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Admiralty

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SURVEY ARTICLES

Admiralty

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The Court of Appeals for the Eleventh Circuit decided nine admiralty cases with written opinions in 1994. In one case the court faced for the first time the issue of whether a vessel on dry dock was on land or water for purposes of admiralty jurisdiction. In another case the court interpreted, for the first time, a statute concerning marine sanctuaries. The other seven cases did not change the law as it exists in this circuit. This was the case despite a factually attractive opportunity to relax the court's requirement that a shipper literally comply with the procedures set forth in the carrier's bill of lading to avoid the $500 package limitation. Finally, the Government shows no signs of abandoning its attempts to reverse maritime lien law as it relates to public vessels.

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I. CARGO

The Eleventh Circuit reviewed two cargo cases both involving package limitation issues. The first cargo case decided by the Eleventh Circuit, *Marine Transportation Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp.*,[1] began as a simple suit for freight but ended up with a substantial counterclaim for conversion.[2] The case arose when the shipper, Python High Performance Marine Corp., booked a twenty-foot sealed container of boat parts and three boat molds (one hull mold and two deck molds) for shipment from Miami to San Juan, Puerto Rico.[3] The container was shipped first, freight collect, under a separate bill of lading. The hull mold and one of the two deck molds were bound together for shipment. The deck mold that remained separate disappeared before shipment. Despite this, the bill of lading issued for the shipment of the two-mold set reflected that three packages of break bulk boat molds were shipped. The bill of lading also noted that a request and charge for insurance had been made by the shipper.[4]

When the shipment reached San Juan, the consignee refused to accept the cargo ostensibly because of the missing deck mold. When the shipper contacted the carrier's traffic manager he told the shipper to file a claim for the lost deck mold. The traffic manager also offered to return all the cargo to Miami at no charge and said that the freight for the Miami-San Juan voyage would be deducted from the proceeds of the claim.[5] When the container and two-mold set arrived back in Miami, the shipper went to the terminal to pick up the cargo but on that occasion was told by the same traffic manager that he would have to pay the freight charges on the two-mold set for the Miami to San Juan trip before he could pick up the cargo. The traffic manager referred the shipper to its claims manager who confirmed that the freight would have to be paid prior to the release of the cargo.[6]

The shipper obtained a corporate check in the amount of the freight and returned to the terminal to obtain the cargo. On that occasion the traffic manager refused to accept the check and told the shipper that he could not release the cargo and that the shipper would have to wait to hear from the carrier's attorney.[7]

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1. 16 F.3d 1133 (11th Cir. 1994).
2. *Id.* at 1136.
3. *Id.* at 1135-36.
4. *Id.* at 1136.
5. *Id.*
6. *Id.* at 1137.
7. *Id.*

The container and two-mold set, which had deteriorated beyond repair due to exposure to the elements, remained in the carrier's possession. The carrier brought suit to recover freight due for the carriage of the container and the boat molds from Miami to San Juan and for the return trip to Miami. The carrier also asked for demurrage on the cargo while it remained in the carrier's possession in San Juan and Miami. The shipper counterclaimed for the loss of the boat mold and for conversion of the container and two-mold set because of the carrier's refusal to release the cargo.[8]

The district court found that the carrier was entitled to recover the freight charges and interest but denied its claim for demurrage since the delay had been occasioned by the carrier, and under such circumstances a provision in the bill of lading provided that no demurrage would be payable.[9] On the counterclaim, the district court held that the carrier was liable to the shipper for the missing mold plus interest.[10] The district court held that the $500 package limitation was not applicable because the shipper had declared a $100,000 value on the boat mold and incurred a $50 insurance charge, in accordance with the bill of lading requirements to avoid the package limitation.[11] The district court further found that the carrier had converted the container and two-mold set by refusing to release the cargo when the carrier tendered a corporate check in payment for the freight.[12] The court denied the shipper's claim for lost profits because the agreement between the shipper and its consignee had not been consummated.[13]

While both parties in the district court relied on Florida law on the issue of equitable estoppel,[14] the court of appeals, under admiralty jurisdiction, applied general maritime law.[15] The court of appeals then recited the requirements of the doctrine: "(1) a representation of fact by one party contrary to a later asserted position; (2) good faith reliance by another party upon the representation; and (3) a detrimental change in position brought by the later party due to the reliance."[16]

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1139 n.8. The Eleventh Circuit reviewed the elements of equitable estoppel under the clearly erroneous standard, and the issue of whether the district court correctly applied equitable estoppel was reviewed de novo. *Id.* at 1138.
15. *Id.* at 1139 n.8.
16. *Id.* at 1139.

In the district court, the issue concerning equitable estoppel was whether the carrier could insist on payment in United States currency.[17] In the Eleventh Circuit, using a slightly different analysis the court focused on whether the carrier, having communicated to the shipper that there was nothing it could do to retrieve the cargo, could, at trial, take the position that all the shipper had to do was to tender cash or a cashier's check.[18] To the court of appeals this constituted a representation of material fact contrary to a later asserted position.[19] The court of appeals found that the shipper relied on the representation because the shipper assumed that nothing it could do would result in the release of the cargo.[20] Lastly, the court of appeals found that the shipper's position had been detrimentally changed since the carrier now demanded demurrage in addition to the freight; moreover, the two-deck mold set had deteriorated beyond repair and the shipper was defending a lawsuit.[21]

