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Admiralty Law

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The Court of Appeals for the Eleventh Circuit decided nine admiralty cases with written opinions in 1998. With one exception, these cases did not involve issues of first impression. They instead fell into the following categories: cases that were decided with reference to existing law; a case in which the court's decision put it at odds with the holding of other circuit courts; a case in which the court's holding continued an expansive trend in maritime law; and a case of first impression involving important constitutional issues.

The cases that were decided with reference to existing law were three admiralty jurisdiction cases, two cases involving contracts,[1] one case arising out of tort,[2] a case involving maintenance and cure, [3] and two

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1. Inbesa America, Inc. v. M/V ANGLIA, 134 F.3d 1035 (11th Cir. 1998) and Wilkins v. Commercial Inv. Trust Corp., 153 F.3d 1273 (11th Cir. 1998).
2. Broughton v. Florida Int'l Underwriters, Inc., 139 F.3d 861 (11th Cir. 1998).
3. Aksoy v. Apollo Ship Chandlers, Inc., 137 F.3d 1304 (11th Cir. 1998).

cargo cases, one of which is discussed in a fifty page opinion that is a primer of cargo law.[4] The case that created a conflict among the circuits was a case that arose under the Longshore and Harbor Workers' Compensation Act ("LHWCA").[5] It was settled and dismissed after the Supreme Court granted certiorari, leaving the Second and Ninth Circuits in conflict with the Eleventh over exactly what a "pier" is under the LHWCA.[6] The "expansive trend" case involved the relationship between the maritime wrongful death remedy and state wrongful death statutes.[7] The case raising an issue of first impression, on a return appearance before the court, presented the court with an opportunity to examine the relationship between Eleventh Amendment sovereign immunity and the Limitation of Shipowner's Liability Act and its procedural counterpart, Rule F of the Supplemental Rules.[8]

I. ADMIRALTY JURISDICTION

In *Inbesa America, Inc. v. M/V ANGLIA*,[9] the Eleventh Circuit confronted the question of whether a contract between a terminal operator and a vessel charterer which covered dockage, stevedoring, unloading, stuffing and stripping, securing, and wharfage was, as a whole, maritime in nature, thus giving rise to admiralty jurisdiction.[10] Admiralty jurisdiction over contracts involving cargo traditionally exists when the contract is maritime, that is, the contract is concerned with getting a ship and its cargo from one point to another, including the chartering of the vessel, carriage of goods or passengers, loading and discharge of cargo, and obtaining voyage supplies, repairs, and towing.[11] The court in *Inbesa* held that dockage and stevedoring are clearly maritime because charges related to the needs of a vessel lying at a dock, as well as the stowing of cargo aboard that vessel, are maritime in nature.[12] However, the court held that the other categories of service are nonmaritime cargo handling.[13] In reaching this decision,

4. Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455 (11th Cir. 1998).
5. 33 U.S.C. § 903(a) (1994).
6. Brooker v. Durocher Dock & Dredge, 133 F.3d 1390 (11th Cir. 1998).
7. American Dredging Co. v. Lambert, 153 F.3d 1292 (11th Cir 1998).
8. Bouchard Transportation Co. v. Updegraff, 147 F.3d 1344 (11th Cir. 1998).
9. 134 F.3d 1035 (11th Cir. 1998).
10. *Id.* at 1036-37.
11. Rea v. Eclipse, 135 U.S. 599, 608 (1890).
12. 134 F.3d at 1037 (quoting 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 215, at 14-25 (7th ed. 1997)).
13. *Id.*

the court relied upon *Luvi Trucking, Inc. v. Sea-Land Services, Inc.*[14] "It has long been the rule that contracts involving cargo are maritime only to the extent the cargo is on a ship or is being loaded on or off a ship."[15] The court found that services such as the unloading of trucks and railcars and the stuffing and stripping of containers, while important parts of the transportation of cargo, were not "necessary" for the operation of the vessel.[16] The court drew this distinction between stevedoring and shore-side cargo handling and held shore-side cargo handling to be nonmaritime in nature.[17]

As for wharfage, the court noted the term "wharfage" is often synonymous with "dockage," which has been held to be a maritime service.[18] However, in this case, wharfage was a charge assessed on the cargo moving through Inbesa's terminal. Therefore, the court concluded that this wharfage charge was not dockage and was instead related to shore-side cargo handling services.[19] Thus, the Eleventh Circuit reversed the decision of the district court, holding that the district court did not have admiralty jurisdiction over the nonmaritime aspects of the contract because they were separable from the contract.[20]

In *Wilkins v. Commercial Investment Trust Corp.*,[21] the Eleventh Circuit examined whether admiralty jurisdiction existed when investors in a new cruise line posted a letter of credit or advanced funds to pay for refurbishment of the vessel. The investors asserted a maritime lien against the vessel.[22] The questions before the court were whether the refurbishment contracts constituted maritime contracts for the purpose of jurisdiction and whether the investors who had paid the refurbishers were subrogated to the refurbishers' maritime lien rights.[23]

Traditionally, a prerequisite to contractual maritime liens was that the underlying contract concern a subject matter within admiralty jurisdiction.[24] However, in *Wilkins* the court worked in reverse, first deciding whether the investors held maritime liens by way of subroga-

