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Admiralty Law

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SURVEY ARTICLES

Admiralty Law

by George M. Earle*

The Eleventh Circuit Court of Appeals published six admiralty opinions in 1999. The court faced one issue of first impression, but otherwise applied existing case law to decide the cases before it. In the case presenting the issue of first impression, the court joined the Fifth Circuit in holding that an ocean carrier's unreasonable deviation does not nullify the one-year statute of limitation for filing suit under the Carriage of Goods by Sea Act.[1] The cases decided with reference to existing law included two cases involving maritime liens,[2] one case addressing appellate jurisdiction,[3] one case addressing personal

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1. Mesocap Indus. Ltd. v. Torm Lines, 194 F.3d 1342, 1345 (11th Cir. 1999).

2. Rose v. M/V GULF STREAM FALCON, 186 F.3d 1345 (11th Cir. 1999); Galehead, Inc. v. M/V ANGLIA, 183 F.3d 1242 (11th Cir. 1999) (per curiam).

3. Sea Lane Bahamas Ltd. v. Europa Cruises Corp., 188 F.3d 1317 (11th Cir. 1999).

jurisdiction,[4] and one case resolving whether one party's alleged nonperformance under a contract of carriage would excuse the other party's performance.[5]

I. MARITIME LIENS

A. Waiver of Maritime Lien for Necessaries

In *Rose v. M/V GULF STREAM FALCON*,[6] the Eleventh Circuit employed principles of contract interpretation to determine whether a claimant had waived his maritime lien for necessaries against a vessel.[7] Reversing the district court, the Eleventh Circuit held that no waiver had occurred and remanded the case to the district court for further proceedings.[8]

In 1990 Alden Hanson ("Owner"), the owner of the M/V BEAU SOUTHERN ("Vessel"), entered into discussions with Captain Mark Rose ("Claimant") for Claimant's possible purchase of the Vessel for use in Claimant's offshore dive-excursion business. The two also discussed using the Vessel as a commercial diving vessel. Claimant advised Owner that the Vessel would require major renovations to be used as a commercial diving vessel.[9]

From January 1990 to March 1992, the parties engaged in negotiations for a joint venture agreement whereby Claimant would renovate and operate the Vessel, with both parties recouping their investments from the Vessel's operations. Although the parties failed to execute a written joint venture agreement, Claimant was permitted to renovate the Vessel in anticipation of purchasing it.[10]

In March 1992 the parties entered into a first Purchase and Sale Agreement ("March Purchase Agreement") for the Vessel. However, Claimant could not obtain funding and, therefore, did not purchase the Vessel. In June 1992 the parties entered into a second Purchase and Sale Agreement ("June Purchase Agreement"), expressly superseding the March Purchase Agreement. The parties, together with a third party

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4. Associated Transp. Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A., 197 F.3d 1070 (11th Cir. 1999).

5. Crowley Am. Transp., Inc. v. Richard Sewing Mach. Co., 172 F.3d 781 (11th Cir. 1999).

6. 186 F.3d 1345 (11th Cir. 1999).

7. *Id.* at 1350.

8. *Id.* at 1351.

9. *Id.* at 1347.

10. *Id.* The Vessel was renamed the GULF STREAM FALCON during the renovations. *Id.*

named Buckley ("Investor"), also entered into a joint venture and a Bareboat Charter agreement ("Charter Party") pursuant to which the Vessel would be used for whale-watching tours. Under the terms of the Charter Party, Claimant was to serve as the captain for these excursions and could not be removed from his position absent grossly negligent conduct. Conflicts developed in the parties' business relationship, and as a result, Owner and Investor removed Claimant as captain of the Vessel. The Charter Party was subsequently canceled.[11]

In May 1993 Owner and Claimant decided once again to work together in the whale-watching excursion business. Claimant was to serve again as the captain of the Vessel.[12] On May 16, 1993, the parties entered into the Arcadian Operating Agreement ("Operating Agreement"), which provided, in relevant part, as follows:

> 3. Revenues earned in the operation of the [Vessel] will be distributed as follows:
>
> . . .
>
> b) Payment of outstanding debt incurred by [Claimant] in the conversion of the vessel to a whale watch vessel. [Owner] will make the final determination, at his sole discretion, of which bills will be paid.
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> . . .
>
> 4. All parties acknowledge that payment of the above amounts impy [sic] no ownership interest or claim in the [Vessel] or any claim against [Owner] for any reason.[13]

The whale-watching joint venture failed to produce profits that could be distributed to the joint venturers. As a result Claimant sued to foreclose on his $334,476.17 maritime lien for his work in renovating the Vessel. Owner counterclaimed for breach of contract and wrongful arrest of the Vessel. After a bench trial, the district court dismissed all claims and counterclaims except Claimant's maritime lien claim against the Vessel.[14] As to that claim, the district court held that paragraphs 3 and 4 of the Operating Agreement constituted an explicit waiver by Claimant of his lien arising from work he performed on the Vessel before May 16, 1993. The district court awarded Claimant $15,955.81 for work performed on the vessel after that date.[15]

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11. *Id.*
12. *Id.* at 1347-48.
13. *Id.* at 1348.
14. *Id.* Concluding that Owner breached the June Purchase Agreement, the district court dismissed Owner's counterclaims arising from that agreement. Owner did not appeal the dismissals of his counterclaims. *Id.* at 1347 n.2.
15. *Id.* at 1348.