The court of appeals quickly disposed of the carrier's argument that the district court did not have subject matter jurisdiction of the shipper's land-based claim of conversion.[22] The Eleventh Circuit reasoned: "[The] counterclaim for conversion arose directly from the same transaction or occurrence upon which [the carrier's] complaint [was] founded. As such it was a compulsory counterclaim. Therefore, the district court had ancillary jurisdiction in admiralty to hear the counterclaim."[23] With that foundation the court of appeals concluded that the district court properly entertained the shipper's state law conversion claim since no independent basis for federal jurisdiction is required for ancillary jurisdiction.[24] The court of appeals went on to find that the carrier wrongfully deprived the shipper of the property when the carrier refused the corporate check tendered by the shipper.[25] The Eleventh Circuit noted that pursuant to Florida law "'[t]he essence of the tort is not the acquisition of the property; rather, it is the wrongful deprivation.'"[26]

The court of appeals also rejected the carrier's alternative argument that the district court erred in not applying the doctrine of avoidable

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17. *Id.* at 1138.
18. *Id.* at 1139.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (citing FED. R. CIV. P. 13(a)).
24. *Id.*
25. *Id.*
26. *Id.* at 1140.

consequences.[27] The carrier argued that when the shipper learned that the carrier would not accept its corporate check, the shipper had a duty to mitigate and avoid the consequences of the carrier's action, i.e., tender cash or a cashier's check. The carrier lost this argument because it had never informed the shipper of why it had rejected the corporate check.[28] According to the court of appeals, "[m]anifest in this doctrine is the assumption that the injured party knows what reasonable efforts to use to mitigate damages."[29]

In urging its claim for demurrage, the carrier contended that it was due demurrage because the shipper had failed to file a written claim for waiver of demurrage in accordance with the bill of lading. The carrier also claimed that it was not at fault for the delays which caused the demurrage.[30] The court of appeals affirmed the district court's determination that the shipper's answer denying liability for demurrage met the bill of lading requirements for a written claim of waiver.[31] While at first glance this appears to have been a fairly weak compliance, in view of the fact that the carrier made no demand for demurrage prior to trial it is easier to understand the holding. The court of appeals also affirmed the district court's finding that the demurrage was due to the fault of the carrier.[32] In the first instance, the carrier's loss of the deck mold caused the demurrage in San Juan, and the carrier's conversion caused the demurrage in Miami.[33]

The court of appeals reversed the district court on the package limitation issue.[34] In doing so, the Eleventh Circuit adhered to its precedent of requiring literal adherence to the requirements in the bill of lading to avoid the package limitation.[35] While the shipper had declared a $100,000 value in its booking notice with the carrier, the court of appeals found this insufficient, holding that "[t]he shipper must declare the value of its cargo on the face of the bill of lading, not on some other related documents, to satisfy the valuation requirement."[36] The court of appeals noted that while another $100,000 figure appeared on the bill of lading, it reflected "the amount of insurance coverage [the shipper] sought, not a declaration of value for the purpose of satisfying

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1141.
35. *Id. See* Sony Magnetic Prod., Inc. v. Merivienti O/Y, 863 F.2d 1537 (11th Cir. 1989).
36. 16 F.3d at 1141.

the valuation requirement."[37] Thus, in order to meet the valuation requirement and avoid the package limitation, the shipper must declare the value of the cargo on the face of the bill of lading. The difficulty is that bills of lading rarely provide a specific place for this declaration. In the absence, the shipper must declare the value somewhere on the face other than, or in addition to, the space provided for a declaration of the amount of insurance sought.[38]

The court of appeals also rejected the district court's finding that the shipper had satisfied the requirement for paying additional freight by incurring the $50 charge for insurance.[39] The court of appeals found that "[t]he additional freight requirement requires shippers to pay an amount in accord with filed ad valorem rates."[40] That rate was two percent of the total declared value and should have been $200, not $50.[41] Here again, the Eleventh Circuit, insisting on literal compliance with the provisions of the bill of lading, found that the shipper did not satisfy this requirement either.[42]

The court of appeals affirmed the district court's holding that the shipper's lost profits had not been proven with reasonable certainty as required by Florida law.[43]

In *Hiram Walker & Sons, Inc. v. Kirk Line*,[44] the court of appeals again confronted the $500 package limitation. The question arose when the stevedore was delivering cargo on behalf of an ocean carrier and the cargo was destroyed. The specific issue before the court was whether or not delivery was complete.[45] If delivery was complete, the stevedore did not enjoy the benefit of the package limitation which it claimed pursuant to a Himalaya clause.[46]

Hiram Walker had purchased 5,000 gallons of Tia Maria in Jamaica. A 23-ton tank containing the liqueur was loaded aboard the M/V MORANT BAY and shipped to Miami. The carrier hired a stevedore to unload the tank and store it at the dock.[47] Hiram Walker in turn contracted with an overland carrier to haul the liqueur from Miami to

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37. *Id.*
38. *See id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. 30 F.3d 1370 (11th Cir. 1994).
45. *Id.* at 1372.
46. The Himalaya Clause extends the benefits (in this case the $500 package limitation) of the Carriage of Goods by Sea Act to non-carriers in certain instances. *Id.*
47. *Id.*

New Jersey. Part of the agreement between Hiram Walker and the overland carrier was that the overland carrier was to pump the liqueur from the tank into its freight trailer.[48]

When the overland carrier arrived at the port, the stevedore removed the tank from storage and aligned it with the overland carrier's trailer. When a needed fitting was missing, the overland carrier asked the stevedore to help him make a "gravity feed" by raising the tank above the trailer with a forklift.[49] During the transfer the tank fell off the forklift and ruptured causing the loss.[50]

The district court granted a summary judgment in favor of Hiram Walker finding that the stevedore had been negligent as a matter of law.[51] The district court found that the package limitation did not apply since the stevedore had acted as a volunteer and not as the carrier's independent contractor.[52]