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14. 650 F.2d 371 (1st Cir. 1981).
15. *Id.* at 373 (citing The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866)).
16. 134 F.3d at 1037.
17. *Id.* at 1038.
18. *Id.* (citing 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 213, at 14-21).
19. *Id.*
20. *Id.*
21. 153 F.3d 1273 (11th Cir. 1998).
22. *Id.* at 1274.
23. *Id.* at 1276 (citing E.S. Binnings, Inc. v. The M/V Saudi Riyadh, 815 F.2d 660, 662 (11th Cir. 1987) *overruled in part on other grounds by* Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991)).
24. 815 F.2d at 662.

tion. The court found that the investors had not acquired maritime liens because not all creditors whose funds discharge a maritime lien acquire a maritime lien.[25] Because the investors' funds were advanced to Royal Company, the operating company which was overseeing the refurbishment, rather than to the owner of the vessel, the court found that the investors had advanced money to pay off a demand by the owner and that it would be "unjust to presume that the vessel would end up encumbered, anyway—because of the Royal companies' apparent default in reimbursing their investors as well as the vessel's refurbishers."[26] Therefore, because credit was extended to the operator and not to the vessel itself, no maritime lien existed.[27]

The court also held that the advances were not made on behalf of the owner or the vessel itself but to a party with no property interest in the vessel.[28] Royal Company, the intended operator of the vessel, had agreed to oversee and fund the repairs and refurbishment of the vessel, but did not possess any ownership rights in the vessel. Royal was unable to raise the funds to pay for the expenses. In an effort to raise capital, Royal issued promissory notes to the investors, promising repayment with interest. However, Royal did not have any collateral in the vessel.[29] The court found that there was no presumption that the money was advanced on the credit of the vessel, and because the rights of the investors were not subrogated to the maritime liens of the refurbishers, there was no need to investigate further whether admiralty jurisdiction existed.[30]

In *Broughton v. Florida International Underwriters, Inc.*,[31] the court considered whether a vessel owner's claim for breach of duty by a surplus line insurance broker met the test for admiralty tort jurisdiction.[32] The broker placed coverage for the vessel with an insurance company that was alleged to be financially unsound. The insured's shrimp trawler capsized and was totally destroyed. The hull underwriter failed to pay Broughton's claim against his policy. Broughton brought a tort claim under Georgia law against the broker for breach of alleged statutory duties requiring an insurance broker to ensure that an insurance company is financially sound before placing coverage with it

25. 153 F.3d at 1276 (citing Tramp Oil & Marine Limited v. M/V "MERMAID I," 805 F.2d 42, 45 (1st Cir. 1986)).
26. *Id.* at 1277.
27. *Id.*
28. *Id.*
29. *Id.* (citing The Emily Souder, 84 U.S. (17 Wall.) at 666, 671 (1873)).
30. *Id.* at 1277-78.
31. 139 F.3d 861 (11th Cir. 1998).
32. *Id.* at 864-65.

and requiring the broker to inform the policy holder if the carrier becomes financially unsound.[33] The court examined whether this was a subject within the scope of admiralty jurisdiction.[34]

The test for establishing admiralty jurisdiction in a tort case is the locality plus the nexus to traditional maritime activity test,[35] often referred to as the "locality plus plus" test. The locality portion of the test requires the tort to have occurred on navigable waters or have been caused by a vessel operating on navigable waters.[36] The nexus requirement contains two queries (hence the "plus plus"): first, whether "the incident has a potentially disruptive impact on maritime commerce," and second, "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."[37] The Eleventh Circuit decided *Broughton* solely on the locality requirement. Because the tort neither occurred on a navigable waterway nor related to a vessel operating on a navigable waterway, the locality test was not satisfied and the circuit court found that the district court did not have subject matter jurisdiction.[38]

II. MAINTENANCE AND CURE

In *Aksoy v. Apollo Ship Chandlers, Inc.*,[39] the Eleventh Circuit addressed the calculation of maintenance and cure payments. Aksoy was a wine steward aboard one of Apollo's passenger vessels who became ill and was unable to work. Aksoy's wages included tips from passengers and a monthly income, comprised of base salary and guaranteed gratuities.[40]

When a seaman is injured or becomes ill, he can bring an action for maintenance and cure that includes three types of recovery. These include maintenance, which is a living allowance; cure, which is compensation for medical expenses; and unearned wages, which are the wages from the date of disability until the expiration of the seaman's

33. *Id.* at 862.
34. *Id.* at 864.
35. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 527 (1995).
36. 139 F.3d at 865 (citing 513 U.S. at 534).
37. *Id.* (quoting 513 U.S. at 534).
38. *Id.*
39. 137 F.3d 1304 (11th Cir. 1998).
40. *Id.* at 1305.

employment contract.[41] Collectively, these are referred to as maintenance and cure.[42]

When Aksoy became ill, Apollo paid him unearned wages consisting of his contract wages and the minimum guaranteed gratuity, even though Aksoy's actual income from gratuities was much more.[43] Relying on *Flores v. Carnival Cruise Lines*, Aksoy argued that he should have been paid his estimated actual earnings rather than the guaranteed minimum.[44] The court in *Flores* held that an injured seaman whose income was based primarily on tips could recover lost tip income in an action for maintenance and cure because this remedy was designed to put the seaman in the position he would have been in had he not been injured.[45]

