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Admiralty

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Articles

Admiralty

by Robert S. Glenn, Jr.*
and
Colin A. McRae**

I. INTRODUCTION

The Court of Appeals for the Eleventh Circuit decided fourteen admiralty cases with written opinions in 2000. These cases can generally be divided into three broad categories: (1) cases involving the interpretation of federal statutes such as The Americans with Disabilities Act, ("ADA"), the Foreign Sovereign Immunities Act ("FSIA"), the

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Suits in Admiralty Act ("SAA"), The Carriage of Goods By Sea Act ("COGSA"), and the Federal Maritime Lien Act ("FMLA"); (2) cases involving the interplay of admiralty law and state law in suits involving claims for attorney fees, the application of laches, and marine insurance issues; and (3) cases involving traditional maritime issues such as the interpretation of maritime contracts, salvage law and sovereign immunity.

If there is an underlying theme to the Eleventh Circuit's decisions this year, it would be that they are firmly grounded on precedent and they are consistent with the majority of other circuit courts that have addressed the same issues. In that sense, the Eleventh Circuit could be said to have promoted in 2000 one of the primary goals of the maritime bar: uniformity in maritime law.

II. ADMIRALTY LAW AND THE ADA

The Eleventh Circuit had two opportunities to expound upon the interaction between admiralty law and the ADA.[1] In *Frederick v. Kirby Tankships, Inc.*,[2] the Eleventh Circuit considered whether the filing of an ADA claim, in which a plaintiff alleges to be a "qualified individual"[3] fit to perform essential job functions, is inherently inconsistent with a suit under the Jones Act in which the same plaintiff alleged complete disability.[4] Frederick was a seaman aboard the M/V CHAMPION who successfully sued the vessel's owner for the injuries he sustained from a slip and fall while employed on board the vessel.[5] He alleged these injuries caused him to be completely disabled and thus unable to work. Frederick then brought a subsequent lawsuit alleging, among other things, that he was entitled to damages under the ADA.[6] In order to bring suit under the ADA, plaintiff must show he is a "qualified individual" who is fit to perform the essential job functions.[7] Kirby Tankships brought a Rule 60(b)[8] motion for relief from judgment in the Jones Act case because the ADA suit was predicated on the seemingly contradictory allegation that Mr. Frederick was a qualified individual

1. 42 U.S.C. §§ 12101-12213 (1994).
2. 205 F.3d 1277 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 46 (Oct. 2, 2000).
3. 42 U.S.C. § 12111(8).
4. 205 F.3d at 1282-83.
5. *Id.* at 1282.
6. *Id.* at 1288.
7. 42 U.S.C. § 12111(8).
8. FED. R. CIV. P. 60(b).

who was fit to perform the essential job functions, despite his allegation in the previous Jones Act case that he was totally disabled.[9]

The Eleventh Circuit held that Frederick's assertions in his ADA case that he would be able to work with accommodation were not inconsistent with his claim of disability in his Jones Act case.[10] The court cited to an analogous social security case in which the Eleventh Circuit held that an employee's certification of total disability for the purposes of obtaining social security benefits does not judicially estop that employee from also arguing that she is a qualified individual under the ADA.[11] Therefore, the court concluded that Jones Act cases asserting total disability are not inherently inconsistent with ADA cases in which the plaintiff alleges to be a qualified individual who is fit to perform essential job functions with accommodation.[12]

In its next foray into the interplay between admiralty and the ADA, the Eleventh Circuit was confronted in *Stevens v. Premier Cruises, Inc.*[13] with the question of whether the provisions of Title III of the ADA apply to foreign-flag cruise ships operating in United States territorial waters.[14] The *Stevens* case was brought by a wheelchair-bound individual who decided to take a vacation aboard the S.S. OCEANIC, a Bahamian-flag cruise ship owned by Premiere Cruises. Upon boarding, she discovered that her cabin and many public areas of the vessel were not wheelchair-accessible. Stevens brought suit in the Southern District of Florida, alleging the cruise ship's inaccessibility to persons in wheelchairs constituted a violation of Title III of the ADA. The district court dismissed her complaint on the grounds that the ADA was not applicable to the OCEANIC, and thus her complaint failed to state a claim upon which relief could be granted.[15]

The Eleventh Circuit overturned the dismissal of Stevens' complaint holding that the provisions of the ADA are applicable to foreign-flag cruise ships in United States territorial waters.[16] The court reasoned that cruise ships are places of public accommodation under the ADA because they contain many of the enumerated examples of public

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9. 205 F.3d at 1287-88.

10. *Id.* at 1288. The court noted in dicta that a dismissal of the subsequent ADA suit, not the previous Jones Act case, would have been the appropriate course of action in raising this argument. *Id.* at 1287.

11. *Id.* at 1288 (citing Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1220 (11th Cir. 1997)).

12. *Id.*

13. 215 F.3d 1237 (11th Cir. 2000).

14. *Id.* at 1242.

15. *Id.* at 1238-39.

