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## Admiralty

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# Admiralty

by John P. Kavanagh, Jr. \*

The cases discussed herein represent decisions from the United States Court of Appeals for the Eleventh Circuit, as well as district courts within the Circuit, issued in 2020. While not an all-inclusive list of maritime decisions during that timeframe, the Author identified and provided summaries of key rulings of interest to the maritime practitioner.<sup>1</sup>

## I. CRUISE LINE PASSENGER CLAIMS

A passenger injured aboard the Carnival ship VALOR filed simultaneous state and federal complaints. However, her eschewal of federal jurisdiction—followed by an immediate motion to dismiss the federal lawsuit based on lack of jurisdiction—did not impress the Eleventh Circuit.<sup>2</sup> The court of appeals noted the plaintiff's unique approach to her personal injury claim: “This case comes before us in a peculiar procedural posture, with DeRoy’s tacit invocation of federal jurisdiction—by filing her complaint in the district court—coupled with DeRoy’s explicit disavowal of federal jurisdiction in her allegations and claim for relief.”<sup>3</sup> Rejecting these machinations, the court held that, when admiralty jurisdiction exists based on the facts and substance of the claims alleged, a plaintiff cannot disavow the existence of jurisdiction by failing to specifically reference or acknowledge the same.<sup>4</sup>

As noted above, two complaints were filed, the first in United States District Court for the Southern District of Florida, the underlying suit herein, with a second lawsuit simultaneously filed in the Eleventh

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<sup>1</sup> For an analysis of admiralty law during the prior Survey period, see John P. Kavanagh, Jr., *Admiralty, Eleventh Circuit Survey*, 71 MERCER L. REV. 913 (2020).

<sup>2</sup> *DeRoy v. Carnival Corp.*, 963 F.3d 1302 (11th Cir. 2020).

<sup>3</sup> *Id.* at 1310.

<sup>4</sup> *Id.* at 1313.

Circuit Court in and for Miami-Dade County, Florida. Each complaint contained a single negligence claim against Carnival, the owner and operator of the M/V VALOR.<sup>5</sup>

The Carnival ticket contract contained a forum selection clause, requiring any suit to be filed in the United States District Court for the Southern District of Florida, “[I]f it was jurisdictionally possible to do so[.]”<sup>6</sup> The clause states in pertinent part:

[I]t is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest’s cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.<sup>7</sup>

The federal lawsuit filed by Ms. DeRoy observed that diversity jurisdiction did not exist, since both she and Carnival were citizens of Florida. Her negligence-only complaint precluded federal-question jurisdiction.<sup>8</sup> In an attempt to avoid admiralty jurisdiction, Ms. DeRoy pled her *in personam* action “[A]t law, not in admiralty. So, DeRoy concluded, admiralty jurisdiction did not exist, since admiralty jurisdiction does not extend to *in personam* claims brought *at law*.”<sup>9</sup>

The trial court determined that the “saving-to-suitors clause” of 28 U.S.C. § 1333<sup>10</sup> allowed the plaintiff to essentially plead around the federal court’s admiralty jurisdiction. The plaintiff’s motion to dismiss was granted.<sup>11</sup>

The Eleventh Circuit rejected this position, and noted that an injury to a passenger aboard a cruise ship “falls comfortably within the admiralty jurisdiction of the district court . . .”<sup>12</sup> Further, while the plaintiff is the master of her complaint, the court is not bound by a party’s wordsmithing: “[I]t is the facts and substance of the claims alleged, not

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<sup>5</sup> *Id.* at 1308.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1310. *See* 28 U.S.C. § 1333 (2021). § 1333 (1) provides, in part, that district courts have original jurisdiction over “[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

<sup>11</sup> *Id.* at 1309.

<sup>12</sup> *Id.* at 1310.

the jurisdictional labels attached, that ultimately determine whether a court can hear a claim.”<sup>13</sup> Further, once it is established that the federal court has jurisdiction, it has a duty to proceed with the case in its exercise of that jurisdiction.<sup>14</sup>

The court next dispensed with the suggestion that the plaintiff’s failure to make an election under Rule 9(h) of the Federal Rules of Civil Procedure<sup>15</sup> voided admiralty jurisdiction.<sup>16</sup> Rule 9(h) provides that a claim cognizable only in admiralty or maritime jurisdiction is treated as an admiralty or maritime claim whether or not an election is made.<sup>17</sup> Because Ms. DeRoy’s negligence claim fell only within the federal court’s admiralty jurisdiction, the district court properly exercised admiralty jurisdiction in the case whether DeRoy invoked it or not.<sup>18</sup>

Likewise, the “savings-to-suitors” clause did not provide any escape from federal jurisdiction.<sup>19</sup> The court discussed this in the context of the right to jury trial, which is generally unavailable when a case proceeds solely in admiralty.<sup>20</sup> In the instant case, however, this was not an issue because Carnival agreed to a jury trial.<sup>21</sup>

Finally, the court cited the language of the forum selection clause, which unequivocally requires that suits be filed in the federal courts for the Southern District of Florida.<sup>22</sup> The court rejected the suggestion that the alternative language in the forum selection clause—allowing suit in Florida state court if federal jurisdiction was not available—was an “invitation for litigants to forum shop.”<sup>23</sup> “Litigants who wish to be in state court cannot simply refuse to set forth the correct federal jurisdictional ground. DeRoy’s construction would . . . effectively nullify the forum-selection clause[.]”<sup>24</sup>

The Eleventh Circuit reversed the district court’s order of dismissal and remanded the case for further proceedings soundly within the

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<sup>13</sup> *Id.* at 1311 (citing *inter alia* Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994)).

<sup>14</sup> *DeRoy*, 963 F.3d at 1311.

<sup>15</sup> FED. R. CIV. P. 9(h).

<sup>16</sup> *DeRoy*, 963 F.3d at 1312.

<sup>17</sup> *Id.* (citing FED. R. CIV. P. 9(h)(1)).

<sup>18</sup> *DeRoy*, 963 F.3d at 1313.

<sup>19</sup> *Id.* at 1314.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1315–16.

<sup>23</sup> *Id.* at 1316.

<sup>24</sup> *Id.*

confines of the United States District Court for the Southern District of Florida.<sup>25</sup>

In a fairly cursory opinion, the Eleventh Circuit affirmed the trial court's decision to dismiss a lawsuit brought by cruise ship passengers when their trip was cancelled due to Hurricane Harvey.<sup>26</sup> A group of passengers were slated to leave Galveston, Texas aboard a Royal Caribbean vessel in August 2017. The approach of Hurricane Harvey prompted cancellation of the cruise, although Royal Caribbean did not make the final decision until the day the cruise was set to depart. Plaintiffs were in Galveston and dealt with hurricane conditions upon their arrival and during the subsequent stay. Suit was filed against Royal Caribbean based on negligence and negligent infliction of emotional distress.<sup>27</sup>

The district court highlighted the failure of plaintiffs to identify any harm suffered in the original complaint; leave was granted to amend.<sup>28</sup> The second effort was likewise faulty: "Though the amended complaint added that each appellant suffered 'physical and emotional damage,' it still failed to specify their individual physical and emotional injuries."<sup>29</sup> The matter was dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>30</sup> On appeal, the Eleventh Circuit agreed that the failure of the individual appellants to specifically identify the physical or emotional damage suffered rendered the complaint deficient under the now familiar *Iqbal* standard.<sup>31</sup>

The appellants also sought recovery for the expenses incurred by the unexpected stay in Texas. These allegations of financial harm were barred under the "economic-loss rule."<sup>32</sup> As explained by the court, the economic loss doctrine will not allow for recovery of economic losses unrelated to physical damages.<sup>33</sup> "The appellants do not allege that their

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<sup>25</sup> *Id.* at 1317. The appellate court noted that the state court case was "essentially on hold pending the outcome of the appeal." *Id.* at 1308, n.6. A parallel case where plaintiff also tried to circumvent federal jurisdiction via artful pleading was remanded shortly after the *DeRoy* decision. *See Appleby v. NCL (Bahamas), Ltd.*, 823 F. App'x 833 (11th Cir. 2020). "Because Appleby's claim 'is capable of being pleaded to satisfy federal jurisdiction (and was, in fact, pleaded that way), the claim must proceed, if at all, in federal court.'" *Id.* at 836 (quoting *DeRoy*, 963 F.3d at 1317).

<sup>26</sup> *Heinen v. Royal Caribbean Cruises LTD.*, 806 F. App'x. 847, 849 (11th Cir. 2020).

<sup>27</sup> *Id.* at 848–49.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 849.

<sup>30</sup> *Id.* (citing FED. R. CIV. P. 12(b)(6)).

<sup>31</sup> *Heinen*, 806 F. App'x. at 849–50 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>32</sup> *Id.* at 850.

