

Admiralty

by Thomas S. Rue*

The Court of Appeals for the Eleventh Circuit decided fourteen admiralty cases with written opinions in 1996. Four of the decided cases involved issues of first impression. Of the cases involving issues of first impression, one considered the tension between a shipowner's right to a nonjury trial in admiralty of its right to limitation of liability and the damage claimants' right to a jury trial in a forum of their choice.¹ In that case, the Eleventh Circuit allowed a multiple-claims-inadequate-fund case to be transformed into the functional equivalent of a single claim case, thereby creating another exception to the shipowner's right to a concursus.² In another case, a subcontractor who asserted a maritime lien against a public vessel persuaded the Eleventh Circuit that the lien claim fell outside the scope of the Public Vessels Act³ and was therefore subject to the Suits in Admiralty Act,⁴ allowing the recovery of interest.⁵ In yet another case, the Eleventh Circuit became the first court of appeals to approve the use of self-help remedies in preferred mortgage foreclosures.⁶ In the last case of first impression, the Eleventh Circuit held that the Suits in Admiralty Act bars a seaman's suit for willful denial of maintenance and cure against an agent of the United States.⁷

* Partner in the firm of Johnstone, Adams, Bailey, Gordon & Harris, L.L.C., Mobile, Alabama. University of the South (B.A., cum laude, 1968); University of Alabama (J.D., 1974). Member, Editorial Board, Alabama Law Review (1972-1974). Member, Board of Directors, The Maritime Law Association of the United States (1993-1996); Member, Board of Governors, Southeastern Admiralty Law Institute (1983-1985); Member, American Bar Association and Alabama State Bar Association.

1. *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996).

2. *Id.* at 1039.

3. 46 U.S.C. app. §§ 781-790 (1994).

4. *Id.* §§ 741-752.

5. *Marine Coatings of Ala., Inc. v. United States*, 71 F.3d 1558 (11th Cir. 1996).

6. *Dietrich v. Key Bank, N.A.*, 72 F.3d 1509 (11th Cir. 1996).

7. *Kasprik v. United States*, 87 F.3d 462 (11th Cir. 1996).

Although the remaining cases were not cases of first impression, some of them amplified existing law. For instance, in its first application of *Grubart v. Great Lakes Dredge & Dock Co.*,⁸ the Eleventh Circuit took occasion to define admiralty jurisdiction as encompassing the repair, conversion, and maintenance aboard a vessel in navigable waters.⁹ In the lone cargo case decided by the Eleventh Circuit, it elaborated on when the terms of the bill of lading establish prima facie proof that the carrier received the goods as described in the bill of lading.¹⁰ In a limitation of liability case, the Eleventh Circuit reaffirmed precedent from the old Fifth Circuit constituting a fourth exception to a shipowner's right to a concursus in admiralty.¹¹ The one case involving marine insurance dealt with a "held covered" clause.¹² The remaining decisions were of a garden variety and did not change existing law in this circuit.

I. ADMIRALTY JURISDICTION

In *Alderman v. Pacific Northern Victor, Inc.*,¹³ the Eleventh Circuit addressed the question of whether an injury to a carpenter assisting in the installation of an elevator aboard a vessel docked in navigable waters of south Florida, where it was being converted from an oil-drilling vessel to a fish-processing vessel, involved a maritime tort.¹⁴ The carpenter slipped in oil that had leaked from a codfish heading machine. After the carpenter filed suit in state court, the suit was removed to a federal court based upon diversity and admiralty jurisdiction.¹⁵

The district court found that the incident was a maritime tort and granted summary judgment for the vessel on the ground "that the suit was time barred because it had not been filed within the applicable three-year statute of limitations."¹⁶ In reaching its decision, the district court relied upon *Sisson v. Ruby*¹⁷ and *Kelly v. Smith*.¹⁸ After the

8. 115 S. Ct. 1043 (1995).

9. *Alderman v. Pacific N. Victor, Inc.*, 95 F.3d 1061, 1065 (11th Cir. 1996).

10. *Plastique Tags, Inc. v. Asia Trans Line, Inc.*, 83 F.3d 1367 (11th Cir. 1996).

11. *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996).

12. *Hilton Oil Transp. v. Jonas*, 75 F.3d 627 (11th Cir. 1996).

13. 95 F.3d 1061 (11th Cir. 1996).

14. *Id.* at 1063.

15. *Id.*

16. *Id.* The statute of limitation is found in 46 U.S.C. app. § 763(a) (1994), which provides: "Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued."

17. 497 U.S. 358 (1990).

district court had rendered its decision, the United States Supreme Court decided *Grubart v. Great Lakes Dredge & Dock Co.*¹⁹ and specifically rejected the test set forth in *Kelly*.²⁰

In applying *Grubart*, the Eleventh Circuit set forth the elements necessary to invoke admiralty jurisdiction: "the activity from which the claim arises must satisfy a location test and it must have sufficient connection with maritime activity."²¹ The location test was satisfied when both parties agreed that the tort occurred on navigable waters.²² The Eleventh Circuit then found that the connection test raises two issues.²³ The first is "whether the incident has 'a potentially disruptive impact on maritime commerce,'"²⁴ and the second is "whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"²⁵

The carpenter erroneously relied on the fact that there had been no actual impact of the incident upon maritime commerce.²⁶ The Eleventh Circuit was careful to point out that its "focus is not on what actually happened, but upon the potential effects of what could happen."²⁷ In other words, the court had to consider "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping."²⁸ The Eleventh Circuit described the general features of the accident "as an onboard injury which occurred during the repair, maintenance or conversion of a vessel."²⁹ From there the Eleventh Circuit proceeded to find that "[u]nsafe working conditions aboard a vessel under repairs, maintenance, or conversion, therefore, pose a potentially disruptive impact upon maritime commerce."³⁰

In addressing the second prong of the test, the Eleventh Circuit rejected the carpenter's assertion that he was merely a construction worker and that, therefore, the accident was not a maritime tort.³¹ The Eleventh Circuit held that "[t]he work of the injured plaintiff does not

18. 485 F.2d 520 (5th Cir. 1973).

19. 115 S. Ct. 1043 (1995).

20. 95 F.3d at 1063.

21. *Id.* at 1064.

22. *Id.*

23. *Id.*

24. *Id.* (quoting *Sisson*, 497 U.S. at 362-64 & n.2, and *Grubart*, 115 S. Ct. at 1048).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (quoting *Grubart*, 115 S. Ct. at 1051).

29. *Id.*

30. *Id.*

31. *Id.* at 1065.

determine whether there is a substantial relationship to maritime activity.³² The court quoted *Grubart* and said that the focus is "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case at hand."³³ Before considering the activities of the tortfeasor, the Eleventh Circuit noted that its "examination of the actions of the tortfeasor should be given a 'broad perspective.'"³⁴ The Eleventh Circuit then observed that the parameters of the "relevant activity" of the tortfeasor are not the discrete circumstances surrounding the incident in question, but the general conduct out of which the incident arose.³⁵ Applying that standard to the activity of the tortfeasor in the case, the Eleventh Circuit found that converting an oil-drilling vessel to a fish-processing vessel was substantially related to traditional maritime activity.³⁶

The court broadened the holding beyond the dictates of the case by stating, "[W]e believe that conversions, repairs, or maintenance aboard a vessel in navigable water are substantially related to traditional maritime activity. Work upon ships at sea or docked in navigable waterways is an indispensable maritime activity. It is essential to the continued productive use of those vessels."³⁷ Once the court determined that admiralty jurisdiction applied with the application of substantive admiralty law, the Eleventh Circuit held that the incident was a marine tort and time barred under the applicable three-year statute of limitations.³⁸

II. APPELLATE JURISDICTION

In *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*,³⁹ the Eleventh Circuit decided whether summary judgment against the vessel owner on the question of damages for the loss of use was appealable.⁴⁰ In this case, the owner of a motor yacht initially sought recovery for damage to its vessel while it was being raised out of the water on a floating drydock manufactured by one defendant and owned

32. *Id.*

33. *Id.* (quoting *Grubart*, 115 S. Ct. at 1051).

