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Admiralty

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The Court of Appeals for the Eleventh Circuit decided eight admiralty cases with written opinions in 1995. Five of the decided cases involved issues of first impression. One case considered whether appellate review may be exercised over a stay order favoring arbitration after the stayed action is dismissed for failure to arbitrate as ordered. Two cargo cases dealt with issues of first impression. One case involved two issues of first impression: whether the carrier's failure to deliver the goods on a sight draft basis constituted a misdelivery and whether a misdelivery amounted to a deviation causing the loss of the defenses provided by the Carriage of Goods by Sea Act. The second cargo case addressed whether the carrier can invoke the fire defense of the Carriage of Goods by Sea Act and the Fire Statute without first demonstrating that it had acted with due diligence in providing a seaworthy vessel. A longshore case involved the applicability of the anti-assignment provision of the Longshore and Harbor Workers' Compensation Act to an assignment of annuity payments made to secure a bank loan. The final case of first impression involved a seaman and whether or not his unearned wages included tips he would have earned aboard a cruise ship as a cabin steward. The remaining three cases did not change the law as it exists in this circuit.

I. APPELLATE JURISDICTION

The Eleventh Circuit decided three cases involving issues of appellate jurisdiction. Two of those cases are reviewed here, and the third, *Bradford Marine, Inc. v. M/V SEA FALCON*,[1] is reviewed in the section

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1. 64 F.3d 585 (11th Cir. 1995).

dealing with maritime liens since that was the principal issue in that case.

The most important of those decisions is *Morewitz v. West of England Ship Owners Mutual Protection & Indemnity Ass'n (Luxembourg)*,[2] in which the court of appeals faced issues of appellate jurisdiction and waiver of a right to arbitration. The saga of that case, which has been to the Eleventh Circuit three times, began on December 13, 1975 when the M/V IMBROS, laden with cargo, departed Mobile for Quebec, Canada.[3] Three days later the crew notified the vessel's managing agent of a leak in the salt water cooling system for the main engine gears. Five days into the voyage the crew broadcast an SOS from waters in the Bermuda Triangle. The vessel disappeared at sea without a trace.[4]

The M/V IMBROS was owned by Imbros Shipping Company, Ltd. and managed by General Development & Shipping Enterprises Company, Ltd.[5] The club, West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), had issued a maritime protection and indemnity policy covering the vessel. Imbros Shipping Co., Ltd. was a named insured; General Development was not.[6] One of the risks insured against was "the loss of life of any person onboard an insured vessel."[7] Rule 64 of the club provided for the arbitration of any dispute arising between an owner and the club.[8]

Morewitz brought wrongful death actions on behalf of seven of the deceased crew members against the owner and manager. The owner was dismissed for lack of personal jurisdiction.[9] The club appointed counsel to defend the action both before and after the dismissal of the

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2. 62 F.3d 1356 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996).
3. 62 F.3d at 1359.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* Rule 64 states:

> If any difference or dispute shall arise between an insured Owner . . . and the Association out of or in connection with these Rules or arising out of any contract between an insured Owner and the Association or as to the rights or obligations of the Association or the insured Owner thereunder or in connection therewith or as to any other matter whatsoever, such difference or dispute shall be referred to the arbitration in London of a sole legal Arbitrator . . . . The obtaining of an Arbitration Award as hereinbefore provided shall be a condition precedent to the right of any insured Owner to bring or maintain any action, suit or other legal proceedings against the Association in respect of any such difference or dispute.

Id.

9. *Id.*

owner. Morewitz attempted to establish that the manager was responsible for the vessel at the time of its disappearance by propounding interrogatories to the manager. When the manager refused to respond, the district court imposed sanctions by declaring the manager to be the owner *pro hac vice* of the vessel at the time of the loss.[10] Ultimately the district court determined that the M/V IMBROS was inadequately manned and therefore unseaworthy when it disappeared.[11] The district court held that the manager was liable for the deaths of the crew members and entered judgment in their favor on April 3, 1980.[12] The judgment was summarily affirmed by the Court of Appeals for the Fourth Circuit.[13]

During the course of the litigation the manager became insolvent and defunct. When the judgment remained unpaid, Morewitz registered the Virginia judgment in the United States District Court for the Southern District of Alabama and sought to enforce the judgment and recover on the marine protection and indemnity policy issued by the club. In order to do so, Morewitz filed the present suit to enforce the judgment on June 26, 1985. Morewitz based his suit on English bankruptcy statutes and a marine insurance contract.[14] The club filed a motion to dismiss based on lack of subject matter jurisdiction. Finding that the suit was based on the English bankruptcy statutes, the district court dismissed for lack of subject matter jurisdiction.[15] On Morewitz's first appeal the Eleventh Circuit reversed the district court, reasoning that "the subject matter of the suit is liability under a marine insurance policy, so the basis of [Morewitz's] case also is admiralty subject matter."[16]

On remand, Morewitz relied solely on the Alabama direct action statutes which "give a group of persons—those whose possible injury was the risk insured by the contract—direct standing to sue an insuror by putting them 'in the shoes' of the assured."[17] The club then sought to enforce the arbitration provision pursuant to Section 3 of the Federal Arbitration Act (the Act) and filed a motion to stay the proceedings pending arbitration.[18] The motion was granted by the district court.[19]

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10. *Id.* at 1360.
11. *Id.*
12. *Id.*
13. Morewitz v. General Dev. & Shipping Enter. Co., 660 F.2d 491 (4th Cir.), *cert. denied*, 454 U.S. 939 (1981).
14. 62 F.3d at 1360.
15. *Id.*
16. 896 F.2d 495, 500 (11th Cir. 1990).
17. 62 F.3d at 1360. ALA. CODE §§ 27-23-1 & 27-23-2 (1975).
18. 62 F.3d at 1361. Section 3 provides:

Morewitz filed a motion for reconsideration, arguing that the club had waived its right to compel arbitration. The district court denied Morewitz's motion, concluding that the club was not required to make a prelitigation demand for arbitration.[20] Morewitz then made his second appeal to the Eleventh Circuit, which was dismissed for lack of jurisdiction because Section 16 of the Federal Arbitration Act prohibits appeals from orders entered pursuant to Section 3 of the Act favoring arbitration.[21]