<sup>33</sup> *Id.*

out-of-pocket expenses stem from physical injury to their person or their property—they allege purely economic losses stemming from the additional time they spent in Texas.”<sup>34</sup>

Sexual assaults aboard cruise ships continue to be a problem, and lawsuits seeking damages for such illicit activities populated the dockets of the south Florida courts. In two related decisions, the Southern District of Florida addressed motions to dismiss claims involving assaults against passengers.<sup>35</sup> In *Doe v. Carnival Corp.*,<sup>36</sup> the mother of a fifteen-year-old cruise passenger filed suit against Carnival Corporation (vessel owner/operator) and Dufry Cruise Services, LLC (concessionaire aboard ship), alleging that her child was sexually assaulted by two employees of Dufry. The plaintiff alleged numerous counts against both Carnival and Dufry, including a claim that Carnival was negligent in its training and monitoring of the crew. Punitive damages were requested in the complaint’s prayer for relief.<sup>37</sup>

The court assessed the Rule 12(b) motion to dismiss under the familiar *Iqbal* and *Twombly* standards.<sup>38</sup> To survive a motion to dismiss, the complaint must state sufficient factual matter to be plausible on its face, and contain “content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>39</sup> The plaintiff’s complaint was actually fairly detailed in its factual allegations concerning negligent training and supervision of the alleged attackers.<sup>40</sup> However, the allegations were leveled against Carnival, not the employer: “Plaintiff does not explain how Carnival, rather than Dufry, was supposed to train and monitor its non-employees.”<sup>41</sup> Based on this, the court held that the plaintiff’s negligent training and negligent monitoring claims against Carnival were due to be dismissed.<sup>42</sup>

With respect to punitive damages, the district court surveyed the current jurisprudence in the Eleventh Circuit, which still finds as its

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<sup>34</sup> *Id.*

<sup>35</sup> *See Doe v. Carnival*, 470 F. Supp. 3d 1317 (S.D. Fla. 2020); *see also Doe v. Carnival Corp.*, 472 F. Supp. 3d 1187 (S.D. Fla. 2020).

<sup>36</sup> 470 F. Supp. 3d at 1317.

<sup>37</sup> *Id.* at 1320–22.

<sup>38</sup> *Id.* at 1322 (citing *Iqbal*, 556 U.S. at 662; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

<sup>39</sup> *Doe*, 470 F. Supp. 3d at 1322 (citing *Twombly*, 550 U.S. at 544).

<sup>40</sup> *See id.* at 1321–22.

<sup>41</sup> *Id.* at 1325.

<sup>42</sup> *Id.*

touchtone the *Amtrak*<sup>43</sup> decision.<sup>44</sup> Based on *Amtrak* and its progeny, the district court agreed that punitive damages are available in exceptional circumstances, such as intentional misconduct.<sup>45</sup> Accordingly, the motion to dismiss punitive damages was denied, as the allegations of sexual assault upon a minor, if proved, certainly qualify as exceptional circumstances.<sup>46</sup>

The second published decision addressed similar motions to dismiss filed by the co-defendant, Dufry.<sup>47</sup> Recall that Dufry was a contract vendor aboard the Carnival vessel, and its employees were the alleged attackers of the minor victim. The plaintiff's complaint alleged that Dufry was strictly liable for the actions of its employees, relying on Eleventh Circuit precedent.<sup>48</sup> In *Doe v. Celebrity Cruises*,<sup>49</sup> a passenger was raped by a crewmember.<sup>50</sup> The Eleventh Circuit held that a cruise line, as a common carrier, is strictly liable for crewmember assaults on passengers during transit.<sup>51</sup> Dufry argued that, as a contract vendor, it should not be treated as a common carrier and held to the strict liability standard.<sup>52</sup> The district court disagreed, citing case law holding that strict liability logically should extend to concessionaires whose employees work aboard cruise vessels.<sup>53</sup>

The collapse of a chair in a ship's cabin resulted in a negligence case of first impression involving *res ipsa loquitur*.<sup>54</sup> Irina Tesoriero was a passenger aboard a Carnival cruise ship. Attempting to sit in the vanity chair in her cabin, it collapsed resulting in an injury to her arm. Ms. Tesoriero reported the accident to the ship's crew. A cabin steward took the chair away and replaced it with a new one. Her arm continued to bother her, and Ms. Tesoriero incurred additional medical treatment, costs and expenses once she returned home. Suit was eventually filed in

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<sup>43</sup> *Altosino v. Warrior & Gulf Navigation Co. (In re Amtrak "Sunset Limited" Train Crash Bayou Canot v. Warrior & Gulf Navigation, Co.)*, 121 F.3d 1421 (11th Cir. 1997).

<sup>44</sup> *Id.* at 1325–26.

<sup>45</sup> *Doe*, 470 F. Supp. 3d at 1326.

<sup>46</sup> *Id.*

<sup>47</sup> *Doe v. Carnival Corp.*, 472 F. Supp. 3d at 1187.

<sup>48</sup> *Id.* at 1192 (citing *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004)).

<sup>49</sup> 349 F.3d at 913.

<sup>50</sup> *Id.* at 893.

<sup>51</sup> *Celebrity Cruises, Inc.*, 394 F.3d at 914 (cited in *Doe*, 472 F. Supp. 3d at 1191–92).

<sup>52</sup> *Doe*, 472 F. Supp. 3d at 1192–93.

<sup>53</sup> *Id.* (citing and quoting *Doe (T.C.) v. Celebrity Cruise, Inc.*, 389 F. Supp. 3d 1109, 1117–18 (S.D. Fla. 2019)) (“To hold otherwise would permit common carriers to effectively eliminate its [sic] duty to protect passengers from the intentional torts of its crewmembers through the use of creative, carefully-drafted contractor and subcontractor agreements.”).

<sup>54</sup> *Tesoriero v. Carnival Corp.*, 965 F.3d 1170 (11th Cir. 2020).

the Southern District of Florida, asserting a single count of negligence against Carnival and alleging that the company failed to inspect and maintain the cabin furniture, or warn Ms. Tesoriero of the dangers associated therewith. Summary judgment was granted in favor of the vessel owner/operator, however, because the plaintiff failed to present evidence that Carnival had notice that the chair was dangerous. Likewise, the court held that the doctrine of *res ipsa loquitur* did not absolve the plaintiff's obligation to show notice. Finally, the district court declined to sanction Carnival based on the fact that the chair was disposed of after the accident.<sup>55</sup>

On appeal, the Eleventh Circuit affirmed.<sup>56</sup> The controlling issue was whether or not the doctrine of *res ipsa loquitur* relieves a plaintiff from the obligation to show actual or constructive notice of the risk-creating condition.<sup>57</sup> It is well settled that the cruise line is not an insurer of its passenger's safety and is responsible only for injuries caused by its negligence.<sup>58</sup> As a prerequisite for imposing liability, the plaintiff must demonstrate that the vessel knew or should have known of the danger.<sup>59</sup> Notice of the problem can be actual or constructive.<sup>60</sup>

In the instant case, it was undisputed that the chair did not have any obvious defect. Testimony from the plaintiff's husband, as well as photographs he took after the accident, demonstrated this fact. Likewise, Carnival produced evidence that its cleaning crew regularly moves chairs and other furniture about the cabin, and would have noticed any defect during such activity.<sup>61</sup>

Effectively conceding the lack of notice, the plaintiff's claim hinged on the application of the *res ipsa loquitur* doctrine.<sup>62</sup> The plaintiff argued that, even if she is unable to show Carnival had notice of the chair's defective condition, "[T]he cruise line can still be held liable under that doctrine because it eliminates the usual notice requirement."<sup>63</sup>

As explained by the Eleventh Circuit, "Res ipsa loquitur—Latin for 'the thing speaks for itself'—is an evidentiary doctrine that permits a trier of fact to infer a defendant's negligence from unexplained

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<sup>55</sup> *Id.* at 1174–75.

<sup>56</sup> *Id.* at 1175.

<sup>57</sup> *Id.* at 1178.

<sup>58</sup> *Id.* (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)).

<sup>59</sup> *Tesoriero*, 965 F.3d at 1178.

<sup>60</sup> *Id.* at 1178–79.

<sup>61</sup> *Id.* at 1179–80.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1180.



circumstances.”<sup>64</sup> It is a form of circumstantial evidence, which allows an injured party to demonstrate breach of a duty.<sup>65</sup> Importantly, however, the doctrine “cannot show that a defendant must have had that duty in the first place.”<sup>66</sup>

In reviewing jurisprudence on the issue—and the split amongst district courts within the Eleventh Circuit—the court opined that *res ipsa loquitur* does not allow for the imposition of liability without fault, nor does it actually establish a duty of care in the first instance.<sup>67</sup> “That means the doctrine does not apply unless the alleged negligence is ‘within the scope of the defendant's duty to the plaintiff.’”<sup>68</sup>

The negligence analysis flows from the duty owed to passengers, which is one of ordinary reasonable care under the circumstances.<sup>69</sup> As a prerequisite to imposing liability, the vessel owner must have had actual or constructive notice of the dangerous condition.<sup>70</sup> Stripped to its essence, the obligation of demonstrating a duty vis-à-vis the plaintiff is not impacted by the *res ipsa loquitur* doctrine.<sup>71</sup>

In sum, a plaintiff who relies on *res ipsa loquitur* to show a breach of duty still bears the burden of proving that a duty existed in the first place. And because notice is an integral part of duty, a passenger who relies on *res ipsa loquitur* bears the burden of showing that the cruise line had notice.<sup>72</sup>

The court of appeals likewise disposed of the plaintiff's request for sanctions because the cruise line threw out the chair.<sup>73</sup> Spoliation sanctions, including adverse inferences arising therefrom, are imposed only if the party's failure to preserve evidence is premised in bad faith.<sup>74</sup> In the instant case, the chair was disposed of in the normal course of business and no request was made to Carnival to preserve the chair.<sup>75</sup> The onboard medical department did not report Ms. Tesoriero's accident

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<sup>64</sup> *Id.* (citing *Sweeney v. Erving*, 228 U.S. 233, 238–39 (1913)).