34. *Id.* (quoting *Sisson*, 497 U.S. at 366-67).

35. *Id.* (citing *Sisson*, 497 U.S. at 364-66).

36. *Id.*

37. *Id.*

38. *Id.* at 1065-66. The court reviewed de novo whether substantive admiralty law applied. *Id.* at 1063.

39. 77 F.3d 376 (11th Cir. 1996).

40. *Id.* at 376.

and operated by another defendant.⁴¹ When the vessel owner amended its complaint to add a claim for damages for loss of use, both defendants filed a motion for partial summary judgment on the claim for loss of use.⁴² In granting the motion, the district court noted that the vessel was documented and insured as a pleasure vessel; therefore, the owner had not lost any profits while the vessel was being repaired.⁴³ After the district court denied the owner's timely motion to alter or amend, the vessel owner filed the appeal.⁴⁴

The defendants filed a motion to dismiss the appeal, contending that the partial summary judgment was "not appealable because it does not resolve the principal liability issue between the parties in this case."⁴⁵ In deciding the issue, the Eleventh Circuit noted the proper standard that "[t]o be appealable, however, the order must have 'the effect of ultimately determining the rights and obligations of the parties.'"⁴⁶ The Eleventh Circuit found that the district court had not decided "whether either of the defendants is responsible for damage to the . . . vessel."⁴⁷ In essence the district court's order struck the claim for damages for loss of use but did not dispose of a separate claim for relief. Thus, the court did not determine liability. Accordingly, the court of appeals granted the motion to dismiss the appeal.⁴⁸

III. CARGO

The sole cargo case decided by the Eleventh Circuit was *Plastique Tags, Inc. v. Asia Trans Line, Inc.*,⁴⁹ in which the court decided when a bill of lading is prima facie proof that the carrier received the cargo as described therein.⁵⁰ In this case, the shipper contracted with Asia Trans Line, Inc., for the carriage of one sealed container from Korea to New York. Upon the representation of the shipper that there were 4,437,500 plastic bags in the container, Asia Trans Line issued a bill of lading for the cargo that stated: "Shipper's Load & Count Said To Contain: 5,600 boxes/4,437,500 . . . plastic bags."⁵¹ Asia Trans Line,

41. *Id.* at 377.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 378 (quoting *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 564 (5th Cir. 1981)).

47. *Id.*

48. *Id.*

49. 83 F.3d 1367 (11th Cir. 1996).

50. *Id.* at 1367.

51. *Id.* at 1369.

Inc. in turn contracted with DSR Senator Lines for carriage of the container aboard the M/V Cho Yang World. Upon delivery of the sealed container directly to Senator by the shipper, Senator issued its bill of lading, the terms of which were identical in all material respects to those of Asia Trans Line. When the vessel delivered the container to New York, Senator released it with its seal intact to a trucking company that transported the container to a customer of Plastique. After the customer inventoried the container, it found 2,618,500 bags missing and refused to pay for the shipment. This caused Plastique to bring suit for the shortfall against the carriers but not the shipper.⁵²

The Eleventh Circuit began its analysis with a fundamental statement of law from the Carriage of Goods by Sea Act ("COGSA")⁵³ that "a shipper must prove that the goods were damaged or lost while in the carrier's custody," which is usually done "by showing: 1) full delivery of the goods in good condition to the carrier, and 2) outturn by the carrier of the cargo with damaged or missing goods."⁵⁴ Plastique sought to establish full delivery in good condition by means of the bill of lading, which it claimed pursuant to COGSA was "prima facie evidence of the receipt by the carrier of the goods as therein described."⁵⁵

In reaching its decision, the Eleventh Circuit set forth the general rule: In order for a bill of lading to constitute prima facie proof that the carrier received cargo consistent with the terms of the bill, it must either be without limiting language such as "shipper's load and count" or it must contain terms that the carrier can verify.⁵⁶ The court elaborated on the rule as follows: (1) If the bill of lading contains no limiting language, it constitutes prima facie proof of each term and the carrier is bound thereby; (2) If the bill of lading contains limiting language that a term was supplied by the shipper and not checked by the carrier, the carrier is not bound except when the term is easily verifiable by the carrier.⁵⁷ The Eleventh Circuit pointed out that the basis for the rule was that "COGSA expressly states that a carrier shall not be bound to include in the bill of lading a term which he has no reasonable means of checking."⁵⁸

In applying the rule, the court found that the bill of lading did not constitute prima facie proof of the terms because the bill of lading contained limiting language, and one of the terms, the amount of goods

52. *Id.*

53. 46 U.S.C. app. §§ 1300-1315 (1994).

54. 83 F.3d at 1369.

55. *Id.* (quoting 46 U.S.C. app. § 1303(4)).

56. *Id.* at 1370.

57. *Id.*

58. *Id.* (citing 46 U.S.C. app. § 1303(3)(c)).

in the sealed container, was not verifiable by the carrier.⁵⁹ Since the bill of lading was the only ground upon which Plastique presented proof of good delivery, the Eleventh Circuit concluded that Plastique could not show that the loss occurred while the cargo was in the carrier's custody.⁶⁰ Accordingly, the Eleventh Circuit affirmed the district court.⁶¹

IV. IMMUNITY

The Eleventh Circuit was presented with an interesting and novel issue involving Eleventh Amendment immunity in *Bouchard Transportation Co. v. Florida Department of Environmental Protection*.⁶² This case arose when an oil spill into Florida's navigable waters occurred as a result of the collision of two tug-barge flotillas and a freighter. Each of the three vessel owners filed separate limitation of liability actions. An agency of the State of Florida authorized to pursue oil pollution claims on behalf of the state was served with notice to file its claims in all three limitation actions. The agency filed answers and claims for affirmative relief in all three limitation actions.⁶³ In response, the tug owners filed counterclaim claims against the agency, which then moved to dismiss those limitation actions and counterclaims on the ground that the Eleventh Amendment⁶⁴ prevented the vessel owners from bringing the state agency into federal court.⁶⁵ The district court failed to rule on the agency's motions to dismiss but instead consolidated the limitation actions and ordered the parties to mediate. The agency objected to the court-ordered mediation on Eleventh Amendment grounds. Its objections were overruled by the district court, which held that it "had inherent power to order mediation."⁶⁶ The appeal ensued.

Although the Eleventh Circuit agreed with the vessel owners that the order of the district court did not address the Eleventh Amendment immunity, the Eleventh Circuit decided that it had jurisdiction to review the district court's order directing the agency to mediate.⁶⁷ According

59. *Id.*

60. *Id.* at 1370-71.

61. *Id.*

62. 91 F.3d 1445 (11th Cir. 1996).