The Eleventh Circuit identified three issues raised on appeal: (1) whether the district court erred in finding Claimant waived his maritime lien for goods and services provided to the Vessel prior to May 16, 1993; (2) whether Owner was entitled to the proceeds from the sale of the Vessel pursuant to the June Purchase Agreement; and (3) whether the district court erred in awarding damages to Claimant for his maritime lien for necessaries provided to the Vessel after May 16, 1993.[16]

The Eleventh Circuit began its analysis of the waiver issue by confirming that Claimant's maritime lien arose from his provision of necessaries to the Vessel in accordance with the Federal Maritime Lien Act.[17] Claimant sought to recover his costs incurred in converting the Vessel to a commercial diving vessel.[18]

Before reaching the issue of waiver, the court addressed Owner's argument that Claimant was never entitled to a maritime lien because he was a joint venturer and, therefore, not a "stranger" to the Vessel. The court set forth the general proposition that joint venturers usually are not entitled to a maritime lien for necessaries because their status is similar to that of a vessel owner.[19] A stranger to the vessel, on the other hand, generally "is entitled to a maritime lien for 'necessaries' . . . because a 'stranger' relies on the credit of the vessel, and not on the credit of the co-venturer."[20]

The Eleventh Circuit affirmed the district court's rejection of Owner's argument that no lien ever existed, concluding that the district court was not clearly erroneous in finding no joint venture existed between the parties except between June and August of 1992.[21] The court found sufficient evidence in the record to support the district court's finding that no joint venture existed prior to June 3, 1992—the period when

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16. *Id.* The second and third issues on appeal were not reached by the court of appeals. Finding that the second issue was not raised by Claimant below and was not addressed by the district court, the court declined to address Claimant's argument that the district court erred in ruling that Owner was entitled to the first $375,000 from the sale of the Vessel. *Id.* at 1351. Because the court of appeals ruled that Claimant had not waived his maritime lien, Owner's appeal of the district court's $15,955.81 award to Claimant for his lien claim was rendered moot. *Id.* The matter was remanded for the district court to recalculate the lien amount in light of the court's ruling that the maritime lien had not been waived. *Id.*

17. *Id.* at 1348 (citing 46 U.S.C. § 31342(a) (1994)).

18. *Id.*

19. *Id.* (citing Sasportes v. M/V SOL DE COPACABANA, 581 F.2d 1204, 1208 (5th Cir. 1978)).

20. *Id.* (citing Fulcher's Point Pride Seafood v. M/V THEODORA MARIA, 935 F.2d 208, 211 (11th Cir. 1991)).

21. *Id.* at 1349 (noting the district court's factual findings with respect to the existence of a joint venture must be reviewed under the clearly erroneous standard).

Claimant was converting the Vessel to a commercial diving vessel.[22] The court held Claimant was entitled to assert a maritime lien for work performed on the Vessel prior to that date because he was a stranger to the vessel, not a joint venturer.[23]

The Eleventh Circuit then turned to the district court's determination that Claimant had explicitly waived his lien pursuant to the language of the Operating Agreement. The district court relied exclusively on the language of the Operating Agreement to reach the conclusion that the lien had been waived. On appeal Claimant argued that paragraph 3(b) of the Operating Agreement merely gave Owner discretion to use profits from the whale-watching venture to compensate Claimant for costs in converting the Vessel from a commercial diving vessel to a whale-watching vessel. Claimant emphasized that he was seeking compensation for his earlier efforts in converting the Vessel from a treasure-salvage vessel to a commercial diving vessel, not for the later conversion to a whale-watching vessel. Thus, the plain language of paragraph 3(b) could not be read as a waiver of Claimant's maritime lien for the earlier conversion of the Vessel. Claimant argued that paragraph 4 of the Operating Agreement could not be construed as a waiver of his lien because it merely governed the distribution of profits and confirmed that Owner's payment of profits should not be construed to suggest that Claimant would have any claims against Owner or the Vessel. Finally, Claimant asserted that the Operating Agreement was ambiguous and must be resolved against Owner, the drafter of the agreement. Owner argued that the "whereas" clause of the Operating Agreement confirmed Claimant's intent to waive his lien. The "whereas" clause provided, "All parties hereto recognize and confirm that [Owner] is the sole owner of the [Vessel] and no party has a claim against the [V]essel."[24]

The Eleventh Circuit reviewed the contractual language de novo[25] and applied Florida law pursuant to conflicts of law principles.[26] Florida law mandated that the court look first to the "words used on the face of the contract to determine whether that contract [was] ambiguous," for Florida law provides that the actual language of the contract is

22. *Id.*
23. *Id.*
24. *Id.* at 1349-50.
25. *Id.* at 1350. ("Since the waiver issue relates to the district court's interpretation of contract language, we review the lower court's decision *de novo*.")
26. *Id.*

the best evidence of the parties' intent and, thus, that the plain meaning of the contract language governs.[27]

The Eleventh Circuit determined that the language of the Operating Agreement was not ambiguous and that its plain meaning did not support the district court's finding of an explicit waiver of Claimant's maritime lien.[28] The court concluded that paragraph 3(b) of the Operating Agreement established only the priority of revenues earned from the Vessel, if any.[29] Likewise, the plain meaning of paragraph 4 of the Operating Agreement suggested that it governed only the act of distributing revenues and, "[a]t the very least," did not constitute an explicit waiver of any lien claims.[30]

Finally, the court rejected Owner's argument that the "whereas" clause of the Operating Agreement was sufficient to find a waiver of Claimant's maritime lien.[31] Florida law provides that "whereas" or other prefatory clauses are not binding upon the parties to the contract.[32] Thus, even if the "whereas" clause could be construed as a waiver, it would not be binding against Claimant.[33] In addition, the court of appeals stated that it need not look to the "whereas" clause of the Operating Agreement if the operative language of the agreement was unambiguous.[34] Having found the language of paragraphs 3(b) and 4 unambiguous, the court declined to consider the "whereas" clause as evidence of Claimant's intent to waive his lien.[35]

B. Third-Party Providers of Necessaries

In *Galehead, Inc. v. M/V ANGLIA*,[36] the Eleventh Circuit addressed the issue of when a third-party provider of necessaries possesses a valid maritime lien against a vessel. The case involved the procurement of bunkers on three occasions by the M/V ANGLIA ("Vessel") through its charterer, Genesis Container Line ("Charterer"). On the first occasion, Charterer retained Polygon Energy Services, Inc. ("Polygon") to obtain bunkers for the Vessel at Port Everglades, Florida. Polygon engaged

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27. *Id.* (citing Hurt v. Leatherby Ins. Co., 380 So. 2d 432 (Fla. 1980); Boat Town U.S.A., Inc. v. Mercury Marine Div. of Brunswick Corp., 364 So. 2d 15 (Fla. Dist. Ct. App. 1978)).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1350-51.
32. *Id.* at 1350 (citing Johnson v. Johnson, 725 So. 2d 1209, 1212 (Fla. Dist. Ct. App. 1999)).
33. *Id.*
34. *Id.*
35. *Id.* at 1350-51.
36. 183 F.3d 1242 (11th Cir. 1999) (per curiam).