<sup>65</sup> *Tesoriero*, 965 F.3d at 1180.

<sup>66</sup> *Id.* at 1182.

<sup>67</sup> *Tesoriero*, 965 F.3d at 1181.

<sup>68</sup> *Id.* (quoting Restatement (Second) of Torts § 328D (Am. Law Inst. 1965)).

<sup>69</sup> *Tesoriero*, 965 F.3d at 1182.

<sup>70</sup> *Id.* (citing *Keefe*, 867 F.2d at 1322).

<sup>71</sup> *Tesoriero*, 965 F.3d at 1183.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1183–84.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1185–86.

to security, classifying it as “non-reportable” because she was treated with only basic first aid.<sup>76</sup>

Circuit Judge Robin Rosenbaum issued a fairly lengthy and somewhat hostile dissent, suggesting that Carnival “destroyed the chair that caused Tesoriero’s injuries.”<sup>77</sup> Circuit Judge Rosenbaum believed fact questions existed as to the bad faith issue and spoliation, making summary judgment inappropriate.<sup>78</sup>

## II. SHIPOWNER’S LIMITATION OF LIABILITY

There seems to be an annual reminder of the inherent conflict between vessel owners’ rights under the Limitation of Liability Act,<sup>79</sup> and the “savings-to-suitors clause.”<sup>80</sup> This year’s reminder is found in the decision *In re Freedom Unlimited*.<sup>81</sup> Mr. Joshua Bonn was a deckhand employed aboard the M/Y FREEDOM, a large motor yacht owned and operated by Freedom Unlimited. Mr. Bonn was injured while the M/Y FREEDOM was undergoing repairs at a boatyard in south Florida. Bonn filed suit in state court against Freedom Unlimited and the owner of the boatyard, Taylor Lane Yacht and Ship Repair (Taylor Lane).<sup>82</sup>

The owner of the M/Y FREEDOM filed a limitation action, seeking the usual injunction against state court proceedings, and admonished all potential claimants to file claims in the federal limitation action. Mr. Bonn asserted claims of Jones Act negligence and unseaworthiness in the limitation action; Taylor Lane filed claims against the vessel owner for contractual indemnification as well as attorney’s fees. The magistrate recommended that the injunction be lifted, allowing Mr. Bonn to pursue his claims in state court. Because Freedom Unlimited objected, the district court reviewed the magistrate’s decision on a *de novo* basis.<sup>83</sup>

The personal injury claimant, Mr. Bonn, filed the stipulations necessary to protect the vessel owner’s rights under the Limitation Act.<sup>84</sup> Here, the issue was whether or not the claims by the boatyard for contractual indemnification and attorney’s fee turned a single claimant

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1187 (Rosenbaum, J., dissenting).

<sup>78</sup> *Id.* at 1197–98.

<sup>79</sup> 46 U.S.C. § 30505(a)–(b)(2021).

<sup>80</sup> 28 U.S.C. § 1333(1)(2021).

<sup>81</sup> 440 F. Supp. 3d 1332 (S.D. Fla. 2020).

<sup>82</sup> *Id.* at 1334.

<sup>83</sup> *Id.* at 1334–35 (citing FED. R. CIV. P. 72(b)(3)).

<sup>84</sup> 440 F. Supp. 3d at 1336, 1343–44. The Eleventh Circuit’s decision in *Beiswenger Enter. Corp. v. Carletta*, approved the claimant’s stipulations which have become the *de facto* standard. 86 F.3d 1032 (11th Cir. 1996).

situation into a multiple-claimant-inadequate-fund case.<sup>85</sup> In that instance, “courts have not allowed damage claimants to try liability and damages issues in their chosen fora, even if they agree to return to the admiralty court to litigate the vessel owner’s privity or knowledge.”<sup>86</sup>

The district court made quick work of the contract-based indemnification claim advanced by the shipyard.<sup>87</sup> Contract claims are not subject to limitation because their obligations clearly arise with the owner’s “privity or knowledge.”<sup>88</sup> The personal contract exception to a limitation action is well established and reflects the purpose of the act to “limit the shipowner’s liability for matters beyond his control. A personal contract is obviously within the control of the ship owner.”<sup>89</sup>

The claim for attorney’s fees was closer, as these would be over-and-above whatever judgment a claimant might obtain.<sup>90</sup> Consequently, the district court agreed with Freedom Unlimited that, on their face, the protective stipulations would be inadequate to protect the vessel owner (that is, the possibility exists that the combination of attorney’s fees and an indemnity obligation would exceed the value of the vessel).<sup>91</sup> The Eleventh Circuit has not spoken directly on this issue; specifically, whether or not contractual attorney’s fees might create a multiple-claimant, inadequate-fund situation.<sup>92</sup> However, because the attorney’s fees claim arises from a personal contract of the ship owner, this warrants their exclusion from consideration or protection under the Limitation Act.<sup>93</sup> Based on the foregoing, the district court agreed to lift the injunction, stay the federal limitation action, and permit the injured deckhand to pursue his claims in state court.<sup>94</sup>

In a later opinion, the district court rejected efforts by the vessel owner to stay enforcement of its decision pending an appeal to the Eleventh Circuit.<sup>95</sup> Rule 62 of the Federal Rules of Civil Procedure<sup>96</sup> does allow the district court to stay a lawsuit pending appeal of an interlocutory

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<sup>85</sup> *In re Freedom Limited*, 440 F. Supp. 3d at 1336.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1339.

<sup>88</sup> *Id.* (citing *inter alia* Richardson v. Harmon, 222 U.S. 96, 102 (1911)).

<sup>89</sup> *In re Freedom Limited*, 440 F. Supp. 3d at 1343 (citing S & E Shipping Corp. v. Chesapeake & O. Ry. Co., 678 F.2d 636, 645, n. 14 (6th Cir. 1982)).

<sup>90</sup> *In re Freedom Limited*, 440 F. Supp. 3d at 1339.

<sup>91</sup> *Id.* at 1339–40.

<sup>92</sup> *Id.* at 1340.

<sup>93</sup> *Id.* at 1341–43.

<sup>94</sup> *Id.* at 1345.

<sup>95</sup> *In re Freedom Unlimited*, 489 F. Supp.3d 1328, 1333 (S.D. Fla. 2020).

<sup>96</sup> FED. R. CIV. P. 62(c).

decision.<sup>97</sup> However, the party seeking a stay bears a “heavy burden,” seeking this “extraordinary relief.”<sup>98</sup>

The movant must establish four factors in order to obtain a stay pending appeal: “(1) [S]ubstantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury . . . ; (3) no substantial harm to the other interested persons; and (4) no harm to the public interest.”<sup>99</sup> Relying heavily on the determination that personal contracts are not subject to limitation, the district court concluded that Freedom Unlimited was unlikely to prevail on the merits of its appeal.<sup>100</sup> Accordingly, the request to stay was denied.<sup>101</sup>

### III. MARINE INSURANCE

The Eleventh Circuit reaffirmed that the doctrine of *uberrimae fidei* is alive and well in the context of marine insurance.<sup>102</sup> Mr. Quintero owned a thirty-two foot powerboat which he kept at this home, parked in the driveway when not in use. The vessel was insured by Geico, under a policy that ran from May 5, 2017 to May 5, 2018. Geico sent a reminder indicating that the policy would expire on May 5, 2018. On May 4, 2018, Mr. Quintero called Geico to complain about an increase in premium, indicating that he was going to find a new insurance company.<sup>103</sup> When he did not make the required renewal payment prior to the May 5, 2018, deadline, Geico sent a “Notice of Policy Expiration,” confirming that the marine insurance policy expired on May 5, 2018, and that “all liability thereunder terminated on its expiration date.”<sup>104</sup>

Unfortunately, in the pre-dawn hours of May 25, 2018, Mr. Quintero’s vessel was stolen from his driveway. Mr. Quintero placed a call to Geico that same morning seeking to reinstate his marine insurance policy. The Geico representative asked a series of questions, and Mr. Quintero answered in the affirmative that his vessel was sound and seaworthy, and otherwise remained in his possession. The policy was reissued, with coverage backdated to May 5, 2018.<sup>105</sup>

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<sup>97</sup> FED. R. CIV. P. 62(c) (quoted in *In re Freedom Unlimited*, 489 F. Supp. 3d at 1331–32).

<sup>98</sup> 489 F.Supp. 3d at 1331–32 (internal citations omitted).

<sup>99</sup> *Id.* (citing and quoting *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000)).

<sup>100</sup> *In re Freedom Unlimited*, 489 F. Supp. 3d at 1132–33.

<sup>101</sup> *Id.* at 1140.

<sup>102</sup> *Quintero v. Geico Marine Insurance Co.*, 983 F.3d 1264 (11th Cir. 2020).

<sup>103</sup> *Id.* at 1267.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1267–68.

