SCL BASILISK*. The vessel was detained by a non-party on an unrelated claim, pursuant to a writ of attachment in the United States District Court for the Eastern District of Louisiana.[159] Charterers delayed posting security to release the vessel and, as a result, the plaintiffs incurred significant damages. London arbitration was initiated according to the terms of the voyage charter agreement.[160]

After commencing the London arbitration, the plaintiffs filed a petition in the District Court for the Southern District of Georgia to obtain security in aide of foreign arbitration. The plaintiffs' petition sought relief through both Rule B "attachment,"[161] as well as a recently enacted Georgia statute allowing a party to seek "an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement."[162]

The district court held an expedited hearing, but denied the requested relief, determining that the Rule B attachment was unavailable since all of the listed defendants were present within the district.[163] Turning to Georgia law, the district court found that it could not apply a state statute that would frustrate the uniformity of maritime law: "[A]llowing

154. *Id.* at 1074–75.

155. *Id.* at 1075.

156. *Id.* The inequities of this result are readily apparent (to the Author, at least), but the Eleventh Circuit was not ready to lend Radcliff a shoulder to cry on: "[B]y entering into a contractual relationship exclusively with O.W. USA, Radcliff became O.W. USA's creditor. It is assuredly not the only one . . . . It was Radcliff's right to gamble, but its choice should elicit no sympathy." *Id.* at 1073 n.15.

157. 875 F.3d 609 (11th Cir. 2017).

158. *Id.* at 612.

159. *Id.* A letter of indemnity requiring charterers to post security if the vessel was arrested or detained was issued along with the executed voyage charter party. *Id.*

160. *Id.*

161. FED. R. CIV. P. supp. B.

162. O.C.G.A. § 9-9-30 (2018).

163. *SCL Basilisk,* 875 F.3d at 612–13.

plaintiffs to seek attachment outside of the rules would not only subject entities to varying security and attachment requirements, it would also allow them to bypass the procedural requirements of the Supplemental Rules."[164]

The Eleventh Circuit made short work of the Rule B argument. Rule B has the twin purposes of securing jurisdiction over an absent defendant (one not found within the district), as well as providing security in the event of a future award.[165] Because the defendants were admittedly within the Southern District of Georgia, attachment under Rule B was not permissible: "The two purposes may not be separated, however, for security cannot be obtained except as an adjunct to obtaining jurisdiction."[166]

The Eleventh Circuit then turned to the analysis under Georgia law, specifically Official Code of Georgia Annotated section 9-9-30.[167] This is a section within Georgia's recently enacted International Commercial Arbitration Code.[168] Again, the referenced provision allows a litigant to petition a court for "an interim measure of protection," before or during arbitral proceedings.[169] Essentially, the Eleventh Circuit cast § 9-9-30 as an "enabling statute," devoid of any substantive remedial power. It was incumbent on the litigant seeking relief to identify and employ substantive remedies (such as attachment) if available pursuant to a specific state law.[170] Here, it was acknowledged that Georgia did provide relief in the form of attachment and garnishment. The plaintiffs at the trial court level never cited or pursued such remedies; instead, they apparently sought only "an order requiring the posting of security pursuant to Georgia Code . . . § 9-9-30."[171]

164. *Id.* at 614. Of course, Rule 64 of the Federal Rules of Civil Procedure contemplates that state law remedies are available to litigants in federal court. FED. R. CIV. P. 64. Rule 64(b) lists specific examples which include arrest, attachment, and garnishment. FED. R. CIV. P. 64(b). The Eleventh Circuit noted that some of these are specifically available under Georgia law such as attachment and garnishment. *See* O.C.G.A. tit. 18 chs. 3, 4.

165. *SCL Basilisk,* 875 F.3d at 615.

166. *Id.* (quoting Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 582 (2d Cir. 1963)).

167. O.C.G.A. § 9-9-30.

168. O.C.G.A. tit. 9 ch. 9 art. 1 pt. 2. Georgia's statute is based on the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration (UNCITRAL Model Law). *See SCL Basilisk AG*, 875 F.3d at 616.

169. O.C.G.A. § 9-9-30.

170. *SCL Basilisk*, 875 F.3d at 618–19. The Eleventh Circuit determined such reading of O.C.G.A. § 9-9-30 was consistent with the commentaries to the UNCITRAL Model Law, upon which the Georgia statute was based. *See id.* at 617.