On remand, the district court ordered the parties to begin arbitration within six months.[22] When the district court denied Morewitz's request to reconsider the stay order or to certify the question for immediate appeal, Morewitz intentionally refused to comply with the arbitration order.[23] As a result, the district court dismissed the case with prejudice for want of prosecution.[24] Morewitz appealed for the third time.[25]

The threshold issue confronted by the Eleventh Circuit was whether or not it had jurisdiction to consider the appeal.[26] The issue arose in the context of whether a party whose action is stayed pending arbitration under Section 3 of the Act[27] must first arbitrate the dispute before obtaining appellate review of the stay order. The club argued that there was no jurisdiction because of the prohibition stated in Section 16 of the Act which provides "an appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title."[28] The club contended that because arbitration had never taken place due to Morewitz's refusal to arbitrate, the matter was not appealable. Section 3 of the Act gives credence to the club's position with language which states, "the court . . . shall on application of one of the parties stay the trial of the action *until such arbitration has been had* in accordance

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> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1988).

19. 62 F.3d at 1361.
20. *Id.*
21. *Id.* at 1358.
22. *Id.* at 1359.
23. *Id.* at 1359.
24. *Id.* at 1359, 1361.
25. *Id.* at 1359.
26. *Id.* at 1361.
27. 9 U.S.C. § 3 (1988).
28. 62 F.3d at 1361 (quoting 9 U.S.C. § 16(b)(1) (Supp. III 1991)).

with the terms of the agreement . . . ."[29] In other words, there is to be no judicial interference until arbitration is had.

In order to get around the express statutory prohibition, the court of appeals chose to view the dismissal with prejudice as a final judgment pursuant to 28 U.S.C. § 1291, "a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment."[30] The court of appeals was unreceptive to the club's argument that the real issue was whether or not a party can thwart the express statutory language of section 16 of the Federal Arbitration Act (and a direct order from the district court) by refusing to arbitrate. According to the Eleventh Circuit, by intentionally refusing to arbitrate and suffering a dismissal with prejudice a party can obtain review of an order that is otherwise unreviewable.[31] At the very least there seems to be a conflict between 28 U.S.C. § 1291 and the Federal Arbitration Act which the Eleventh Circuit did not fully reconcile.[32]

The Eleventh Circuit purported to support its opinion with its decision in *State Establishment for Agricultural Product Trading v. M/V WESERMUNDE*.[33] That case was a poor choice of authority since the decision preceded the 1988 amendments to the Federal Arbitration Act, specifically Section 16 which prohibits appeals of rulings under Sections 3 and 4.[34]

The decision of the Eleventh Circuit permits a party who does not want to arbitrate to short circuit the prohibition of appeals in Section 16 by refusing to arbitrate and suffering a dismissal with prejudice. Although this procedure is not without risk (all is lost if the order to arbitrate is affirmed), it does provide a party with a means to circumvent the Federal Arbitration Act.

The Eleventh Circuit then addressed the conflict between the English bankruptcy and the Alabama direct action statutes.[35] In resolving the issue the Eleventh Circuit relied on the procedural versus substantive characterization.[36] The Eleventh Circuit characterized the Alabama direct action statutes as "procedural and therefore not subject to choice

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29. 9 U.S.C. § 3 (1988) (emphasis added).

30. 62 F.3d at 1361.

31. *Id.* at 1362.

32. Section 1291 provides in part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1988).

33. 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988).

34. *State Establishment* was decided on March 11, 1988, eight months prior to the effective date of the Act, November 19, 1988. 838 F.2d at 1576.

35. 62 F.3d at 1362.

36. *Id.* at 1363.

of law rules."[37] Thus, the court of appeals ruled that the Alabama statutes applied automatically as the procedure of the forum without engaging in any meaningful conflicts analysis.[38]

The Eleventh Circuit then turned its attention to the arbitration provision in the contract of insurance, noting that under Alabama law the injured party steps into the shoes of the insured in any effort to collect against the insurance company.[39] According to the Eleventh Circuit, since arbitration is an affirmative defense that would have been available to the club in an action brought by the insured, Morewitz was bound by the terms of the arbitration agreement unless the arbitration provision did not apply to the decedents or the club had waived its right to compel arbitration.[40] The court of appeals then analyzed whether the arbitration provision applied to the decedents.[41] That entire discussion is nothing more than obiter dicta since the Eleventh Circuit never reached a conclusion on this issue but decided the case based on the waiver issue.[42] The Eleventh Circuit was inconsistent in requiring the parties to abide by the terms of the contract of insurance. The court of appeals was fully prepared and did require the club to fulfill each and every provision in the contract of insurance, but when it came time to apply the same requirement to Morewitz, the Eleventh Circuit waffled by saying, "we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so .... [W]e question whether the arbitration clause in the policy between West of England and General Development applies to the deceased crew members."[43]

In addressing the issue of whether the club waived its right to compel arbitration, the Eleventh Circuit appears to have been swayed by the fact that the club appointed counsel who unsuccessfully defended General Development's liability in the Virginia action. The Eleventh Circuit seemed to overlook the fact that the club had a contractual obligation to provide a defense. The Eleventh Circuit appears to have made no distinction between a duty to provide a defense and an obligation to pay a judgment.

In laying the foundation for finding a waiver, the Eleventh Circuit noted that:

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37. *Id.* (citing State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 416 (2d Cir. 1990)).

38. *Id.*

39. *Id.*

40. *Id.* at 1364.

41. *Id.*

42. *Id.* at 1365; *see also id.* at 1367 (Carnes, J., concurring).

43. *Id.* at 1365.

> [w]aiver occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party . . . . Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate.[44]

The court of appeals then applied those considerations to the case and concluded, "it is apparent to this Court that West of England has waived its right to compel arbitration."[45] Apparently the court of appeals chose to ignore the fact that without the judgment Morewitz obtained in the Virginia action, he would have had no basis upon which to institute an action for collection against the club.