Establissment Asamar, Ltd. ("Asamar") to supply the fuel. Asamar engaged Coastal Refining and Marketing, Inc. ("Coastal") to deliver the bunkers to the Vessel. Polygon's "bunker confirmation" named Coastal as the physical supplier and Asamar as the seller of the fuel. Asamar subsequently paid Coastal for the fuel, but Charterer did not pay Asamar.[37]

On the second occasion, Charterer retained Polygon to provide bunkers for the Vessel, this time at Houston, Texas. Polygon again contacted Asamar, who in turn retained ChemOil Corp. ("ChemOil") and Marsh Distributing Company ("Marsh") to deliver the bunkers to the Vessel. ChemOil and Marsh supplied the bunkers to the Vessel and were paid by Asamar. Again, however, Charterer did not pay Asamar. Asamar subsequently assigned its rights to the money due from Charterer for both fuelings to Galehead, Inc. ("Galehead"), a collection agency.[38]

The third fueling occurred when Charterer contacted Polygon to obtain bunkers for the Vessel at Houston. This time, however, Polygon directly engaged ChemOil and Tesoro Petroleum Distributing Company ("Tesoro") to fuel the Vessel. Polygon's bunker confirmation listed ChemOil and Tesoro as the physical suppliers and Polygon as the seller of the fuel. Polygon paid $20,349.29 to ChemOil and Tesoro for the amount due for the bunkers. However, Charterer failed to pay Polygon the $24,376 due under their contract. Polygon subsequently assigned its rights under its contract with Charterer to Galehead.[39]

Galehead filed suit in district court against the Vessel to foreclose the three maritime-lien claims it obtained by assignment from Asamar and Polygon. Both parties moved for summary judgment, and the district court granted both motions in part. The district court held that Polygon had a maritime lien against the Vessel, but that Asamar did not. The court awarded Galehead the amount due under Polygon's contract with Genesis, which was $24,376. However, the district court subsequently reduced this judgment to the amount paid by Polygon to ChemOil and Tesoro, which was $20,349.29. Galehead appealed, and the Vessel cross-appealed.[40]

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37. *Id.* at 1244.

38. *Id.*

39. *Id.*

40. *Id.* On appeal the Vessel argued (1) that its fact-based affirmative defenses should not have been resolved by motions for summary judgment and (2) that Galehead failed to perfect proper assignments with Asamar and Polygon. *Id.* at 1244 n.1. The court of appeals held, however, that the Vessel "presented no triable issue of fact on either of these claims." *Id.*

To determine the validity of the maritime lien claims, the Eleventh Circuit began its analysis by setting forth the general test for determining who is entitled to a lien for necessaries.[41] This test, based upon the plain meaning of the Federal Maritime Lien Act,[42] provides that a person must "(1) provide necessaries; (2) to a vessel; (3) on the order of the owner or agent."[43]

With respect to the validity of Polygon's lien, the court of appeals clarified that while Polygon did not physically supply the bunkers to the Vessel, "a party need not be the physical supplier or deliverer to have 'provided' necessaries under the statute."[44] The court found it sufficient that the bunkers were provided to the Vessel pursuant to the agreement between Charterer and Polygon.[45] The court held that Polygon had also satisfied the second and third elements necessary to establish a maritime lien.[46] It was undisputed that bunkers were supplied to the Vessel and were supplied at the order of Charterer, and the court stated, "A charterer is authorized under the statute to bind a vessel for necessaries."[47]

As for Asamar's two lien claims, the Eleventh Circuit concluded that while Asamar could satisfy the first two elements of the test for establishing a maritime lien, Asamar's actions were not performed "'on the order of the owner or a person authorized by the owner,'" and that, therefore, the third element could not be satisfied.[48] "Asamar provided the bunkers at Polygon's request, and Polygon [was] not a 'person[] . . . presumed to have authority to procure necessaries[.]'"[49] Thus, Asamar's two lien claims were invalid.[50]

The court stated that Asamar would have to show that Charterer was sufficiently aware of and involved in Asamar's work so that it could be shown that Asamar was in fact working for Charterer, a party authorized under the Federal Maritime Lien Act to bind a vessel for necessaries.[51] In reviewing cases that have addressed this "third-party

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41. *Id.* at 1244.
42. *See* 46 U.S.C. § 31342(a).
43. 183 F.3d at 1244.
44. *Id.* at 1245 (citing The Golden Gate Knutsen v. Associated Oil Co., 52 F.2d 397, 400 (9th Cir. 1931); A/S Dan-Bunkering Ltd. v. M/V ZAMET, 945 F. Supp. 1576, 1578-79 (S.D. Ga. 1996)).
45. *Id.*
46. *Id.*
47. *Id.* (citing 46 U.S.C. § 31341(a)(4)(B)).
48. *Id.* (quoting 46 U.S.C. § 31342(a)).
49. *Id.* (quoting 46 U.S.C. § 31341(a)) (second and third alterations in original).
50. *Id.*
51. *Id.*

provider" scenario, the Eleventh Circuit stated that "[w]here the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction, the courts have found a triable issue of fact about whether the third-party deserved a lien."[52] The court further stated that "other cases illustrate that a third-party provider is not entitled to a lien where the degree of involvement with the owner is minimal or nonexistent."[53]