On the first appeal, by the stevedore, the Eleventh Circuit agreed that the stevedore had been negligent as a matter of law, but reversed the judgment because there were unresolved factual issues regarding the stevedore's entitlement to the package limitation.[53] The Eleventh Circuit remanded to the district court and directed it to determine whether delivery had already occurred at the time of the spill.[54] If it had, the stevedore was not entitled to the limitation.[55]

After a bench trial, the district court again entered judgment for Hiram Walker on the negligence issue but limited the stevedore's liability to $500 by finding that the ocean carrier's responsibility for delivery had not ended before the spill occurred.[56] Under that scenario, the stevedore was performing services on behalf of the ocean carrier and was entitled to the package limitation. In concluding that delivery was not complete before the spill, the district court relied heavily on Clause 18[57] of the bill of lading.[58] The district court found that language

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48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 1372-73.
53. *Id.* at 1373.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* Clause 18 of the bill of lading provided that "'removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage . . . shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading.'" *Id.*
58. *Id.*

precluded the possibility of delivery without a change of custody.[59] The district court applied that standard to the facts, it being undisputed that the stevedore had never transferred the cargo into the overland carrier's custody, and concluded that delivery had not occurred.[60] In essence, the district court ignored all other evidence of delivery, including a delivery receipt tendered by the stevedore to the overland carrier before the spill.

Hiram Walker appealed and the case went to the Eleventh Circuit for the second time.[61] On that occasion the Eleventh Circuit held "that the district court had misinterpreted the bill of lading as identifying change of custody as the only possible evidence of delivery."[62] The Eleventh Circuit noted that change of custody could be prima facie evidence of delivery but it was not conclusive evidence.[63] The Eleventh Circuit remanded and directed the district court to "develop any facts that would aid it in determining the point of delivery."[64]

On remand the district court relied on trial testimony and found that the issuance of the delivery receipt was either inadvertent or erroneous because it was inconsistent with the stevedore's customary practice of issuing delivery receipts and gate passes after physical possession of the cargo had passed to the consignee.[65] Under those circumstances the district court concluded that the stevedore was in the process of delivering the liqueur when the accident happened and was thus entitled to the package limitation.[66] In so holding, the district court found that the delivery receipt that had been issued by the stevedore before the spill did not establish when legal delivery took place.[67]

Hiram Walker appealed again, contending that the district court was clearly erroneous since there was no evidence that the delivery receipt had been issued erroneously or that delivery receipts were customarily issued only after physical transfer of the cargo.[68] Since the finding of the district court was one of fact the Eleventh Circuit reviewed it for clear error.[69] In view of the testimony of the manager of operations and the general traffic manager of the stevedore, Judge Roney, writing

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59. *Id.*
60. *Id.*
61. Hiram Walker & Sons v. Kirk Line, 963 F.2d 327 (11th Cir. 1992).
62. *Id.*
63. *Id.* at 1373-74.
64. *Id.* at 1374.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

the majority opinion, found this argument baseless.[70] Judge Dubina concurred specially and said that it did not matter whether the issue of delivery was purely factual, as viewed by Judge Roney, or a mixed question of law and fact, as viewed by Judge Tjoflat, delivery had not occurred under any circumstances.[71]

Judge Tjoflat dissented, pointing out that the majority and the district court had confused actual delivery with legal delivery; in effect, they had equated the two.[72] The question in Judge Tjoflat's mind was at what point had the carrier's duty been fulfilled.[73] If the cargo had been transferred by pumping, there was a custom and practice which dictated that the legal delivery from the carrier to the overland carrier would have been complete once the stevedore had aligned the tank containing the liqueur with the overland carrier's trailer even though there had been no physical delivery. Judge Tjoflat observed that such legal delivery had no connection with the issuance of the delivery receipt, which was typically made after physical delivery.[74] With nothing to indicate that the delivery receipt had any greater probity in deciding legal delivery for gravity transfers, Judge Tjoflat preferred to analyze who had control over the process of the physical transfer.[75] Judge Tjoflat argued that the overland carrier had control of the process of transfer "and, with it, control of the Tia Maria itself. Legal delivery had taken place."[76] Under those circumstances, Judge Tjoflat favored remand with instructions for judgment to be entered in favor of Hiram Walker without regard to the package limitation.[77]

II. JURISDICTION

The Eleventh Circuit decided two cases concerning admiralty jurisdiction and one case involving personal jurisdiction. The first, *Sea Vessel, Inc. v. Reyes*,[78] is a case of first impression regarding the issue of whether a vessel in dry dock was on water or land for purposes of admiralty jurisdiction. Factually and legally the case is very similar to *Sisson v. Ruby*.[79] In *Sea Vessel, Inc.* a fire broke out on a vessel that

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70. *Id.*
71. *Id.* at 1377-78 (Dubina, J., concurring).
72. *Id.* at 1378 (Tjoflat, J., dissenting).
73. *Id.* at 1378-79. In Judge Tjoflat's opinion that was a question of law, reviewed de novo. *Id.* at 1378 n.2.
74. *Id.* at 1379 n.6.
75. *Id.* at 1379.
76. *Id.*
77. *Id.* at 1379-80.
78. 23 F.3d 345 (11th Cir. 1994).
79. 497 U.S. 358 (1990).

was dry docked for routine repairs and maintenance at a shipyard on the Miami River. The fire apparently occurred as the result of welding by shipyard workers on the vessel. One worker was seriously injured and two were killed.[80]

The owner filed a complaint for exoneration from or limitation of liability for the damages resulting from the fire.[81] A death claimant filed a motion to dismiss for lack of admiralty jurisdiction, arguing that the locality test for a maritime tort was not satisfied because fires on dry docks do not occur on navigable waters, i.e., that a dry dock is an extension of land.[82] The claimant also contended that the nexus requirement was not satisfied because the work being done on the vessel was more extensive than "mere scheduled routine repairs."[83] A magistrate judge found that the vessel was not on navigable waters and concluded that admiralty jurisdiction was lacking.[84] The district court adopted the report of the magistrate and dismissed the action for lack of subject matter jurisdiction.[85]