171. *SCL Basilisk*, 875 F.3d at 616.

A last-ditch effort by appellants relied on the equitable powers of an admiralty court to fashion relief appropriate for the circumstances presented. The Eleventh Circuit rejected this approach and its concomitant reliance upon *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*.[172] There is language in *Leonhardt* suggesting that a district court, sitting in admiralty, may tailor appropriate prejudgment remedies pursuant to its equitable power.[173] The Eleventh Circuit refused to take an expansive view of this practice in light of congressional authority to alter historical powers of an admiralty court, which had been done with the enactment of the Supplemental Rules.[174] "[D]istrict courts still may apply and adapt their inherent admiralty powers as long as they do so consistently with the Supplemental Rules."[175] Because of the limiting dictates of Supplemental Rule B (that is, it cannot separate jurisdiction from security), any exercise of the court's equitable power to order attachment solely for security would be prohibited.[176]

In the Author's humble opinion, this is a particularly harsh result given the unique vagaries of maritime actors and the likely inability to find assets with which to satisfy any award rendered in arbitration. In fact, this was the starting point for the Eleventh Circuit's discussion and analysis.[177] It seems the district court, followed by the appellate court, went to lengths to exalt form over function; that is, failure to cite specific state law statutes providing the substantive relief requested, even though it was clear from the pleadings what relief was being sought. Again, Rule B incorporates by reference Rule 64 of the Federal Rules of Civil Procedure,[178] which allows litigants to use state law remedies "however designated." There is no requirement for talismanic words or magic language which, in years gone by, would often catch unwary litigants off guard. From the Author's view, the result in this case is an impermissible return to such rigid doctrine.

172. 773 F.2d 1528 (11th Cir. 1985) (en banc).

173. *Id.* at 1533.

174. *SCL Basiliksk*, 875 F.3d at 621.

175. *Id.* at 622.

176. *Id.*

177. *See id.* at 614 ("Maritime parties are peripatetic, and their assets are often transitory.") (internal quotations omitted).

178. FED. R. CIV. P. 64.

## VIII. MARITIME DRUG LAW ENFORCEMENT ACT

This Article summarizes three criminal decisions, all addressing matters within the Maritime Drug Law Enforcement Act (MDLEA).[179] The first is *United States v. Iguaran*,[180] where the defendant pled guilty to conspiracy to distribute cocaine while aboard a vessel subject to the jurisdiction of the United States.[181] On appeal, Iguaran argued that the District Court for the Southern District of Florida lacked subject matter jurisdiction because the record failed to establish that the vessel upon which he was apprehended was, in fact, "subject to the jurisdiction of the United States."[182]

Thus, the threshold inquiry—but not an element of the underlying offense[183]—is that the district court have jurisdiction over the vessel involved: "[T]he Government must preliminarily show that the conspiracy's vessel was, when apprehended, 'subject to the jurisdiction of the United States.'"[184]

In the case at hand, the district court did not make any factual findings with respect to jurisdiction.[185] The defendant's plea agreement simply stipulated to the fact that he was aboard a vessel that was subject to the jurisdiction of the United States.[186] The Eleventh Circuit pointed out that parties may not stipulate to jurisdiction, although they may stipulate to facts that otherwise establish the federal court's jurisdiction.[187] In this case, the plea agreement was devoid of such predicate facts. The court remanded the matter to the district court "for the limited purpose of determining whether subject matter jurisdiction exists" and to assess whether the government had met its burden of establishing the vessel involved was indeed subject to the jurisdiction of the United States.[188]

The case may be important to those practicing criminal law in the maritime realm. The threshold inquiry in any federal proceeding is subject matter jurisdiction. Whether a civil or criminal action, the parties

179. U.S.C. tit. 46 ch. 705 (2018).

180. 821 F.3d 1335 (11th Cir. 2016).

181. 46 U.S.C. § 70503(a)(1) (2018).

182. 46 U.S.C. § 70502(c)(1) (2018). The MDLEA lists multiple examples of when a vessel would be "subject to the jurisdiction of the United States," including a vessel without nationality or a vessel flagged by a country which has given consent to U.S. law enforcement activities. *See* 46 U.S.C. § 70502(c)(1)(A), (C) (2018).

183. 46 U.S.C. § 70504(a) (2018).