Later that afternoon (May 25, 2018), Mr. Quintero reported that his boat was stolen. Shortly thereafter, he also called Geico to make a claim for the stolen boat and trailer. Geico investigated and ultimately discovered the ruse. The claim for loss was denied.<sup>106</sup>

Mr. Quintero filed suit against Geico claiming a breach of the policy of insurance. The case was removed to federal court, where the district judge granted Geico's motion for summary judgment. On appeal, Mr. Quintero argued that the district court erred in applying the doctrine of *uberrimae fidei* because (1) the policy was not cancelled or expired when he obtained coverage on May 25, 2018; (2) his coverage continued in full force without a lapse; and (3) the statements made following the theft of his vessel were not material to Geico's decision to continue insurance on the vessel.<sup>107</sup>

The doctrine of *uberrimae fidei*<sup>108</sup> applies to marine insurance contracts and embodies the "highest degree of good faith."<sup>109</sup> Essentially, the doctrine requires an insured to act with the utmost good faith in its dealings with his or her marine insurance company, largely because the underwriters "often cannot ensure the accuracy or sufficiency of the facts supplied" before accepting the risk.<sup>110</sup> Violation of the obligation will allow the insurance company to void the policy *ab initio*.<sup>111</sup> This is the case even if the misrepresentations are the result of a mistake, accident or forgetfulness, or if the insurance company "did not inquire about the particular material fact that its insured failed to disclose."<sup>112</sup>

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<sup>106</sup> *Id.* at 1268.

<sup>107</sup> *Id.* at 1268–69.

<sup>108</sup> The doctrine of *uberrimae fidei* was long thought to be an entrenched precedent in the general maritime law. *See, e.g.*, *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*, 518 F.3d 645, 651 (9th Cir. 2008). A sea change was announced by the Fifth Circuit in its 1991 decision of *Albany Ins. Co. v. Anh Thi Kieu*. 927 F.2d 882 (5th Cir. 1991). The *Albany Ins. Co.* decision has been subject to criticism and appears to stand alone amongst the circuits which have considered the issue. *See* *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 583 F.3d 236, 241 (5th Cir. 2009); *see also* John P. Kavanagh, Jr., "Ask Me No Questions and I'll Tell You No Lies: The Doctrine of *Uberrimae Fidei* in Marine Insurance Transactions," 17 TUL. MAR. L.J. 37 (Fall 1992). For present purposes, it is sufficient to note that the Eleventh Circuit continues its adherence and application of the *uberrimae fidei* doctrine. *See* *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000) ("It is well-settled that the marine insurance doctrine of *uberrimae fidei* is the controlling law of this circuit.").

<sup>109</sup> *Quintero*, 983 F.3d at 1271 (quoting *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *vacated in part*, 779 F.2d 1485 (11th Cir. 1986)).

<sup>110</sup> *Quintero*, 983 F.3d at 1271.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362–63 (11th Cir. 2000)).

The Eleventh Circuit quickly disposed of Mr. Quintero's arguments and rejected his efforts to establish coverage for his stolen vessel.<sup>113</sup> First, while it is true the doctrine of *uberrimae fidei* only applies when a policy is issued—as opposed to one already in force—Mr. Quintero's policy was not in force on May 25th because it expired on May 5, 2018.<sup>114</sup>

Alternatively, Mr. Quintero argued his statements were not material to Geico's decision to reinstate coverage.<sup>115</sup> This idea was rejected; the materiality of the insured's statements must be viewed “from the perspective of a reasonable insurer.”<sup>116</sup> As explained by the Eleventh Circuit, when Mr. Quintero made the call to reinstate coverage on May 25, 2018, his boat had already been missing for over two and a half hours.<sup>117</sup> “Quintero had a duty to disclose that fact even if Geico did not directly ask him.”<sup>118</sup> Even giving him the benefit of the doubt, the Eleventh Circuit held that Mr. Quintero's knowledge about the location of his boat was a fact clearly within his knowledge and was undoubtedly material to Geico's decision to issue marine insurance.<sup>119</sup>

In *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Vinardell Power Systems, Inc.*<sup>120</sup>, the district court was called upon to interpret a cargo insurance policy following damage to electrical equipment shipped from Miami, Florida to El Salvador. Twenty-five large circuit breakers owned by Vinardell Power Systems were shipped in open top containers on the deck of two different vessels. The cargo was damaged by water, although a dispute existed over whether it was rainwater from a pre-voyage storm in Florida, or damage caused by water during transit. This was not the dispositive issue for the court's attention, however.<sup>121</sup> Rather, “the only issue now pending before the Court is what type of insurance coverage applies should the Court find, at trial, that the insurance policy attaches.”<sup>122</sup>

The policy at issue was an “all risk” policy. Different documents actually comprised the policy and described coverage thereunder, including a certificate which incorporated by reference a number of

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<sup>113</sup> *Quintero*, 983 F.3d at 1271.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1272.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (“An insured's possession of the subject property is clearly material to the insurer's risk in insuring it, and we agree with the district court's commonsense observation that ‘insuring a stolen Vessel is akin to insuring a loss.’”).

<sup>120</sup> 2020 WL 1307192 (S.D. Fla. Mar. 19, 2020).

<sup>121</sup> *Id.* at \*2.

<sup>122</sup> *Id.* at \*6.

endorsements. One of the endorsements required application of the “German General Rules of Marine Insurance.”<sup>123</sup> In pertinent part, the German Rules limit coverage for deck cargo: “The policy states that ‘[f]or goods loaded on deck with the consent of the Insured, Stranding cover only shall apply.’”<sup>124</sup> It appears from the text of the opinion that the stranding coverage is a more discreet and limited form of coverage, providing insurance for certain enumerated risks of which water damage is not included.<sup>125</sup>

The court ultimately concluded that stranding coverage applied, despite the cargo owner’s suggestion of ambiguity, and that the terms of the certificate alone should control.<sup>126</sup> Of particular interest for the reader is the court’s heavy reliance on cases interpreting “all risk” homeowner’s insurance policies.<sup>127</sup> As a preliminary matter, the court turned to Florida law, noting that federal courts “routinely apply Florida law to govern the manner of interpretation of a maritime contract.”<sup>128</sup> Pursuant to Florida law, the court looks at the text of the policy and construes the plain language of the contract.<sup>129</sup> The policy must be read as a whole, with an effort to give meaning to each component part of the policy.<sup>130</sup> Finally, if the policy language is susceptible to more than one reasonable interpretation, the court will employ the interpretation which provides for coverage. This is the case, however, “[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to ordinary rules of construction[.]”<sup>131</sup>

The court then drew an analogy between homeowner’s insurance policies in Florida and the marine policy at issue herein.<sup>132</sup> Both are “all risk” contracts, giving with one hand and taking with another (namely, in the exclusions contained in the policy itself).<sup>133</sup> “The uncanny resemblance between this maritime cargo insurance contract and that of a homeowner’s all-risk insurance contract cannot be overstated.”<sup>134</sup>

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<sup>123</sup> *Id.* at \*3.

<sup>124</sup> *Id.* at \*5.

<sup>125</sup> *Id.* at \*4.

<sup>126</sup> *Id.* at \*10.

<sup>127</sup> *Id.* at \*14–15.

<sup>128</sup> *Id.* at \*10 (citing *Geico Marine Ins. Co. v. Shackleford*, 945 F.3d 1135, 1139–40 (11th Cir. 2019)).

<sup>129</sup> *National Union Fire Ins. Co.*, 2020 WL 1307192, at \*10.

<sup>130</sup> *Id.* at \*10–11.

<sup>131</sup> *Id.* at \*11 (quoting *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)).

<sup>132</sup> *National Union Fire Ins. Co.*, 2020 WL 1307192, at \*12.

<sup>133</sup> *Id.* at \*12.

<sup>134</sup> *Id.* at \*15.

Employing the accepted rules of interpretation for homeowner's policies in Florida, the court concluded the instant marine policy provided only for standing coverage, again, which appears to be a more limited form of insurance available to the loss at issue.<sup>135</sup>

#### IV. MARITIME DAMAGES (MEDICAL EXPENSES)

In a case of first impression, the Eleventh Circuit held that the “appropriate measure of medical damages in a maritime tort case is that reasonable value determined by the jury upon consideration of any relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer.”<sup>136</sup> Joyce Higgs was injured while on a Caribbean cruise with her family in 2014. She tripped over a cleaning bucket, sustaining serious injuries to her shoulder. Suit was filed in the Southern District of Florida, alleging negligence under Federal Maritime Law. The lawsuit had a fairly lengthy shelf life, including a trial, appeal, reversal, and a second trial. While interesting, the procedural posture of the case is not relevant to the damage issue.<sup>137</sup>

The jury returned a significant verdict for Ms. Higgs, awarding \$650,000.00 in “past general damages,” \$500,000.00 in future general damages, and \$61,000.00 in past medical expenses. The district court reduced the award of medical expenses to \$16,326.01, the amount actually paid by Plaintiff and her insurance company (United Health Care).<sup>138</sup>

Anyone who has reviewed EOB (“Explanation of Benefits”) forms knows that the amount health care providers charge is drastically different than the amount actually paid by a health insurance company. Ms. Higgs’ case is a prime example. The various medical providers charged \$57,799.41 for care and treatment provided, while Ms. Higgs paid \$350.00 in co-pays. United Health Care, however, pursuant to its contracts with the doctors, hospitals, and so forth, paid only a fraction of that amount (\$12,313.67) in total satisfaction of the charges. The balance was “written off,” never to be paid by anyone.<sup>139</sup> Indeed, the court described this “reality of the contemporary healthcare market,” in which

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<sup>135</sup> *Id.* at \*18–19.

<sup>136</sup> *Higgs v. Costa Crociere S.P.A. Co.*, 969 F.3d 1295, 1299 (11th Cir. 2020).

<sup>137</sup> *Id.* at 1299.

<sup>138</sup> *Id.* at 1302.