On appeal,[86] in order to determine if the case was cognizable in admiralty, the Eleventh Circuit had to consider the situs of the fire (locality test) and the relationship between a fire on a vessel in dry dock undergoing routine repairs and traditional maritime activity (nexus test).[87] In addressing the locality test, "[w]hether a vessel in dry dock on a navigable waterway is in or on navigable waters for purposes of admiralty jurisdiction," the Eleventh Circuit concluded that it was bound by Supreme Court precedent[88] which held "that a vessel in dry dock is on water, not on land, for purposes of admiralty jurisdiction."[89]

In turning to the nexus test, the Eleventh Circuit framed the issue as "whether routine repairs to a vessel in dry dock 'bear a significant relationship [nexus] to traditional maritime activity.'"[90] According to the Eleventh Circuit: "The nexus test involves two queries: (1) Did the

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80. 23 F.3d at 346.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 346-47.
85. *Id.* at 347.
86. *Id.* The Eleventh Circuit reviewed de novo the district court's determination that it was without subject matter jurisdiction. *Id.*
87. *Id.* at 348.
88. *Id.* at 348-49 (citing Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924); Simmons v. The Steamship Jefferson, 215 U.S. 130 (1909); The Robert W. Parsons, 191 U.S. 17 (1903)).
89. *Id.* at 348.
90. *Id.* at 349-50 (quoting Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972)).

incident have a 'potentially disruptive impact on maritime commerce'? and (2) Does a 'substantial relationship' exist between the activity giving rise to the incident and traditional maritime activity?"[91] In addressing the first query, the Eleventh Circuit relied heavily on *Sisson* in which the Supreme Court held that a court does not consider the actual effects on maritime commerce but considers "the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity."[92] Following that directive, the Eleventh Circuit found that, "[t]he fire . . . could have spread to the other vessels and could have resulted in the obstruction of a navigable waterway—the Miami River."[93]

In turning to the second query, the court of appeals had to decide if the routine repair of a vessel in a dry dock had "a substantial relationship to a 'traditional maritime activity.'"[94] Again the court of appeals relied on Sisson in which the Supreme Court held that "maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity.'"[95] The court of appeals found that the term "maintenance" encompassed the routine repair of a vessel and that such repair was "a crucial maritime activity."[96] Accordingly, the court found admiralty jurisdiction.[97] It is interesting to note that the Eleventh Circuit was not concerned with the type of dry dock.

In *Mink v. Genmar Industries, Inc.*,[98] the Eleventh Circuit determined whether maritime law applied to a suit arising out of injuries suffered by a passenger in a pleasure craft in the Gulf of Mexico.[99] Mink along with others was a passenger on a demonstration ride onboard a Wellcraft Scarab 38-foot pleasure boat cruising at approximately eighty miles per hour in the Gulf of Mexico.[100] While trying to find a secure position to enjoy the ride Mink lost his balance and was thrown to the deck. The blow crushed a vertebra and rendered him a paraplegic.[101]

Almost four years later, Mink filed suit against the manufacturer in a Florida circuit court. The manufacturer removed the case to federal

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91. *Id.* at 350.
92. *Id.* (citing Sisson v. Ruby, 497 U.S. 358, 363 (1990)).
93. *Id.*
94. *Id.* at 350-51 (citing *Sisson*, 497 U.S. at 365).
95. *Id.* at 351 (citing *Sisson*, 497 U.S. at 367).
96. *Id.*
97. *Id.*
98. 29 F.3d 1543 (11th Cir. 1994).
99. *Id.* at 1543.
100. *Id.* at 1544.
101. *Id.* at 1545.

court, sought a dismissal and filed a third party complaint against the owner seeking indemnity or contribution.[102] The district court granted the manufacturer's motion to dismiss the suit as being time barred by the three year maritime statute of limitations.[103]

In order to save his claim, Mink appealed arguing that admiralty law did not apply and therefore under Florida law his claim was not time barred. The Eleventh Circuit relied on *Sea Vessel*[104] and the authorities cited therein to find that the locality test had been met.[105] All that was needed was for the tort to have occurred on navigable waters.[106]

The Eleventh Circuit then turned to the maritime nexus test as stated in *Sisson*.[107] The Eleventh Circuit rejected Mink's argument that there was no actual disruption of maritime commerce and therefore the nexus requirement was not satisfied.[108] The Eleventh Circuit reminded Mink that the focus was not on the actual effect on maritime commerce but on the potential effect.[109] In that context the Eleventh Circuit found that Mink's fall could have interfered with the operator of the boat and thus directly disrupted navigation.[110]

In addressing the query of whether the potential hazard to maritime commerce arose out of an activity that bore a substantial relationship to traditional maritime activity, the Eleventh Circuit determined that the relevant activity was navigation of a vessel on navigable waters and that was "the very paradigm of traditional maritime activity."[111]

Mink also argued that neither test had been satisfied because the alleged design defect occurred on land.[112] The Eleventh Circuit found that argument unavailing because "[t]he defect could not have manifested itself, and the injury could not have occurred until the vessel was actually operated as a vessel in navigation."[113] Precedent from the

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102. *Id.* The third party defendants were an individual and apparently his company with whom or which the manufacturer had entered into an oral agreement to provide a vessel which, in turn, would be displayed at the third party defendant's dealership and automotive races as a form of advertising for the manufacturer. *Id.* at 1544. For ease of reference they are referred to herein as "owner."

103. *Id.* at 1545 (citing 46 U.S.C. App. § 763a (1994)).