184. *Iguaran*, 821 F.3d at 1336 (quoting United States v. De La Garza, 516 F.3d 1266, 1272 (11th Cir. 2008)).

185. *Id.* at 1337.

186. *Id.*

187. *Id.*

188. *Id.* at 1338.

cannot stipulate to the same. Subject matter jurisdiction either exists for the federal court or it does not.

In *United States v. Wilchcombe*,[189] the United States Coast Guard intercepted a small vessel traveling between Haiti and the Bahamas. During the chase, multiple bales of cocaine and marijuana were thrown overboard. The small boat eventually stopped, and the men aboard taken into custody.[190] The vessel was registered in the Bahamas, so the Coast Guard requested that the Bahamian government provide a statement of no objection (SNO) which would allow Coast Guard personnel to board the subject vessel for law enforcement reasons.[191] The Bahamian government confirmed that the vessel was registered in the Bahamas and provided the SNO.[192] The occupants of the subject vessel eventually pled guilty or were convicted for various and sundry crimes, including charges under the MDLEA for conspiracy to possess with intent to distribute drugs while aboard a vessel subject to the jurisdiction of the United States.[193]

There were several issues raised on appeal. Germane for present purposes, however, is the argument that the federal government failed to establish jurisdiction over the vessel because the SNO obtained from the Bahamian government was invalid.[194] Under the MDLEA, a foreign nation can consent or waive its objection to law enforcement activity of the United States by verbal confirmation received over radio, telephone, or similar electronic means.[195] The defendants here argued the language in the SNO received from the Bahamian government failed to precisely follow the language contained in the MDLEA.[196] The Eleventh Circuit has previously approved SNOs that did not mirror exactly the language of the MDLEA: "[W]e reiterate that, as long as the substance of the consent or waiver is communicated, the language contained in SNOs need not exactly track the language contained in § 70502(c)(1)(C) to satisfy the requirements of the MDLEA."[197]

The last in the trio of MDLEA cases is *United States v. Cruickshank*.[198] The defendant was aboard the vessel *VENUS*, located in international

189. 838 F.3d 1179 (11th Cir. 2016).
190. *Id.* at 1184.
191. *Id.* at 1184–85.
192. *Id.*
193. *Id.* at 1185.
194. *Id.* at 1186.
195. 46 U.S.C. § 70502(c)(2)(A) (2018).
196. *Wilchcombe*, 838 F.3d at 1186.
197. *Id.* at 1187.
198. 837 F.3d 1182 (11th Cir. 2016).

waters, and carrying 171 kilograms of cocaine when the ship was intercepted by the United States Coast Guard. Cruickshank was convicted and sentenced to a lengthy prison term for conspiracy to possess with intent to distribute drugs while aboard a vessel subject to the jurisdiction of the United States.[199] Challenging the federal court's jurisdiction as well as the constitutionality of the MDLEA, Cruickshank appealed.[200]

Unsurprisingly, the Eleventh Circuit rejected both arguments. This case is interesting for its brief background discussion of the congressional authority to enact the MDLEA pursuant to the "Felonies Clause,"[201] which authorizes the federal government to define and punish felonies committed on the high seas.[202] The court further noted that the criminal act does not need a nexus to the United States in order to come within the purview of the MDLEA, "because the Felonies Clause empowers Congress to punish crimes committed on the high seas, and because 'the trafficking of narcotics is condemned universally by law-abiding nations.'"[203]

## IX. SALVAGE

Salvage cases are always interesting from a factual and historical standpoint. The opinions often include tales of lost gold and ships floundering in hurricanes and treacherous weather, all leading to the present-day legal fight over who is entitled to the recovered treasure. The decision in *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*,[204] presents a good overview of this unique field within admiralty law. Salvors, Inc. was the successor-in-interest to Cobb Coin Company (Cobb). In 1979, Cobb pulled a single cannon from a field of debris off the coast of south Florida, near Vero Beach. The wreckage was believed to come from the remains of the "Almiranta of the New Spain Group of the 1715 Plate Fleet, known to the Spanish by two names: San Christo del Valle and Nuestra Senora de la Concepcion."[205] Cobb filed suit in the District Court for the Southern District of Florida, using the cannon to establish *in rem* jurisdiction.[206] Cobb requested an order granting it exclusive rights to salvage the shipwreck. Eventually, after addressing claims by