The district court, granting summary judgment for Apollo, distinguished *Flores* because Aksoy's employment contract provided for a guaranteed minimum gratuity, whereas Flores's contract did not.[46] The Eleventh Circuit, reviewing the trial court's order de novo, found that Aksoy, like Flores, earned a substantial portion of his income from tips.[47] Additionally, although Aksoy's employment contract provided for a guaranteed minimum amount of tip income, it did not limit the amount of that income.[48] The court found that the only way to place the employee in the same position that he would have been in had he not been injured was to allow him to recover wages in the amount that he would have earned during the period of his injury.[49] Thus, the court vacated the order of summary judgment and remanded the case for further proceedings.[50]

III. PERSONAL INJURY

In *American Dredging Co. v. Lambert*,[51] the Eleventh Circuit reviewed a bench trial decision against American Dredging. The lower court, applying Florida's Wrongful Death Act,[52] awarded damages for

41. Flores v. Carnival Cruise Lines, 47 F.3d 1120, 1122 (11th Cir. 1995) (citing Archer v. Trans/American Serv., 834 F.2d 1570, 1575 (11th Cir. 1988)).
42. *Id.* at 1122.
43. 137 F.3d at 1305.
44. *Id.* (citing *Flores*, 47 F.3d 1120, 1127).
45. *Id.* at 1305-06 (citing *Flores*, 47 F.3d at 1121-22).
46. *Id.* at 1305.
47. *Id.* at 1306.
48. *Id.*
49. *Id.*
50. *Id.*
51. 153 F.3d 1292 (11th Cir. 1998).
52. FLA. STAT. chs. 327.35 & 327.351 (1995). Chapter 327.351 was repealed in 1996.

past and future emotional pain and suffering, as well as prejudgment interest, in an action by the parents and estates of individuals killed in a boating accident. The claims arose out of an accident in which a pleasure craft operated by Lambert and carrying three passengers collided with an improperly lit dredge pipeline, ejecting the four occupants from the boat. Three of them were killed.[53]

American Dredging argued that the district court's award of damages for emotional pain and suffering under the Florida Wrongful Death Act conflicted with the long-standing general maritime rule that these damages were not available to nondependent parents of adult children.[54] This notwithstanding, the Eleventh Circuit held in an earlier appeal of this case that nonpecuniary damages could be recovered under Florida law.[55] Thus, the court chose not to revisit this issue.[56]

American Dredging argued that Lambert was comparatively negligent because he violated three Florida statutes that were intended to prevent collisions. These statutes addressed the intoxication of the operator of a vessel, required vessels to proceed at a safe speed, and required vessels to maintain a proper lookout.[57] The Eleventh Circuit reviewed the trial court's findings on each of these claims under the "clearly erroneous" standard and upheld the factual findings of the lower court.[58]

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53. 153 F.3d at 1294.

54. *Id.* at 1295.

55. *See* American Dredging Co. v. Lambert, 81 F.3d 127, 130-31 (11th Cir. 1996). The court, following *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619 (1996), held that "no federal statute or common law precedent precludes the personal representatives from recovering non-pecuniary damages under Florida law." 81 F.3d at 130.

56. This holding may conflict with general maritime law. *See In Re* Amtrack "Sunset Ltd." Train Crash, 121 F.3d 1421 (11th Cir. 1997) (in which the court held that wrongful death claims were governed by Federal Maritime Law and not Alabama's wrongful death statute). The court distinguished cases closely related to traditional maritime activity from those involving pleasure craft. *Lambert* contains the mixed elements of dredging, a traditional maritime activity, with a pleasure craft. *Id.* at 1426. Additionally, the court in *Amtrack*, concerned with the maritime law principle of uniformity and attempting to clarify the Supreme Court's position in *Yamaha*, did not apply an inconsistent state remedy to a maritime tort. *Id.* at 1427. In *Yamaha* the Court held a state wrongful death statute to apply to a tort involving pleasure craft because the general maritime law appeared not to address a situation in which an accident occurred within the territorial waters of a state. *See Yamaha Motors Corp.*, 116 S. Ct. at 626.

57. FLA. STAT. chs. 327.35, 327.351 (prohibiting the operation of a vessel in Florida while under the influence of alcohol); 33 U.S.C. § 2006 (1994) (requiring vessels to operate at a safe speed for the "prevailing circumstances and conditions"); and 33 U.S.C. § 2005 (1994) (requiring vessels to maintain proper lookout).

58. 153 F.3d at 1295.

The Eleventh Circuit reversed the district court's award of prejudgment interest on the damages for past emotional pain and suffering.[59] In reaching its decision, the Eleventh Circuit applied the Florida Wrongful Death Act because it provided the basis for recovery of damages for emotional pain and suffering.[60] Under Florida law, an award of prejudgment interest is appropriate when a fact finder determines that the plaintiff suffered an actual out-of-pocket loss prior to the entry of judgment.[61] However, because tort damages are generally uncertain and unliquidated until determination by the fact finder, awards for prejudgment interest are generally not allowed in personal injury cases.[62] The Eleventh Circuit found that although the parents and estates of the decedents were not actual personal injury plaintiffs, they were like personal injury plaintiffs in that their damages were uncertain and unliquidated until determined by the court.[63] The district court divided the emotional pain and suffering awards into two awards, one for past emotional pain and suffering and one for future emotional pain and suffering.[64] The Eleventh Circuit found that this division demonstrated an intention to compensate for injuries suffered over time and not for injuries suffered as of a certain date.[65] Therefore, prejudgment interest on damages for past emotional pain and suffering was inappropriate.[66]