<sup>139</sup> *Id.* at 1308–09.



providers “bill arbitrarily large amounts with the knowledge and expectation that no one will ever be required to pay so high of a figure.”<sup>140</sup>

The Eleventh Circuit’s analysis was guided by the principle that plaintiffs are entitled to recover the “reasonable value of treatment for injuries they have sustained, regardless of whether their medical expenses have been paid and by whom.”<sup>141</sup> What then, is the “reasonable value of treatment?” Is it the inflated values on a hospital bill? Or is it the steeply discounted prices paid pursuant to whatever contractual arrangements the insurance companies have with providers?<sup>142</sup> The court rejected the idea that either one of these measures sufficed as the best approximation of “reasonable value” for healthcare services.<sup>143</sup>

In view of this, the court refused to “impose a bright-line rule for the calculation of damages.”<sup>144</sup> In the absence of any legislative direction, the court held that it is incumbent upon the jury to determine the reasonable value of medical services received by a plaintiff in any given case, taking into consideration “all relevant evidence, notably including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer.”<sup>145</sup> In concluding its analysis, the court recognized two principle arguments against this approach, both arising out of the collateral source rule.<sup>146</sup> First, it was noted the collateral source rule plays two roles: “A substantive one, which prohibits the reduction of a plaintiff’s damages by amounts paid by a third party; and an evidentiary one, which prohibits admission of evidence that a third-party payment was made in compensation of a plaintiff’s injuries.”<sup>147</sup> The first recognized criticism is that write-offs of unpaid charges can be seen as a collateral payment of sorts.<sup>148</sup> Again, the court referenced the fictional nature of the inflated medical bills which generally present “an amount that never was and never will be paid.”<sup>149</sup> The court further noted that the evidence of amount actually paid is certainly probative of the value of services provided.<sup>150</sup> “The evidentiary role of the collateral source rule

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<sup>140</sup> *Id.* at 1315 (citing *Kenney v. Liston*, 233 W. Va. 620 (2014) (Loughry, J., dissenting)).

<sup>141</sup> *Higgs*, 969 F.3d at 1311 (citing *inter alia* Restatement (Second) of Torts § 924 (1979)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1311–13.

<sup>144</sup> *Id.* at 1313.

<sup>145</sup> *Id.* at 1313–14.

<sup>146</sup> *Id.* at 1314.

<sup>147</sup> *Id.* (citing *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351, 354 (5th Cir. 1980)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1315 (quoting John Dewar Gleissner, *Proving Medical Expenses: Time for a Change*, 28 Am. J. Trial Advoc. 649, 656 (2005)).

<sup>150</sup> *Id.*

was never intended to shield the jury from highly probative evidence of this kind.”<sup>151</sup>

The second criticism addressed the evidentiary aspect of the collateral source rule; that is, injecting the fact of the plaintiff’s insurance into the trial and alerting the jury that a third-party made payments to compensate the plaintiff’s injuries.<sup>152</sup> The court of appeals noted that the district court could redact or omit the fact of who paid the bills, and simply place into evidence the amounts paid.<sup>153</sup>

Having addressed these putative criticisms, the Eleventh Circuit restated its position—again a matter of first impression—that “the appropriate measure of past medical expense damages in a maritime tort case is the amount determined to be reasonable by the jury upon its consideration of all relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer.”<sup>154</sup>

#### V. ARBITRATION OF SEAFARER’S CLAIMS

The previous Eleventh Circuit Admiralty Survey cataloged the court’s continued willingness to enforce arbitration clauses in seaman’s employment contracts.<sup>155</sup> The decision in *Sisca v. Hal Maritime, Ltd.*,<sup>156</sup> is a variation on that theme. Moreover, the case is a cautionary tale that should prompt counsel for vessel operators and cruise lines to revisit the terms of employment contracts.<sup>157</sup>

The plaintiff Antonio Sisca, an Italian national, was employed as a “cast member” aboard the M/V VENDAAAM.<sup>158</sup> Mr. Sisca’s employment contract was executed with the defendant, Hal Maritime, Ltd. The M/V VENDAAAM, however, was a vessel owned and operated by Princess Cruise Lines, Ltd. Princess Cruise Lines was not a signatory to the plaintiff’s employment contract, a critical fact in the proceedings.<sup>159</sup>

Mr. Sisca’s employment contract with Hal commenced on July 26, 2019, and expired on April 22, 2020. However, on March 14, 2020, the United States announced a “no sail order” for cruise ships due to the

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1316.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1317.

<sup>155</sup> John P. Kavanagh, Jr. *Admiralty, Eleventh Circuit Survey*, 71 MERCER L.REV. 913, 926–928 (2020).

<sup>156</sup> 2020 WL 6581608 (S.D. Fla. Nov. 10, 2020).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at \*2.

<sup>159</sup> *Id.* at \*6–7.

COVID-19 pandemic. Mr. Sisca was unable to disembark from the M/V VENDAAM until April 23, 2020, the day after his employment contract expired. On April 23, 2020, Mr. Sisca and other crewmembers from the M/V VENDAAM were transferred to another Princess vessel (REGAL PRINCESS) by use of lifeboats. While on the lifeboat, Mr. Sisca slipped and fell due to rough sea conditions. He injured his back, and later underwent surgery but was left a paraplegic as a result of his injury.<sup>160</sup>

Sisca filed a complaint in Florida state court. The defendants, Hal Maritime and Princess Cruise Lines, removed the case to federal court and sought to compel arbitration of Mr. Sisca's claims. The defendants relied on the terms of Sisca's "Seagoing Employment Agreement." The agreement directed that all disputes arising out of Sisca's service on board a ship would be governed by the law specified in the applicable Collective Bargaining Agreement. Further, the agreement required that all claims be resolved by binding arbitration pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958).<sup>161</sup> The statutory mechanism by which the United States enforces the Convention's terms is the Federal Arbitration Act.<sup>162</sup>

In addressing a motion to compel arbitration, the threshold question is whether or not the parties agreed to arbitrate in the first instance. As noted above, Princess Cruise Lines was not a signatory to the plaintiff's Seagoing Employment Agreement, the document which contained the necessary arbitration clause.<sup>163</sup> Princess Cruise Lines argued that it was a "sister company" of Hal (a signatory to the Seagoing Employment Agreement) and that both corporations were owned by Carnival Corporation.<sup>164</sup>

Left without a written arbitration agreement executed with the plaintiff, Princess Cruise Lines had to bootstrap itself into the agreement signed with Hal Maritime and argue that Mr. Sisca was equitably estopped from disavowing the arbitration provision in his Seagoing Employment Agreement with Hal Maritime. Essentially, Princess was arguing that the plaintiff was trying to have his cake and eat it too; he was relying on the Seagoing Employment Agreement to provide seaman's status and invoke Jones Act, unseaworthiness, and maintenance and

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<sup>160</sup> *Id.* at \*2-3.

<sup>161</sup> *Id.* at \*4-5. In *Sisca's* case, the law of the British Virgin Islands would apply. 21 U.S.T. 2517, 330 U.N.T.S. 3.

<sup>162</sup> *Sisca*, 2020 WL 6581608, at \*8 (citing 9 U.S.C. §§ 201-208).

<sup>163</sup> *Id.* at \*7-8.

<sup>164</sup> *Id.* at \*11.

cure claims, while simultaneously repudiating the arbitration clause.<sup>165</sup> In this case, the equitable estoppel issue would have been controlled by British Virgin Island law.<sup>166</sup> Evidently, Princess did not make any showing that British Virgin Island law “recognizes the equitable estoppel doctrine in this context, much less that it would apply in Princess’ favor.”<sup>167</sup> Accordingly, without a written agreement—and left without an equitable estoppel argument—Princess Cruise Lines’ motion to compel arbitration was denied.<sup>168</sup>

As to Hal Maritime, the court agreed that the plaintiff’s claims against it were subject to arbitration.<sup>169</sup> Even though Mr. Sisca’s injury arose after the Seagoing Employment Agreement expired, the agreement was clearly broad enough to encompass any and all claims arising out of the employment relationship.<sup>170</sup> Relying on the “but for” test used by the Eleventh Circuit, the district court held that Sisca’s claim would be subject to arbitration “even where the dispute allegedly arises after the seaman’s employment terminates.”<sup>171</sup>

In another cautionary tale for future handling of seaman’s employment agreements, the Eleventh Circuit remanded a foreign seaman’s Jones Act and general maritime law claim to state court with its decision in *Hodgson v. Seven Seas Cruises*.<sup>172</sup> The plaintiff, Sambola Hodgson, a citizen of Nicaragua, was employed as a seaman on a vessel owned by Voyager Vessel Company. The ship was operated by Seven Seas Cruises (Regent). Mr. Hodgson was injured, and filed suit in state court, asserting claims under the Jones Act and general maritime law. Defendants removed the case to federal court and sought to compel arbitration pursuant to the Federal Arbitration Act.<sup>173</sup> The plaintiff moved to remand the case to state court, arguing that his claims did not relate to a valid arbitration agreement governed by the Federal Arbitration Act or the New York Convention.<sup>174</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at \*12–13 (citing *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011)).

<sup>167</sup> *Id.* at \*14.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at \*15.

<sup>170</sup> *Id.* at \*18.

<sup>171</sup> *Id.* (citing *Montero v. Carnival Corp.*, 523 F. App’x 623, 627–28 (11th Cir. 2013)). The test asks whether or not the subject claims would be viable “but for” the seaman’s service on a vessel. *Id.*

<sup>172</sup> 2020 WL 6120478, \*1, 14–15 (11th Cir. Mar. 27, 2020).