63. *Id.* at 1447.

64. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

65. 91 F.3d at 1447.

66. *Id.*

67. *Id.*

to the Eleventh Circuit, "a state's Eleventh Amendment immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'"⁶⁸ Since "[t]he order. . . effectively denied [the agency] the right not to participate in [the] litigation," the Eleventh Circuit had jurisdiction over the appeal.⁶⁹

On the merits of the appeal, the Eleventh Circuit declined to address whether the agency was entitled to Eleventh Amendment immunity for the first time on appeal because the district court had not addressed that issue.⁷⁰ The court of appeals did reach the issue of mediation by considering whether the district court had erred in ordering the agency to mediate before ruling on the agency's motions asserting Eleventh Amendment immunity.⁷¹

The Eleventh Circuit also raised the tangential issue of whether the agency had adequately raised the issue that the district court had erred by reserving a ruling on the agency's Eleventh Amendment immunity.⁷² Initially, the agency contended that the district court had ruled on and denied Eleventh Amendment immunity. The issue of reserving a ruling was first clearly raised at oral argument. The Eleventh Circuit noted that "issues not discussed in a party's initial brief are deemed waived, but we construe briefs liberally in determining the issues raised on appeal."⁷³ Ultimately, the Eleventh Circuit found that the agency had "implicitly raised this issue in its initial brief by arguing that the Eleventh Amendment deprived the district court of subject matter jurisdiction to enter the mediation order."⁷⁴

The Eleventh Circuit noted that the United States Supreme Court had "held that Eleventh Amendment immunity is in the nature of a jurisdictional bar."⁷⁵ Since "Eleventh Amendment immunity . . . is a right to be free from the burdens of litigation," the court of appeals believed that the issue should be decided at an early stage.⁷⁶ The court of appeals found that a purpose of the Eleventh Amendment "is to protect states from the indignity of being haled into federal court by

68. *Id.* at 1448 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

69. *Id.*

70. *Id.*

71. *Id.* at 1449. The standard of review employed by the court was the abuse of discretion standard. *Id.* at 1448.

72. *Id.* at 1448 n.3.

73. *Id.*

74. *Id.*

75. *Id.* If the Eleventh Amendment were jurisdictional per se, the court would have to raise the issue sua sponte.

76. *Id.*

private litigants" and that "[t]his purpose is not served when a ruling on Eleventh Amendment immunity is unnecessarily postponed."⁷⁷

In vacating and remanding the case, the Eleventh Circuit narrowed its holding (that "the district court abuses its discretion by reserving a ruling on immunity and ordering the parties to mediate") to instances in which the Eleventh Amendment issue "is a purely legal one."⁷⁸ The view of the Eleventh Circuit was that the district court had inherent powers to manage its affairs, but such inherent powers could not be exercised in disregard of the Constitution and its concerns.⁷⁹ The Eleventh Circuit correctly discerned that the mediation ordered by the district court was unnecessary to the resolution of the Eleventh Amendment issue.⁸⁰

V. LIMITATION OF LIABILITY

In *American Dredging Co. v. Lambert*,⁸¹ the Eleventh Circuit decided a garden variety limitation of liability case involving nonseamen. The case arose out of a nighttime allision in territorial waters near Miami. In the very early hours of the morning, four individuals boarded a motorboat and proceeded toward Fishermen's Channel where the Dredge American was dredging with approximately one thousand feet of dredge pipeline floating on top of the water.⁸² The pipeline had flashing yellow lights, the number and location of which failed to meet 33 C.F.R. § 88.15.⁸³ In order to allow a barge and tug access to a dock blocked by the dredge and its pipeline, a tug assisting the dredge divided the pipeline and moved part of it away. This left the ends of the divided pipeline without the required red lights.⁸⁴ With the dredge and its pipeline in that configuration, the motorboat approached at approximately thirty miles per hour and struck the dredge pipeline, killing three of the occupants. The dredging company filed a petition seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act.⁸⁵ The lone survivor and the three personal representatives of the

77. *Id.* at 1448-49.

78. *Id.* at 1449.

79. *Id.*

80. *Id.*

81. 81 F.3d 127 (11th Cir. 1996).

82. *Id.* at 128-29.

83. *Id.* at 130.

84. *Id.* at 129 (referring to 33 C.F.R. § 88.15(b) (1996)).

85. 46 U.S.C. app. §§ 181-196 (1994). Section 183 provides in part:

The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners,

decedents filed answers as claimants contesting the right to exoneration from or limitation of liability and counterclaimed for pecuniary and nonpecuniary damages as a result of the dredging company's negligent operation. The district court granted the claimants' motion for summary judgment, contending that the dredging company's negligence precluded exoneration and limitation of liability. The district court denied the dredging company's motion for partial summary judgment regarding the recoverability of nonpecuniary damages.⁸⁶

The Eleventh Circuit began with a recitation of the general rule that "[a] shipowner is entitled to exoneration from all liability for a maritime collision only when it demonstrates that it is free from any contributory fault."⁸⁷ The Eleventh Circuit noted that the entitlement to limitation is a two-step analysis: (1) determine "what acts of negligence or conditions of unseaworthiness caused the accident" and (2) determine "whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness."⁸⁸ Regarding the first step of the analysis, the Eleventh Circuit reviewed the district court's determinations without comment but with tacit approval.⁸⁹ The district court concluded that the dredging company had violated statutory regulations designed to prevent this type of accident.⁹⁰ That finding required the application of *The Pennsylvania Rule*,⁹¹ whereupon the district court found that the dredging company failed to produce evidence that its negligence could not have been a cause of the accident.⁹² At that point, the district court concluded that the dredging company "was negligent as a matter of law, that its negligence was a proximate cause of the accident, and that it was not entitled to exoneration from liability."⁹³

In addressing the second step of the analysis, the Eleventh Circuit noted that when a claimant proved negligence or unseaworthiness, the burden of proof shifted to the shipowner to prove lack of privity or

shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. app. § 183(a).

86. 81 F.3d at 129.

87. *Id.* The Eleventh Circuit reviewed the grant of summary judgment de novo. *Id.*

88. *Id.* (quoting *Hercules Carriers, Inc. v. Claimant State of Fla.*, 768 F.2d 1558, 1563-64 (11th Cir. 1985)).

89. *Id.* at 129-30.

90. *Id.* at 129.

91. *The Pennsylvania Rule* requires that a vessel guilty of statutory fault must prove that its fault could not have contributed to the collision in order to avoid liability. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873).

92. 81 F.3d at 130.

93. *Id.*

knowledge.⁹⁴ Lack of actual knowledge alone will not suffice because privity and knowledge will also be found "where the owner 'could have and should have obtained the information by reasonable inquiry or inspection.'"⁹⁵ In instances where the shipowner is a corporation, "privity or knowledge means the privity or knowledge of a managing agent, officer, or supervisory employee."⁹⁶ Since "supervisory personnel had offices near the dredging site and were on the site often," the Eleventh Circuit affirmed the district court's finding that the dredging company "could not carry its burden of showing that it had no privity or knowledge of the negligence."⁹⁷ There was no mention of the dredging company's practice, if any, allowing vessel traffic access to facilities blocked by the dredging operation. The Eleventh Circuit appears to have assumed the worst and used that assumption to deny limitation.