When the Eleventh Circuit could find no basis for a waiver in the actions of the club in the Alabama litigation, the only litigation in which the club was a party, the Eleventh Circuit gave a wholly gratuitous reason for finding waiver: "[W]e do not believe that an insurer should be permitted to collude with its insured to the detriment of the injured third-party."[46] Given the fact that there was no proof or even allegation of collusion, this is evidence that the opinion was result oriented. Finally, the Eleventh Circuit found prejudice because the House of Lords' decision requiring that the insured must first pay before any other party can sue on the contract when the insurance policy in question is an indemnity policy was not announced until nine years after the Fourth Circuit affirmed the manager's liability for the deaths of the crew members.[47] Not only does this rationale burden the club with changes in the law adverse to the plaintiff and that the club could not have foreseen, it overlooks the fact that Morewitz himself delayed filing the action in Alabama for four years.[48]

The Eleventh Circuit held that "the appropriate time for West of England to contest coverage and demand arbitration with General Development was during the proceedings in the United States District Court for the Eastern District of Virginia."[49] Since the club was not a party to that litigation, the Eleventh Circuit has now established in this circuit that a party must make a prelitigation demand for arbitration. This will create harmful ramifications since doing so requires that parties demand arbitration before an arbitral issue is actually contested.

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44. *Id.* at 1366.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 1360. Morewitz did not file the Alabama action until June 26, 1985. *Id.*
49. *Id.* at 1366.

Last, the Eleventh Circuit reviewed the decision of the district court to dismiss the case for want of prosecution.[50] The Eleventh Circuit noted that dismissal with prejudice should "be imposed only in the face of a clear record of delay or contumacious conduct by the plaintiff. Dismissal with prejudice is a sanction of last resort that is to be utilized only in extreme situations."[51] The court of appeals cited *State Establishment* and concluded that the district court had abused its discretion.[52] Again, that case is poor authority in view of the fact that the Federal Arbitration Act was materially amended subsequent to the decision, and the fact that the Supreme Court subsequently overruled the main issue of the case.[53] The holding in *State Establishment* to the effect that the district judge should have certified the question under Rule 54(b) of the Federal Rules of Civil Procedure may seem like a reasonable alternative and a less drastic sanction than dismissal with prejudice. However, in view of the express language of the Federal Arbitration Act, such an order affords the party a remedy to which he is not otherwise entitled.

All of the courts of appeals which have addressed the issue of appealability under somewhat similar circumstances have found that no appeal lies.[54] Accordingly, the Eleventh Circuit would seem to be out of step with its decision in *Morewitz*. For parties who do not want to arbitrate, this decision offers a potential means around the express prohibition of appeals from orders requiring arbitration.

The other case dealing with appellate jurisdiction is *Isbrandtsen Marine Services v. M/V INAGUA TANIA*.[55] In that case, the supplier, Isbrandtsen Marine Services, Inc. provided bunkers and lube oil to the vessel pursuant to orders of the vessel owners and charterers. Supplying such "necessaries" gave the supplier a maritime lien against the vessel which it foreclosed when repeated demands for payment went unanswered.[56] After the vessel was arrested, the district court set the

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50. *Id.* at 1361.

51. *Id.* at 1366 (citations omitted).

52. *Id.* at 1365-66.

53. The amendments to the Federal Arbitration Act became law on November 19, 1988, eight months after the decision in *State Establishment* on March 11, 1988. The primary issue on appeal in *State Establishment* was overruled in Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 115 S. Ct. 2322 (1995).

54. Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953 (10th Cir. 1994); American Casualty Co. v. L-J, Inc., 35 F.3d 133 (4th Cir. 1994); Humphrey v. Prudential Sec., Inc., 4 F.3d 313 (4th Cir. 1993); Perera v. Siegel Trading Co., 951 F.2d 780 (7th Cir. 1992); Stedor Enters., Ltd. v. Armtex, Inc., 947 F.2d 727 (4th Cir. 1991).

55. 68 F.3d 1315 (11th Cir. 1995).

56. *Id.* at 1316. Section 31342(a) provides in part:

amount of the bond in order to secure the release of the vessel. When the owners failed to secure the release of the vessel, it was purchased by the supplier at a marshal's sale. The sale was subsequently confirmed by the district court. The supplier ultimately sold the vessel to a third party who sailed the vessel from the jurisdiction.[57]

The owner brought an interlocutory appeal, challenging (1) the order setting the amount of the bond; (2) the order for interlocutory sale; and (3) the orders denying owner's motions for reconsideration of those orders.[58] The court of appeals determined that the order setting the bond was not subject to an interlocutory appeal because it did not determine the rights and liabilities of the parties as is required by section 1292(a)(3).[59] In accordance with *Bradford Marine, Inc. v. M/V SEA FALCON*,[60] the court of appeals concluded that the orders directing and confirming the sale of the vessel were reviewable pursuant to section 1292(a)(3).[61] Unfortunately for the owner, the Eleventh Circuit found "these appeals became moot upon the departure of the vessel from the court's jurisdiction, since all of [the owner's] arguments concerning the sale focus[ed] on its claim to possession of the vessel."[62] Accordingly, the court of appeals dismissed the remaining issues.[63]

II. CARGO

In a case of first impression, *Unimac Co. v. C.F. Ocean Service, Inc.*,[64] the Eleventh Circuit addressed the question of whether a carrier's misdelivery of goods constituted a deviation, thereby causing the carrier

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[A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner -
(1) has a maritime lien on the vessel;
(2) may bring a civil action in rem to enforce the lien; and
(3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342(a) (1994).

57. 68 F.3d at 1316.

58. *Id.* Section 1292 provides in part:
(a) [T]he courts of appeals shall have jurisdiction of appeals from: . . . .
. . . . (3) Interlocutory 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.

28 U.S.C. § 1292 (1988).

59. 68 F.3d at 1316 (citing 28 U.S.C. § 1292(a)(3) (1988)).

60. 64 F.3d 585 (11th Cir. 1995).

61. 68 F.3d at 1316.