IV. LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ("LHWCA")

In *Brooker v. Durocher Dock & Dredge*,[67] the court considered a question of situs under the LHWCA.[68] The question was whether a seawall was a "pier" for purposes of the LHWCA. Brooker was a welder working on the construction of a new seawall designed to protect an electricity generating plant from the Savannah River. He was injured when he fell landward off an old seawall which was being replaced.[69]

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59. *Id.* at 1297.
60. *Id.* (citing Royster Co. v. Union Carbide Corp., 737 F.2d 941, 948 (11th Cir. 1984)).
61. *Id.* (citing Alvarado v. Rice, 614 So. 2d 498, 499 (Fla. 1993)).
62. *Id.* at 1297-98 (citing Griefer v. DiPietro, 708 So. 2d 666, 673 (Fla. Dist. Ct. App. 1998); Lumbermen's Mutual Cas. Co. v. Percefull, 653 So. 2d 389, 390 (Fla. 1995); Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 214 (Fla. 1985)).
63. *Id.* at 1298.
64. *Id.*
65. *Id.*
66. *Id.*
67. 133 F.3d 1390 (11th Cir. 1998).
68. 33 U.S.C. § 901.
69. 133 F.3d at 1391.

An administrative law judge ("ALJ") denied Brooker benefits under the LHWCA, finding that Brooker failed to meet the "situs" test of the LHWCA.[70] The LHWCA requires in part that the injury claimed must have occurred "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."[71] The ALJ held that because the electric plant "'receives no shipment by water and the seawall is not designed to facilitate either the docking of a vessel, its loading, unloading, construction or repair,'" it failed to meet the situs requirement.[72] The ALJ considered the function of the seawall but not its location in reaching its conclusion. By operation of law, the Benefits Review Board ("BRB") deemed the ALJ's decision affirmed and final because the BRB failed to act on the decision within one year of Brooker's appeal.[73]

In reviewing the case law on the situs issue, the Eleventh Circuit noted that the Ninth Circuit was the only court that had expressly interpreted the term "pier" under the LHWCA.[74] The Ninth Circuit, reviewing a case about a structure used to separate oil into water, gas, and crude oil, and to store the crude oil, noted that this structure "resembled a pier to the extent that it extended from the beach on pilings and touched the water at high tide."[75] The appearance and location of the structure qualified it as a pier and thus satisfied the situs test.[76] The Ninth Circuit's holding focused on the location of the structure rather than on its function.

The Eleventh Circuit observed that other courts, including the Supreme Court, had avoided the function versus location dichotomy in determining whether a "pier" had to be used for customary vessel activity.[77] The Supreme Court circumvented the issue in *Northeast Marine Terminal Co. v. Caputo*[78] by finding that "it is not at all clear that the phrase 'customarily used' was intended to modify more than the

70. *Id.* at 1392.
71. 33 U.S.C. § 903(a)
72. 133 F.3d at 1392 (quoting Brooker v. Durocher Dock & Dredge, No. 93-LHC-2457, at 1 (Dep't Labor, March 24, 1994)).
73. *Id.*
74. *Id.* at 1393 (citing Hurston v. Director, Office of Workers Compensation Programs, 989 F.2d 1547 (9th Cir. 1993)).
75. 989 F.2d at 1549.
76. *Id.* at 1553.
77. 133 F.3d at 1393.
78. 432 U.S. 249, 280 (1977).

immediately preceding phrase 'other areas.'"[79] The Court, however, found that a pier used for stuffing and stripping containers satisfied the situs test because it was a part of an "'adjoining . . . terminal . . . customarily used . . . in loading [and] unloading.'"[80]

The Eleventh Circuit had also previously avoided the issue of whether the phrase "customarily used" modified more than just the "other areas" portion of section 903(a) of the LHWCA. The Eleventh Circuit held that an inland facility located five blocks from the pier, which was used for storage and maintenance of vessel loading equipment, satisfied the situs test because it constituted another adjoining area customarily used in vessel activity.[81]

The Eleventh Circuit in *Brooker* also chose not to examine the issue of whether the pier was required to be customarily used for vessel activity to satisfy the situs test. Instead, the court focused on whether a seawall was a pier.[82] The court concluded that a seawall is not a pier because it does not look like a pier or function like a pier.[83] It found that the ALJ correctly determined that a seawall is not a pier.[84] The court also affirmed the ALJ's finding that a seawall is not an "'other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.'"[85] The court pointed out that although a seawall adjoins a navigable waterway, it is not used for loading, unloading, repairing, dismantling, or building a vessel and, therefore, is not a covered situs.[86]

Although the Supreme Court granted certiorari in *Brooker*,[87] it was later dismissed when the case was settled.[88] The Court granted certiorari because there appeared to be a conflict among the circuits. Soon after the Eleventh Circuit decided *Brooker*, the Second Circuit decided *Fleischmann v. Director, Office of Workers' Compensation*

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79. *Id.*
80. *Id.* at 281 (brackets in original).
81. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 506-08, 516-17 (5th Cir. 1980) (en banc). The Eleventh Circuit adopted as binding precedent all affirmed Fifth Circuit cases decided prior to October 1, 1981. Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).
82. 133 F.3d at 1393.
83. *Id.*
84. *Id.* at 1394.
85. *Id.* (quoting 33 U.S.C. § 903(a)).
86. *Id.*
87. 119 S. Ct. 30 (1998).
88. 119 S. Ct. 390 (1998).