Regarding the recoverability of nonpecuniary damages for the wrongful deaths of nonseamen killed in territorial waters, the Eleventh Circuit affirmed the district court's denial of the dredging company's motion for summary judgment.⁹⁸ The court of appeals noted that the Supreme Court had recently resolved that question in favor of the deceased nonseaman.⁹⁹

A shipowner's right to a concursus in a limitation of liability proceeding incurred further disfavor in *Beiswenger Enterprises Corp. v. Carletta*.¹⁰⁰ This case arose when an individual and his fiancée hired the owner of the M/V Skyrider Express to take them parasailing near Clearwater Beach, Florida. The vessel pulled the couple aloft by a parachute that was secured to the vessel by a tow line. When weather conditions hampered the operator's efforts to retrieve the parasailors, he severed the tow line, causing them to fall into the water. A gust of wind caused the parachute to rise on its own, unsecured and uncontrolled by the vessel operator. Unfortunately, the tow line had become entangled around one of the parasailors' ankles, allowing the parachute to pull him into the air hanging upside down. When the parachute drifted over land, he struck several shoreside objects, sustaining injuries from which he later died. As a result of the accident, the vessel owner sought exoneration from or limitation of liability. After approving the vessel

94. *Id.*

95. *Id.* (quoting *Hercules Carriers*, 768 F.2d at 1577).

96. *Id.* (citing *Hercules Carriers*, 768 F.2d at 1574).

97. *Id.*

98. *Id.* at 131.

99. *Id.* at 130 (relying upon *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619 (1996)).

100. 86 F.3d 1032 (11th Cir. 1996).

owner's security bond and ad interim stipulation, the district court enjoined the further prosecution of any suits against the vessel owner or the vessel in any other forum. Pursuant to a public notice, the fiancée, the estate, and the decedent's children contested the right to limitation and claimed damages as a result of the accident.¹⁰¹

Approximately fifteen months later, the claimants instituted a state court action for personal injury and wrongful death against the manufacturer of the parasailing equipment, the seller of the parasailing equipment, an employee of one or both, the operator of the vessel, and the parasailing instructor. The district court declined to enjoin the state court action because the claimants did not name the vessel owner as a party. When the claimants later decided to add the vessel owner as a party in the state court action, they filed a motion to stay the limitation of liability proceeding and to lift the injunction.¹⁰² Along with the motion, the claimants filed a stipulation intended to protect the owner's rights under the Limitation of Liability Act.¹⁰³ The magistrate judge denied the claimants' motion to lift the injunction because of perceived deficiencies in the stipulation.¹⁰⁴ Shortly thereafter, the claimants filed an amended stipulation addressing the deficiencies identified by the magistrate. That stipulation had six provisions: (1) exclusive jurisdiction in the district court to determine the owner's right to limitation; (2) exclusive jurisdiction in the district court to determine the value of the vessel immediately following the accident; (3) no litigation of either of the aforementioned issues in any state court and waiver of any res judicata effect of any state court decisions, rulings, or judgments in regard thereto; (4) no enforcement of any state court judgment that would expose the owner to liability in excess of the limitation fund until after the district court had decided the limitation issue; (5) if the district court granted limitation, the stipulation established first priority against the available fund for any claim based upon fees and costs awarded against the vessel owner in any state court proceeding; and (6) after payment of the claims in provision (5), established the order of priority of the other claims against the limitation fund if limitation were granted.¹⁰⁵ The district court stayed the limitation proceeding and lifted the injunction, allowing claimants to proceed against the vessel owner in state court.¹⁰⁶ The appeal ensued.

101. *Id.* at 1034.

102. *Id.* at 1035.

103. 46 U.S.C. app. §§ 181-185.

104. 86 F.3d at 1035.

105. *Id.* at 1035-36.

106. *Id.* at 1036.

The appeal brought before the Eleventh Circuit for the first time the inconsistency between the exclusive jurisdiction of the admiralty courts to determine an owner's right to limitation without a jury and the claimant's right to try his case before a jury pursuant to the saving to suitors clause.¹⁰⁷ The Eleventh Circuit observed that "[i]n resolving this tension, the 'primary concern is to protect the shipowner's absolute right to claim the Act's liability cap, and to reserve the adjudication of that right in the federal forum.'"¹⁰⁸ In accommodating the competing interests of the owner and claimants, the Eleventh Circuit pointed out two exceptions that allow the claimants to try liability and damages in a forum of their choice: (1) "where the limitation fund exceeds the aggregate amount of all the possible claims against the vessel owner" (often referred to as an "adequate fund case"); and (2) "where there is only one claimant" (commonly referred to as a "single claimant case").¹⁰⁹ When the limitation fund exceeds all the claims, an owner will not be exposed to liability in excess of the limitation fund, and the claimants do not have to compete for a larger portion of an inadequate fund.¹¹⁰ In the single claimant situation, there are no competing claims to the limitation fund, and upon the filing of a stipulation to protect the owner's right to determine the limitation issue, the claimant may proceed in another forum.¹¹¹ Having made that analysis, the Eleventh Circuit acknowledged that it was presented with a "multiple-claims-inadequate-fund" case.¹¹² In simplest terms, the issue before the court was whether the claimants could "transform a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case" by means of a stipulation.¹¹³ The Eleventh Circuit reasoned that if the stipulation precludes the vessel owner from being exposed to competing judgments in excess of the limitation fund, there was no need to have a concursus, the same as in a true single claimant case.¹¹⁴

107. *Id.* at 1037. The saving to suitors clause provides that the district court of the United States shall have exclusive 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." 28 U.S.C. § 1333(1) (1994). This is the very same statute that confers exclusive jurisdiction of admiralty and maritime matters on federal courts.

108. 86 F.3d at 1037 (quoting *Magnolia Marine Transp. Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1038.

113. *Id.*

114. *Id.*

Using *Lake Tankers Corp. v. Henn*¹¹⁵ for the proposition that "claimants in a multiple-claim-inadequate-fund case may file appropriate stipulations to create an adequate fund case, thereby eliminating the need for a concursus," the Eleventh Circuit concluded that claimants "also should be able to make a concursus unnecessary by transforming their multiple claims into the functional equivalent of a single claim."¹¹⁶ The Eleventh Circuit distinguished *Pershing Auto Rentals, Inc. v. Gaffney*¹¹⁷ on the ground that only two of the four claimants in that case agreed to the requisite stipulation, meaning that a concursus was necessary to ensure that the owner was not exposed to competing judgments that might exceed the limitation fund.¹¹⁸ The Eleventh Circuit also took comfort that the Second, Third, Fifth, Sixth, and Eighth Circuits had adopted a similar position.¹¹⁹ With that rationale, the Eleventh Circuit created another exception to the shipowner's right to a concursus.

The court of appeals then turned its attention to whether the stipulation had created the functional equivalent of a single claim. In order to do that, the court had to determine how many claims there actually were.¹²⁰ There was no question that the personal injury claim of the fiancée and the wrongful death claim of the estate were separate claims.¹²¹ The court also recognized the potential for claims of attorney fees or costs against the vessel owner by a claimant or third party.¹²² Although the three separate and competing claims required a concursus, the Eleventh Circuit declared that problem cured by the stipulation that established the priority of the competing claims.¹²³

The vessel owner also contended that its rights were not protected because the four minor children of the decedent had not signed a protective stipulation.¹²⁴ The court of appeals determined that whether general maritime, Florida, or New York law applied, "[t]here is only a single claim arising from [the] death, and it belongs to the personal representative of his estate."¹²⁵ The Eleventh Circuit concluded "that, for purposes of the Limitation Act, the existence of minor children does

115. 354 U.S. 147 (1957).