62. *Id.*

63. *Id.*

64. 43 F.3d 1434 (11th Cir. 1995).

to lose the benefits of the defenses afforded by the Carriage of Goods by Sea Act ("COGSA").[65] The dispute arose as the result of two shipments of washing machines from Savannah to Australia. On November 13, 1989, the shipper, Unimac Company, Inc., a manufacturer and seller of washing machines, delivered a locked and sealed container to C. F. Ocean Service, Inc., a nonvessel operating common carrier engaged in the business of shipping goods from the United States to foreign destinations. Three days later the shipper sent the carrier a letter directing that the shipment be handled on a sight draft basis, meaning that the consignee must pay for the washing machines before obtaining them from the carrier.[66]

On January 30, 1990, another shipment was delivered to the carrier along with a similar letter of instruction. The carrier made no objection to the terms set forth in the letters and issued an ocean bill of lading for each of the shipments. Although the bills of lading were not mailed until after each of the ships had sailed, the shipper received each of the bills of lading before each ship arrived in Australia.[67] Each bill of lading set forth provisions governing the contract of carriage, including a clause paramount expressly incorporating COGSA, a $500 per package limitation, an opportunity for the shipper to obtain "all risk" insurance upon declaring the value of the cargo and paying an excess insurance charge, a one year statute of limitations, and a provision incorporating the carrier's tariff on file with the Federal Maritime Commission. The shipper never objected to any of the terms in the bill of lading and never ordered or paid for the excess insurance.[68]

On February 6, 1990, the carrier delivered the first shipment to the consignee without obtaining payment by sight draft. The second shipment was similarly delivered on March 16, 1990. The consignee never paid for any of the merchandise, and the shipper instituted suit on February 19, 1991 against the carrier, seeking damages for breach of contract and misdelivery of the goods. On cross motions for summary judgment the district court held that the shipper's claim for the first shipment was barred by COGSA's one year statute of limitation, and that the carrier had breached a provision in the contract of carriage requiring it to obtain a sight draft prior to delivery. However, the court limited recovery for the second shipment to $500 for each of the seven packages.[69]

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65. 46 U.S.C.A. App. §§ 1300-1315 (1994).
66. 43 F.3d at 1435.
67. *Id.*
68. *Id.* at 1435-36.
69. *Id.* at 1436. There was no contest over the number of packages. *Id.*

On appeal the shipper contended that the carrier's failure to obtain a sight draft prior to delivery of the goods constituted a deviation of the contract of carriage and therefore COGSA defenses were unavailable. Alternatively, the shipper argued that it did not have a fair opportunity to declare a higher value for the second shipment because it did not receive the bill of lading until after the ship had sailed.[70]

As a threshold issue on appeal the Eleventh Circuit determined that COGSA governed the transaction since the dispute between the parties arose from a contract for the shipment of goods from Savannah to Australia.[71] The Eleventh Circuit held that the carrier's "failure to deliver the goods on a sight draft basis was a misdelivery."[72] The court of appeals then followed the First and Second Circuits and held that a misdelivery is not a deviation.[73] The Eleventh Circuit stated that it had a "general reluctance to interpret the doctrine of deviation expansively,"[74] noting that "[s]ince the passage of COGSA, courts have applied the doctrine of deviation sparingly, generally only for geographical departures and unauthorized on-deck stowage."[75] In holding that a misdelivery did not constitute a deviation, the Eleventh Circuit did not reach the question of whether a deviation would cause a carrier to lose both the $500 package limitation and the one year statute of limitations defenses.

In rejecting the shipper's argument that the $500 package limitation did not apply because the shipper had not received the bill of lading until after the ship had sailed, the Eleventh Circuit maintained its rigid adherence to what a shipper must do in order to avoid the package limitation.[76] The court of appeals pointed out the requirements for the carrier to obtain limited liability as follows: "Under COGSA, a carrier has limited liability provided that the carrier gives the shipper adequate notice of the $500 limitation by including a clause paramount in the bill of lading and the carrier gives the shipper a fair opportunity to avoid COGSA's limitation by declaring excess value."[77]

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70. *Id.* at 1437.

71. *Id.* at 1436.

72. *Id.* at 1437 n.6.

73. *Id.* at 1438. *See* Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc., 896 F.2d 656 (1st Cir. 1990); B.M.A. Indus., Ltd. v. Nigerian Star Line Ltd., 786 F.2d 90 (2d Cir. 1986).

74. 43 F.3d at 1438.

75. *Id.* at 1437.

76. *Id.* at 1438; *see also* Marine Transp. Servs. Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133 (11th Cir. 1994); Sony Magnetic Prod., Inc. v. Meriventi O/Y, 863 F.2d 1537 (11th Cir. 1989).

77. 43 F.3d at 1438.

In rejecting the shipper's argument, the court of appeals held that adequate notice was given in not only the carrier's bill of lading but also in the valid tariff filed with the Federal Maritime Commission.[78] The Eleventh Circuit also found that the shipper had a fair opportunity to declare a higher value for its cargo.[79] The Eleventh Circuit rejected the shipper's contention that its letter of instruction, which stated the value of the cargo, satisfied the requirement for declaring the excess value.[80] The Eleventh Circuit found this insufficient, as the bill of lading and COGSA require that the declaration of excess value be in the bill of lading.[81] Additionally, the Eleventh Circuit observed that the shipper did not pay for the excess insurance.[82]

The second cargo case, also a case of first impression, *Banana Services, Inc. v. M/V TASMAN STAR*,[83] dealt with the fire defense of COGSA[84] and the Fire Statute.[85] The issue before the court of appeals was whether a carrier must first demonstrate that it acted with due diligence to provide a seaworthy vessel before the carrier may invoke the fire defense and the Fire Statute.