16. *Id.* at 1242-43.

accommodations, such as places of lodging, restaurants, bars, theaters, and auditoriums.[17] Premier Cruises argued successfully to the district court that application of the ADA would conflict with the presumption against extraterritorial application of United States statutes.[18] The Eleventh Circuit rejected this argument because "a foreign-flag ship sailing in United States waters is not extraterritorial."[19] Further, the Eleventh Circuit held that extending the applicability of the ADA to cruise ships in United States waters would not violate the presumption against applying United States law to the "internal management and affairs" of a foreign-flag vessel[20] because the vessel's accessibility to disabled American passengers does not involve the "internal management and affairs" of the vessel.[21] The court concluded by comparing *Stevens* to *Cunard S.S. Co. v. Mellon,*[22] in which the United States Supreme Court upheld the applicability of the National Prohibition Act to foreign-flag ships in United States waters.[23] The court in *Stevens* observed that, as with the ADA, Congress had drawn no distinction in the National Prohibition Act between domestic and foreign-flag ships and intended the Act to have a broad reach.[24]

III. ADMIRALTY PROCEDURE

In addition to the numerous substantive admiralty law issues addressed by the Eleventh Circuit in 2000, the court also had occasion to decide two cases on admiralty procedural grounds. In *Beluga Holding, Ltd. v. Commerce Capital Corp.*,[25] the Eleventh Circuit reviewed a case in which a litigant sought to appeal a nonadmiralty claim under 28 U.S.C. § 1292(a)(3), the admiralty interlocutory appeals section.[26] This statute gives the Federal Courts of Appeal jurisdiction over the interlocutory appeal of either an admiralty claim, or a claim "integrally linked" to an admiralty claim.[27] *Beluga Holding* involved an admiralty claim (foreclosure of a ship's mortgage), as well as a non-

17. *Id.* at 1240-41 (citing 42 U.S.C. § 12181(7)(A)-(F)).
18. *Id.* at 1242.
19. *Id.*
20. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).
21. 215 F.3d at 1242.
22. 262 U.S. 100 (1923).
23. *Id.* at 131.
24. 215 F.3d at 1242-43.
25. 212 F.3d 1199 (11th Cir. 2000).
26. *Id.* at 1200.
27. Roco Carriers, Ltd. v. M/V NURNBERG EXPRESS, 899 F.2d 1292, 1297 (2d Cir. 1990).

admiralty claim (tortious conversion of stock certificates).[28] However, the court concluded that because these two claims had no common elements or facts, and because Beluga could prevail on one of them but not the other, the causes of action were not "integrally linked" for purposes of establishing appellate jurisdiction over the nonadmiralty conversion claim.[29] Therefore, the Eleventh Circuit had no appellate jurisdiction over the appeal of the stock certificate conversion claim, and the court dismissed the appeal.[30]

The Eleventh Circuit took the opportunity in *Coastal Fuels Marketing, Inc. v. Florida Express Shipping Co.*[31] to clarify when it is appropriate for a federal court sitting in admiralty to apply substantive state law from the jurisdiction in which the district court sits.[32] *Coastal Fuels* involved the question of which party was entitled to attorney fees in a marine insurance proceeds dispute in which both sides claimed victory.[33] The question of when to apply state substantive law is one with which admiralty courts have often wrestled.[34] The court readily conceded that no federal statutes or general maritime cases provided an answer.[35] The court concluded that, because this was a question to which the general maritime law does not provide an answer and this issue is not one which calls for the creation of a uniform national rule in admiralty, state law may be applied.[36] The Eleventh Circuit examined Florida state law to ascertain what standard to use in determining who is the "prevailing" party for the purposes of recovering attorney fees.[37] Applying standards borrowed from Florida law, the Eleventh Circuit determined that Florida Express had clearly prevailed on the "significant

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28. 212 F.3d at 1202-03.
29. *Id.* at 1204.
30. *Id.* at 1205.
31. 207 F.3d 1247 (11th Cir. 2000).
32. *Id.* at 1251.
33. *Id.*
34. *See, e.g.*, Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). The general rule in the Eleventh Circuit holds:

> One must identify the state law involved and determine whether there is an admiralty principle with which the state law conflicts, and, if there is no such admiralty principle, consideration must be given to whether such an admiralty should be fashioned. If none is to be fashioned, the state rule should be followed.

Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986).
35. 207 F.3d at 1251.
36. *Id.* (citing *Steelmet, Inc.*, 779 F.2d at 1488).
37. *Id.* (citing Moritz v. Hoyt Enters., 604 So. 2d 807, 810 (Fla. 1992)).

issue"[38] tried before the court, and accordingly upheld the district court's decision to award them attorney fees.[39]