116. 86 F.3d at 1039.

117. 279 F.2d 546 (5th Cir. 1960).

118. 86 F.3d at 1040.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1041.

125. *Id.*

not transform the wrongful death cause of action . . . from a single claim situation to one involving multiple claims."¹²⁶

The court of appeals then addressed whether the possibility of third party claims against the vessel owner for indemnity or contribution created a multiple claimant situation requiring a concursus. In resolving this issue, the Eleventh Circuit noted that there was a split of authority among the federal courts of appeals—some holding that an indemnity claim against an owner does not create a multiple claim situation because “the indemnity claim is merely derivative of the one presented by the claimant,” and others holding that potential claims for contribution or indemnity against the owner should constitute a multiple claimant situation requiring a concursus.¹²⁷ The Eleventh Circuit found the latter persuasive and held “that the possibility of claims from [the vessel owner’s] state court co-defendants creates a multiple claims situation.”¹²⁸ The Eleventh Circuit then concluded that the “multiple claims” problem was cured by the fourth provision of the stipulation, that is, that the claimants would forego enforcement of any state court judgment against anyone, including the vessel owner’s co-defendants, until the vessel owner’s right to limitation had been decided.¹²⁹ Accordingly, the Eleventh Circuit held that the stipulation converted the case “into the functional equivalent of a single claim case.”¹³⁰

Finally, the Eleventh Circuit turned its attention to the content of the stipulation. In reviewing the stipulation, the court expressed three specific concerns for which it remanded the case to the district court for evaluation: (1) whether the stipulation fully protected the vessel owner’s claim for limitation of liability exclusively in admiralty; (2) whether the stipulation protected the vessel “owner from having to pay damages in excess of the limitation fund, unless and until the admiralty court denies limited liability”; and (3) whether the stipulation protected the vessel “owner from litigation by the damage claimants in any forum outside the limitation proceeding.”¹³¹ Regarding the vessel owner’s right to try limitation in admiralty, the Eleventh Circuit required the claimants not only to waive any res judicata effect of the decisions, rulings, or judgments of any state court, they also had to waive the defense of issue

126. *Id.*

127. *Id.* at 1041-42 (quoting *Universal Towing Co. v. Barrale*, 595 F.2d 414, 419 (8th Cir. 1979)).

128. 86 F.3d at 1042.

129. *Id.* at 1043.

130. *Id.* at 1044.

131. *Id.*

preclusion with respect to all limitation issues.¹³² With respect to the vessel owner's protection from having to pay damages in excess of the fund, the Eleventh Circuit directed that the stipulation be clarified to cover the possible granting of limitation.¹³³ Under the pertinent stipulation, the claimants only had to forego enforcement of any judgment in excess of the fund until after the vessel owner's right to limitation was determined, that is, it did not provide what would happen if limitation were granted.¹³⁴ In the case of the provision that afforded protection to the vessel owner from litigation in any forum outside the limitation proceeding, the Eleventh Circuit was concerned that the stipulation referred only to "state court" whereas damage claims could also be brought in other courts.¹³⁵

In another limitation of liability case, *Suzuki of Orange Park, Inc. v. Shubert*,¹³⁶ the Eleventh Circuit reaffirmed another exception allowing claimants to try liability and damages outside the admiralty court.¹³⁷ This case arose out of an accident that occurred during a demonstration of recreational watercraft by Suzuki. The demonstration was held on the waterfront property of a customer, and numerous other customers were invited. The president of Suzuki constructed a slalom course to demonstrate the watercraft.¹³⁸ At the time of the accident, three watercraft were traversing the slalom course. One was owned by Suzuki and operated by a customer with permission from Suzuki's president. The second watercraft was owned and operated by another customer. The third watercraft was owned by yet another customer and operated by another individual. Shubert and two other individuals rode as passengers on the Suzuki watercraft. For an unknown reason, Shubert fell into the water while the Suzuki watercraft made its way through the slalom course. The second watercraft avoided striking Shubert, but the third hit Shubert, causing him serious and permanent injuries.¹³⁹

Shubert and his wife brought suit in Florida state court against Suzuki, its president, the operator of its watercraft, the other two passengers on its watercraft, the owner and operator of the second watercraft, and the operator of the third watercraft. The basis of the complaint was that Suzuki negligently supervised the demonstration. Almost five months later, Suzuki petitioned for limitation of its liability.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (i.e., the law side of the federal district court).

136. 86 F.3d 1060 (11th Cir. 1996).

137. *Id.* at 1060.

138. *Id.* at 1061.

139. *Id.* at 1062.

The Shuberts filed their answer and claim for damages. No other claims were filed. The Shuberts moved for summary judgment on the ground that Suzuki was not entitled to limitation because the accident was caused by the direct negligence of its president.¹⁴⁰ The district court agreed, reasoning that "if the state court holds Suzuki liable for the accident, Suzuki's liability would derive solely from [its president's] actions [Its president] necessarily has privity and knowledge of his own actions, and . . . [the president's] privity and knowledge is the same as Suzuki's."¹⁴¹ The appeal ensued.

In its analysis, the court of appeals again acknowledged "the tension between the exclusive admiralty jurisdiction over Limitation Act claims and the presumption favoring jury trials under the saving to suitors clause."¹⁴² The court noted three exceptions to exclusive admiralty jurisdiction: (1) adequate fund cases, (2) single claimant cases, and (3) multiple-claims-inadequate-fund cases in which stipulations were used to create the functional equivalent of a single claimant case.¹⁴³ The Eleventh Circuit then referred to another way to preserve the claimant's right to a jury trial, that is, "where it is apparent that limitation cannot be granted."¹⁴⁴ The Eleventh Circuit's rationale was simple, "[w]here no grant of limitation is possible, the basis for granting exoneration vanishes."¹⁴⁵ Relying on precedent, the Eleventh Circuit reasoned

that the admiralty court may decide the privity or knowledge issue without first deciding the liability issue—at least where the boat owner concedes privity or knowledge, or where it is otherwise impossible under any set of circumstances for the vessel owner to demonstrate the absence of privity or knowledge.¹⁴⁶

With that rule firmly in mind, the court of appeals turned its attention to the privity or knowledge issue. The Eleventh Circuit traced the development of "privity and knowledge," beginning with the basic principle initially accepted by the courts that "privity or knowledge" generally refers to the vessel owner's personal participation in, or actual knowledge of, the specific acts of negligence or conditions of unseaworthiness which caused or contributed to the accident.¹⁴⁷ The court then pointed out that the definition of privity or knowledge had been

140. *Id.*

141. *Id.* at 1065.

142. *Id.* at 1063.

143. *Id.* at 1063 n.2.

144. *Id.* (quoting *Fecht v. Makowski*, 406 F.2d 721, 722 (5th Cir. 1969)).

145. *Id.* at 1064 (quoting *Fecht*, 406 F.2d at 722-23).