199. *Id.* at 1186–87.
200. *Id.* at 1187.
201. U.S. CONST. art. 1, § 8, cl. 10.
202. *Cruickshank*, 837 F.3d at 1188.
203. *Id.* (quoting *Campbell,* 743 F.3d at 810).
204. 861 F.3d 1278 (11th Cir. 2017).
205. *Id.* at 1283.
206. *Id.*

the State of Florida to the wreck, the court entered an order in 1982 granting Cobb exclusive rights to proceed with salvage operations, subject to the requirement that it appear yearly for a distribution hearing. Cobb and its successors-in-interest did so for the following three decades.[207]

In 2010, 1715 Fleet-Queens Jewels, LLC (1715 Fleet), a successor-in-interest to Cobb, engaged subcontractors to assist with the salvage operations.[208] One of the subcontractors was Gold Hound, LLC (Gold Hound). Gold Hound eventually developed and used proprietary software and maps to assist in this endeavor. In 2013, 1715 Fleet attempted to renegotiate the contract with Gold Hound, requiring that Gold Hound surrender ownership of its intellectual property (proprietary maps and computer software). When the parties could not come to terms, Gold Hound was no longer allowed to work on the wreck site.[209]

Before the 2014 distribution hearing, Gold Hound filed a motion to intervene in order to protect its interests and recover certain property allegedly discovered using the proprietary materials.[210] The court denied the motion to intervene, finding it to be untimely. At the 2015 distribution hearing, Gold Hound filed a claim asserting a maritime lien over certain artifacts.[211] The district court concluded that Gold Hound was not entitled to recover under its lien claim, and Gold Hound appealed.[212]

The first argument advanced by Gold Hound on appeal was that the district court lacked *in rem* jurisdiction. This was quickly disposed of by the appellate court, reiterating the understanding that *in rem* jurisdiction can be actual or constructive.[213] The trial court obtained constructive *in rem* jurisdiction over the entirety of the shipwreck by virtue of the cannon used as the *in rem* lynchpin in 1979, and jurisdiction continued to remain valid for the ensuing decades.[214] The substantive arguments on appeal were, essentially, that the district court erred in denying Gold Hounds' motion to intervene in the 2014 distribution

207. *Id.* at 1283–84.

208. *Id.* at 1284.

209. *Id.*

210. *Id.*

211. *Id.* at 1285.

212. *Id.*

213. *Id.* at 1286–87.

214. *Id.* at 1289. There was a second jurisdictional argument arising out of the Abandoned Shipwreck Act, U.S.C. tit. 43 ch. 39 (2018). This Act was enacted in 1988, several years after the district court exercised its exclusive admiralty jurisdiction over the rest brought before the court by Cobb. The Abandoned Shipwreck Act has a specific section precluding retroactive application. 43 U.S.C. § 2106(c) (2018).

hearing, as well as denying the maritime lien filed by Gold Hound in the 2015 distribution hearing.[215]

The Eleventh Circuit provided a comprehensive overview of standing necessary for intervention, finding that Gold Hound easily met the threshold inquiry (that is, an injury-in-fact, a connection between claimed injury and the defendant's conduct, and a likelihood that a favorable decision would redress the injury).[216] Recall that the decision for the 2014 distribution hearing turned on the alleged untimeliness of Gold Hound's motion to intervene. There was no significant delay between the order setting the date of the 2014 distribution hearing and Gold Hound's motion to intervene. The appellate court determined there was no suggestion or showing of prejudice to the interested parts, but that Gold Hound was undoubtedly prejudiced since it was not allowed to participate.[217] Gold Hound fully satisfied the requirements for intervention under Rule 24 of the Federal Rules of Civil Procedure[218] as well as the local admiralty rules. The Eleventh Circuit held that the trial court erred by denying Gold Hound's motion to intervene in the 2014 distribution hearing.[219]

Turning to the 2015 distribution hearing, the appellate court held that Gold Hound may have a maritime lien associated with the salvage of treasure subject to distribution during that proceeding.[220] Maritime liens arise from salvage services, although a claimant need not actually salvage the property.[221] "[A]ll who engaged in the [salvage] enterprise and materially contributed to the saving of the property, are entitled to share in the reward . . . ."[222] Since the district court denied Gold Hound's lien claim without considering whether its contributions—the proprietary maps and software—might have contributed to the recovery, it was deemed appropriate to reverse and remand the trial court's decision for further evaluation of this issue.[223]