The Eleventh Circuit also heard a case involving the use of the Supplemental Rule B attachment procedure against corporations owned by foreign nations. In *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*[40] ("*Venus Lines I*"), the first of two separate cases involving these same parties,[41] the issue was whether a contract of affreightment granting the carrier the "right to attach the cargo for the payment of the freight" offers a sufficient waiver of immunity under the Foreign Sovereign Immunities Act ("FSIA")[42] to permit prejudgment attachment.[43] *Venus Lines I* involved the attachment, under Supplemental Rule B, of aluminum produced by Venalum, an aluminum-producing company controlled primarily by the Venezuelan government.[44] Venalum cited to the FSIA as a bar to this attachment proceeding on the grounds that the property of a foreign state is immune from attachment in the United States.[45] Venus Lines argued that Venalum's shipment of aluminum could be attached under an exception found in Section 1610(d) of the FSIA, which permits attachment if (1) the foreign state has explicitly waived immunity; (2) the purpose of the attachment is to obtain security and not to obtain jurisdiction; and (3) the cargo is being used for a commercial activity in the United States.[46]

The primary issue facing the Eleventh Circuit in deciding whether to permit this attachment was whether the contract of affreightment's language permitting attachment amounted to an explicit waiver of immunity.[47] The court reviewed the language of the attachment provision of the contract and decided that the clear reference contained therein to the "right to attach the cargo" operated as a sufficiently explicit waiver of immunity under the Section 1610(d) exception.[48] The court reasoned that the term "attachment" certainly encompasses

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38. *Id.* at 1252; *see also Moritz*, 604 So. 2d at 810.

39. 207 F.3d at 1252-53.

40. 210 F.3d 1309 (11th Cir. 2000).

41. *See also* Venus Lines Agency, Inc. v. CVG Int'l Am., Inc., 234 F.3d 1225 (11th Cir. 2000).

42. 28 U.S.C. §§ 1602-1611 (1994).

43. 210 F.3d at 1310-12.

44. *Id.* at 1310-11. When a foreign government retains a majority interest in a corporation, that corporation is considered a "foreign state" under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1603(a), (b).

45. 210 F.3d at 1310. *See* 28 U.S.C. § 1609.

46. 210 F.3d at 1311.

47. *Id.* at 1311-12.

48. *Id.*

"prejudgment attachment," and that language demonstrates a "'clear and unambiguous intent to waive all claims of immunity in all legal proceedings.'"[49] Having found this language to be a sufficiently explicit waiver, the court then turned its attention briefly to the question of whether this attachment was done to obtain security or to obtain jurisdiction.[50] Because jurisdiction over Venalum in the United States was not in dispute (the contract conferred jurisdiction in New York), the court held that this attachment was undertaken for the purpose of obtaining security and thus fit under the Section 1610(d) exception.[51] The court stopped short of declaring that attachment was proper in this case under the exception, however, and remanded the case to the district court for a factual determination as to whether the commercial activity prong had been satisfied.[52]

IV. MARITIME TORTS

A. *Personal Injury*

The Eleventh Circuit examined the enforceability of two release provisions, both of which arose in the context of maritime personal injury cases. In *Shultz v. Florida Keys Dive Center, Inc.*,[53] the court considered a release provision signed by a scuba diving customer that purported to exculpate the scuba diving company of any liability for negligence.[54] In *Shultz* the estate of Patricia Shultz brought a wrongful death claim against Florida Keys Dive Center, Inc. after Shultz drowned while scuba diving. Prior to transporting Shultz out to the dive site, Florida Keys required her to sign a release form relieving Florida Keys from any liability for damages sustained by Shultz during the scuba diving expedition. The district court granted Florida Keys' motion for summary judgment based on this release. Shultz's estate appealed on the grounds that this release was invalidated by 46 U.S.C. app. § 183c(a), which prohibits passenger vessels from lessening their liability for their own negligence.[55]

The Eleventh Circuit concluded that 46 U.S.C. app. § 183c(a) did not apply to Florida Keys in this case, and therefore, the release signed by

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49. *Id.* at 1312 (citing Libra Bank, Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49-50 (2d Cir. 1982)).
50. *Id.* at 1312-13.
51. *Id.*
52. *Id.* at 1313.
53. 224 F.3d 1269 (11th Cir. 2000).
54. *Id.* at 1270.
55. *Id.*

Shultz was properly enforced by the district court.[56] Section 183c(a) applies to common carrier vessels transporting passengers between ports of the United States or between United States and foreign ports.[57] The court acknowledged that there were no federal appellate authorities to refer to for guidance on this issue, but noted the published district court and state court opinions have refused to apply Section 183c(a) to releases in recreational scuba diving cases.[58] The court also focused on the legislative intent behind Section 183c(a), which Congress enacted in order to put a stop to the steamship lines' practice of putting releases on the reverse side of passenger tickets.[59] As for plaintiff's further argument that admiralty common law invalidates these releases, the court observed the cases cited by plaintiff involved common carriers, such as ferries, ocean liners, or cruise ships.[60] No court had ever relied upon federal common law to invalidate a liability release for scuba diving.[61] As neither Section 183c(a) nor maritime common law invalidates these releases, the court concluded that the release was enforceable and summary judgment at the district court level was appropriate.[62]