146. *Id.*

147. *Id.*

broadened "to include constructive knowledge—what the vessel owner could have discovered through reasonable inquiry."¹⁴⁸ The court of appeals then alluded to the difference between managerial employees and ministerial employees of a corporation and concluded that "the privity and knowledge of . . . Suzuki's president, clearly constitutes the privity and knowledge of Suzuki."¹⁴⁹

In analyzing the district court's decision, the Eleventh Circuit concluded that Suzuki's rights under the Limitation Act were not adequately protected.¹⁵⁰ Although the court of appeals acknowledged that Suzuki possessed privity and knowledge with respect to all of the acts of its president, it was not convinced that Suzuki could be held vicariously liable only through its president, particularly at that stage of the proceedings.¹⁵¹ The Eleventh Circuit postulated that it was possible for Suzuki to be held liable through the acts of the nonemployee operator of its watercraft and that Suzuki could lack privity or knowledge of the operator's negligence.¹⁵² Accordingly, the Eleventh Circuit held "that the possibility of vicarious liability through parties other than [Suzuki's president] precludes summary judgment."¹⁵³

The Eleventh Circuit was unpersuaded by the Shuberts' argument that their state court complaint did not allege that Suzuki was vicariously liable for anyone's conduct other than its president's.¹⁵⁴ It was the possibility of Suzuki's vicarious liability arising from the actions of someone other than its president that troubled the Eleventh Circuit.¹⁵⁵ The court of appeals was also concerned with the possibility that the non-Suzuki defendants might file cross-claims against Suzuki for indemnification or contribution on the ground that Suzuki was vicariously liable through a person other than its president.¹⁵⁶ In closing, the court invited the claimants to file appropriate protective stipulations as in *Beiswenger*.¹⁵⁷ If a protective stipulation is all that is needed to obtain a jury trial in the claimant's choice of forum, it appears that the exceptions have consumed the rule.

148. *Id.*

149. *Id.* at 1065.

150. *Id.* at 1066.

151. *Id.* at 1065. In reaching its decision, the district court had before it the pleadings in the limitation action, the complaint filed in the state court action, and the deposition of Suzuki's president. The Eleventh Circuit felt that it was too early to reach that result on too few facts. *Id.* at 1065 n.4, 1066.

152. *Id.* at 1066.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

VI. MARINE INSURANCE

Although the appeal in *Hilton Oil Transport v. Jonas*¹⁵⁸ turned on the existence of genuine issues of material fact, the heart of the controversy was a "held covered" clause in a marine insurance policy.¹⁵⁹ This case arose when the barge *Hilton*, which was moored at a berth that was unsafe in heavy weather, broke her mooring lines during a storm and ended up in an area of rock rip-rap where she became a constructive total loss. The owner had procured hull and machinery insurance on the barge from Underwriters at Lloyds, which had the following trading limits: "Limited to East Coast of USA, Gulf of Mexico and the West Indies or held covered."¹⁶⁰ Pursuant to a charter, the barge was towed from Amuay, Venezuela to Puerto Cortes, Honduras. A month later the barge was towed to Puerto Castilla, Honduras, where she was berthed until the fatal storm struck. She had been unable to leave because of a dispute with the Honduran government.¹⁶¹

The owner never advised its New York broker, its London broker, or Underwriters of the voyages to Puerto Cortes, Honduras; never requested the barge be "held covered" for the voyages; and never agreed to pay any additional premium. When the owner made a claim against Underwriters for the constructive total loss of the barge, Underwriters denied coverage. The owner brought suit in the district court to recover for the constructive total loss of the barge. In keeping with its previous denial of coverage, Underwriters again denied coverage because the barge was outside of the trading limits specified by the hull and machinery insurance.¹⁶² On cross-motions for partial summary judgment as to liability, the district court held that although the loss occurred outside of the trading limits warranty, there was coverage under the "held covered" clause.¹⁶³ A bench trial was later held on damages, and the appeal followed.

158. 75 F.3d 627 (11th Cir. 1996).

159. *Id.* at 629.

160. *Id.*

161. *Id.*

162. *Id.* Underwriters based their denial of coverage on other grounds as well—failure to have the barge certified by the U.S. Coast Guard, policy exclusions based on losses caused by arrest and detainment, war risks and strike clauses, and the owner's breach of the duty of good faith and fair dealing—all of which the court of appeals found to be meritless. *Id.* at 629 n.1.

163. *Id.* at 629. The district court applied state law because once it learned there was a "held covered" clause, it determined that there was "no firmly established federal admiralty law governing 'held covered cases'" and that *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), required such application. 75 F.3d at 630.

Although the appeal turned on the question of whether there were issues of disputed fact, the liability of Underwriters turned on whether the "held covered" clause was applicable. If there had been a willful or intentional breach of the trading limits without notice to Underwriters, the owner could not receive the benefits of the "held covered" clause.¹⁶⁴ Quoting the Ninth Circuit opinion in *Campbell v. Hartford Fire Insurance Co.*, written by Judge (now Mr. Justice) Kennedy, the Eleventh Circuit stated that "[b]y including the clause ['held covered'], the insurer accepts the greater risk occasioned by a possible failure to comply with those warranties, on condition that the breach is not wilful, the assured gives prompt notice in the event a breach occurs and agrees to pay an additional premium."¹⁶⁵ The Eleventh Circuit reversed and remanded the matter to the district court because there was a factual dispute between the parties that the district court did not and should not have resolved.¹⁶⁶ Underwriters contended that the owner's managing director intentionally breached the trading limits warranty whereas the managing director claimed that although he knew the barge was in Honduras at the time of the casualty, he thought that was within the trading limits.¹⁶⁷

The Eleventh Circuit addressed one other issue. Pursuant to the sue and labor clause of the policy, the owner took steps to mitigate the damage from a covered peril. The owner received \$583,000 from the charterer as a result of a successful arbitration. The charterer satisfied the arbitration award by depositing the funds in an interpleader action in the federal court in Houston.¹⁶⁸ Underwriters contended that if they were ultimately liable to the owner for damages to the barge, they were "entitled to a credit or setoff from the amount recovered by [the owner] from [the charterer]."¹⁶⁹ On the other hand, the owner contended that if Underwriters were liable for damage to the barge, they must file their claim in the interpleader action.¹⁷⁰ The Eleventh Circuit held that in the event of liability of Underwriters, who would then be responsible for the reasonable sue and labor expenses, they did not have to file a claim in the interpleader action but were automatically entitled

164. 75 F.3d at 629-30.

165. *Id.* at 630 (quoting *Campbell v. Hartford Fire Ins. Co.*, 533 F.2d 496, 497-98 (9th Cir. 1976)).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 630-31.

170. *Id.* at 631.

to a "setoff against the amount otherwise recoverable by [the owner]."¹⁷¹

VII. MARITIME LIENS

Although the issues on appeal involved the award of interest and attorney fees, *Marine Coatings of Alabama, Inc. v. United States*¹⁷² arose in the context of a maritime lien. On appeal to the Eleventh Circuit for the third time, the court decided whether the Suits in Admiralty Act¹⁷³ or the Public Vessels Act¹⁷⁴ applied in a case in which a ship repair subcontractor performed repair services on a naval vessel.¹⁷⁵ After the second appeal, a bench trial was held in the district court in which the subcontractor recovered a judgment against the United States for work performed on three naval vessels. In its judgment, the district court included an award of prejudgment interest and attorney fees.¹⁷⁶ On appeal the Government challenged those two awards.