A salvor's appeal in *Girard v. M/Y BLACKSHEEP*,[224] corrected earlier (and erroneous) panel precedent as to the elements necessary to obtain a salvage award. While at anchor a few hundred feet offshore at or near

215. *See Salvors, Inc.*, 861 F.3d at 1282.
216. *Id.* at 1292–94.
217. *Id.* at 1294–95.
218. FED. R. CIV. P. 24.
219. *Salvors, Inc.*, 861 F.3d at 1295.
220. *Id.* at 1298–99.
221. *Id.* at 1297–98.
222. *Id.* (quoting *The BLACKWALL*, 77 U.S. (10 Wall.), at 12).
223. *Id.* at 1298–99.
224. 840 F.3d 1351 (11th Cir. 2016).

Key West, Florida, a 125-foot yacht, known as the *M/Y BLACKSHEEP*, began to take on a significant amount of water after its port propeller shaft dislocated from the gearbox.[225] The yacht's captain made a distress call which was repeated by the U.S. Coast Guard to marine interests and vessels in the area. Arnaud Girard, a professional maritime salvor, responded within four minutes of the Coast Guard's message.[226] He proceeded to dewater the *M/Y BLACKSHEEP* and install a temporary patch to limit the intake of water. The vessel was eventually towed into dock by another entity.[227]

Girard filed suit against the vessel, *in rem*, seeking a salvage award. After a bench trial, the District Court for the Southern District of Florida found that Girard was not entitled to such relief. Applying the test outlined in *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*,[228] the trial court determined that Girard failed to demonstrate that the *M/Y BLACKSHEEP* "could not have been rescued without the salvor's assistance."[229] Girard appealed, arguing that the extra element of showing (essentially) that "but for" the salvor's efforts the ship would have been lost was incongruent with Supreme Court and United States Court of Appeals for the Fifth Circuit precedent.[230]

In *Klein*, an Eleventh Circuit panel held that to receive a salvage award, the salvor had to prove three elements: (1) a maritime peril from which the ship could not have been rescued without the salvor's assistance; (2) a voluntary act, not one bound by official or legal duty; and (3) success in whole or part to save the property.[231] The district court opined that Girard failed to show "what would have happened to the Vessel had [he] not arrived on-scene," ostensibly required by the first prong of *Klein*.[232]

On appeal, the Eleventh Circuit reversed, holding that *Klein* wrongfully engrafted an additional requirement onto Supreme Court and prior Fifth Circuit precedent vis-à-vis salvage awards. Specifically, the first element under *Klein*—a marine peril from which the ship could not have been rescued without the salvor's assistance—contained an impermissible caveat that the salvor show that, but for his efforts, the

225. *Id.* at 1353.

226. *Id.*

227. *Id.*

228. 758 F.2d 1511 (11th Cir. 1985).

229. *Girard*, 840 F.3d at 1354.

230. *Id.*

231. *Id.* at 1353.

232. *Id.* at 1354. "Because Mr. Girard failed to meet [his] burden under *Klein* by proving that the ship 'could not have been rescued without his assistance,' the District Court found that Mr. Girard was not entitled to a salvage award." *Id.* at 1353.

vessel would have been lost. This is inconsistent with Supreme Court and prior Fifth Circuit precedent, which requires only the showing of a marine peril.[233]

In conclusion, the Eleventh Circuit stripped the superfluous requirement engrafted by *Klein*, removing the "but for" test erroneously applied by the district court.[234] The case was reversed and remanded for determination of whether or not Girard contributed to saving the *M/Y BLACKSHEEP* and, if so, the value of any award to be made.[235]

## X. SOVEREIGN IMMUNITY

In *Thacker v. Tennessee Valley Authority*,[236] the Eleventh Circuit addressed the sovereign immunity protections applicable to the Tennessee Valley Authority (TVA). The TVA is an agency of the United States government charged with developing dams on the Tennessee River and its tributaries for flood control and power generation services.[237] Although the Tennessee Valley Authority Act[238] expressly provides that the entity "' [m]ay sue and be sued in its corporate name,"'[239] Eleventh Circuit precedent holds that, "TVA cannot be subject to liability when engaged in governmental functions that are discretionary in nature."[240] In the instant case, one recreational boater was killed and another seriously injured when the TVA attempted to raise a downed power line and related equipment that was partially submerged in the Tennessee River.[241] At the same moment the TVA began to lift the electric conductor and the wire, the recreational vessel passed through the area at a high rate of speed; the vessel and its occupants struck the conductor, seriously injuring one occupant and killing the other.[242] The TVA was sued for negligent acts, specifically (1) failure to use reasonable care in assembly and installation of power lines