The Eleventh Circuit concluded that Asamar's relationship with Charterer was not sufficiently significant and ongoing to "establish that [Charterer] authorized Asamar's work on the vessel."[54] The court emphasized that Charterer dealt only with Polygon, not Asamar.[55] Moreover, Charterer physically received no bunkers from Asamar, did not communicate with Asamar, did not inspect Asamar's work, and did not ratify Asamar's role in the transaction.[56] Finally, Asamar directed all requests for payment to Polygon, not Charterer.[57] The court affirmed the district court, holding that the fact that "a charterer of a vessel becomes aware that some work performed was by a party somewhere down the chain of contracting and re-contracting does not give rise to a maritime lien."[58]

The Eleventh Circuit then addressed the district court's reduction of Galehead's judgment from the full amount due under Polygon's contract with Charterer ($24,376.00) to the amount actually paid by Polygon to ChemOil and Tesoro ($20,349.29). The Vessel argued on appeal that the lower amount was the correct amount because it represented the reasonable value of the necessaries provided to the Vessel, "which is all a maritime lien claimant is entitled to."[59] The Vessel argued that adding a commission or profit to this amount would remove the contract from maritime jurisdiction.[60] Noting that the Vessel cited no supporting authority for this position, the Eleventh Circuit held that there was no basis for holding that profits are nonmaritime and, therefore, outside the admiralty jurisdiction of the federal courts.[61] The court vacated the district court's order on the amount of the Polygon lien, holding that

52. *Id.*
53. *Id.* at 1246.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 1246-47.
61. *Id.* at 1247.

"[t]he natural valuation of the lien . . . is the value of the debt irrespective of whether a profit is part of that debt."[62]

II. JURISDICTION

A. *Appellate Jurisdiction over Interlocutory Decrees*

In *Sea Lane Bahamas Ltd. v. Europa Cruises Corp.*,[63] the Eleventh Circuit examined whether the district court's order denying plaintiff's motions to reopen the case and to amend the complaint to add a party was an appealable order under 28 U.S.C. § 1292(a)(3). Concluding that the district court's order did not determine the rights and liabilities of the parties, the court of appeals held that appellate jurisdiction was lacking.[64] Therefore, the court dismissed the appeal.

In August 1989 Sea Lane Bahamas Ltd. ("Owner") chartered the M/V EUROPA JET ("Vessel") to Europa Cruise Line, Ltd. ("Charterer").[65] Following various defaults, Charterer returned the Vessel to Owner in November 1993. In January 1994 Owner filed suit, alleging Charterer's redelivery of the Vessel was in breach of the charter agreement. However, before Charterer filed an answer, the parties entered into a settlement agreement dated February 4, 1994. The parties resolved all claims except one for damages arising from the Vessel's condition upon redelivery. Pursuant to the terms of the settlement agreement, Charterer made a voluntary appearance in the district court. Owner subsequently moved the district court to compel arbitration pursuant to the terms of the settlement agreement. By order dated April 24, 1995, the district court granted Owner's motion and compelled the parties to submit to arbitration. The district court then closed the case.[66]

On November 20, 1997, Charterer filed a written submission for arbitration, raising the defense that Owner was not the real party in interest. Charterer based this defense on the fact that Owner sold the Vessel to Marne (Delaware), Inc. ("Purchaser") during the Spring of 1990. Owner countered that it remained the registered owner of the Vessel, retaining legal title to the Vessel while transferring only beneficial ownership to Purchaser.[67]

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62. *Id.*
63. 188 F.3d 1317 (11th Cir. 1999).
64. *Id.* at 1326.
65. Europa Cruise Line, Ltd. is a wholly owned subsidiary of Europa Cruises Corp. Both entities are referred to collectively as "Europa." *Id.* at 1318 n.1.
66. *Id.* at 1318-19.
67. *Id.* at 1319.

On December 9, 1997, a hearing was held before an arbitration panel, the purpose of which was to permit the panel to identify the issues before it. The panel concluded that it could not address the issue of whether a party must be or could be added to the proceedings. The arbitrators stated that this real-party-in-interest issue should be worked out by the parties and that the panel was not the proper body to determine the issue. The panel concluded that the "ruling party" would make an application to the district court on this issue. If the district court decided that the panel should decide the issue, the matter would be returned to the panel for a decision. The panel directed Owner to seek leave from the district court to amend its complaint so the district court could decide whether to address the real-party-in-interest issue or return it to the arbitration panel for a decision. On March 20, 1998, Owner filed motions in the district court to reopen the case and to amend the complaint. The district court denied both motions and a subsequent motion for reconsideration. Owner timely appealed.[68]

On appeal the Eleventh Circuit focused on whether the district court's order denying Owner's motions was appealable under 28 U.S.C. § 1292(a)(3). Owner asserted that the charter party between the parties was maritime in nature and, therefore, within the district court's admiralty jurisdiction. Thus, Owner argued, appellate jurisdiction was proper under Section 1292(a)(3), which grants jurisdiction to appellate courts for "'[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.'"[69] Charterer countered that Owner's invocation of Section 1292(a)(3) was improper because the dispute between the parties arose from the nonmaritime settlement agreement, not the maritime charter agreement. Charterer also maintained that the district court's order did not determine the rights and liabilities of any party as contemplated by Section 1292(a)(3).[70]

Noting that Owner's complaint focused on alleged breaches of the charter party, the Eleventh Circuit held that admiralty jurisdiction was present and that, therefore, the lower court's order denying Owner's motions was also within the district court's admiralty jurisdiction.[71] The court rejected Charterer's argument that the issues on appeal related only to the parties' settlement agreement.[72] The court noted

68. *Id.*
69. *Id.* at 1319-20 (quoting 28 U.S.C. § 1292(a)(3) (1994)).
70. *Id.* at 1320.
71. *Id.*
72. *Id.*

that the settlement agreement was not at issue in the district court's order and, indeed, was not mentioned in the order.[73]