The court was confronted with a similar provision purporting to limit liability for negligence in *Sea-Land Service, Inc. v. Sellan.*[63] Sellan was a seaman injured in the course of his employment as a cook aboard a vessel owned by Sea-Land. However, after a previous accident on a Sea-Land vessel involving plaintiff, the two parties had entered into an agreement that provided Sellan would never again work nor seek to procure work aboard a Sea-Land vessel. This agreement further provided that if, by oversight of Sea-Land, Sellan was able to procure employment aboard a Sea-Land vessel and was then injured, Sea-Land would bear no responsibility for his injuries. Sea-Land referred to this release after Sellan brought suit for back injury sustained in his post-release employment aboard a Sea-Land vessel, and the district court judge entered judgment for Sea-Land. Sellan appealed, arguing that

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56. *Id.* at 1271.
57. *Id.* at 1270 (quoting 46 U.S.C. app. § 183c(a)).
58. *Id.* at 1271.
59. *Id.*
60. *Id.* at 1273.
61. *Id.* The *Shultz* opinion expresses skepticism as to whether this incident is even within the purview of admiralty jurisdiction. The opinion surveys the authorities on each side of the issue but stops short of deciding whether there is admiralty jurisdiction over recreational scuba diving accidents in the absence of direct involvement of a boat. *Id.* at 1272-73.
62. *Id.*
63. 231 F.3d 848 (11th Cir. 2000).

these releases violate the section of the Federal Employers' Liability Act ("FELA"),[64] which renders void any contract intended to enable a common carrier to exempt itself from liability for negligence.[65] As support for this proposition, the court relied on *Babbitt v. Norfolk & West Railway Co.*,[66] which states that a FELA employer's release "'must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims.'"[67]

The court concluded the release signed by Sellan was a settlement of current injury claims and an attempt to prevent a re-injury to Sellan, and thus the release did not run afoul of FELA.[68] The court focused on the fact that the prior settlement between Sea-Land and Sellan was for a claim of permanent total disability, and "[r]efusal to rehire permanently and totally disabled seamen appears to be the only effective means of both protecting them from further injury and satisfying the employer's duties."[69] Placing the risk of re-injury with Sellan was a permissible method of putting "teeth" in such an agreement.[70] Therefore, the district court's reliance on this enforceable release was permitted, and the judgment for Sea-Land was affirmed.[71]

B. Property Damage

The Eleventh Circuit also reviewed two tort cases that involved maritime property damage. The first case, *Mid-South Holding Co. v. United States*,[72] involved property damage sustained by a vessel during a search by the United States Customs Service and the United States Coast Guard ("Customs Service"). The Customs Service was called in to search the fishing vessel ABNER'S CHOICE on a tip that she was involved in narcotics trafficking. While the agents discovered no contraband, they were alleged to have unplugged the vessel's bilge pump during the search, which caused her to sink the following day. The vessel owners brought suit against the United States under the Suits in

64. 45 U.S.C. §§ 51-60 (1994). In 1920 Congress enacted the Jones Act, which granted seamen the same rights to sue their employers for personal injuries and death as railway workers have under FELA. *See* Jacob v. New York, 315 U.S. 752 (1942) (construing 46 U.S.C. § 688).

65. 231 F.3d at 849-51 (citing 45 U.S.C. § 55).

66. 104 F.3d 89 (6th Cir. 1997).

67. 231 F.3d at 852 (quoting *Babbitt*, 104 F.3d at 93).

68. *Id.* at 851-53.

69. *Id.* at 851.

70. *Id.*

71. *Id.* at 853.

72. 225 F.3d 1201 (11th Cir. 2000).

Admiralty Act ("SAA")[73] to recover the value of the lost vessel. The United States gained summary judgment on the grounds that the district court lacked subject matter jurisdiction because the court concluded the United States enjoyed sovereign immunity in this case.[74]

The Eleventh Circuit affirmed the district court's finding that subject matter jurisdiction was lacking and held that this case constituted a "discretionary function" exception to the SAA's waiver of sovereign immunity.[75] The SAA provides an avenue for admiralty claims to be brought against the United States, for it includes an explicit waiver of the sovereign immunity of the United States government.[76] There are, however, certain exceptions to this waiver of sovereign immunity, such as the "discretionary function" exception from *United States v. Gaubert*,[77] which provides immunity for certain discretionary acts of government officials.[78] For the discretionary function exception to apply, the conduct must (1) involve an element of judgment and (2) be "'susceptible to policy analysis.'"[79] The court concluded that the applicable federal regulations gave broad discretion to Customs Service agents and the decision on whether or not to board and search a vessel involves policy decisions, thereby satisfying the two prongs of the *Gaubert* "discretionary function" inquiry.[80] Therefore, because this case represented a discretionary function of the Customs Service, the SAA's waiver of sovereign immunity did not apply, and thus the district court correctly held that it had no subject matter jurisdiction over this case.[81]

In *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*,[82] the owner of the BLACKHAWK, a pleasure craft used for business purposes, sued the owner and the manufacturer of a floating dry dock in which the BLACKHAWK sustained damages while being repaired. The

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73. 46 U.S.C. app. §§ 741-52 (2000).

74. 225 F.3d at 1202-03.

75. *Id.* at 1203-04.

76. *Id.* at 1203 (citing 46 U.S.C. app. § 742).