Programs,[89] which followed the Ninth Circuit's reasoning in *Hurston* and held that a bulkhead constituted a "pier."[90]

The Ninth Circuit in *Hurston*, commenting on Congress's failure to define the term "pier," suggested that Congress intended to "'leave the geographic areas such as a pier or wharf unlimited so long as they adjoin navigable waters of the United States.'"[91] The court in *Hurston* examined the purposes of the 1972 amendments to the LHWCA, which included the language of the situs requirement in order to provide coverage to a worker who otherwise would only be covered for injuries in limited areas.[92] The bulkhead in *Fleischmann* was similiar to the seawall in *Brooker* in that it was not used for loading or unloading cargo or repairing or constructing a vessel, yet the Second Circuit held that the bulkhead in *Fleischmann* was a pier under the LHWCA.[93] Therefore, the split among the circuits remains, and the Supreme Court will likely grant certiorari again to resolve this issue.

V. LIMITATION OF LIABILITY PROCEEDINGS

In *Bouchard Transportation Co. v. Updegraff*,[94] the Eleventh Circuit once again dealt with issues arising from the Tampa Bay oil spill of August 1993, and specifically the relationship between Rule F[95] and the Oil Pollution Act of 1990 ("OPA '90").[96] In *Bouchard* the owners of three vessels filed petitions under Rule F of the Supplemental Rules to limit their liability.[97] In its opinion, the Eleventh Circuit addressed three issues: first, whether the Department of Environmental Protection of the State of Florida was entitled to Eleventh Amendment sovereign immunity from a Rule F maritime limitation of liability proceeding; second, whether claims brought under OPA '90 are subject to Rule F limitation; and third, whether claims brought under Florida's Pollution Discharge Prevention and Control Act ("FPDPCA")[98] are subject to Rule F limitation.[99]

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89. 137 F.3d 131 (1998).
90. *Id.* at 139.
91. *Id.* at 138-39 (quoting *Hurston*, 989 F.2d at 1551).
92. *Id.* at 139 (citing *Hurston*, 989 F.2d at 1552).
93. *Id.*
94. 147 F.3d 1344 (11th Cir. 1998).
95. FED. R. CIV. P. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F.
96. 33 U.S.C. § 2701 (1994).
97. 147 F.3d at 1347.
98. FLA. STAT. ch. 376.011-.17, 376.19 -.21 (1995).
99. *Bouchard Transp. Co.*, 147 F.3d at 1346.

With regard to the issue of Eleventh Amendment immunity, the Eleventh Circuit noted that no court of appeals had ever addressed the issue.[100] In 1998 the Supreme Court in *California v. Deep Sea Research*[101] reviewed the application of the Eleventh Amendment in the context of an in rem maritime proceeding.[102] The Eleventh Amendment prevents a citizen of a state from filing suit in federal court against that state.[103] In *Deep Sea Research*, an in rem proceeding under Rule C,[104] the Supreme Court held that when a state does not have possession of the res in issue, the Eleventh Amendment does not bar federal jurisdiction.[105]

The Eleventh Circuit noted that *Bouchard* was not an in rem action.[106] However, like an in rem case, "the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants."[107] Because plaintiffs in the limitation proceedings filed security bonds with the district court, and Florida did not have possession of those bonds (the res), Florida was not immune under the Eleventh Amendment from the limitation of liability action.[108]

With regard to limitation of liability for OPA '90 claims, the Eleventh Circuit found that Rule F did not apply.[109] Rule F does not specify to which limitation statutes it applies.[110] As a result, the owners of the vessels argued that the procedural aspects of Rule F apply to all limitation statutes and that OPA '90 was a limitation statute.[111] The Eleventh Circuit disagreed, noting that while OPA '90 is a limitation statute in the sense that it limits a shipowner's liability, it is not a limitation statute with regard to the amount of money that may be recovered by claimants.[112] The court held that every claim must be paid in full through the Oil Spill Liability Trust Fund mechanism of OPA '90.[113] The court also noted that a conflict exists between the

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100. *Id.* at 1348.
101. California v. Deep Sea Research, Inc., 118 S. Ct. 1464 (1998).
102. *Id.* at 1467.
103. 147 F.3d at 1349 (citing *Deep Sea Research*, 118 S. Ct. at 1470).
104. FED. R. CIV. P. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C.
105. 147 F.3d at 1349.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1350.
110. *Id.* at 1349.
111. *Id.* at 1350.
112. *Id.*
113. *Id.* at 1352.

general procedures of Rule F limitations and the procedures of OPA '90.[114] The court followed the fundamental principle of statutory construction that when resolving a conflict between two statutes, the specific statute takes precedence over the more general one.[115] In this case, OPA '90 contained specific procedures for specific types of incidents while Rule F procedures were more general. The court further noted the principle of avoiding statutory constructions that render provisions insignificant.[116] For these reasons, the Eleventh Circuit found that claims brought under OPA '90 must follow the procedures prescribed in that statute rather than those in Rule F.[117]

Finally, with regard to claims brought under the FPDPCA, the court found that, like OPA '90, the FPDPCA did not limit the recovery available to claimants.[118] The FPDPCA established the Florida Coastal Protection Trust Fund to ensure full payment of all claims and specified procedures which take precedence over a general limitation scheme such as Rule F.[119] Therefore, claims brought under the FPDPCA are not subject to limitation of liability under Rule F.[120]