The court then addressed whether the orders appealed from determined the rights and liabilities of the parties within the meaning of Section 1292(a)(3), so that the court of appeals would have appellate jurisdiction over the district court's order, which Owner conceded was an interlocutory decree.[74] Owner asserted that the district court's order denying the motions to reopen the case and to amend the complaint determined the rights and liabilities of the parties because the arbitration panel would not proceed without the real-party-in-interest issue being resolved. Owner asserted, therefore, that the district court's orders determined the parties' rights "by foreclosing all avenues of relief."[75]

While finding no cases directly addressing this issue, the Eleventh Circuit held that prior decisions of the Fifth and Eleventh Circuits provided sufficient guidance on the issue of jurisdiction under Section 1292(a)(3).[76] The court set forth the general rule as follows: "[A] district court's order resolving one or more claims on the merits is appealable under § 1292(a)(3), irrespective of any claims that remain pending. Similarly, [the court of appeals] has jurisdiction over the appeal of an order dismissing on the merits one or more parties from an action."[77] However, jurisdiction under Section 1292(a)(3) does not stand "when the order appealed from 'does not reach the merits of the claim and in no way determines, denies, or prejudices any substantive rights of the parties.'"[78]

The Eleventh Circuit noted that authority within the circuit "appear[ed] to differ" on whether Section 1292(a)(3) should be interpreted broadly or narrowly.[79] The court determined, however, that "the greater weight of authority supports a narrow construction."[80] The court cited its opinion in *Jamaica Commodity Trading Co. v. Barge HERCULES*[81] as setting forth the original purpose of Section 1292-(a)(3):

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1320-21.
77. *Id.* at 1321 (footnote omitted).
78. *Id.* (quoting Jensenius v. Texaco, Inc., 639 F.2d 1342, 1343 (5th Cir. Unit A Mar. 1981)).
79. *Id.* at 1322.
80. *Id.*
81. 992 F.2d 1162 (11th Cir. 1993).

> "As our predecessor court . . . noted, this provision originally 'was designed to apply in circumstances distinctive to admiralty where it is not uncommon for a court to enter an order finally determining the issues of liability between the parties and then to refer the case to a master for a determination of damages.'"[82]

The court pointed out that the Second, Third, Fourth, and Eighth Circuits also supported this narrow interpretation of Section 1292(a)(3).[83]

The court of appeals conceded, however, that one Eleventh Circuit opinion and decisions from the Second and Third Circuits appeared to support jurisdiction in this case.[84] The court noted that in *Isbrandtsen Marine Services, Inc. v. M/V INAGUA TANIA*,[85] foreign seamen had tried to intervene in an in rem admiralty action to assert their maritime liens for wages, supplies, and repairs.[86] The district court, which had already ordered the interlocutory sale of the vessel, denied the seamen's motion because of deficiencies in their pleadings.[87] Noting that the seamen were foreign and, thus, deserving of the court's protection and that the vessel often serves as the only asset against which seamen can enforce their claims, the Eleventh Circuit held in *Isbrandtsen Marine Services* that "'it is . . . clear that the interlocutory order denying intervention to the seamen constitutes an appealable order determining the rights and liabilities of the parties as 28 U.S.C. § 1292(a)(3) requires.'"[88]

Turning to the facts of *Sea Lane Bahamas Ltd.*, the Eleventh Circuit stated that Owner "must first demonstrate that the district court's order in fact precludes all avenues of relief."[89] The court commented that Owner faced "stormy seas" in this regard, pointing out that "nothing in the record establishes that the arbitration panel cannot proceed on the merits of [Owner's] claim."[90] Moreover, "neither the settlement agreement nor the order compelling the parties to arbitration . . . precludes the panel from determining whether [Purchaser] is the real-

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82. 188 F.3d at 1322 (quoting *Jamaica Commodity Trading Co.*, 992 F.2d at 1163).
83. *Id.*
84. *Id.* at 1323 (citing A.H. Bull Steamship Co. v. United States, 235 F.2d 1, 2 (2d Cir. 1956) (per curiam); Kingstate Oil v. M/V GREEN STAR, 815 F.2d 918, 922-24 (3d Cir. 1987)).
85. 93 F.3d 728 (11th Cir. 1996).
86. 188 F.3d at 1323.
87. *Id.*
88. *Id.* (quoting 93 F.3d at 733).
89. *Id.* at 1324.
90. *Id.*

party-in-interest."[91] Finally, the court found that Owner likely would have other avenues for obtaining relief even without arbitration.[92] For example, Owner could file a separate lawsuit based upon the settlement agreement, or Owner could move "the district court to reopen and reconsider its order compelling arbitration in light of the alleged fraud in, or breach of, the foundational settlement agreement."[93]

In the end the Eleventh Circuit refused to extend *Isbrandtsen Marine Services* and "break new ground in this circuit to hold that denial of motions to reopen a case and amend the complaint determines the rights and liabilities of the parties."[94] The court noted that *Isbrandtsen Marine Services* would be applicable in this case only if Purchaser, a nonparty, had been denied leave to intervene by the district court.[95] Moreover, the facts of the present matter did not "give rise to a special duty of the court such as the duty owed to the foreign seamen in *Isbrandtsen*."[96] The Eleventh Circuit held that jurisdiction under Section § 1292(a)(3) was absent because the order denying Owner's motions to reopen the case and to amend the complaint "did not resolve any claim on the merits or dismiss a party, or even one claim with respect to a party."[97]

B. Personal Jurisdiction: Long-Arm Jurisdiction

In *Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*,[98] the Eleventh Circuit addressed whether the exercise of personal jurisdiction over a foreign defendant was proper. The court affirmed the district court's dismissal of the lawsuit for want of personal jurisdiction, concluding (1) that jurisdiction based upon Florida's long-arm statute was improper because defendant did not commit a tort within that state and (2) that Rule 4(k)(2) of the Federal Rules of Civil Procedure would not support jurisdiction because defendant had insufficient contacts with the United States.[99]