<sup>173</sup> *Id.* at \*2–3 (citing 9 U.S.C. §§ 201–208 (2021)).

<sup>174</sup> *Id.* at \*5 (citing United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.).

The notice of removal contained two agreements with arbitration provisions: (1) The employment contract (Crew Agreement), signed by the plaintiff and a third-party staffing company (Seven Seas Services Limited), and (2) a Collective Bargaining Agreement between the staffing company, Regent (vessel operator), and a labor union.<sup>175</sup> The plaintiff was not a signatory to the Collective Bargaining Agreement. However, the Crew Agreement, signed by the plaintiff, incorporated the Collective Bargaining Agreement by reference. Of critical importance, however, for this case and others involving Seamen's contracts calling for arbitration, is that there was no one document—signed by all the parties—that compelled arbitration of disputes.<sup>176</sup>

Again, removal and demand for arbitration was based on the New York Convention, which directs district courts to order arbitration when certain prerequisites are met.<sup>177</sup> However, the Eleventh Circuit's recent decision in *Outokumpu Stainless USA, LLC v. Converteam SAS*,<sup>178</sup> imposes an additional inquiry when the federal court's jurisdiction is challenged on a motion to remand.<sup>179</sup>

The heart of the matter is the existence, *vel non*, of an arbitration agreement signed by all parties.<sup>180</sup> The Eleventh Circuit in *Outokumpu* made clear this is necessary for enforcement of arbitration provisions under the New York Convention.<sup>181</sup> As summed up by the court in *Hodgson*, "In other words, an arbitration agreement that has been signed by the parties to the litigation must exist."<sup>182</sup>

Here, it is undisputed that the two documents cited in the notice of removal (Crew Agreement and Collective Bargaining Agreement) were not signed by all parties to the litigation. Recall, however, that the Crew Agreement—signed by Plaintiff and the staffing company (a non-party)—expressly incorporated the Collective Bargaining Agreement by reference. The Collective Bargaining Agreement was signed by Regent (vessel operator), the staffing company and a labor union, but not by the

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<sup>175</sup> *Id.* at \*3.

<sup>176</sup> *Id.* at \*9–10.

<sup>177</sup> *Id.* at \*5–6 (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1294–95 (11th Cir. 2005)).

<sup>178</sup> 902 F.3d 1316, 1323 (11th Cir. 2018).

<sup>179</sup> *Hodgson*, 2020 WL 6120478, at \*6.

<sup>180</sup> *Id.* at \*14.

<sup>181</sup> *Id.* at \*13–14 (citing *Outokumpu*, 902 F.3d at 1325)). The Convention was quoted in *Outokumpu*—and restated in *Hodgson*—in pertinent part:

[E]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

<sup>182</sup> *Hodgson*, 2020 WL 6120478, at \*12.

plaintiff.<sup>183</sup> As set out in *Outokumpu*, the New York Convention requires “that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.”<sup>184</sup> There was no document compelling arbitration that was actually signed by all parties.<sup>185</sup> Because the court determined that arbitration was not appropriate under the New York Convention or FAA, and lacking any other grounds to maintain federal jurisdiction, the district court remanded Mr. Hodgson’s lawsuit back to its original state court forum.<sup>186</sup>

#### VI. FOREIGN JUDICIAL SALE OF VESSEL – EXTINGUISHED LIENS

In *World Fuel Services, Inc. v. M/V PARKGRACHT*,<sup>187</sup> the district court granted summary judgment based on a foreign judicial sale and dismissed the putative lien holder’s claim against the vessel.<sup>188</sup> The plaintiff delivered bunkers to the M/V PARKGRACHT. The bill remained unpaid, and the plaintiff tracked the vessel with the hopes of arresting it at some point. In January 2019, the vessel arrived in Malta. The plaintiff learned of this, as well as the subsequent arrest of the vessel in Malta by the bank holding a ship mortgage. The plaintiff did not intervene in the Maltese litigation, although they consulted with a Maltese attorney, which notified the plaintiff of the arrest. The vessel was sold by the Maltese court, which issued a decree confirming the sale as providing free and clear title to the buyer under Maltese law.<sup>189</sup>

The vessel arrived in south Florida in October 2019. The plaintiff filed a lawsuit seeking to foreclose its maritime lien based on the unpaid bunker bill.<sup>190</sup> In opposing this effort, and moving for summary judgment, the vessel’s new owner argued that the Maltese judicial sale provided title free and clear of liens arising prior to the sale of vessel, including the lien for bunkers claimed by plaintiff.<sup>191</sup>

American courts will honor foreign judicial sales if the following elements are demonstrated: (1) a foreign court of competent admiralty jurisdiction ordered the sale; (2) the proceedings were “fair and regular;” (3) the sale followed validly entered judgment after an in rem admiralty

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<sup>183</sup> *Id.* at \*13.

<sup>184</sup> *Id.* at \*14 (quoting *Outokumpu*, 902 F.3d at 1326 (emphasis in original)).

<sup>185</sup> *Id.* at \*13.

<sup>186</sup> *Id.* at \*14–15.

<sup>187</sup> 489 F. Supp. 3d 1340 (S.D. Fla. 2020).

<sup>188</sup> *Id.* at 1345.

<sup>189</sup> *Id.* at 1343–46.

<sup>190</sup> *Id.* at 1346 (citing 46 U.S.C. § 31342 (2021)).

<sup>191</sup> *World Fuel Services, Inc.*, 2020 WL 6481115 at \*8.

proceeding; and (4) the sale had the effect, under the law of the foreign forum, of extinguish all pre-existing maritime liens.<sup>192</sup>

The court first dismissed the lienholder's effort to strike the affidavit of a Maltese attorney proffered on behalf of the vessel owner.<sup>193</sup> It was argued that the movant (vessel owner), pursuant to Rule 26,<sup>194</sup> failed to identify the lawyer as an expert. Instead, the vessel owner argued that the affidavit should be considered pursuant to Rule 44.1,<sup>195</sup> as a source of information on foreign law.<sup>196</sup> The district court agreed, observing that Rule 44.1 allowed the trial court to consider a broad range of evidence pertaining to foreign law, as long as it was relevant and related to the determination of the county's law.<sup>197</sup>

The affidavit of the Maltese lawyer clearly demonstrated that the proceedings were in all respects proper, and in accord with Maltese maritime law. Apparently, the ship owner, nonmoving party, did not provide a counter affidavit to create an issue of fact, or at least a legal issue with the sufficiency of the Maltese proceedings.<sup>198</sup>

Even taking the evidence in the light most favorable to the nonmoving party, the court held there was no genuine issue of material fact and that the lien claimant's efforts to foreclose against the M/V PARKGRACHT were due to be dismissed.<sup>199</sup>

#### VII. DEATH ON THE HIGH SEAS ACT

The Eleventh Circuit reaffirmed that suits falling within the Death on the High Seas Act (DOHSA),<sup>200</sup> do not require an independent maritime nexus.<sup>201</sup> The case arises from the crash of a U.S. Air Force F-16 fighter jet operated by Lt. Col. Matthew LaCourse, a retired Air Force pilot employed as a civilian by the Department of Defense. While on a training run over the Gulf of Mexico, Lt. Col. LaCourse's F-16 crashed into the

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<sup>192</sup> *Id.* at \*8–9 (citing and quoting *Crescent Towing & Salvage Co., Inc. v. M/V ANAX*, 40 F.3d 741, 744 (5th Cir. 1994)).

<sup>193</sup> *Id.* at \*12.

<sup>194</sup> FED. R. CIV. P. 26(a)(2).

<sup>195</sup> FED. R. CIV. P. 44.1. (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing . . .”).

<sup>196</sup> *World Fuel Services*, 2020 WL 6481115, at \*11–12.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at \*12–13.

<sup>199</sup> *Id.* at \*4–5.

<sup>200</sup> 46 U.S.C. §§ 30301–08 (2021).

<sup>201</sup> *LaCourse v. PAE Worldwide Inc.*, 980 F.3d 1350, 1358, n.7 (11th Cir. 2020).

Gulf of Mexico more than 12 nautical miles from shore. Lt. Col. LaCourse was killed.<sup>202</sup>

Maintenance on the jet was performed by PAE Worldwide, pursuant to a contract with the United States Air Force. The pilot's widow brought an action against PAE in state court, alleging that PAE Worldwide failed to properly maintain the aircraft's systems and remove it from service when potential problems were discovered. Suit was removed to federal court based on federal question jurisdiction and other grounds.<sup>203</sup> The specific focus of the instant decision was DOHSA, which states in pertinent part: "[W]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible."<sup>204</sup>

As the court of appeals explained, DOHSA's application brings with it limits on recoverable damages.<sup>205</sup> Compensation is allowed only for pecuniary losses, thereby eliminating recovery for emotional injury and punitive damages.<sup>206</sup>

The district court granted a series of motions to dismiss, and appeal to the Eleventh Circuit followed.<sup>207</sup> Mrs. LaCourse initially argued that the district court erred by holding DOHSA applied in the first place. Specifically, because the wrongful act, neglect, or default occurred on land—namely, alleged negligent maintenance of the aircraft—the plain language of DOHSA weighed against the statute's application.<sup>208</sup>

The Supreme Court rejected this argument in an earlier case, *Offshore Logistics, Inc. v. Tallentire*.<sup>209</sup> *Tallentire* specifically held that, "admiralty jurisdiction is expressly provided under DOHSA where the accidental deaths occurred beyond a marine league from shore."<sup>210</sup>

The Eleventh Circuit's predecessor circuit was even more blunt in its recognition of this point.<sup>211</sup> Even though negligence occurs on land, as long as the impact is felt on the high seas DOHSA will apply: "DOHSA has been construed to confer admiralty jurisdiction over claims arising

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<sup>202</sup> *Id.* at 1352–53.