VI. CARGO ISSUES

In *Itel Container Corp. v. M/V TITAN SCAN*,[121] the shipper of new refrigerated containers sued the nonvessel operating common carrier ("NVOCC") and the ocean carrier to recover damages for containers that were lost overboard or damaged during ocean transit from Japan to the United States. The NVOCC cross-claimed for indemnity against the ocean carrier.[122] The district court held, and the parties did not contest on appeal, that the NVOCC breached its contract of carriage with the shipper and was liable for the resulting cargo damage and, in turn, that the ocean carrier must indemnify the NVOCC.[123] However, construing as separate and independent the contracts of carriage between the shipper and the NVOCC on the one hand, and the NVOCC and ocean carrier on the other, the district court held that the NVOCC's liability was limited by the package limitation set forth in England's

114. *Id.* at 1351.
115. *Id.* (citing San Pedro v. United States, 79 F.3d 1065, 1069 (11th Cir. 1996)).
116. *Id.* (citing WoodFork v. Marine Cooks & Stewards Union, 642 F.2d 966, 970-71 (5th Cir. 1981)).
117. *Id.*
118. *Id.* at 1352.
119. *Id.*
120. *Id.*
121. Itel Container Corp. v. M/V "Titan Scan," 139 F.3d 1450 (11th Cir. 1998).
122. *Id.* at 1451-52.
123. *Id.* at 1452.

Hague-Visby Rules.[124] The district court further held that the ocean carrier's liability to the NVOCC was limited by the package limitation of the United States Carriage of Goods by Sea Act ("U.S. COGSA").[125] Because U.S. COGSA's liability limit is less than that provided by the Hague-Visby Rules, the NVOCC was not fully indemnified for the amount adjudged against it.[126]

The NVOCC appealed, asserting that the district court erred in finding that the NVOCC's liability to the shipper was governed by the Hague-Visby Rules whereas the ocean carrier's liability to the NVOCC was governed by U.S. COGSA.[127] The NVOCC argued that no legal basis existed for distinguishing between the two contracts of carriage because "they were intentionally created as 'back to back' contracts to be governed in all aspects by the same statutory regime."[128] The NVOCC also asserted that the district court erred in finding that the Hague-Visby Rules governed its contract of carriage with the shipper.[129]

The Eleventh Circuit affirmed the district court's conclusion that the two contracts of carriage were separate transactions.[130] The court reasoned that the shipper and ocean carrier had no communication during the negotiations for the respective contracts of carriage and that the NVOCC failed to include any language in the contracts that would justify evaluating the two contracts as a single transaction.[131]

In affirming the district court's conclusion that the Hague-Visby Rules applied to the shipper/NVOCC contract, the Eleventh Circuit relied on several clauses in the bill of lading.[132] The court found that the clause paramount required application of Japanese COGSA.[133] The court also

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* The NVOCC asserted that while the parties agreed that English law would govern the contract of carriage, that law would require application of Japan's Carriage of Goods By Sea Act ("Japanese COGSA") to the contract, not England's Hague-Visby Rules. *Id.* During the time relevant to the lawsuit, Japan had not yet adopted the Hague-Visby Rules with its higher package limitation. *Id.* at 1451 n.1.
130. *Id.* at 1453.
131. *Id.*
132. *Id.* at 1454.
133. *Id.*

> "The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading . . . as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable the terms of the said Convention shall apply.

found that the choice of forum clause,[134] which required application of the law of the carrier's principal place of business, required application of English law because the NVOCC's place of business was London, England.[135] A clause in the typewritten addendum to the contract of carriage provided for application of "'English law.'"[136]

To resolve the conflict between these clauses, the Eleventh Circuit applied rules of contract construction which provide that "specific clauses take precedence over general ones, and clauses that have been added by the parties preempt form provisions."[137] The court held that the typewritten clause "'English law to apply'" was a specific clause that preempted the boilerplate clause paramount.[138] The court also held that the boilerplate forum selection clause was more specific than the clause paramount.[139] Thus, the court concluded that English law applied to the shipper/NVOCC bill of lading.[140]

The Eleventh Circuit reversed the district court's conclusion that U.S. COGSA governed the NVOCC/ocean carrier contract of carriage.[141] The court held that "[w]hile the [NVOCC/ocean carrier] situation is marginally different from the [shipper/NVOCC] situation, we do not think the differences between the two situations constitute adequate grounds upon which to distinguish the statutory schemes applicable to the liability limits of the [English Hague-Visby Rules]."[142] The court noted that, like the shipper/NVOCC contract of carriage, the clause paramount in the NVOCC/ocean carrier bill of lading required application of Japanese COGSA and, as contained in the addendum, provided

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Trades where Hague-Visby Rules apply. In trades where . . . the Hague-Visby Rules [ ] apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading.'"

Id.

134. "Any dispute arising under the Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the laws of such country shall apply except as provided elsewhere herein." *Id.*

135. *Id.* The carrier, for purposes of the shipper/NVOCC contract of carriage, was the NVOCC. The NVOCC's principal place of business was England. *Id.*

136. *Id.*

137. *Id.* at 1455.