Regarding the award of interest, the issues centered around whether the suit was governed by the Public Vessels Act, which does not provide for the recovery of interest, or the Suits in Admiralty Act, which does provide for the recovery of interest.¹⁷⁷

Before addressing the Government's contention, the Eleventh Circuit reviewed the history surrounding the two statutes. It began with the common law doctrine of sovereign immunity, which provides that "the United States cannot be sued in admiralty without its consent."¹⁷⁸ Likewise, "the Government's property [is not] subject to in rem proceedings in a court of admiralty."¹⁷⁹ Prior to 1916, when Congress passed the Shipping Act, the only relief available to those injured by a government-owned vessel was to obtain a private bill from Congress authorizing suit.¹⁸⁰ When Congress became inundated with private claims arising from the Government's ownership of a substantial merchant fleet in World War I, Congress passed the Shipping Act, "which provided that Government-owned vessels 'while employed solely

171. *Id.*

172. 71 F.3d 1558 (11th Cir. 1996).

173. 46 U.S.C. app. §§ 741-752 (1994).

174. *Id.* §§ 781-790 (1994).

175. 71 F.3d at 1559.

176. *Id.* at 1560.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels"¹⁸¹ After the Supreme Court held in *The Lake Monroe*¹⁸² that the Shipping Act allowed in rem proceedings against government vessels, Congress passed the Suits in Admiralty Act in 1920 to prevent such actions.¹⁸³ Since that Act applied only to merchant vessels owned by the Government, public vessels still enjoyed the Government's sovereign immunity.¹⁸⁴ With the passage of the Public Vessels Act in 1925, Congress extended the right to sue the United States to claims involving public vessels.¹⁸⁵ In 1960 Congress amended the Suits in Admiralty Act by repealing the "merchant vessel" language, "thus expanding the coverage of that Act to claims against the United States involving public vessels."¹⁸⁶ Since Congress followed this twisted route to afford relief to claims against all government vessels, the Eleventh Circuit noted:

Claims that fall "within the scope of the Public Vessels Act remain subject to its terms after the 1960 amendment to the Suits in Admiralty Act" This means that in a case that is covered by the Public Vessels Act—a case that would now appear to be covered by both acts—only the provisions of the Public Vessels Act are applied.¹⁸⁷

In addressing the Government's contention that the Public Vessels Act applied and therefore interest was barred, the Eleventh Circuit noted that there was no contract that provided for prejudgment interest.¹⁸⁸ Accordingly, the court of appeals had to decide whether the subcontractor's claims fell within the scope of the Public Vessels Act.¹⁸⁹ The Eleventh Circuit noted that the district court had premised its award of interest on the Suits in Admiralty Act because the subcontractor had alleged that the Suits in Admiralty Act governed the sovereign immunity issue.¹⁹⁰ The Eleventh Circuit rejected that as a basis upon which to award interest.¹⁹¹ The Eleventh Circuit also rejected the Government's contention "that any claim involving a public vessel brought in personam against the United States on in rem principles is a claim governed by

181. *Id.* (quoting The Shipping Act, ch. 451, 39 Stat. 728 (1916)).

182. *The Lake Monroe*, 250 U.S. 246 (1919).

183. 71 F.3d at 1560.

184. *Id.*

185. *Id.*

186. *Id.* at 1560-61.

187. *Id.* at 1561.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

the Public Vessels Act.¹⁹² Instead, the Eleventh Circuit found that the Public Vessels Act "lifts the Government's sovereign immunity only for claims 'for damages caused by a public vessel of the United States, and for compensation for towage and salvage services'"¹⁹³

The primary obstacle that Marine Coatings faced on appeal was the holding by the Eleventh Circuit in *Stevens Technical Services v. United States*,¹⁹⁴ a case involving a similar claim, in which the court stated "[w]e hold: [The Public Vessels Act] applies to and controls this public vessel case. [The Public Vessels Act] controls with all of its restrictive provisions."¹⁹⁵ The Eleventh Circuit distinguished *Stevens Technical Services*, resolving that argument against the Government by saying:

We were not faced, however, with the question of whether the claim in that case did or did not fall under the provisions of § 781 of the Public Vessels Act, but rather whether the no-lien provisions of § 788 barred the claim Thus, the question of whether [the subcontractor's] claim falls within the Public Vessels Act is still an open one.¹⁹⁶

The Eleventh Circuit noted that there was no question that the three ships involved were public vessels.¹⁹⁷ The court then traced the case history interpreting "damages caused by a public vessel" as provided in the Public Vessels Act. The court of appeals noted that in *Canadian Aviator, Ltd. v. United States*,¹⁹⁸ the United States Supreme Court did not limit the application of the Public Vessels Act "to cases in which a public vessel is the 'physical instrument' that caused 'physical damage.'"¹⁹⁹ Accordingly, the Supreme Court extended the Act to a case involving damage to a private ship when a public vessel negligently led it to strike a submerged wreck.²⁰⁰ The Eleventh Circuit also observed that the Supreme Court expanded the Act's coverage "to include a claim for personal injuries suffered by a longshoreman aboard a public vessel."²⁰¹

192. *Id.*

193. *Id.* at 1562 (citing Public Vessels Act, 46 U.S.C. app. § 781 (1994)).

194. 913 F.2d 1521 (11th Cir. 1990).

195. *Id.* at 1527.

196. 71 F.3d at 1562 n.5.

197. *Id.* at 1561 n.4.

198. 324 U.S. 215 (1945).

199. 71 F.3d at 1562 (quoting *Canadian Aviator*, 324 U.S. at 224).

200. 324 U.S. at 228-29.

201. *American Stevedores v. Porello*, 330 U.S. 446, 454 (1947).

The Eleventh Circuit then analyzed the claim of the subcontractor and found that it arose under the Federal Maritime Lien Act.²⁰² In finding that such an action did not fall within the purview of the Public Vessels Act, the Eleventh Circuit determined:

[I]t [was] not literally an action for "damages caused by a public vessel," since the "damages" in this case resulted from a failure by [the prime contractor] and the Government to pay [the subcontractor] for the repair work, not from any negligent act by a ship or its crew. Second, it is not an action for "compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States."²⁰³

The court of appeals reasoned that "[t]he specific inclusion of particular contract claims [towage and salvage services, including contract salvage] would be meaningless if the 'damages' provision extended to maritime contract claims in general."²⁰⁴

Since the court of appeals held that the subcontractor's claim was not authorized by the Public Vessels Act, it "[fell] within that 'category of claims involving public vessels [that is] beyond the scope of the Public Vessels Act,' . . . and, as such, are covered only by the Suits in Admiralty Act."²⁰⁵ Accordingly, the Eleventh Circuit affirmed the award of prejudgment interest by the district court.²⁰⁶

The district court had also awarded attorney fees pursuant to the Equal Access to Justice Act,²⁰⁷ finding "that the Government was not 'substantially justified' in proceeding to trial"²⁰⁸ The Eleventh Circuit found that the second appeal did not resolve the factual questions; therefore, it was appropriate to resolve such questions at a trial.²⁰⁹ Accordingly, the Eleventh Circuit reversed the award of attorney fees.²¹⁰

202. 71 F.3d at 1563; 46 U.S.C. §§ 971-975 (1920) (current version at 46 U.S.C. §§ 31341-31343 (1994)).

203. 71 F.3d at 1563 (citing 46 U.S.C. app. § 781).

204. *Id.* at 1564.

205. *Id.* (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 180-81 (1976)).

206. *Id.*

207. Pub. L. No. 96-481, Title II, § 204(a), 94 Stat. 2325 (1980).

208. 71 F.3d at 1564.