<sup>203</sup> *Id.* at 1353–54.

<sup>204</sup> *Id.* at 1355 (citing 46 U.S.C. § 30302)(2021).

<sup>205</sup> *Id.* at 1355.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1362.

<sup>208</sup> *Id.* at 1355.

<sup>209</sup> 477 U.S. at 207 (cited in *LaCourse*, 980 F.3d at 1356).

<sup>210</sup> *Tallentire*, 477 U.S. at 218.

<sup>211</sup> *Id.* at 1356.



out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land.”<sup>212</sup>

A concurring opinion written by Circuit Judge Newsom agreed that DOHSA applied based on the jurisprudence cited.<sup>213</sup> But Judge Newsom’s acquiescence came with him “holding my nose, as DOHSA’s plain language is squarely to the contrary.”<sup>214</sup> Judge Newsom explained that DOHSA jurisprudence is likely the result of an historical anomaly in admiralty law, premised on the “consummation of the injury” theory.<sup>215</sup> Essentially, this doctrine assesses maritime jurisdiction based on the locality of the injury, versus where the underlying negligent act occurred.<sup>216</sup>

Appellant also suggested that the accident lacked a significant nexus to a maritime activity, one of the hallmarks of maritime jurisdiction.<sup>217</sup> Unfortunately for the appellant, the Supreme Court of the United States *Executive Jet* decision rejected the need for a maritime nexus when DOHSA applies.<sup>218</sup> “In sum, then, we agree with the district court that DOHSA doesn’t require a maritime nexus—and therefore, that because (on the Supreme Court’s interpretation) the Act applies whenever a death occurs on the high seas, it governs LaCourse’s wrongful-death suit.”<sup>219</sup> With the application of DOHSA, the statute provided the exclusive remedy, preempting the plaintiff’s breach of warranty and breach of contract claims brought under Florida law.<sup>220</sup>

#### VIII. CRIMINAL – SEAMAN’S MANSLAUGHTER STATUTE

The Eleventh Circuit’s decision in *United States v. Alvarez*<sup>221</sup> involves the interpretation and application of the “Seaman’s Manslaughter Statute.”<sup>222</sup> The statute provides, in pertinent part:

<sup>212</sup> *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 272 (5th Cir. 1974) (cited and quoted in *LaCourse*, 980 F.3d at 1363).

<sup>213</sup> *LaCourse*, 980 F.3d at 1362 (Newsom, J. concurring).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1364.

<sup>216</sup> *Id.* (internal citations omitted).

<sup>217</sup> *Id.* at 1356 (citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)).

<sup>218</sup> *Id.* at 1357.

<sup>219</sup> *Id.* at 1358.

<sup>220</sup> *Id.* The court also addressed a government contractor defense, holding that the aircraft maintenance company satisfied the prerequisites for its application. This essentially extends sovereign immunity to a private party operating pursuant to detailed government instructions and contract terms. *Id.* at 1362.

<sup>221</sup> 809 F. App’x 562 (11th Cir. 2020).

<sup>222</sup> 18 U.S.C. § 1115 (2021).

Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.<sup>223</sup>

Defendant Mauricio Alvarez was operating a ninety-one foot performance yacht, the MIAMI VICE, as an unlicensed captain engaging in commercial charters for hire.<sup>224</sup> “For a commercial charter for hire to be lawful, the captain of the charter must have taken a USCG-approved captain's license course and must have an active USCG captain's license.”<sup>225</sup> Despite never having taken a captain's course, or having any formal training in operating a vessel of this size, Mr. Alvarez served as the charter captain on the MIAMI VICE “at least forty times between October 2017 and the date of the accident [April 1, 2018].”<sup>226</sup>

On April 1, 2018, a group of individuals chartered the MIAMI VICE from its owner, TM Yachting Charter LLC. Alvarez was acting as captain of the vessel and operated the boat to Monument Island in Biscayne Bay. Alvarez did not anchor the vessel, instead beaching the ninety-one-foot yacht on Monument Island. He joined the passengers at the rear of the vessel, and began swimming behind the yacht along with the group. At some point, Alvarez returned to the helm, started the engines and immediately began to back the boat off Monument Island. Unfortunately, Alvarez failed to clear the area, post a lookout, or do anything which a reasonably prudent vessel operator would do to make sure it was safe to back the vessel into a waterway known to be occupied by swimmers. Tragically, one of the passengers was caught in the propeller and killed.<sup>227</sup>

Alvarez was charged in one-count indictment under the Seaman's Manslaughter Statute. He pled guilty, although he reserved his right to take an appeal on certain matters, including the denial of his motion to dismiss the statute as unconstitutionally vague for criminalizing simple negligence.<sup>228</sup>

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<sup>223</sup> *Id.*

<sup>224</sup> *Alvarez*, 809 F. App'x. at 564.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 565.

<sup>228</sup> *Id.* at 566.

The Eleventh Circuit noted that only one federal court of appeals had apparently addressed the *mens rea* requirement under the statute.<sup>229</sup> In *United States v. O'Keefe*,<sup>230</sup> the Fifth Circuit had no trouble finding that the unambiguous language of the Seaman's Manslaughter Statute could not be stretched to imply the requirement of gross negligence; the court concluded that Congress did not intend any heightened *mens rea* requirement beyond negligence when it enacted the statute.<sup>231</sup>

Apparently, there are no United States Supreme Court decisions on point. The Eleventh Circuit reviewed other Supreme Court holdings addressing the constitutionality of criminal statutes lacking a knowledge element.<sup>232</sup> The developed jurisprudence makes clear that “if Congress intends and expressly crafts a statute to reach negligent actions, then the Due Process Clause does not bar it from doing so.”<sup>233</sup>

This accident and ensuing criminal charges appear to be the result of the private charter operations, which are now more prevalent through the use of “sharing applications,” akin to the ridesharing platforms like Uber and Lyft. These operations are on the United States Coast Guard’s radar, primarily for the use of uninspected vessels and unlicensed captains (like Mr. Alvarez).<sup>234</sup> The author tried unsuccessfully to determine if any criminal charges were brought against the owner of the MIAMI VICE, TM Yachting Charter LLC. The second part of the Seaman's Manslaughter Statute would allow a corporation or a corporate officer to be criminally charged for allowing a negligent act to cause a fatal injury:

When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than \$10,000 or or imprisoned not more than ten years, or both.<sup>235</sup>

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<sup>229</sup> *Id.* at 568 (citing *United States v. O'Keefe*, 426 F.3d 274, 279 (5th Cir. 2005)).

<sup>230</sup> 426 F.3d 274 (5th Cir. 2005).

<sup>231</sup> *Id.* at 279 (cited in *Alvarez*, 809 Fed.App'x at 568).

<sup>232</sup> *Alvarez*, 809 F. App'x at 568–69.

<sup>233</sup> *Id.* (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994)).

<sup>234</sup> See “*Illegal Charters: Don't Step Aboard*,” BOATU.S. (May 3, 2021) [www.boat.us.com/expert-advice/expert-advice-archive/2020/november/illegal-charters](http://www.boat.us.com/expert-advice/expert-advice-archive/2020/november/illegal-charters).

<sup>235</sup> 18 U.S.C. § 1115 (2021).

The Eleventh Circuit discussed a number of prior events where the Coast Guard cited Mr. Alvarez for operating the vessel illegally (and without holding a USCG captain's license).<sup>236</sup> One might assume the corporate owners of the yacht knew or should have known of these events.<sup>237</sup>

#### IX. CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT OF 1996

Havana Docks Corporation sued Norwegian Cruise Lines in federal court, seeking damages for the cruise lines' use of dock facilities in Havana confiscated by the Castro regime in 1960.<sup>238</sup> This lawsuit was brought under the "Cuban Liberty and Democratic Solidarity Act of 1996," also interchangeably referred to as the LIBERTAD Act, "Title III," or the Helms-Burton Act.<sup>239</sup> Essentially, the Helms-Burton Act was an effort by the United States to address the wrongful confiscation of property by the Cuban government, as well as its subsequent use by third-parties—referred to as "trafficking" the confiscated property.<sup>240</sup> A private right of action was created by the Helms-Burton Act, allowing aggrieved parties to sue any person who "traffics" or uses for gain the confiscated property.<sup>241</sup>

In March 2017, Norwegian Cruise Lines, and other cruise line operators, began calling on Cuban ports. The company used docks in Havana formally owned by the Havana Docks Corporation or its predecessor. Havana Docks sued under the Helms-Burton Act, seeking economic damages based on Norwegian Cruise Lines use of confiscated property. Norwegian Cruise Lines filed a motion to dismiss, raising three issues: (1) lack of standing, (2) violation of the Ex Post Facto Clause, and (3) a violation of the Due Process Clause, based on inadequate notice of potential liability through the Helms-Burton Act's retroactive application.<sup>242</sup> The district court rejected these arguments, and allowed the suit to proceed.<sup>243</sup>

The threshold analysis of standing was addressed first. To establish an actual case or controversy, standing must be demonstrated by showing (1) an injury that is concrete and particularized, (2) causation

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<sup>236</sup> *Alvarez*, 809 F. App'x at 564–65.