104. *Id.* (citing *Sea Vessel*, 23 F.3d at 345).

105. *Id.*

106. *Id.*

107. *Id.* (citing *Sisson*, 497 U.S. at 358).

108. *Id.* at 1546.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Supreme Court and other circuit courts of appeal compelled this result.[114] Since the locality test and the maritime nexus test were met, the Eleventh Circuit found that admiralty jurisdiction was obtained.[115] Thus, substantive admiralty law applied and the three year statute of limitations for maritime torts governed the cause of action.[116]

Mink's attempts to place himself without the purview of the three year statute of limitations for maritime torts by framing his claim as a breach of contract foundered on the admiralty doctrine of uniformity.[117] Even if Mink had a cause of action in contract under state law, it was to no avail since he also had a cause of action in tort which was subject to substantive admiralty law. Once subject to substantive admiralty law, Mink could not escape its effects by framing his claim for personal injuries as a state law cause of action in contract.[118] Condoning such a ploy would have trampled on the federal interest in uniformity. This case is another sobering reminder to counsel to know when admiralty law applies with its three year statute of limitations.

The third case dealt with the question of personal jurisdiction even though it arose in the context of a cargo claim. In *Francosteel Corporation v. M/V CHARM*,[119] Francosteel, a New York corporation with its principal place of business in New York City, purchased steel wire rods from a French manufacturer.[120] In order to transport the rods from France to Savannah, Georgia, and Jacksonville, Florida, the manufacturer subchartered the M/V CHARM from an entity in Rotterdam, which had itself chartered the vessel from its owner, a Danish shipping partnership. Another Danish partnership managed the vessel. The cargo was loaded in Caen, France pursuant to four bills of lading, and the vessel set sail. Four days later the vessel sank with a total loss of the cargo.[121]

Francosteel and the manufacturer brought an admiralty and maritime action pursuant to the Carriage of Goods by Sea Act[122] against the owner of the vessel and her manager in personam and against the M/V

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114. *Id.* at 1547 (citing East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986); Hassinger v. Tideland Electric Membership Corp., 781 F.2d 1022 (4th Cir.), *cert. denied*, 478 U.S. 1004 (1986); Sperry Rand Corp. v. Radio Corp., 618 F.2d 319 (5th Cir. 1980); Jones v. Bender Welding & Mach. Works, 581 F.2d 1331 (9th Cir. 1978)).

115. *Id.*

116. *Id.* at 1548.

117. *Id.* at 1548-49.

118. *Id.*

119. 19 F.3d 624 (11th Cir. 1994).

120. *Id.* at 626.

121. *Id.*

122. *Id.* (citing 46 U.S.C. §§ 1300-1315 (1988)).

CHARM in rem, claiming unseaworthiness, breach of the contract of carriage, and negligence.[123] The district court dismissed the case for lack of in personam jurisdiction, both general and specific.[124]

The question presented for review by the court of appeals was whether the exercise of specific in personam jurisdiction over the owner and her manager complied with the due process requirements of the United States Constitution.[125] Noting that Georgia's long arm statute conferred in personam jurisdiction to the maximum extent allowed by the Due Process Clause, the Eleventh Circuit recited the rule for establishing compliance with due process for in personam jurisdiction purposes: "(1) the nonresident defendant has purposefully established minimum contacts with the forum state, and (2) the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice."[126] The Eleventh Circuit noted, "[t]he availability of specific jurisdiction depends on the relationship among the defendant, the forum, and the litigation."[127]

The Eleventh Circuit applied the rationale of the Supreme Court as announced in *Burger King Corp. v. Rudzewicz*.[128] There the Court observed that since a contract binds prior negotiations with future consequences, the determination of whether a party purposefully established minimum contacts with the forum depends upon the prior negotiations, the contemplated future consequences, the terms of the contract, and the parties' actual course of dealing.[129] In applying that rule the court of appeals held, "that the contracts to deliver cargo to a Georgia port do not constitute sufficient minimum contacts with Georgia to justify the exercise of specific in personam jurisdiction over [the owner] and [the manager] in Georgia."[130] The Eleventh Circuit also supported its holding as to specific jurisdiction with an analysis appropriate to general jurisdiction as if to say the requirements for general jurisdiction had not been met either. In doing so the Eleventh Circuit noted that the only possible connection with Georgia was that

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123. *Id.*

124. *Id.* Since the district court did not conduct an evidentiary hearing on the jurisdictional issue, Francosteel and the manufacturer were required only to make out a prima facie case of jurisdiction, i.e., they had to present sufficient evidence to defeat a motion for directed verdict. *Id.*

125. *Id.* The Eleventh Circuit reviewed de novo the dismissal for lack of in personam jurisdiction. *Id.*

126. *Id.* at 627.

127. *Id.*

128. *Id.* at 628; *Burger King*, 471 U.S. 462 (1985).

129. 471 U.S. at 478-79.

130. 19 F.3d at 629.

the contract called for delivery of the cargo in Georgia.[131] None of the events giving rise to the cause of action took place in Georgia. None of the parties was a Georgia resident. There were no direct negotiations between the owner or manager and the shipper. The shipper, in its capacity as subcharterer, actually controlled the vessel's movements. Except for one prior port call to Georgia, the owner and manager had no physical contact with Georgia.[132]

The Eleventh Circuit viewed the owners'/managers' "agreement to deliver the cargo to Georgia [as] an isolated and sporadic contact with Georgia [and] not part of a regular practice."[133] This decision provides additional grounds for shipowners and operators to argue that "isolated and sporadic" port calls by their vessels do not provide the requisite basis for personal jurisdiction.