138. *Id.*

139. *Id.*

140. *Id.* The court also held that the forum selection clause, in conjunction with the typewritten clause providing for application of English law, satisfied "Article X(c) of the Hague-Visby Rules, which provides that the Hague-Visby Rules apply if 'the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract.'" *Id.*

141. *Id.*

142. *Id.*

for application of English law.[143] The court found that the only ground for distinguishing between the contracts was the forum selection clause, which required application of the law of the carrier's principal place of business.[144] Because the ocean carrier's principal place of business was the Netherlands, the forum selection clause required application of Dutch law.[145] Because the Netherlands, like England, had adopted the Hague-Visby Rules, application of Dutch law would also result in the higher liability limits of the Hague-Visby Rules.[146] The court concluded, therefore, that no basis existed for differentiating between the two contracts of carriage.[147] Because the Hague-Visby Rules applied to both, the NVOCC enjoyed complete indemnity from the ocean carrier for the amount adjudged against it.[148]

Hale Container Line, Inc v. Houston Sea Packing Co.,[149] was a multiclaim lawsuit that arose from two voyages in which mobile homes were transported from Tampa, Florida to French Guyana. Societe Guayanaise De Coneils Immobiliers ("SOGUCI"), which had contracted with the European Space Agency to provide housing for workers constructing a space center in French Guyana, contracted with Project Logistics and Transporation, Inc. ("Project Logistics") to arrange for the ocean transportation of the homes. Project Logistics then contacted a shipping agency, Meridian Shipping, Inc. ("Meridian"), which, in turn, contacted Houston Sea Packing Co. ("Houston") for the transportation of the homes and the construction of a stanchion assembly to hold the homes during shipment.[150]

On August 28, 1989, Hale Container Line, Inc. ("Hale"), as "owner," and Houston, as "charterer," entered into a time charter party whereby Houston chartered a tug and barge from Hale. The charter party contained an acknowledgment that Houston intended to add a stanchion assembly to the barge and that Houston would be responsible for, and indemnify Hale, for any claims arising from the stanchions.[151]

The first shipment of mobile homes departed Tampa on September 23, 1989. Upon arrival of the tug and barge in French Guyana, it was discovered that the stanchions and supports for the mobile homes had bent, causing damage to some of the mobile homes. As a result of the

143. *Id.*
144. *Id.*
145. *Id.* at 1455-56.
146. *Id.* at 1456.
147. *Id.*
148. *Id.*
149. 137 F.3d 1455 (11th Cir. 1998).
150. *Id.* at 1460.
151. *Id.* at 1461.

failure of the stanchion assembly, SOGUCI advised Houston and Project Logistics that it would require a survey of the tug and tow before departure of the second shipment. Houston hired a surveyor to ensure that the mobile homes were properly secured prior to the commencement of the second voyage. At the conclusion of loading operations for the second shipment, the surveyor issued a document stating that all of the mobile homes had been properly secured aboard the barge.[152]

While the vessels carrying the second shipment of homes were en route to French Guyana, some of the mobile homes on the stanchion assembly shifted. Hale then instructed the master of the tug to call at Martinique. While the vessels were in Martinique, SOGUCI commenced legal proceedings against the vessels because of a dispute with Hale concerning the manner in which the mobile homes would be transported to French Guyana. The vessels were held under arrest in Martinique from December 8 to December 29, 1989. During this time, fifteen mobile homes were discharged from the barge and transported to French Guyana on another vessel. The tug and barge eventually arrived in French Guyana in January 1990, where it was discovered that several of the mobile homes had sustained damage due to the apparent failure of the stanchions.[153]

Hale sued Houston seeking recovery of unpaid charter hire, fuel and lube expenses, indemnification for any sums due the cargo interests in SOGUCI's pending lawsuit in Martinique, $70,895.38 for expenses incurred during the vessels' emergency call at Martinique, and $100,000 in lost profits.[154] SOGUCI filed a complaint against Houston and other parties seeking $700,000 for damages to the mobile homes.[155]

The district court entered judgment for Hale and the vessels on SOGUCI's claims against them.[156] The district court also entered judgment for SOGUCI against Houston for $337,049.52.[157] Houston and SOGUCI appealed.[158]

A. *"Carrier" Status Under U.S. COGSA*

Houston argued on appeal that the district court erred in concluding that it was not entitled to assert U.S. COGSA's package limitation

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152. *Id.* at 1462.

153. *Id.* at 1463-64.

154. *Id.* at 1464. Houston also sought indemnification, damages for detention, loss of profit, port charges, pilotage, and stevedoring charges from other parties. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

because it was not a "carrier" within the meaning of U.S. COGSA.[159] Houston also asserted the district court erred in finding that it was not entitled to assert the package limitation by virtue of the bills of ladings' Himalaya clause because it was not an independent contractor of the "carrier," Project Logistics.[160] SOGUCI argued on appeal that the district court erred in finding that the vessels, in rem, constituted U.S. COGSA "carriers."[161] The Eleventh Circuit affirmed the district court's findings as to these issues.[162]

The Eleventh Circuit noted that U.S. COGSA defines a "carrier" as "the owner or charterer who enters into a contract of carriage."[163] The court stated that "[a] charterer may be a 'carrier' as established by the vessel's charter, its acts of accepting and loading goods into containers owned by the charterer, and issuance of the bill of lading."[164] The court concluded that the evidence supported the district court's finding that Houston was not a "carrier" within the meaning of U.S. COGSA.[165]

The court found that Houston was not a party to the July 31, 1989 booking note issued for the shipments and, moreover, was not a party to the bills of lading issued for the cargo.[166] The court held that "[t]here was no evidence presented that showed that Project Logistics entered into a contract of carriage or bill of lading with Houston, consented to have Houston act on its behalf as an agent, or was in privity with Houston."[167]