77. 499 U.S. 315 (1991).

78. 225 F.3d at 1204-05. The United States did not elect to proceed under the discretionary function exception defense at the district court level but instead chose to proceed on a law enforcement exception theory borrowed from the Federal Torts Claims Act ("FTCA"). However, the court of appeals opinion recognized that, unlike the discretionary function exception from the FTCA, this law enforcement exception has not been incorporated into the SAA in this circuit. *Id.* Judge Kravitch exercised judicial restraint in eschewing the unrecognized law enforcement exception in favor of the fully recognized discretionary function exception to the SAA in deciding this case.

79. *Id.* at 1205 (quoting *Gaubert*, 499 U.S. at 325).

80. *Id.*

81. *Id.* at 1207.

82. 206 F.3d 1373 (11th Cir. 2000).

BLACKHAWK was damaged when the severe listing of the dry dock, a condition known to both the owner and the manufacturer of the dry dock, caused the support lines securing the vessel to snap, and as a result, she tumbled over off of the block supporting the keel. The vessel owner sought to recover the amount of physical damage sustained by the vessel, as well as damages for loss of use of the BLACKHAWK. The district court found that the manufacturer and owner of the dry dock were negligent and that the negligence "operated in concert" to cause injury to the vessel in the amount of $125,000. The district court apportioned seventy-five percent of the fault for these damages to the manufacturer of the dry dock, and twenty-five percent to the dry dock owner.[83] The district court refused, however, to award any damages for loss of use of this pleasure vessel.[84]

On appeal the Eleventh Circuit affirmed the apportionment of damages and the refusal to award loss of use damages.[85] The boat yard owner had argued that the "proportionate share"[86] rule of liability apportionment was not applicable in this case because the manufacturer was sued in tort while the owner was sued in contract.[87] The Eleventh Circuit concluded that the proportionate share rule was applicable because the owner and manufacturer had operated in concert to cause a single injury to the vessel and because the manufacturer had settled its liability with the appellee.[88] Furthermore, the court acknowledged that loss of use damages are available for pleasure craft[89] but cautioned that those damages are awarded only when profits have actually been lost and the amount of the profits is proven with reasonable certainty.[90] Because the corporate clients that used the BLACKHAWK continued to pay fees even during her repair, no actual loss of profits could be proven, and the Eleventh Circuit affirmed the district court's denial of loss of use damages.[91]

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83. *Id.* at 1374-75. Before trial the appellant settled all its claims against Conrad, the manufacturer of the dry dock, for $150,000. *Id.* at 1375.

84. *Id.*

85. *Id.* at 1377.

86. *Id.* The "proportionate share" rule holds that, when one joint tortfeasor has settled, the nonsettling joint tortfeasor's liability should be assessed on the basis of that tortfeasor's proportionate share. *See* McDermott, Inc. v. AmClyde, 511 U.S. 202, 210 (1994).

87. 206 F.3d at 1377.

88. *Id.* (citing Jovovich v. Desco Marine, Inc., 809 F.2d 1529, 1530 (11th Cir. 1987)).

89. *Id.* at 1376. *See* The Conqueror, 166 U.S. 110 (1897).

90. 206 F.3d at 1376 (citing The Conqueror, 166 U.S. at 125).

91. *Id.* at 1376-77.

V. MARITIME CONTRACTS

The Eleventh Circuit took the opportunity in *Venus Lines Agency, Inc. v. CVG International America, Inc., ("Venus Lines II")*[92] to clarify when maritime breach of contract claims are time barred.[93] Venus Lines Agency, Inc. ("Venus") brought suit in 1998 to recover demurrage[94] dating back to 1995, 1996, and 1997.[95] The Eleventh Circuit affirmed the district court's holding that the 1995 and 1996 demurrage claims were time barred under the doctrine of laches, the principle by which most admiralty claims are reviewed.[96] In determining whether a party's delay in bringing a claim should bar the suit, admiralty courts look to the analogous state statute of limitations as a benchmark.[97] When the plaintiff files its admiralty claim within the analogous statutory period, the burden shifts to the defendant to show "'inexcusable delay'" and "'resulting prejudice'" in order to establish a laches defense.[98]

In *Venus Lines II,* Venus filed its demurrage claims within Florida's analogous four-year statute of limitations for oral contracts. Therefore, CVG had to show "inexcusable delay" and "resulting prejudice" in order to have these claims dismissed as time barred. CVG showed that Venus had failed to demand payment from CVG for the 1995 and 1996 demurrage claims until filing the lawsuit in 1998, which constituted inexcusable and prejudicial delay.[99] The court found prejudice because of the fact that CVG could have sought payment for the demurrage from the consignees of the cargo if timely presuit demand for payment had been made by Venus.[100] Therefore, the 1995 and 1996 demurrage charges were barred by the doctrine of laches despite having been filed within the analogous four-year statute of limitations in Florida for disputes concerning oral contracts.[101] The Eleventh Circuit held

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92. 234 F.3d 1225 (11th Cir. 2000). This is the second of two cases heard by the Eleventh Circuit involving these same two parties.