The case arose out of the shipment of fruit from South America to Florida aboard the M/V TASMAN STAR. The vessel was owned and operated by Navegantes Del Oriente, S.A. which had time chartered the vessel to Star Reefers, Ltd. Star Reefers, Ltd. contracted with Banana Services, Inc. for the carriage of fruit from South America to Florida. The contract of carriage provided that the carrier accepted "liability for any cargo carried in accordance with the U.S. Carriage of Goods by Sea Act."[86]

Two and one-half hours after the vessel departed South America, a fire broke out in the engine room. The crew extinguished the fire but not before it damaged the ship's refrigeration control panels. That damage precluded the vessel from properly refrigerating the fruit. When it was determined that the refrigeration panels could not be repaired at sea, the ship returned to South America where various discussions between the owner and charterers ensued with the shipper participating by telephone. The carrier ultimately decided to proceed to Florida with the cargo aboard the vessel. Upon arrival in Florida it was determined that

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 1438 n.7.
83. 68 F.3d 418 (11th Cir. 1995).
84. 46 U.S.C. § 1304(2)(b) (1988).
85. *Id.* § 182.
86. 68 F.3d at 419.

the cargo was unmarketable because the pulp temperature of the fruit exceeded industry standards.[87]

The shipper refused to take delivery of the fruit and the owners bore the costs of disposal. The shipper brought suit against owners and the carrier for more than $1.1 million as a result of the loss of the fruit. The district court entered judgment against the shipper.[88]

Before reaching the issue concerning COGSA fire defense and the Fire Statute, the Eleventh Circuit determined that the shipper established a prima facie case by demonstrating that the cargo was loaded in an undamaged condition and discharged in a damaged condition, which the shipper did by tendering a clean bill of lading.[89]

According to the Eleventh Circuit, "[o]nce a shipper establishes a prima facie case, the burden of proof shifts to the carrier to demonstrate either (1) it exercised due diligence to prevent the cargo damage, or (2) the damage was caused by an 'excepted cause' listed in 46 U.S.C. App. § 1304(2)."[90] That section exonerates a carrier for cargo damage resulting from a fire unless the damage was "caused by the actual fault or privity of the carrier."[91] COGSA also preserves a carrier's defense under the Fire Statute, which exonerates a carrier from liability for fire damage unless the fire was caused by the "design or neglect" of the owner.[92]

On appeal the shipper contended that the carrier could not invoke the Fire Statute or the fire defense in COGSA without first demonstrating that it acted with due diligence in providing a seaworthy vessel for the carriage of the cargo. In confronting the issue, the court of appeals noted that the Ninth Circuit had accepted this position.[93] On the other hand, the Eleventh Circuit noted that the Second and Fifth Circuits "have concluded COGSA does not condition a carrier's right to invoke the fire defense on proving due diligence."[94] The Eleventh Circuit found the reasoning of the Second and Fifth Circuits persuasive and held "that COGSA does not require carriers to demonstrate due diligence as a condition precedent to invoking the fire defense of section 1304(2)(b) and

87. *Id.* at 419-20.
88. *Id.* at 420.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 421. *See* Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd., 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980).
94. 68 F.3d at 421. *See* Westinghouse Elec. Corp. v. M/V LESLIE LYKES, 734 F.2d 199 (5th Cir.), *cert. denied*, 469 U.S. 1077 (1984); *In re* Complaint of Ta Chi Navigation (Panama) Corp., S.A., 677 F.2d 225 (2d Cir. 1982).

the Fire Statute."[95] Accordingly, the court of appeals held that the carrier "only had to demonstrate the cargo was destroyed by fire," which it had done.[96] It is also noteworthy that the court of appeals found that the cargo was destroyed by fire. The court of appeals instructed that a "fire need not directly ignite the cargo to be the cause of damage under COGSA."[97] This decision is of obvious benefit to the carrier because it shifts the burden of proof from the carrier to the shipper in cases in which the loss is caused by fire aboard the vessel.

III. LONGSHORE

In re Sloma[98] involved the issue of whether an assignment to a bank of an annuity payment was valid or barred under the anti-assignment provision of the Longshore and Harbor Workers' Compensation Act.[99] Sloma was injured in a work related accident within the purview of the Longshore and Harbor Workers' Compensation Act. His employer and its carrier negotiated a settlement pursuant to which Sloma was to be paid $180,000 in a structured settlement.[100] The United States Department of Labor, pursuant to 33 U.S.C. § 908(i),[101] approved the

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95. 68 F.3d at 421. In footnote three the court cited to Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado, 205 F.2d 886, 887 (5th Cir.), *cert. denied*, 346 U.S. 915 (1953) in which the former Fifth Circuit had held that the shipper must prove that the cause of the fire was due to the "design or neglect of the owner." 68 F.3d at 421 n.3.

96. 68 F.3d at 421.

97. *Id.*

98. 43 F.3d 637 (11th Cir. 1995).

99. *Id.* at 639. 33 U.S.C. §§ 901-950 (1986). The anti-assignment provision thereof provides at section 916:

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

100. 43 F.2d at 638.

101. Section 908(i) provides in part:

> (1) Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval . . . .
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> . . . .

settlement. In accordance with that settlement, the carrier paid Sloma $10,000 in cash and purchased an annuity naming Sloma as the annuitant and for which the carrier paid a single premium. Pursuant to the annuity, Sloma was to receive $500 per month for twenty years and then lump sum payments on certain five year anniversaries.[102]

Subsequently, Sloma, in order to obtain an $85,000 loan to acquire and operate a Western Auto store, executed an absolute collateral assignment of the annuity payments to secure the loan. The bank received the monthly payments pursuant to the assignment until Sloma's business failed, at which point Sloma instructed the annuity company to forward all future payments to him personally and not the bank, in violation of the security agreement.[103] That action caused the bank to file suit against Sloma in the Circuit Court of Marengo County, Alabama. Judgment was rendered for the bank in the amount due under the note.[104] The bank then obtained a writ of garnishment against the annuity company to enforce payments under the assignment in order to satisfy the judgment.[105]

Sloma filed a Chapter 7 bankruptcy petition seven years after the assignment, asserting a claim of exemption as to the payments due from the annuity company.[106] The bank did not file an objection to Sloma's claim of exemption within the thirty days permitted by the bankruptcy rules. When the bank continued to receive the monthly payments from the annuity company, Sloma filed an adversary proceeding against the bank asserting that the payments due from the annuity company were exempt property.[107] The bankruptcy court determined that the annuity payments constituted an assignment of the right to receive compensation under the Longshore and Harbor Workers' Compensation Act, and that as such was void *ab initio*.[108] The district court affirmed the judgment of the bankruptcy court.[109]

The bank appealed on two issues. The first was whether the assignment of the annuity payments was barred under the anti-assignment provision of the Act. The second was whether the bank's failure