The court then addressed Houston's argument that it was an independent contractor of the carrier, Project Logistics, and therefore could find refuge under the Himalaya clause of the bills of lading.[168] While cautioning that such clauses are strictly construed, the court noted that a Himalaya clause may expressly extend the defenses and protections of U.S. COGSA to a carrier's agents and contractors.[169] The court then set forth guidelines for determining whether a party is an intended beneficiary of a Himalaya clause.[170]

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159. *Id.*
160. *Id.* at 1464-65.
161. *Id.* at 1464.
162. *Id.* at 1468.
163. *Id.* at 1464 (quoting 46 U.S.C. § 1301(a) (1994)).
164. *Id.* at 1465.
165. *Id.* at 1466.
166. *Id.*
167. *Id.*
168. *Id.* at 1465.
169. *Id.*
170. *Id.*

> A reference to a class of persons such as "agents" and "independent contractors" clearly indicates that the contract includes all persons engaged by the carrier to perform the functions and duties of the carrier within the scope of the carriage contract, and no further clarity, such as enumeration of the parties, is necessary.[171]

The court also set forth guidelines for determining whether a party is an independent contractor as referenced in a Himalaya clause: "a court should (1) compare the nature of the services provided by the party with the carrier's responsibilities under the bill of lading or contract of carriage, and (2) consider whether the independent contractor's duty had been fulfilled at the time when the liability was incurred."[172] Moreover, "a contractor will be entitled to the benefits of a Himalaya clause where there is a manifest consent by the carrier that the contractor shall act on its behalf and subject to its control, and consent by the contractor to so act."[173]

The Eleventh Circuit affirmed the district court's finding that Houston was neither an agent nor a contractor of the carrier, Project Logistics.[174] The court noted that Houston was not directly employed by Project Logistics, received no payment for services provided to Project Logistics, had no contractual relationship with Project Logistics, and, finally, that Project Logistics did not consent to have Houston act on its behalf.[175]

Addressing whether the carrying vessels were U.S. COGSA "carriers," the court noted that a "vessel is a 'carrier,' and thus liable under [U.S.] COGSA, where (1) the ship transported and discharged the cargo; (2) the bill of lading was issued 'for the master'; (3) no contractual relationship existed which absolved the ship and its owner from liability for the cargo."[176] Utilizing this analysis, the court affirmed the district court's conclusion that the carrying vessels were U.S. COGSA carriers because (1) the vessels transported the mobile homes; and (2) "the master of each voyage, by transporting the cargo, ratified the bills of lading."[177]

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171. *Id.*
172. *Id.* at 1465-66.
173. *Id.* at 1466.
174. *Id.*
175. *Id.*
176. *Id.* at 1465.
177. *Id.* at 1466.

B. Due Diligence and Deviation Under U.S. COGSA

SOGUCI asserted on appeal that the district court erred in finding that the vessels (1) exercised due diligence in loading and stowing the mobile homes for the second voyage; (2) were not liable for the costs associated with discharging the fifteen mobile homes in Martinique and transhipping the homes to French Guyana on a different vessel; and (3) were entitled to limit their liability pursuant to U.S. COGSA's package limitation.[178] The Eleventh Circuit affirmed the district court on the first two issues but did not address the package limitation issue.[179]

The Eleventh Circuit held that "[t]he duty to load, stow, and discharge cargo in the carriage of goods under a time charter is on the ship and its owner."[180] The court affirmed the district court's finding that Hale exercised due diligence "'to ensure the seaworthiness of the vessel with respect to the stanchion system.'"[181] The court noted that under the terms of the time charter party, Houston, the time charterer, was responsible for the stanchion system.[182] The court also noted that Houston retained a surveyor, as required by SOGUCI, to confirm that the mobile homes were properly stowed prior to the sailing of the vessels.[183] The surveyor issued a document confirming proper stowage of the mobile homes and SOGUCI, accepting that document, permitted the vessels to sail.[184] Thus, the court reasoned, the master of the vessel reasonably relied upon the surveyor's findings with respect to the stanchion system.[185]

The court then addressed the issue of deviation, clarifying the doctrine as "provid[ing] that, when a ship deviates from the contract of carriage or varies the conduct in the carriage of goods, increasing the risk of shipment of the goods, COGSA does not apply because the bill of lading, which acts as the contract of carriage, is nullified."[186] The court noted that "[w]here a ship leaves port badly stowed or unseaworthy, courts have held that the ship did not deviate in seeking a port of refuge."[187] Moreover, "a ship's master is empowered to exercise his good faith

178. *Id.* at 1468.
179. *Id.* at 1470. Because the court concluded that the vessels, in rem, were not liable under U.S. COGSA, it refused to consider the package limitation issue. *Id.*
180. *Id.* at 1468.
181. *Id.* at 1469.
182. *Id.*
183. *Id.* at 1469-70.
184. *Id.* at 1470.
185. *Id.*
186. *Id.* at 1469.
187. *Id.*

judgment during his command where the safety of the crew, vessel and cargo are concerned."[188]

The court affirmed the district court's finding that the offloading of the fifteen mobile homes from the vessel in Martinique because of concerns about the soundness of the stanchion system did not constitute a deviation.[189] The court noted that the master was entitled to "exercise his good faith judgment where the safety of the cargo was involved" and therefore, while the offloading of the mobile homes "may have been a change in the time charter, it was not a 'deviation.'"[190]

188. *Id.*
189. *Id.* at 1470.
190. *Id.*