Productos Fitosanitarios Profico El Carmen, S.A. ("Shipper") contracted with Associated Transport Line, Inc. ("Carrier") to transport a cargo of herbicide from Colombia to a purchaser in Trinidad. The shipping

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91. *Id.*
92. *Id.* at 1325.
93. *Id.* at 1326.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1323 (footnote omitted).
98. 197 F.3d 1070 (11th Cir. 1999).
99. *Id.* at 1074-76.

documents, which were prepared and signed in Colombia, confirmed that the carrying vessel would stop in Texas and Florida before delivering the cargo to Trinidad. Carrier maintained that the shipping documents did not identify the chemical content of the herbicide.[100]

During the voyage the herbicide leaked onto the deck of the vessel while it was in Florida waters. The United States Coast Guard ordered Carrier to clean up the spill. Carrier's Colombian agents contacted Shipper to obtain the chemical name of the herbicide so that Carrier would know the proper means of cleaning and disposing of the cargo. Carrier alleged that Shipper misidentified the cargo as a dangerous environmental pollutant when in fact it was a far less harmful product. Carrier alleged that because of this misidentification, it incurred $673,177 in cleanup costs. Carrier further alleged that had the cargo been properly identified, cleanup costs would have amounted to only $15,000.[101]

Carrier sought reimbursement of the excess cleanup costs by filing suit against Shipper in district court in Florida, seeking recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[102] and the general maritime law. Shipper sought dismissal for lack of personal jurisdiction. Carrier argued that personal jurisdiction over Shipper was proper under (1) the tort prong of Florida's long-arm statute,[103] and (2) Rule 4(k)(2), which is the "national long-arm statute."[104] Shipper countered that neither jurisdictional hook was applicable because no tort occurred in Florida and because Shipper had insufficient contacts with either Florida or the United States to support jurisdiction. The district court dismissed the lawsuit, and Carrier timely appealed.[105]

The Eleventh Circuit first addressed whether the exercise of personal jurisdiction was proper under Florida's long-arm statute. The court stated simply that Carrier must show that Shipper committed a tort in Florida.[106] Carrier argued that Shipper's misidentification of the cargo "caused a clean-up to occur in Florida."[107] Carrier asserted that Shipper's actions constituted a CERCLA violation and that under the reasoning of the court in *Chatham Steel Corp. v. Brown*,[108] a tort based

100. *Id.* at 1071.
101. *Id.* at 1071-72.
102. 42 U.S.C.A. §§ 9601-9675 (West 1995 & Supp. 2000).
103. FLA. STAT. ANN. § 48.193(1)(b) (West Supp. 2000).
104. 197 F.3d at 1072.
105. *Id.*
106. *Id.*
107. *Id.*
108. 858 F. Supp. 1130, 1146 (N.D. Fla. 1994).

upon a CERCLA violation takes place where the environmental hazard occurs.[109]

The Eleventh Circuit disagreed, focusing on the nature of the alleged tort committed by Shipper.[110] The court clarified that the basis of Carrier's complaint was not Shipper's alleged negligence in causing the spill that resulted in the cleanup costs.[111] Indeed, Carrier did not allege that Shipper played any role in causing the spill.[112] Rather, Carrier sought recovery for Shipper's alleged misidentification of the cargo as hazardous, which caused Carrier to pay more for the cleanup than it should have.[113] Therefore, the court concluded that Shipper's liability to Carrier would have to arise from a duty to communicate accurately the chemical nature of the herbicide.[114] Any breach of this duty would have had to occur in Colombia, where Shipper's representatives informed Carrier's Colombian agents of the identity of the cargo.[115] Thus, the court reasoned, the alleged tort occurred in Colombia, not Florida.[116]

The Eleventh Circuit then addressed whether the exercise of personal jurisdiction was proper under Rule 4(k)(2). The court explained that Rule 4(k)(2) "permits the exercise of personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole, but is without sufficient contacts to satisfy the long-arm statute of any particular state."[117] The court then set forth the due process requirements that must be satisfied for the exercise of jurisdiction under Rule 4(k)(2):

> [Defendant's] contacts with the nation as a whole must be (1) either related to the plaintiff's cause of action or have given rise to it; (2) involve some act by which the defendant has purposefully availed itself of the privilege of conducting activities within the forum; and (3) must be such that it should reasonably have anticipated being haled into court there.[118]

The Eleventh Circuit examined Shipper's contacts with the United States, which included the export of Shipper's products to the United

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109. 197 F.3d at 1072.
110. *Id.* at 1073.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1074 (citing SEC v. Carrillo, 115 F.3d 1540, 1543-44 (11th Cir. 1997)).
118. *Id.*

States on 9 occasions, the purchase of goods from the United States on 193 occasions, and the shipment of the herbicide in the present matter.[119] The court held Shipper's alleged single act of misidentifying the cargo that was transported through Florida waters would not support jurisdiction under Rule 4(k)(2).[120] Likewise, Shipper's purchases from the United States (nonrelated contacts) were not sufficiently pervasive to support jurisdiction under Rule 4(k)(2).[121] The court stated that "a party's purchases in the United States are never enough to justify jurisdiction."[122] Finally, the court concluded that Shipper's nine sales in the United States during a four-year period were not sufficient to support general personal jurisdiction over Shipper.[123] Thus, the Eleventh Circuit affirmed the district court's dismissal of Carrier's complaint for lack of personal jurisdiction.[124]