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(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

102. 43 F.3d at 638.
103. *Id.* at 638-39.
104. *Id.* at 639.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

to file a timely objection in the bankruptcy court to the claim of the property as exempt prevented the bank from challenging the validity of the exemption.[110]

The question before the court of appeals was whether or not the employer's payment of $10,000 and the purchase of an annuity for $170,000 fulfilled its obligation to Sloma or whether the $170,000 being paid by the annuity was still "in the course of transmission" to Sloma under which circumstances it would be protected by section 13 of the Act.[111] The Eleventh Circuit held, "[t]he payments received by Sloma under the annuity contract were not *due and payable under the Act*; they were payments made to him by a third party, [the annuity company]."[112] The Eleventh Circuit found that conclusion consistent with the language of the Supreme Court in *McIntosh v. Aubrey*.[113] Accordingly, the court of appeals found that the purpose of the anti-assignability provision had been served and ended "once the amount of the award of $180,000.00 was paid to Sloma by the payment of $10,000.00 and the purchase, in his behalf, of an annuity for $170,000.00."[114] Under those circumstances Sloma's assignment to the bank was valid and the bank was entitled to the payments until its loan was fully repaid.[115]

The Eleventh Circuit disposed of Sloma's argument that the bank's failure to make a timely objection to the claim prevented it from challenging the validity of the exemption by stating that "[s]ince Sloma's lack of interest in the assigned property does not establish a basis for a proper claim of exemption, there was no need for the Bank, a secured creditor, to object," because "a debtor cannot claim as exempt property that he does not own."[116]

Judge Hatchett dissented.[117] He believed that the majority opinion unduly restricted Section 916 to assignments of compensation that are to be received in the future.[118] It did not make any difference to Judge Hatchett that Sloma's employer purchased an annuity for him, thereby satisfying its obligation. In Judge Hatchett's view the obligation had not been met since the carrier was the owner of the policy and not Sloma. According to Judge Hatchett, Sloma's employer and its carrier had not made the full payment of the $180,000 because the carrier "maintained

110. *Id.*
111. *Id.* at 640.
112. *Id.*
113. 185 U.S. 122, 125 (1902).
114. 43 F.3d at 640.
115. *Id.*
116. *Id.*
117. *Id.* at 641 (Hatchett, J., dissenting).
118. *Id.*

ownership" of the annuity policy.[119] Under those circumstances, Judge Hatchett considered the installments of the annuity contract as in the process of being received and therefore amounted to "compensation or benefits *due or payable*."[120]

IV. MARITIME LIENS

In *Bradford Marine, Inc. v. M/V SEA FALCON*,[121] the lone case involving a maritime lien, the Eleventh Circuit confronted the issue of whether or not a provision in a ship repair contract which provided for attorney fees gave rise to a maritime lien against the vessel.[122] Bradford Marine, Inc. performed repair work on the M/V SEA FALCON at the request of its captain, who signed a repair contract which provided in part, "[s]hould it become necessary to collect any charges upon demand of an attorney, the Owner(s) of the Yacht agree(s) to pay a reasonable attorney's fee, costs and interest."[123] When the owner failed to pay the bill, the repairer filed a complaint against the vessel in rem and the owner in personam. Since the repairs were "necessaries" provided to the vessel, the repairer sought to foreclose a maritime lien on the vessel which was arrested.[124] Although never served in the in personam claim, the owner filed a claim of ownership[125] and moved the court to release the vessel conditioned on its placing an amount equal to the repair claim plus twelve percent to cover costs in the registry of the court, pursuant to the local admiralty rule.[126] Five days after the district court issued an order releasing the vessel subject to the owner's

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119. *Id.* at 642.

120. *Id.*

121. 64 F.3d 585 (11th Cir. 1995).

122. *Id.* at 588.

123. *Id.* at 586.

124. *Id.* 46 U.S.C. § 31342 provides for a maritime lien when "necessaries" are furnished to a vessel. *See supra* note 56.

125. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(6) allows anyone claiming an interest in the property seized to demand its restitution and the right to defend the action. Rule E(8) also allows a party to appear to defend against the in rem action without constituting a general appearance. This has the effect of limiting any judgment obtained to the value of the property or the amount of the bond substituted therefor.

126. Local Admiralty Rule for the Southern District of Florida 11(A)(3) provides:

> In an action entirely for a sum certain, by paying into the Court the amount alleged in the complaint to be due, with interest at six percent per annum thereon from the date claimed to be due to a date twenty-four months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, appropriate stipulation for costs and claim of the property shall be filed.

placement of the funds in the registry, the repairer filed a motion to modify the order "to include estimated attorneys' fees, interest, and costs."[127] The district court ordered the owner to deposit an additional $6,048.36 after the vessel had been released, which the owner did.[128] The vessel filed an answer and counterclaim for breach of contract, wrongful arrest, and damage to the vessel. The owner did not file an answer.[129]

The district court found that the owner had breached the repair contract and entered judgment against the vessel for $22,901.93, including the cost to repair, late payment fees, custodial fees, and interest.[130] The district court awarded attorney fees upon proper motion from the repairer in the amount of $14,212.50 and additional costs of $2,611.48.[131] When the repairer filed a motion to release the funds on deposit in the registry of the court, the vessel filed a notice of appeal and a motion to stay judgment. Upon the posting of a supersedeas bond by the vessel the district court stayed execution.[132]

The vessel, but not her owner, appealed, claiming that the district court erroneously assessed the attorney fees against her in rem. The vessel contended that the legal services were not "necessaries" furnished to the vessel.[133]

The court of appeals addressed the threshold question of whether or not it had jurisdiction to decide the appeal. The court of appeals found that it had jurisdiction pursuant to 28 U.S.C. § 1292(a)(3) because the repairer's rights and liabilities as to the vessel had been determined.[134]

With regard to the repairer's argument that it had a maritime lien for the attorney fees because the provision in the repair contract bound the vessel, the Eleventh Circuit went directly to the statute and said the claim "can succeed only if the fees, which [the repairer] incurred as a result of retaining legal counsel to pursue a claim against the [vessel] and its owners, were (1) 'necessaries' and (2) provided to the [vessel]."[135] Before deciding the issue, the Eleventh Circuit recited various definitions of "necessaries" including

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127. 64 F.3d at 586.
128. *Id.*
129. *Id.*
130. *Id.* at 587.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 588. The court of appeals determined that it did not have jurisdiction of the appeal pursuant to 28 U.S.C. § 1291 (1988) because the judgment was not final. 64 F.3d at 588.
135. 64 F.3d at 589.