233. *Id.* at 1353–55. The appellate court held that the decision in *Klein* to add an extra hurdle (demonstration of necessity) erroneously conflicted with prior Supreme Court and panel precedent. It was therefore appropriate for a subsequent panel decision to remedy this issue. *Id.* at 1355. The Court re-affirmed that the second and third elements of a salvage award claim, as set out in *Klein*, do comport with precedent, and "thus remain good law." *Id.* at 1355 n.2.

234. *Id.* at 1355.

235. *Id.*

236. 868 F.3d 979 (11th Cir. 2017).

237. *Id.* at 981.

238. 16 U.S.C. § 831(c) (2018).

239. *Thacker*, 868 F.3d at 981 (quoting 16 U.S.C. § 831(b) (2018)).

240. *Id.*

241. *Id.* at 980.

242. *Id.*

across the Tennessee River and (2) failure to exercise reasonable care to warn boaters of the hazards the TVA created.[243] The district court dismissed the suit for lack of subject matter jurisdiction, finding that the TVA enjoyed sovereign immunity from suit and no waiver of such immunity was otherwise applicable.[244]

The Eleventh Circuit affirmed, finding that the work involved fell within the TVA's discretionary function immunity.[245] The court's analysis began by noting that the discretionary function exception applies to TVA's commercial, power-generating activities.[246] The discretionary function exception is distilled from the test developed for Federal Tort Claims Act[247] cases, and involves a two-part test: (1) whether the action is discretionary or a matter of choice, as opposed to a task which is specifically directed or controlled by federal statute, regulation, or policy; and (2) "whether the conduct at issue involves the kind of judgment designed to be shielded by the discretionary function exception."[248] In the case at bar, there was no specific federal statute, regulation, or policy directing how the TVA employees should raise a power line and equipment from the river. With respect to the second step, the Eleventh Circuit agreed that the TVA's actions involved public policy considerations which implicated allocation of resources, public safety, costs concerns, and the like.[249] The appellate court affirmed the district court's dismissal of the suit for lack of subject matter jurisdiction based on the TVA's immunity from suit.[250]

This result seems particularly harsh, leaving a seriously injured boater and the survivors of the decedent without any recourse or remedy. The decision states that the boaters were participating in a local fishing tournament at the time of the accident.[251] There was no discussion of whether or not the TVA was aware of the tournament and the corresponding boat traffic in the area. Likewise, there was no discussion of what steps the TVA took (if any) to warn boaters of the serious hazard posed by stringing wire and equipment across an active waterway.

243. *Id.* at 982.

244. *Id.* at 980–81.

245. *Id.* at 983.

246. *Id.* at 981.

247. U.S.C. tit. 28 ch. 171 (2018).

248. *Thacker*, 868 F.3d at 983. This assessment is premised on the need to "prevent judicial 'second-guessing' of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* (internal citations omitted).

249. *Id.*

250. *Id.*

251. *Id.* at 980.

## XI. MISCELLANEOUS

### *A. Fair Labor Standards Act*

*Freixa v. Prestige Cruise Services, LLC*,[252] is actually a Fair Labor Standards Act (FLSA)[253] case, involving calculation of overtime benefits ostensibly due to an employee whose pay was based on commissions for selling cruises. It may be of some benefit to counsel and their clients faced with evaluating whether overtime compensation is due when employees are paid salary plus commission.