III. CARRIAGE OF GOODS BY SEA

A. *Nonperformance of Contract as Excusing Performance*

In *Crowley American Transport, Inc. v. Richard Sewing Machine Co.*,[125] the Eleventh Circuit affirmed the district court's grant of summary judgment to an ocean carrier on its claim for unpaid freight and reasonable attorney fees.[126] Richard Sewing Machine Co. ("Shipper") entered into a contract with Crowley American Transport, Inc. ("Carrier") to transport two containers of textiles and machines from Miami, Florida to the "Free Trade Zone" in Managua, Nicaragua. The contract[127] provided that upon arrival of the cargo in Managua, Carrier would notify both Industrias Sama & Cia, Ltda. ("Receiver") and a Nicaraguan bank ("Bank").[128]

Carrier delivered the cargo to the Free Trade Zone and notified Receiver, but not the Bank, of the cargo's arrival. Carrier then entrusted the cargo to Nicaraguan customs authorities, who were

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119. *Id.*
120. *Id.* at 1074-75.
121. *Id.* at 1075.
122. *Id.* (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418 (1984)).
123. *Id.*
124. *Id.* at 1076.
125. 172 F.3d 781 (11th Cir. 1999).
126. *Id.* at 786.
127. Two bills of lading were issued, one for each container. *Id.* at 783. The Eleventh Circuit noted that the bills of lading served both as negotiable documents of title and as the contract of carriage between the parties thereto. *Id.* at 783 n.2.
128. *Id.* at 783.

expected to release the cargo upon receipt of the two original bills of lading. Shipper had previously forwarded the original bills of lading to the Bank with instructions to surrender them to Receiver upon Receiver's execution of time drafts in the amount of $473,704 in favor of Shipper. Upon arrival of the cargo, Receiver went to the Bank, but refused to execute the time drafts. As a result the Bank would not surrender the bills of lading to Receiver. Instead, the Bank returned the bills of lading to Shipper.[129]

Because the cargo remained unclaimed, Shipper contracted with Carrier to return the cargo from Managua. However, Carrier discovered that Receiver had obtained the cargo from Nicaraguan customs officials without presenting the original bills of lading. Pursuant to a Nicaraguan court order obtained by Carrier, Receiver returned the containers to Carrier, who transported them back to Miami. Shipper subsequently discovered that the cargo had sustained damage while it was in Receiver's possession.[130]

Upon Shipper's refusal to pay Carrier for the transportation of the containers to and from Managua, Carrier filed suit in district court for breach of contract to collect the amount due. Shipper answered that Carrier breached its contractual obligations by (1) failing to notify the Bank upon the arrival of the cargo in Managua and (2) failing to protect the cargo from misappropriation by Receiver. Shipper also counterclaimed for the damage allegedly sustained by the cargo while in Receiver's possession.[131]

Both parties moved for summary judgment. The district court granted Carrier's motion on its breach of contract claims and against Shipper on its counterclaims. Carrier subsequently moved for summary judgment on the issue of damages, including a request for attorney fees. The district court granted this motion, and Shipper timely appealed.[132]

The Eleventh Circuit first addressed the issue of notification. The court identified the following two undisputed facts: (1) Carrier was contractually obligated to notify the Bank of the cargo's arrival, and (2) Carrier breached this contractual duty by failing to notify the Bank.[133] However, Carrier's breach did not end the court's inquiry. The issue was whether Carrier's breach was sufficiently material to excuse Shipper's

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129. *Id.*

130. *Id.* at 783-84.

131. *Id.* at 784.

132. *Id.*

133. *Id.* The record confirmed that the Bank was notified of the cargo's arrival, but allegedly not by Carrier. *Id.* at 784 n.5.

nonpayment or nonperformance of the contract.[134] The court found that the only purpose of the notification provision was to alert the Bank and Receiver to commence the exchange of bills of lading and bank drafts.[135] This goal, the Eleventh Circuit reasoned, was accomplished when Carrier notified Receiver of the cargo's arrival.[136] Thus, the court held that Carrier's failure to notify the Bank was immaterial and did not excuse Shipper's nonperformance of the contract.[137]

The Eleventh Circuit then addressed Shipper's counterclaims. On Shipper's counterclaim seeking recovery of damages for Receiver's misappropriation of the containers, the court resolved the issue by proximate-causation analysis.[138] The court emphasized that a "party cannot recover damages for breach of contract unless it can prove that the damages were proximately caused by the breach."[139] The court found no evidence in the record to show that the Bank would have prevented the misappropriation of the cargo had Carrier notified the Bank of the cargo's arrival.[140]

The court then addressed whether Carrier had a contractual duty to prevent Receiver's misappropriation of the cargo. Shipper argued that Carrier had a contractual duty to deliver the cargo to Receiver upon presentation of the original bills of lading. Because Carrier surrendered the cargo to Nicaraguan customs authorities without receiving the original bills of lading, Carrier breached its contractual duty to deliver the cargo.[141] The court of appeals, finding no such contractual duty, rejected Shipper's argument.[142] The court found that the contract required only that Carrier deliver the cargo to the Free Trade Zone and notify Receiver of its arrival; it did not require Carrier to supervise the cargo until Receiver presented the original bills of lading for the cargo.[143] Therefore, the court reasoned, Receiver's misappropriation of the cargo could not constitute a breach of the contract by Carrier and would not excuse Shipper's nonperformance of the contract.[144]

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134. *Id.* at 784 (citing 17A AM. JUR. 2D *Contracts* § 701 (1991)).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* (citing 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 997 (1964)).
140. *Id.* at 784-85.
141. *Id.* at 785.
142. *Id.*
143. *Id.*
144. *Id.* This conclusion resolved Shipper's counterclaim on this issue as well. *Id.*

The Eleventh Circuit then addressed Shipper's counterclaim for negligence. Citing the Harter Act,[145] the court stated that "a carrier has a non-waivable duty, independent of any contractual duties, to effect a 'proper delivery' of cargo entrusted to it."[146] The court explained that "[w]hether there has been a proper delivery is determined by what is customary at the port of delivery."[147] The court found a "proper delivery" based upon Carrier's unrebutted evidence that in Nicaragua it was customary to surrender cargo to customs authorities, who in turn were expected to deliver the cargo to the proper party upon presentation of original bills of lading.[148] The court affirmed the district court, holding that Carrier did not breach its Harter Act duties.[149]