93. *Id.* at 1227.

94. Demurrage is compensation to the owners of a ship for the detention of their vessel beyond the permitted number of days for loading and unloading of cargo. BLACK'S LAW DICTIONARY 432 (6th ed. 1990).

95. 234 F.3d at 1227-28.

96. *Id.* at 1231.

97. *Id.* at 1230.

98. *Id.* (quoting Mecom v. Levingston Shipbuilding Co., 622 F.2d 1209, 1215 (5th Cir. 1980)).

99. *Id.* at 1230-31.

100. *Id.* at 1231.

101. *Id.*

further that the 1997 demurrage claim was not time barred under the doctrine of laches because demanding payment for a 1997 claim upon filing suit in 1998 did not inexcusably delay or prejudice CVG.[102]

VI. MARINE INSURANCE

In *HIH Marine Services, Inc. v. Fraser*,[103] the first of its two marine insurance cases, the Eleventh Circuit reaffirmed its adherence to the strict rule of *uberrimae fidei*, or "utmost good faith," under which a material misrepresentation on a marine insurance application will render any policy procured void *ab initio*.[104] HIH Marine Services, Inc. ("HIH Marine") agreed to provide hull insurance for the M/V NETAN-EL pursuant to a request by Mobay Underseas Tours, Ltd. ("Mobay") that the vessel be added to Mobay's existing policy. As part of Mobay's application for the endorsement covering the NETAN-EL, Mobay represented to HIH Marine that Mobay had a charter agreement in place with the vessel's owners, Roger Fraser and Shalom Enterprises, Ltd. In addition, Mobay purported to have custody of the NETAN-EL pursuant to this chartering agreement. However, these representations were untrue, for the proposed charter agreement was never executed and Mobay was never given custody of the vessel. After a fire broke out on the NETAN-EL, leading to her total destruction, HIH Marine discovered that no final charter agreement was in place and that Mobay had not had custody of the vessel. HIH Marine accordingly denied coverage. The district court found these representations to be material and voided the policy under the doctrine of *uberrimae fidei*.[105]

The Eleventh Circuit affirmed the district court's grant of summary judgment, concluding that the district court had properly applied the *uberrimae fidei* standard in voiding this endorsement to the hull policy.[106] The court ruled that material misrepresentations are those that "'might have a bearing on the risk to be assumed by the insurer.'"[107] Moreover, an applicant's duty to disclose extends even to those material facts not directly inquired into by the insurer.[108] The Elev-

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102. *Id.*

103. 211 F.3d 1359 (11th Cir. 2000).

104. *Id.* at 1361-63 (citing CIGNA Property & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 418 (9th Cir. 1998)).

105. *Id.* at 1361-62.

106. *Id.* at 1364.

107. *Id.* at 1363 (quoting Northfield Ins. Co. v. Barlow, 983 F. Supp. 1376, 1380 (N.D. Fla. 1997)).

108. *Id.* at 1362-63 (citing Jackson v. Leads Diamond Corp., 767 F. Supp. 268, 271 (S.D. Fla. 1991)).

enth Circuit reasoned that the insurer should have the right to assess the risk using accurate information on the identity of the insured and the use of the vessel.[109] The court further reasoned that an applicant's opinion as to what is material to the insurer's decision is irrelevant.[110] Accordingly, the Eleventh Circuit affirmed the district court's grant of summary judgment declaring the marine insurance endorsement void *ab initio*.[111]

The Eleventh Circuit's next marine insurance case, *All Underwriters v. Weisberg*,[112] involved the question of how to determine an attorney fees award in the marine insurance context.[113] The dispute in *Weisberg* over attorney fees arose out of a declaratory judgment action filed by certain underwriters who sought to have a marine insurance policy declared void *ab initio* due to alleged misrepresentations. The underwriters' motion for summary judgment was denied, and the parties settled the claim for the full loss amount, with the vessel owners reserving the right to appeal the attorney fees issue.[114] The Eleventh Circuit referred to *Coastal Fuels Marketing, Inc. v. Florida Express Shipping Co.*[115] in concluding that this specific question was one for which maritime law does not provide an answer and was not an area in which a uniform maritime law need be fashioned.[116] The court concluded that the applicable Florida state statute on attorney fees in insurance disputes should be used in deciding the question.[117] The Eleventh Circuit then remanded the case to the district court to determine the attorney fee question under the applicable Florida statute.[118]

This holding aligns the Eleventh Circuit with the Fifth Circuit on this question but directly contrasts with Second Circuit decisions.[119] In *INA of Texas v. Richard*,[120] the Fifth Circuit arrived at the same conclusion as the Eleventh Circuit, holding that "there is no specific and controlling federal rule of law relating to attorney's fees in maritime insurance litigation."[121] However, in *American National Fire Insur-*