III. LONGSHORE

The sole case decided pursuant to the Longshore and Harbor Workers' Compensation Act,[134] *C. G. Willis, Inc. v. Director*,[135] involved the "second injury" provision of Section 8(f) of the Act.[136] The issue for the court turned on whether a pre-existing permanent partial disability of the claimant was manifest to his employer. Claimant Gary Anderson injured his back on March 20, 1978 while working as a longshoreman for C. G. Willis, Inc. While being treated by his physicians, Anderson disclosed that he had had a laminectomy in 1959. Anderson had worked from 1959 until 1978 when he sustained the injury which was the subject of the suit, after which he was unable to work.[137]

In the hearing before the Administrative Law Judge ("ALJ"), the employer did not contend that it was actually aware of the pre-existing back condition prior to the injury in question. Rather than submitting

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131. *Id.* at 628.
132. *Id.*
133. *Id.*
134. 33 U.S.C. §§ 901-950 (1986).
135. 31 F.3d 1112 (11th Cir. 1994).
136. *Id.* at 1173 (citing 33 U.S.C. § 908(f)). That section provides in pertinent part:
> (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury .... In ... cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide ... compensation payments or death benefits for one hundred and four weeks only.

33 U.S.C. § 908(f).
137. 31 F.3d at 1113.

pre-injury records to substantiate the pre-existing back condition, the employer relied solely upon a surgical scar on Anderson's back as proof that Anderson's pre-existing back condition was manifest.[138]

The ALJ found that Anderson's second injury resulted in a permanent total disability, that the pre-existing back injury resulted in a permanent partial disability, that the second injury combined with the pre-existing back injury to cause a greater disability than the second injury alone, but found no grounds upon which to posit a finding that the pre-existing disability was manifest to the employer at the time Anderson was hired.[139] While no medical records were submitted at the hearing, counsel for the employer stated that he had obtained some medical records but they were of such poor quality that counsel had returned them asking that they be deciphered. According to the ALJ, the most that could be said for such evidence was that Anderson had been in the hospital.[140]

The ALJ rejected the employer's contention that the scar on Anderson's back would have put the employer on notice of a prior surgery, saying that, "the scar could have resulted from other causes and [Anderson] was not given a physical examination prior to employment."[141] Essentially, the ALJ concluded that since the medical documentation of Anderson's 1959 surgery was based entirely on what he told his examining physicians after the 1978 accident, the employer did not know and could not have learned from the medical records in existence on or before March 20, 1978, that Anderson had had back surgery in 1959.[142] Accordingly, the prior injury was not manifest and the ALJ denied the limitation of liability provided by the second injury provision of the Act.[143] The Benefits Review Board affirmed, holding that, "the mere existence of a scar without any relevant diagnosis prior to March 20, 1978, is not sufficient."[144]

The Eleventh Circuit began its discussion by stating, "[t]he purpose of section 8(f) is to discourage discrimination against disabled workers."[145] With that purpose in mind, the court of appeals observed that a majority of the federal circuits, including the Eleventh, requires that the pre-existing disability be manifest to the employer prior to the

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138. *Id.* at 1113-14.
139. *Id.* at 1114.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1114-15.
145. *Id.* at 1115.

compensable injury in order to receive relief under section 8(f).[146] If the purpose of section 8(f) is to encourage employers to hire disabled workers, the time at which the pre-existing injury should be manifest is at the time of hiring. That is how the ALJ expressed it.[147] In other words, if the existing disability was not manifest at the time of hiring, it could not cause or support discrimination against a disabled worker. In the statement of the "manifest" rule to which the panel cited, there was no reference to time. The Eleventh Circuit did refine that statement by adding the words "prior to the compensable injury."[148] Thus while the Eleventh Circuit clarified its previous statement of the rule it did not go far enough.

The Eleventh Circuit then recited the rule under which an employer is entitled to relief under section 8(f),[149] noting that the only issue before the court was whether the pre-existing disability was manifest to the employer prior to the compensable injury.[150] Since the employer did not have actual knowledge of Anderson's pre-existing disability, the Eleventh Circuit had to determine whether the employer had constructive knowledge of that condition because of the scar on Anderson's back, i.e., whether a scar on Anderson's back was sufficient to make his pre-existing back condition manifest to the employer.[151]

Although the Eleventh Circuit mentioned that some courts had embraced an objective standard of evidence of the disability, the court of appeals noted that it had not adopted such standard but even if it had, the employer could not meet it.[152] The court of appeals rejected the contention that a disability was manifest "merely because it was 'discoverable,' that is, it might have been discovered had the proper testing been performed."[153] Instead, the Eleventh Circuit applied the rationale of the Fifth Circuit which held, "[t]he question is whether the condition was discoverable by the employer based on then existing medical records available to it."[154] Since the employer did not offer

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146. *Id.*

147. *Id.* at 1114.

148. *Id.* at 1115.

149. *Id.* at 1116. The employer is entitled to relief upon proof "(1) that the employee had a preexisting, permanent partial disability; (2) that this preexisting disability was manifest to the employer prior to the compensable injury; and (3) that the preexisting disability contributed to the seriousness of the compensable injury." *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1116-17.

153. *Id.* at 1117.