> "what is reasonably needed in the ship's business" . . . such as "goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Necessaries are the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged."[136]

The Eleventh Circuit concluded that the attorney's services did not help the vessel perform her function.[137] Moreover they were not provided to the vessel, but to the repairer to aid it in pursuit of its claim. Accordingly, the Eleventh Circuit found that the attorney fees were not necessaries and thus could not be assessed against the vessel in rem.[138]

V. NAVIGABLE WATERS

In *Lykes Brothers v. United States Army Corps of Engineers*,[139] the court of appeals reviewed the district court's decision as to the navigability of a waterway pursuant to the Rivers and Harbors Act.[140] The controversy centered around Fisheating Creek, a nontidal freshwater waterway in south central Florida that flows through Cowbone Marsh and then through Fort Center before entering Lake Okeechobee. A significant portion of the creek flows through lands owned by Lykes. The public had access to Fisheating Creek until 1988 when Lykes felled trees to block access, posted no trespassing signs, and erected barbed wire fences and gates across the creek at several locations.[141]

The State of Florida sued Lykes in federal district court to compel removal of the trees and fences under the Rivers and Harbors Act. The district court dismissed the case on the theory that the state must first pursue its administrative remedies.[142] The state then sued the United States Army Corps of Engineers in federal district court to compel it to make a navigability determination. The Corps responded by finding that Fisheating Creek was a navigable waterway of the United States between Lake Okeechobee and the bridge over State Road 731 near Venus, Florida.[143] Lykes removed the obstacles and filed a permit application with the Corps for permission to maintain fencing and

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136. *Id.*
137. *Id.*
138. *Id.*
139. 64 F.3d 630 (11th Cir. 1995).
140. *Id.* at 635. *See* 33 U.S.C. § 403 (1988) (which generally prohibits the obstruction of navigable waters).
141. 64 F.3d at 633.
142. *Id.*
143. *Id.*

operable gates at two crossings on the creek. Lykes in turn sued the Corps in federal district court based on the Corps' navigability determination. Lykes moved for a trial de novo, which the district court granted. Ultimately the district court concluded that Fisheating Creek was navigable only to Fort Center, which is a few miles upstream from its mouth. The Corps appealed, asserting that the factual determinations of the district court were clearly erroneous and that it misapplied the applicable law.[144]

Before reviewing the findings of fact of the district court, the court of appeals referred to several applicable principles. First, the Eleventh Circuit noted that,

> [a] waterway is regarded as "navigable water of the United States" within the meaning of § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, if it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[145]

Second, the Eleventh Circuit noted that "the waterway must form, either by itself 'or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.'"[146] Finally, the Eleventh Circuit noted,

> if a waterway at one time was navigable in its natural or improved state, or was susceptible to navigation by way of reasonable improvement, it retains its navigable status even though it is not presently used for commerce, or is presently incapable of use because of changed conditions or the presence of obstructions.[147]

Since it was uncontroverted that Cowbone Marsh had blocked travel on Fisheating Creek since at least 1940, and since the creek had no water link to interstate commerce until the late 1880s, the court of appeals determined that the relevant period was between the late 1880s and 1940.[148]

After reviewing all of the evidence, the Eleventh Circuit found that there was "significant evidence to support a finding of nonnavigability between the late 1880s and 1940."[149] Since the Eleventh Circuit was

144. *Id.* at 634.
145. *Id.*
146. *Id.* (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871)).
147. *Id.*
148. *Id.* at 635.
149. *Id.* at 637.

not "left with the definite and firm conviction that a mistake [had] been committed,"[150] it held that the district court did not clearly err in its factual findings regarding Cowbone Marsh.[151] The court of appeals disposed of the Corps' challenge to the court's legal conclusions by noting that the Corps' challenge assumed that the factual findings of the district court were erroneous. Since the court of appeals found that they were not, the legal challenge also failed.[152] This case is another example of how difficult it is to overturn a case on appeal when the standard of review is whether the district court was clearly erroneous in its factual findings.

VI. SEAMEN

In a case of first impression, *Flores v. Carnival Cruise Lines*,[153] the Eleventh Circuit confronted the issue of whether a cabin steward on a cruise ship could recover as part of his unearned wages the tips he would have earned had he continued to work aboard the vessel. Flores was a seaman who signed an employment contract to work for one year as a cabin steward onboard the M/S ECSTASY. The contract provided that Flores would be paid a salary of forty-five dollars a month and further provided:

> If you have been contracted as a . . . CABIN STEWARD, in addition to your monthly salary you may expect daily tips for your services to the passengers . . . . [T]he tips you may expect go as high as $1,000.00 a month. Carnival will take it upon itself to inform passengers of what is customarily tipped for the work that you perform.[154]

Flores worked for about eight months when he became ill and went ashore for medical treatment. He stayed ashore until his first contract expired. During that time he received bi-monthly checks for "unearned wages" from the cruise lines in an amount equal to the wages of the lowest-paid non-gratuity-earning crew member. Flores then signed a second six month contract to work aboard the M/S FANTASY. That contract contained the same payment provisions as the first. Flores worked less than a month on that vessel when the doctor sent him

150. *Id.* at 634 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).
151. *Id.*
152. *Id.* at 638.
153. 47 F.3d 1120 (11th Cir. 1995).
154. *Id.* at 1121.

ashore again where he remained until the expiration of his second contract.[155]