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109. *Id.* at 1363-64.
110. *Id.* at 1364.
111. *Id.*
112. 222 F.3d 1309 (11th Cir. 2000), *cert. dismissed*, 121 S. Ct. 674 (Dec. 28, 2000).
113. *Id.* at 1310.
114. *Id.*
115. 207 F.3d 1247 (11th Cir. 2000). *See supra* text accompanying notes 31-39.
116. 222 F.3d at 1312.
117. *Id.* at 1312-13.
118. *Id.* at 1315.
119. *Id.* at 1314-15.
120. 800 F.2d 1379 (5th Cir. 1986).
121. *Id.* at 1381.

ance Co. v. Kenealy,[122] the Second Circuit has held that there exists an established federal maritime law that prohibits attorney fees in marine insurance contract disputes.[123] In light of this disagreement between the circuits, the court in *Weisberg* carefully analyzed the authority cited by each circuit court before rendering its own opinion on the issue.[124]

The court in *Weisberg* ultimately concluded that the *Kenealy* opinion from the Second Circuit was wrongly decided.[125] The two cases cited in *Kenealy* for the proposition that maritime law prohibits attorney fees were cases involving maritime tort actions, not maritime insurance contract disputes.[126] In fact, the First Circuit opinion cited in *Kenealy* supports the proposition that maritime law does not cover marine insurance contract disputes.[127] Therefore, the Eleventh Circuit chose to side with the Fifth Circuit in concluding that federal maritime law does not provide an answer to the question of how to determine attorney fees in maritime insurance litigation, and thus the state law of the jurisdiction where the district court sits is the appropriate law to consider.[128]

VII. CARGO

In its only case of the year involving the Carriage of Goods by Seas Act ("COGSA"),[129] *Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co.*,[130] the Eleventh Circuit decided two important questions: (1) whether the owner of a shipment of cargo may sue under a bill of lading in which that owner is not named and (2) whether that owner's alternative tort or bailment theories of recovery are preempted by COGSA.[131] Polo had entered into a bailment contract with Drusco, Inc. for the manufacture of men's pants in the Dominican Republic. Part of this arrangement required Drusco to enter into a contract of carriage with Tropical Shipping Construction Co. ("Tropical") to transport Polo's raw fabric from the United States before manufacture and deliver the finished products to the United States after manufacture. The container

122. 72 F.3d 264 (2d Cir. 1995).
123. *Id.* at 270.
124. 222 F.3d at 1314.
125. *Id.*
126. *Id.* (analyzing Sosebee v. Rath, 893 F.2d 54 (3d Cir. 1990); Southworth Mach. Co. v. F/V COREY PRIDE, 994 F.2d 37 (1st Cir. 1993)).
127. *Id.* "'[T]he refusal to settle [insurance] claims is normally left untouched by maritime law.'" *Id.* (quoting *Southworth Mach. Co.*, 994 F.2d at 41).
128. *Id.* at 1314-15.
129. 46 U.S.C. app. §§ 1300-1315 (2000).
130. 215 F.3d 1217 (11th Cir. 2000).
131. *Id.* at 1219.

carrying the finished Polo cargo was lost overboard due to rough seas encountered during the voyage from the Dominican Republic to the United States. Polo then filed this suit seeking damages under bailment, negligence, and contract theories, despite the fact that Polo's name appeared nowhere on the applicable bill of lading. The district court entered summary judgment for Tropical Shipping on all counts.[132]

The Eleventh Circuit began by upholding summary judgment on Polo's bailment and negligence claims on the theory that they were preempted by COGSA.[133] The court acknowledged that COGSA claims are hybrid in nature, drawing on elements of both contract and tort.[134] However, COGSA was promulgated with the intent of offering one unified statutory remedy, and other claims predicated on negligence or other theories of recovery are therefore preempted.[135] Tropical then argued that Polo's COGSA claim should also be eliminated because Polo's name did not appear anywhere on the bill of lading for this shipment.[136] The court disagreed, noting that the bill of lading referred to the "owner of the goods" as a party to the bill of lading and that there was sufficient evidence that Polo indeed owned the cargo.[137] Therefore, Polo did not as a matter of law lack standing to sue on the bill of lading, and the Eleventh Circuit overturned the granting of summary judgment by the district court, remanding the case for trial on the COGSA claim alone.[138]

VIII. SALVAGE

International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft[139] presented several issues regarding the salvage of property owned by the United States government. While searching the ocean depths for sunken Spanish galleons, International Aircraft Recovery, L.L.C. ("IAR") discovered the remains of a United States Navy Devastator TBD-1 torpedo bomber that had crashed off the coast of Florida during training exercises in 1943. IAR attempted on two occasions to raise the wreckage of the rare World War II-era aircraft,

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132. *Id.*
133. *Id.* at 1221.
134. *Id.*
135. *Id.* at 1220-21.
136. *Id.* at 1221.
137. *Id.* at 1223.
138. *Id.* at 1225.
139. 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, International Aircraft Recovery v. United States, 121 S. Ct. 1079 (Feb. 20, 2001).

despite the Navy's objections. IAR responded by filing an injunction in the United States District Court for the Southern District of Florida seeking to bar any interference by the Navy with IAR's future recovery efforts, arguing that it had title to the aircraft under the law of finds because the Navy had long since abandoned the aircraft. In the alternative, IAR argued that it should receive a full and liberal award for salvage services already performed. The district court granted IAR's motion for summary judgment on its injunction claim and held further that IAR would be entitled to a salvage award.[140]