154. *Id.* (quoting Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989)).

any medical records pre-dating the 1978 injury, it failed to demonstrate that there was objective evidence of Anderson's back condition in the records available to it. The Eleventh Circuit went on to note, "that the mere presence of a scar on Anderson's back is insufficient to render his back condition 'manifest' to his employer under the objective standard applied [by other courts]."[155] Implicit in the court's opinion was that if the employer had produced legible medical records establishing the laminectomy in 1959, that would have been sufficient to establish that the previous condition was manifest to the employer.[156]

IV. MARITIME LIENS

Although the issue of whether the Maritime Commercial Instruments and Lien Act ("MCILA")[157] permits an in personam action against the United States based on in rem principles was decided in *Bonanni Ship Supply, Inc. v. United States*,[158] this issue continues to be a source of litigation in this circuit, primarily because the Government will not give up. In *Turecamo of Savannah, Inc. v. United States*, the same issue arose.[159]

In order to have the YFNB-33 Seacon, a public vessel, towed from Mayport, Florida to the United States naval facility in Portsmouth, Virginia, the Government, through the Department of Defense, Military Traffic Management Command, contracted with Panocean Marine, Inc. which, through a subsidiary, contracted with Turecamo for the movement. Government personnel approved the use of the tug nominated by Turecamo and that tug delivered the YFNB-33 Seacon to Portsmouth in accordance with the bill of lading issued by the Government.[160]

When Turecamo was paid only $20,800 of the $55,800 to which it was entitled, it filed suit pursuant to the Suits in Admiralty Act[161] to recover the balance, alleging that it had provided necessaries to the vessel within the purview of MCILA and consequently had an in personam action pursuant to 46 U.S.C. § 742.[162] With *Bonanni* as

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155. *Id.*
156. *Id.*
157. 46 U.S.C. §§ 31301-43 (1988).
158. 959 F.2d 1558 (11th Cir. 1992).
159. 36 F.3d 1083 (11th Cir. 1994).
160. *Id.* at 1084.
161. *Id.*; 46 U.S.C. App. §§ 741-752 (1988).
162. 36 F.3d at 1084; 46 U.S.C. § 742 provides:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States .... Such

binding precedent, the district court entered summary judgment for Turecamo, finding that it had met its burden under the MCILA and was therefore entitled to recover in personam.[163]

The Eleventh Circuit cited *Bonanni* as good authority and affirmed the district court's decision.[164] Before doing so, the court conducted an in depth analysis of the *Bonanni* court's interpretation of MCILA. That analysis cast doubt on the holding of the prior panel. The court invited en banc reconsideration of the rule announced in *Bonanni* and cited five reasons: (1) the legislative history which stated that the provision "'makes no substantive change in the law'" was written when the Act did not expressly exclude public vessels; (2) while the main purpose of the Act was to codify existing maritime law, Congress noted that many substantive changes were made; (3) the legislative history of the 1989 Amendment expressly states Congress' intent that "'a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel"; (4) once Congress has expressly stated its intent to codify a rule prohibiting both in personam and in rem actions asserting maritime liens against public vessels, Congress' view of the law existing at the time of the amendment should not be second-guessed; and (5) whatever Congress' interpretation of the existing law was, it has now made clear that a claim cannot be brought on a maritime lien theory against a public vessel.[165] Following the Eleventh Circuit's affirmance of the district court's holding, the Government filed a petition for rehearing en banc, which was denied.

More often than not, the use of the maritime lien as a means of obtaining payment for goods and services provided to a vessel occurs when the vessel interests have absconded or gone broke. In situations involving the Government, it is usually the prime contractor who has failed to pay the subcontractor after having received the money from the Government. While it is unfortunate for any party to have to pay twice for any goods or services rendered to the vessel, that can happen when someone other than the lienholder is paid. What is not apparent from the Eleventh Circuit opinion is why the Government should be treated differently from every other entity in similar circumstances.

> suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.

46 U.S.C. § 742.

163. 36 F.3d at 1085.

164. *Id.* at 1088.

165. *Id.* at 1087-88.

V. SALVAGE

Two cases involving salvage matters were decided on the same day by the Eleventh Circuit Court of Appeals. In *United States v. Fisher*,[166] the United States brought suit against marine salvors seeking damages and a preliminary injunction to prohibit the salvors from violating the Marine Protection, Research, and Sanctuaries Act[167] ("Sanctuaries Act") and the Florida Keys National Marine Sanctuary and Protection Act[168] ("Florida Keys Act") by using prop wash deflectors[169] in their salvage operations in an area within the boundaries of the Florida Keys Sanctuary.[170] The matter was referred to a magistrate judge before whom the Government presented expert testimony that the sanctuary had been irreparably injured.[171] Those experts described the damage to fans, sponges and historic artifacts unearthed by prop wash deflectors.[172]

The salvors stipulated that they had used prop wash deflectors in such areas and that they had "'created at least 100 depressions' in the sea bed."[173] The magistrate judge held that the Government was "substantially likely to prevail on its § 1443 claim against the [salvors]," that the affected seagrass environments were clearly "sanctuary resources" under the Sanctuaries Act, that "irreparable injury would result if the Fishers' activities were not preliminarily enjoined and that a preliminary injunction would serve the public interest."[174] However, the magistrate judge recommended that only the salvors' use of prop wash deflectors be enjoined and that they be allowed to pursue their livelihood by using other salvage techniques in the sanctuary.[175] The district court issued a preliminary injunction against the salvors.[176]

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166. 22 F.3d 262 (11th Cir. 1994).

167. 16 U.S.C. §§ 1431-1445 (1984).

168. Pub. L. No. 101-605, 104 Stat. 3089 (1990). Both Acts were later amended by the Oceans Act of 1992, Pub. L. No. 102-587, 106 Stat. 5039 (1992).

169. 22 F.3d at 265. Prop wash deflectors direct propeller wash to remove overburden, sediments, and sea grass in which artifacts are contained. *Id.*

170. *Id.* at 263.

171. *Id.* at 265.

172. *Id.* at 266.

173. *Id.* at 265.

174. *Id.* at 266.