Finally, the court addressed the district court's award of attorney fees to Carrier. The court set forth the American Rule, which provides that attorney fees are not recoverable by the prevailing party absent "certain common law and statutory exceptions or a contractual provision."[150] Carrier relied upon language in the contract that provided, "Carrier shall be entitled to recover all costs of collection, including reasonable attorneys' fees and expenses."[151] Shipper asserted that Carrier's contractual right to recover attorney fees applied only to administrative actions before the Federal Maritime Commission.[152] The court of appeals rejected this argument, finding the contract imposed no requirement on Carrier to pursue its claim in administrative proceedings and in no way limited the collection of attorney fees to those incurred in administrative proceedings.[153] Thus, the court affirmed the district court's award of attorney fees.[154]

B. Unreasonable Deviation: Effect upon COGSA's Time Bar

In *Mesocap Industries Ltd. v. Torm Lines*,[155] the Eleventh Circuit resolved a previously open question in the circuit—whether under the Carriage of Goods by Sea Act ("COGSA"),[156] an unreasonable deviation

145. *See* 46 U.S.C. app. § 190 (1994).
146. 172 F.3d at 785.
147. *Id.* (citing Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166, 168 (5th Cir. Unit B May 1981)).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 786.
152. *Id.*
153. *Id.*
154. *Id.*
155. 194 F.3d 1342 (11th Cir. 1999).
156. *See* 46 U.S.C. app. §§ 1300-1315 (1994).

by an ocean carrier prevents the carrier from invoking the one-year statute of limitation for filing suit for cargo damage.[157] Like the Fifth Circuit, the court held that an unreasonable deviation does not oust COGSA's time bar.[158]

Mesocap Industries Ltd. and Tradelink Exports Corp. (collectively "Cargo Interests") filed a lawsuit on September 25, 1999 against Torm Lines ("Carrier"). Cargo Interests sought to recover for damage allegedly sustained by cargo stowed in one of three containers carried on Carrier's vessel. Cargo Interests conceded that suit was not filed within COGSA's one-year limitation period. Carrier conceded for purposes of appeal that it unreasonably deviated from the contract of carriage. The only issue on appeal was whether a carrier's unreasonable deviation prevents the carrier from invoking COGSA's one-year limitation for filing suit.[159]

Carrier moved to dismiss Cargo Interests' complaint on the ground that it was filed more than one year after the delivery of the cargo or the date the cargo should have been delivered, in contravention of COGSA's one-year limitation for filing suit.[160] Cargo Interests opposed Carrier's motion, arguing that Carrier unreasonably deviated from the contract of carriage, thereby nullifying the contract of carriage and making COGSA's one-year limitation period inapplicable.[161] The district court granted Carrier's motion, relying upon the Fifth Circuit's opinion in *Bunge Edible Oil Corp. v. M/V TORM RASK*,[162] in which the court held that "[a]n unreasonable course deviation by a carrier does not prevent it from invoking COGSA's one-year limitation because the limitation has no conceptual nexus with cargo risk allocation."[163] Cargo Interests appealed.[164]

The Eleventh Circuit noted that the effect of a carrier's unreasonable deviation on COGSA's time bar was unsettled in the circuit.[165] While the court had previously addressed the effect of an unreasonable deviation upon a carrier's right to invoke COGSA's package limitation,[166] it had not addressed the specific issue before it in *Mesocap*

157. 194 F.3d at 1343
158. *Id.* at 1345.
159. *Id.* at 1342-43.
160. *Id.* (citing 46 U.S.C. app. § 1303(6)).
161. *Id.*
162. 949 F.2d 786 (5th Cir. 1993) (per curiam), *aff'g* 756 F. Supp. 261 (E.D. La. 1991).
163. 194 F.3d at 1343.
164. *Id.* at 1343-44.
165. *Id.* at 1344.
166. *See* Unimac Co. v. C. F. Ocean Serv., 43 F.3d 1434, 1437 n.5 (11th Cir. 1995).

Industries.[167] Acknowledging that decisions from other courts[168] supported Cargo Interests' argument that an unreasonable deviation ousts COGSA's one-year limitation, including an opinion from the Southern District of Florida,[169] the court rejected Cargo Interests' argument, instead adopting the reasoning advanced by the Fifth Circuit in *Bunge Edible Oil Corp.*[170] Based on the Fifth Circuit's holding that a carrier's unreasonable deviation may have a logical relationship to the parties' risk of loss with respect to the cargo, the Eleventh Circuit stated, "[H]ence the need for elimination of the per package limitation defense."[171] However, the unreasonable deviation has no relationship to the parties' expectations concerning when to sue.[172] Thus, "[n]o justification exists . . . to nullify COGSA's limitation period merely because a carrier veers off course."[173] The court of appeals affirmed the district court, joining the Fifth Circuit in holding that an unreasonable course deviation does not nullify COGSA's one-year limitation period.[174]

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167. 194 F.3d at 1344 (citing *Unimac Co.*, 43 F.3d at 1437 n.5 ("[W]e need not decide whether a deviation would strip a carrier of both the $500 limitation on liability and the statute of limitations, or as the Fifth Circuit has held, merely of the liability limitation, and not of the one-year statute of limitations.")).

168. *See, e.g.*, Northwestern Nat'l Ins. Co. v. Galin, 1988 A.M.C. 878, 879 (S.D.N.Y. 1987).

169. *See* Allstate Ins. Co. v. International Shipping Corp., 1982 A.M.C. 1763, 1769 (S.D. Fla. 1981), *aff'd on other grounds*, 703 F.2d 497 (11th Cir. 1983).

170. 194 F.3d at 1345.

171. *Id.*

172. *Id.*

173. *Id.* at 1342 (citing *Bunge Edible Oil Corp.*, 756 F. Supp. at 263-66).

174. *Id.* at 1345.