The Eleventh Circuit reversed the district court order permitting IAR to continue salvage operations on the Devastator.[141] Furthermore, the Eleventh Circuit disagreed with IAR's abandonment argument and declined to vest title to the aircraft in IAR.[142] The court rejected IAR's argument that the Navy's striking of the plane from its inventory of active planes amounted to abandonment of all interest in the plane, especially in light of the fact that the federal government cannot abandon property absent an affirmative act of Congress.[143] Moreover, a Navy circular from one year after the crash expressly contemplated salvage operations after striking lost aircraft from the Navy's active duty list.[144]

Despite rejecting IAR's law of finds argument and reversing the injunction permitting IAR to salvage the plane, the court held that IAR may be entitled to an award for salvage operations carried out prior to the Navy's objection to those services and remanded the case to the district court to determine the amount of the salvage award, if any.[145] The court reasoned that, while the owner of imperiled property may reject a salvor's assistance, if the rejection comes after substantial efforts have been undertaken, the salvor may be eligible for a salvage award.[146] The court pointed in particular to ongoing negotiations between the Navy and IAR over the post salvage fate of the vintage aircraft as a possible acquiescence to the salvage efforts, thereby necessitating a remand to the district court for a determination as to when the salvage efforts were effectively rejected so that a salvage award, if any, could be affixed.[147]

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140. *Id.* at 1256-57.
141. *Id.* at 1264.
142. *Id.* at 1259-60.
143. *Id.* at 1258-59 (citing Royal Indem. Co. v. United States, 313 U.S. 289, 294 (1941)).
144. *Id.* at 1259.
145. *Id.* at 1263-64.
146. *Id.* at 1262-63.
147. *Id.* at 1263-64.

IX. MARITIME LIENS

Container Applications International, Inc. v. Lykes Brothers Steamship Co.[148] concerned the emerging debate as to whether a company that leases containers in bulk to a steamship line "provides necessaries to a vessel" for the purposes of the Federal Maritime Lien Act ("FMLA").[149] The FMLA provides that a company providing necessaries to a vessel may pursue a maritime lien against the vessel if the vessel owner fails to pay for the necessaries.[150] While both parties conceded that containers constitute necessaries under the FMLA, there was a dispute as to whether Container Applications International ("CAI") had "provided necessaries" within the meaning of the statute when it leased containers in bulk to Lykes Brothers without any specific reference to any particular vessels.[151] The Eleventh Circuit aligned itself with the other four circuits that had ruled on this issue by holding that the bulk leasing of containers to shipping companies who then decide when, where, and how to use the containers does not constitute the "providing of necessaries" for the purposes of the FMLA.[152]

The Eleventh Circuit examined the analogous United States Supreme Court case of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*[153] before arriving at this conclusion.[154] In *Piedmont* a coal dealer supplied coal to an oil company for use on its fleet of fishing vessels without designating any particular vessel to receive the coal. The coal supplied in *Piedmont* was intermingled with other suppliers' coal in bins at the purchaser's facility prior to use at either the factory or on the purchaser's fleet of vessels.[155] The Supreme Court held that the coal supplier had not provided coal pursuant to the meaning of the FMLA, and the Court therefore disallowed any lien.[156] In response to the

148. 233 F.3d 1361 (11th Cir. 2000).

149. 46 U.S.C. § 31342 (2000).

150. *Id.* § 31342(a).

151. 233 F.3d at 1363. For a maritime lien to arise under the FMLA, there must usually be a direct connection between the provider of the necessaries and a specific vessel. Jeffrey v. Henderson Bros., 193 F.2d 589, 593-94 (4th Cir. 1951).

152. 233 F.3d at 1363 (citing Silver Star Enters. v. Saramacca MV, 82 F.3d 666 (5th Cir. 1996); Redcliffe Ams., Ltd. v. M/V TYSON LYKES, 996 F.2d 47 (4th Cir. 1993); Itel Containers Int'l Corp. v. Atlanttrafik Express Serv., Ltd., 982 F.2d 765 (2d Cir. 1992); Foss Launch & Tug Co. v. Char Ching Shipping U.S.A. Ltd., 808 F.2d 697 (9th Cir. 1987).

153. 25 U.S. 1 (1920).

154. 233 F.3d at 1363-66.

155. 25 U.S. at 6-7.

156. *Id.* at 13. The previous iterations of the FMLA used the term "furnishing" in place of "providing" in today's version of the statute, but nothing suggests that the word change

argument that the *Piedmont* decision should not be extended from the clumsy transaction of coal supply to the mature industry of container supply, Judge Pollak reasoned in his concurrence that it is up to Congress to change the FMLA if an individual industry, such as container suppliers, is to receive special dispensation.[157]

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is significant to the issue in *Container Applications International, Inc.* 233 F.3d at 1363 n.2.

157. *Id.* at 1367 (Pollak, J., concurring).

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