175. *Id.*

176. *Id.*

The court of appeals recited the four factors that the Government must prove to obtain a preliminary injunction[177] and noted that the salvors made no attempt to show that the district court misapplied any of those factors.[178] Instead, the salvors mounted a five-pronged defense: (1) that the Florida Keys Sanctuary cannot become operative until the Secretary of Commerce has promulgated a management plan, (2) that the Government cannot bring an enforcement action until the Secretary of Commerce has promulgated a management plan for the sanctuary that includes enforcement activity, (3) that the Government cannot bring an enforcement action until the Secretary of Commerce has filed an environmental impact statement, (4) that they were exonerated because of a statutory exclusion for those authorized by permit in existence prior to the designation of the sanctuary, and (5) that their prior history of salvage operations constituted a defense.[179]

The court of appeals rejected each of the salvors' defenses.[180] First, the Eleventh Circuit found "that the Florida Keys Act itself established the Florida Keys Sanctuary and did not require any further action by the Administration for the Sanctuary to come into existence."[181] The salvors' contention that Congressional designation of the Florida Keys Sanctuary did not take effect until the Administration had promulgated a management plan, was erroneous.[182] The Congress, by means of the Florida Keys Act, designated the sanctuary and directed that it be managed and regulated as if it had been designated pursuant to the Sanctuary Act. According to the Eleventh Circuit this did not mean that to become effective, Congress had to observe any of the requirements for effectuating its designation as would be incumbent on the Secretary of Commerce if the designation had come about pursuant to the Sanctuaries Act.[183]

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177. *Id.* The grant of a preliminary injunction was reviewed for a clear abuse of discretion. *Id.*

178. *Id.* The court said that the Government must show:
(1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that the injury to the government from denial of injunctive relief outweighs the damage to the other party if it is granted; and (4) that the injunction will not harm the public interest. *Id.* at 267.

179. *Id.* at 267-70.

180. *Id.*

181. *Id.* at 267.

182. *Id.* at 268.

183. *Id.*

Second, the Eleventh Circuit held that the enforcement provisions in Section 1434(a)(1)[184] to which the salvors referred (no enforcement action without a management plan including enforcement activity) apply to a sanctuary that the Secretary of Commerce has proposed to designate, and not to one that Congress itself designated.[185] In rejecting that defense, the Eleventh Circuit recited the requirements for the bringing of an enforcement action by the Government: "(1) the Secretary's determination of an imminent risk of destruction or loss of, or injury to, a sanctuary resource and (2) a request by the Secretary to the Attorney General to bring an enforcement action."[186] In short, the Eleventh Circuit found that there was nothing in the statute which required the Secretary of Commerce to have informed Congress about his enforcement plans for the sanctuary before filing suit.[187]

Third, the Eleventh Circuit found that the requirement for an environmental impact statement related only "to a sanctuary designated by the Secretary [of Commerce], not to one designated by Congress."[188] Fourth, the Eleventh Circuit held that the salvors could not come within the prior permit exclusion since they did not have a permit covering the use of prop wash deflectors in the sanctuary.[189] The salvors' attempt to overcome their lack of a permit by claiming that to have applied for a permit would have been a useless act since no procedures had been adopted for the issuance of permits and, in fact, no permits were being issued, was unavailing.[190] Finally, the Eleventh Circuit brushed aside the salvors' contention that their history of prior salvage operations constituted a defense.[191]

While the second salvage case arose in the context of a salvage claim, the issue on appeal was whether an opinion issued during the appeal should be vacated when the case was settled after the appellate mandate had issued. In *Flagship Marine Services, Inc. v. Belcher Towing Co.*,[192] the salvor brought a maritime salvage claim against Belcher for the

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184. Section 1434(a)(1) of the Sanctuaries Act provided in part: "In proposing to designate a national marine sanctuary, the Secretary shall . . . submit . . . the draft management plan detailing the proposed goals and objectives, management responsibilities, resource studies, interpretive and educational programs, and enforcement, including surveillance activities for the area." 16 U.S.C. § 1434(a)(1) (1992).

185. 22 F.3d at 268.

186. *Id.* at 269.

187. *Id.*

188. *Id.*

189. *Id.* at 269-70.

190. *Id.* at 270.

191. *Id.*

192. 23 F.3d 341 (11th Cir. 1994).

voluntary salvage of Belcher's tug. The district court awarded $125,000 for the voluntary salvage.[193] On the first appeal the Eleventh Circuit found that the parties had an oral contract that precluded recovery for voluntary salvage and reversed the award.[194]

On remand the district court held an evidentiary hearing and entered a judgment in favor of the salvor for $24,281.[195] The salvor appealed, but before the case was argued, it settled.[196] The Eleventh Circuit granted the salvor's motion to dismiss the appeal and vacated the opinion in the prior appeal.[197] The issue of whether the prior panel opinion should have been vacated came before the court of appeals on the motion of Belcher to reinstate precedent. The court of appeals pointed out that the case did not settle until after the mandate had issued and the case was in the district court on remand.[198] Under those circumstances there was a "live case or controversy."[199] The court of appeals specifically said:

> Until the mandate issues, an appellate judgment is not final; the decision reached in the opinion may be revised by the panel, or reconsidered by the en banc court or certiorari may be granted by the Supreme Court. When a case settles before the end of the appellate process, any opinion that has been produced should be vacated. It is a different story, however, where the appellate judgment has become final before the case settles. By surviving exposure to the full appellate process, the prior panel decision becomes the law of the circuit, and anything that happens thereafter on remand does not vitiate the effect of the prior appellate decision as precedent.[200]

While not critical to this case, counsel need to remember that the mandate does not necessarily issue at the same time as the appellate opinion.[201]

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193. *Id.* at 342.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. Federal Rule of Appellate Procedure 41 provides that issuance of the mandate can take place up to twenty-one days after the entry of judgment unless otherwise ordered. FED. R. APP. P. 41.