<sup>237</sup> *See id.* at 562.

<sup>238</sup> *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 484 F.Supp. 3d 1215 (S.D. Fla. 2020).

<sup>239</sup> 22 U.S.C. § 6021 (cited in *Havana Docks Corp.*, 484 F.Supp. 3d at 1221).

<sup>240</sup> *Havana Docks Corp.*, 484 F.Supp. 3d at 1221.

<sup>241</sup> *Id.* at 1222.

<sup>242</sup> *Id.* at 1222–27.

<sup>243</sup> *Id.* at 1236.

linking the injury to the acts of the defendant, and (3) the ability to redress the claimed harm.<sup>244</sup>

The gist of the standing arguments focused on the lack of injury sustained by Havana Docks caused by Norwegian Cruise Lines use of the facilities in Cuba. Norwegian Cruise Lines argued, at bottom, that the “injury” was the confiscation of the property by the Cuban government, and not the use of the facility by cruise lines many years later.<sup>245</sup> The court rejected this argument, noting that while the injury may have had its origin in the confiscation, Norwegian Cruise Line’s use of the stolen property (namely, trafficking in the property) suffices as an injury in fact: “Stated otherwise, Havana Docks’ injury is ‘real’ because it is not receiving the benefit of its interest in the Subject Property and NCL’s subsequent trafficking in the confiscated property has undermined Plaintiff’s right to compensation for that expropriation.”<sup>246</sup>

The other elements of causation and redressability were likewise disposed of in fairly abbreviated fashion.<sup>247</sup> As explained by the court, “[i]n enacting Title III, Congress recognized that there exists a causal link between a claimant’s injury from the Cuban Government’s expropriation of their property and a subsequent trafficker’s unjust enrichment from its use of that confiscated property.”<sup>248</sup> This was sufficient to demonstrate causation; Norwegian Cruise Lines’ conduct and profiting from use of the Havana Docks was traceable to the plaintiff’s claimed injury.<sup>249</sup>

Redressability simply required a showing that relief can be gained by a favorable decision.<sup>250</sup> Norwegian Cruise Lines argued that Havana Docks would not regain its confiscated property by a decision in the instant case.<sup>251</sup> The court held that economic damages would be appropriate compensation for the claims asserted by Havana Docks, and the inability to restore the property to its rightful owner did not preclude a claim.<sup>252</sup>

Turning to the *Ex Post Facto* Clause, the court noted that the central concern of this constitutional protection was “lack of fair notice and

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<sup>244</sup> *Id.* at 1231–33 (citing *inter alia* Kelly v. Harris, 331 F.3d 817, 819–20 (11th Cir. 2003)).

<sup>245</sup> *Id.* at 1234–37.

<sup>246</sup> *Id.* at 1228.

<sup>247</sup> *Id.* at 1229–31.

<sup>248</sup> *Id.* at 1230.

<sup>249</sup> *Id.* at 1230.

<sup>250</sup> *Id.* at 1231.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.”<sup>253</sup> The *Ex Post Facto* argument—as well as the due process analysis—turns on the fact that the civil action provisions of the Helms-Burton Act were suspended immediately after enactment of the statute in August of 1996.<sup>254</sup> The suspensions, running for six months, had been consecutively renewed by presidents since that time.<sup>255</sup> In May 2019, the Trump administration announced it would discontinue suspensions and allow the civil actions to be filed.<sup>256</sup> The court made a clear distinction between the effective date of the Act and the discontinuation of the suspension of civil actions.<sup>257</sup> “[L]iability for trafficking thus attached to conduct on confiscated property beginning on November 1, 1996,” (i.e., three months after Title III’s effective date).<sup>258</sup> The potential liability for trafficking likewise remained unchanged since the effective date, “thus putting traffickers on notice of their potential liability . . . since Title III took effect in 1996.”<sup>259</sup>

Interestingly, the court did not give much weight to the cruise line’s argument that it was acting pursuant to (i) government license to sail into Cuban ports, as well (ii) the encouragement of the Obama administration to expand relations and commercial activity with Cuba, including tourism and cruise line operations.<sup>260</sup> The court stated that this encouragement “does not in any way absolve NCL of its obligations to also comply with federal law—namely, by not trafficking in confiscated property without the consent of a claimant.”<sup>261</sup>

## X. LHWCA CLAIMS

In a case of apparent first impression within the Eleventh Circuit, the court held that a ship owner does not breach its “turnover” duty where the plaintiff is injured by an open and obvious hazard.<sup>262</sup> Anthony Troutman was a longshoreman engaged in loading the M/V SEABOARD

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<sup>253</sup> *Id.* at 1232 (quoting *Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1222.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 1235–36.

<sup>258</sup> *Id.* at 1235 (citing 22 U.S.C. § 6082(a)(1)(A)).

<sup>259</sup> *Id.* at 1236.

<sup>260</sup> *Id.* at 1236–37.

<sup>261</sup> *Id.* at 1237–38. Plaintiff sent NCL a letter in February 2019 advising of a potential claim under the Helms–Burton Act. There is no discussion about NCL’s response to this letter or negotiations (if any) with Havana Docks before suit was filed. *Id.* at 1224.

<sup>262</sup> *Troutman v. Seaboard Atlantic Ltd.*, 958 F.3d 1143, 1146 (11th Cir. 2020).

ATLANTIC. This work required Mr. Troutman to traverse an elevated walkway; in the past, the walkway was occasionally fenced off by a rope line. At other times, the elevation of the walkway presented no hazard since the containers could be loaded to a level equal to the walkway itself.<sup>263</sup>

On the day in question, however, there was no rope fencing, nor was the cargo high enough to alleviate the risk (walking at heights). Mr. Troutman stumbled, and fell to the deck below, sustaining serious injuries.<sup>264</sup>

Suit was filed against the vessel owner pursuant to certain provisions of the Longshore and Harbor Workers' Compensation Act.<sup>265</sup> The district court granted summary judgment, holding that Mr. Troutman was unable to succeed on his claim that the vessel violated its "turnover duty"—an obligation to deliver a ship that is reasonably safe for work—because the elevated walkway presented an open and obvious hazard.<sup>266</sup>

The jurisprudence which defines the duties owed by a vessel owner to a longshoreman or other workers aboard a vessel is well established.<sup>267</sup> Under 33 U.S.C. § 905(b), the vessel owner owes the longshoreman (or other worker aboard the vessel) three general duties: (1) turnover duties, (2) to exercise reasonable care in areas where the vessel crew remains in active control, (3) to intervene under certain, albeit limited, circumstances.<sup>268</sup> The turnover duties consist of two related obligations.<sup>269</sup> First, the ship owner must exercise ordinary care under the circumstances to deliver the ship and its appurtenant equipment in such a condition that a competent stevedore can safely carry out its work.<sup>270</sup> The second and corresponding obligation is a duty to warn; if the ship owner knows of a danger hidden from the longshoreman or his employer (the stevedoring company), it must warn of such issue.<sup>271</sup>

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<sup>263</sup> *Id.* at 1144–45.

<sup>264</sup> *Id.* at 1145.

<sup>265</sup> *Id.* at 1144. See Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901–05 (2021). Specifically, 33 U.S.C. § 905(b) allows an injured worker to bring suit against a vessel, its owners and operators, for injuries "caused by the negligence of a vessel."

<sup>266</sup> *Troutman*, 958 F.3d at 1145.

<sup>267</sup> *Id.* at 1148.

<sup>268</sup> *Id.* at 1146 (citing *inter alia* *Kirksey v. Tonghai Maritime*, 535 F.3d 388, 391 (5th Cir. 2008)).

<sup>269</sup> *Id.* at 1146.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1146–47 (internal citations omitted).

The instant case turned on the application of the turnover duty.<sup>272</sup> The district court held that a reasonably competent and experienced stevedore could safely work with full recognition of the dangers presented by an elevated walkway.<sup>273</sup> The Eleventh Circuit agreed.<sup>274</sup> One of the overriding principles of the LHWCA is that the stevedoring company has primary responsibility for the safety of its workers.<sup>275</sup> Likewise, the LHWCA assumes that the vessel is entitled to rely on the stevedoring company to perform its tasks without supervision or intervention by vessel personnel.<sup>276</sup> The Eleventh Circuit held that a general rule exists that the “open-and-obvious defense” is applicable to defeat a claim premised on breach of the turnover duty.<sup>277</sup> To hold otherwise would run contrary to the underpinnings of the LHWCA: “For example, ship owners could no longer rely on the expertise and experience of the stevedoring company or longshoremen to deal with hazards that may arise.”<sup>278</sup> Likewise, the position advanced by Mr. Troutman would effectively impose strict liability, requiring a ship owner to turn over an “absolutely safe vessel, a duty which the LHWCA does not impose.”<sup>279</sup>

Because the elevated and exposed walkway was an obvious hazard that the plaintiff could have avoided with the exercise of reasonable care, the Eleventh Circuit affirmed the district court’s dismissal of his claims against the vessel interests.<sup>280</sup>

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<sup>272</sup> *Id.* at 1147.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1148.

<sup>275</sup> *Id.* at 1147.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 1148.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*