Flores filed a class action suit against the cruise lines on behalf of all tip-earning seamen who had not received "reasonably anticipated lost tips or in the alternative, monthly guaranteed tips," while on maintenance and cure.[156] The cruise line filed a motion to dismiss, arguing that it had no legal duty to pay the seaman anything more than his forty-five dollars per month salary as unearned wages. The magistrate judge treated the motion as a motion for summary judgment and denied it on the ground that there was a factual issue as to whether or not the seaman had been guaranteed tips by the cruise line.[157] The district court considered the matter de novo and entered summary judgment for the cruise line on both the compensatory and punitive damages claims. According to the district court, "the written contract did not guarantee 'any particular amount of tips' to Flores and that any alleged oral promise of tips made at the time Flores signed the contract was merged into the written agreement and barred by the parol evidence rule."[158] Flores appealed the judgment.[159]

Finding "no precedent directly addressing the issue of whether a sick or injured seaman whose income consisted primarily of tips may recover lost tip income as part of the wages remedy," the court of appeals considered "the purposes and policy underlying the maritime remedy for wages, the decisions of courts that have considered similar questions under the rubric of nonmaritime workers' compensation law, and the actual wording of Flores' contract."[160] The Eleventh Circuit reviewed the basic principles of unearned wages, observing

> [u]nearned wages are measured from the time of the seaman's incapacity until the end of his employment contract. . . . [T]he seaman need not suffer from illness or injury that is causally related to his duties, as long as the seaman's incapacitation did not result from his own wilfull misconduct . . . . [T]he shipowner's liability for maintenance and cure was among "the most pervasive" of all and that it was not to be defeated by restrictive distinctions nor "narrowly confined" . . . . [W]hen there are ambiguities or doubts, they are resolved in favor of the seaman.[161]

155. *Id.*
156. *Id.*
157. *Id.* at 1122.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 1122-23.

The Eleventh Circuit found it fitting "that an ancient remedy born of the reality of the seaman's position should be applied to fit the reality of our modern times."[162] The court of appeals found that reality to be that Flores' real compensation would come from the generous tips Flores would receive from the passengers, at the cruise line's urging, and not from the forty-five dollars a month the cruise line had agreed to pay him.[163]

The Eleventh Circuit bolstered its opinion with land-based analogous workers' compensation law noting that "[a]n overwhelming majority of the courts that have considered this question have determined that . . . tip income is recoverable as part of an individual's 'average weekly wage.'"[164] The Eleventh Circuit seemed swayed by the argument that since it did not matter for maintenance and cure purposes whether the cruise line had any hand in causing Flores' illness, it should not matter whether Flores' income came directly from the cruise line or indirectly from tips given by the cruise line's passengers at its urging.[165]

The cruise line argued that the analogy to state workers' compensation laws was not appropriate because employees covered by workers' compensation laws generally traded their ability to claim enhanced damages for the security of a no-fault liability system, whereas seamen have remedies for both injuries completely unrelated to their employment and those arising from negligence or other breaches of an employer's duties.[166] The court of appeals was unpersuaded, finding that "the wage remedy in each seeks to compensate the injured or disabled employee for compensation lost because of absence from the job."[167]

The court of appeals distinguished *Griffin v. Oceanic Contractors, Inc.*,[168] which dealt with the issue of bonus and overtime pay.[169] There the Eleventh Circuit noted that Griffin was to receive bonus pay only upon completion of his term of employment and thereby forfeited any such right when he accepted employment elsewhere instead of returning to his ship after recovering from his injury. On the other hand, Flores would have received substantial tips each week he had

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162. *Id.* at 1123.
163. *Id.*
164. *Id.* at 1124.
165. *Id.* at 1124-25.
166. *Id.* at 1123 n.2.
167. *Id.* at 1125.
168. 664 F.2d 36 (5th Cir. Unit A June 1981), *rev'd on other grounds*, 458 U.S. 564 (1982).
169. 664 F.2d at 38.

worked, and he was unable to return to his ship before his contracts expired. In *Griffin* the overtime was found to be uncertain and therefore purely speculative,[170] whereas Flores had established a record of earnings during the time that he actually worked.[171]

The Eleventh Circuit also supported its decision with *Lamont v. United States*,[172] which dealt with the custom and practice on a particular ship of paying overtime.[173] In *Lamont* the custom and practice was to pay overtime in amounts nearly equal to the base wage. Accordingly, the Eleventh Circuit found *Lamont* more to its liking and used that decision to support its finding that the custom and practice in Flores' case was that the tip income he would receive would be the bulk of his compensation.[174]

The Eleventh Circuit rejected the cruise line's contention that under traditional principles of contract law Flores' claim should be denied.[175] In the Eleventh Circuit's view, the shipowner's duty to provide maintenance and cure was contractual only "'in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident.'"[176] The Eleventh Circuit was unimpressed with the cruise line's claim that including tip income for maintenance and cure would lead to fraudulently inflated claims. The Eleventh Circuit's answer to that was that the cruise line could institute a system for reporting the tips or funneling them through a central point for bookkeeping purposes.[177] Second, the courts are in the business of distinguishing valid from invalid claims.[178] Accordingly, the court of appeals directed the district court to calculate, for each of the two ships, the average amount of tips Flores received each week before he fell ill, add $10.40 (his weekly salary), multiply that sum by the number of weeks he was unable to work until the end of his contract, and subtract from those amounts what the cruise line had already paid him as unearned wages.[179]

The Eleventh Circuit denied Flores' claim for punitive damages.[180] The Eleventh Circuit found that the cruise line "did not exhibit wilfull

170. *Id.* at 40.
171. 47 F.3d at 1125.
172. 613 F. Supp. 588 (S.D.N.Y. 1985).
173. *Id.* at 589.
174. 47 F.3d at 1126.
175. *Id.*
176. *Id.* (quoting Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932)).
177. *Id.*
178. *Id.*
179. *Id.* at 1127.
180. *Id.*

and wanton misconduct," since it "did not abrogate any established legal duty toward Flores."[181] The court so found only because *Flores* was a case of first impression. The Eleventh Circuit also denied Flores' claim for attorney fees.[182] In the Eleventh Circuit's view, the cruise line had not acted in bad faith, callously or unreasonably because it had paid Flores more than forty-five dollars a month while he was incapacitated and Flores did not object to the sums he was receiving as unearned wages prior to the expiration of the second contract and the commencement of suit.[183]

181. *Id.*
182. *Id.*
183. *Id.*