During the period from December 7, 2013 to December 19, 2014, Sean Freixa sold cruises for Prestige Cruise Services, LLC (Prestige).[254] He received a fixed salary of $500 per week plus commissions. Freixa earned over $70,000 in total compensation, the majority of which came from commissions earned by selling cruises.[255] The commissions were calculated and disbursed monthly, running approximately thirty days in arrears (that is, Freixa's commissions were calculated monthly and payments for the commissions were disbursed the following month).[256] Freixa sued for overtime pay, claiming that his compensation in certain weeks fell below the minimum amount necessary for an employer to avoid paying overtime compensation.[257]

Freixa worked an average of sixty hours a week. The district court divided his entire compensation for the year by sixty hours per week to arrive at an average hourly rate of $23.45.[258] Because this average hourly pay exceeded the minimum threshold of $10.88 per hour, Prestige was granted summary judgment on the overtime claim.[259]

On appeal, the Eleventh Circuit reversed and remanded.[260] The court explained the monthly commissions had to be allocated only among the workweeks of the particular period during which they were earned: "The

252. 853 F.3d 1344 (11th Cir. 2017).

253. U.S.C. tit. 29 ch. 8 (2018).

254. *Frexia*, 853 F.3d at 1345.

255. *Id.*

256. *Id.*

257. *Id.* Although the FLSA generally requires employees to be paid overtime for work in excess of forty hours in a single week, the statute relieves an employer of this obligation for retail or service workers who are paid commissions, as long as certain thresholds are met. *Id.* at 1346.

258. *Id.* at 1346. The district court used an equitable exception to the general rule for calculating overtime pay, allowing it to allocate commission payments across multiple weeks if it was impractical to allocate commissions within the week(s) the money was actually earned. *Id.* at 1347.

259. *Id.* at 1345–46.

260. *Id.* at 1348.

district court erred when it allocated commissions earned in one month across weeks worked in other months. Each commission payment that Freixa received reflected 'commissions that were earned' within a single month."[261] Although the parties agreed that Freixa averaged sixty hours per workweek, they disagreed about the number of hours he worked in any specific week or pay period.[262] This factual dispute precluded the use of summary judgment, and the case was remanded for further proceedings.[263]

*B. City of Riviera Beach v. Lozman: Final Act?*

No Eleventh Circuit Survey would be complete without reference to Lozman and his floating house which, as the Supreme Court made clear, was not a vessel.[264] The appellate court's decision in *Lozman v. City of Riviera Beach*[265] is the latest and perhaps last installment of this saga. Fane Lozman, again proceeding *pro se*, appeals the district court's judgment and several orders entered by the district court following remand from the Supreme Court.[266]

The case is notable, at the outset, for its extensive catalog of standards of review applicable to the various and sundry issues raised by Lozman on appeal.[267] The Eleventh Circuit proceeded to address Lozman's grievances starting with the district court's determination that he was only entitled to recover the fair market value of his home at the time of its arrest, rather than its replacement value.[268] Based on the evidence presented, the district court determined the fair market value to be $7,500. The Eleventh Circuit agreed, finding no abuse of discretion and that the valuation was supported by sufficient evidence.[269]

Lozman also complained that the trial court erred in failing to assess sanctions against the city for filing suit under the court's admiralty

261. *Id.* at 1347.

262. *Id.* at 1348.

263. *Id.*

264. *See* Lozman v. City of Riviera Beach, 568 U.S. 115 (2013). Lozman's floating home was initially deemed to be a vessel, and "was arrested, sold, and destroyed pursuant to the court's orders based on its mistaken belief that it had admiralty jurisdiction." Lozman v. City of Riviera Beach, 672 F. App'x 892, 894 (11th Cir. 2016). This issue of "vessel status" ultimately ended up before the Supreme Court which determined that the residence—although borne by water—was not a vessel for admiralty jurisdiction purposes. *Lozman*, 568 U.S. at 131.

265. 672 F. App'x 892 (11th Cir. 2016).

266. *Id.* at 894.

267. *Id.* at 894–95.

268. *Id.* at 896–97.

269. *Id.*

jurisdiction in the first place. This was also rejected by the Eleventh Circuit, which observed that the Supreme Court itself felt there was uncertainty among the circuits on the issue of vessel status and, thus, the propriety of subject matter jurisdiction.[270] The court held that sanctions were not appropriate, nor was Lozman—as a *pro se* litigant—entitled to an award of attorney's fees.[271] Finally, the Eleventh Circuit affirmed the district court's refusal to disqualify itself at the behest of Lozman.[272] The appellate court noted that, "Lozman's motion was entirely based on disagreement with judicial orders and presented no evidence of pervasive bias."[273]

270. *Id.* at 898.
271. *Id.* at 898–99.
272. *Id.* at 899.
273. *Id.*