209. *Id.* at 1564-65.

210. *Id.* at 1565.

VIII. PREFERRED SHIP MORTGAGE

In *Dietrich v. Key Bank, N.A.*,²¹¹ the Eleventh Circuit dispelled the clouds of doubt created by *American National Trust & Savings Ass'n v. Fogle*²¹² when the court came squarely to grips with whether the Ship Mortgage Act²¹³ provides the exclusive procedures for the enforcement of preferred ship mortgage liens, that is, whether the parties to such mortgages may contract for the use of state self-help repossession and resale procedures.²¹⁴ The Eleventh Circuit was the first court of appeals to address this issue. The court's decision that the use of self-help remedies is not prohibited by the Ship Mortgage Act, when provided by contract, is a decision welcomed by financial institutions that can now avoid the costly procedures of a Marshal's sale when there are no competing maritime liens.

The case arose out of the bank's financing the purchase of a Mako sport fishing vessel. The borrower signed a security agreement to protect the bank until the first preferred ship mortgage was in place. The mortgage was obtained about a year later. Three years later, the borrower defaulted on the note. In accordance with the terms of the loan documents, the bank accelerated the note and peacefully repossessed the vessel, which was ultimately sold at a private sale. Subsequently, the borrower filed suit in state court against the bank for breach of contract and conversion. The bank removed the action and counterclaimed for a deficiency judgment.²¹⁵ In response the borrower moved for partial summary judgment on the counterclaim on the ground that the Ship Mortgage Act prohibited the bank from using any self-help remedies.²¹⁶ As a secondary position, the borrower argued that even if it were lawful to contract for a self-help remedy, the relevant contracts did not so provide.²¹⁷ The district court found against the borrower and entered a deficiency judgment.²¹⁸ On appeal the borrower asserted the same grounds as error.

211. 72 F.3d 1509 (11th Cir. 1996).

212. 637 F. Supp. 305 (N.D. Cal. 1985).

213. 46 U.S.C. §§ 31301-31343 (West Supp. 1994). Although the former version, 46 U.S.C. §§ 911-984 (1975), was in effect when the controversy arose, for purposes of the appeal, the Eleventh Circuit referred to the current version because none of the substantive changes made in the 1988 reorganization of the Ship Mortgage Act had any effect on the issues on appeal.

214. 72 F.3d at 1517.

215. *Id.* at 1511.

216. *Id.*

217. *Id.* at 1512.

218. *Id.*

The Eleventh Circuit first addressed the construction of the underlying contracts to determine whether they provided for state law self-help repossession and sale.²¹⁹ There was no contest that the mortgage was validly recorded, perfected, and governed.²²⁰ In concluding that the contracts allowed for self-help repossession and sale, the Eleventh Circuit relied upon three paragraphs in the mortgage that expressly provided for repossession and two paragraphs that expressly referred to resale after repossession.²²¹ The language relied upon by the Eleventh Circuit should be found in most mortgages; for example: "If you repossess the Vessel"; "[m]ake all necessary transfers of the Vessel upon resale after repossession"; and "carry out a resale of the Vessel in the event it becomes necessary for [the mortgagee] to repossess it."²²² The Eleventh Circuit concluded that this language "unequivocally anticipates both self-help repossession and self-help resale."²²³

The Eleventh Circuit then turned to whether the Ship Mortgage Act precluded such remedies. In response to the borrower's argument that the statutory provisions of the Ship Mortgage Act were exclusive and therefore preempted state law remedies, the court of appeals conceded that section 31307 of the Act preempted any state statutes that purport to create a maritime lien for necessities that could be enforced in rem in admiralty.²²⁴ The Eleventh Circuit rejected the borrower's argument that such limited preemption affected the self-help remedies before the court.²²⁵ In fact, the Eleventh Circuit stated that "[t]he Ship Mortgage Act contains no direct expression of congressional intent to preempt state law allowing for self-help repossession and resale."²²⁶ In light of that silence, the question before the Eleventh Circuit was whether the enforcement provisions of the Ship Mortgage Act preempted state law. In addressing that issue, the court of appeals used the guidance furnished by the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*,²²⁷ in which the Court stated, "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law . . . or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1513.

225. *Id.*

226. *Id.*

227. 505 U.S. 504 (1992).

Congress left no room for the States to supplement it.”²²⁸ Finding no express congressional command, the Eleventh Circuit proceeded to analyze whether state self-help repossession and sale conflicted with federal law.²²⁹ The Eleventh Circuit first considered whether the state law actually conflicted with the federal statute. In making that determination, the Eleventh Circuit employed the standards set forth by the Supreme Court in *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*²³⁰ In that case, the Supreme Court held there was a conflict if “‘compliance with both federal and state regulations is a physical impossibility,’ . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²³¹ The Eleventh Circuit observed that the Ship Mortgage Act provides procedures for judicial foreclosure and sale, but nowhere does it describe the procedures to be used by the parties to a preferred ship mortgage who seek to enforce the mortgage by self-help remedies without judicial assistance.²³² Accordingly, no direct conflict existed.²³³ Since the purpose of the Ship Mortgage Act “was to create a means of enforcing mortgages in admiralty in order to promote ship financing,” the Eleventh Circuit found that “supplementation through state law furthers the objectives of Congress by providing another avenue for enforcement of vessel mortgage liens.”²³⁴

The Eleventh Circuit then analyzed “whether Congress intended to occupy the field.”²³⁵ The Eleventh Circuit observed that there were three bases upon which it could infer an intent to preempt: (1) “where the pervasiveness of the federal regulation precludes supplementation by the States”; (2) “where the federal interest in the field is sufficiently dominant”; and (3) “where ‘the object sought to be obtained by the federal law and the character of the obligations imposed by it’ reveal a purpose to preclude the enforcement of the state laws on the same subject.”²³⁶

The Eleventh Circuit concluded that the federal law was not so pervasive that it thoroughly occupied the field “[b]ecause the language of the Act is permissive—i.e., the Act uses the permissive ‘may’ rather than exclusive ‘must’ with respect to its enforcement procedures—and

228. 72 F.3d at 1513-14 (quoting *Cipollone*, 505 U.S. at 516).

229. *Id.*

230. 471 U.S. 707 (1985).

231. 72 F.3d at 1513 (quoting *Hillsborough County*, 471 U.S. at 713).

232. *Id.* at 1514.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988)).

because the Act is silent with respect to self-help repossession and sale.²³⁷ The Eleventh Circuit also concluded that the enforcement of preferred mortgage liens "is not the sort of uniquely federal interest which is so dominant it would create an inference that Congress intended to preempt state law in that field."²³⁸ Likewise, the Eleventh Circuit did not view self-help repossession and sale as a serious danger to the administration of the federal program.²³⁹ Regarding the last basis, the Eleventh Circuit concluded:

[N]either the object sought to be obtained by the Act, i.e., preferred status of mortgage liens enforceable in admiralty, nor the obligations imposed by the statute, i.e., various statutory conditions and documentation requirements, indicate that Congress's purpose was to preclude state law enforcement of preferred mortgages in the manner proposed in this case.²⁴⁰

When those arguments failed, the borrower contended that circuit precedent in *J. Ray McDermott & Co. v. The Vessel Morning Star*²⁴¹ and *Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*²⁴² controlled.²⁴³ The court of appeals distinguished *McDermott* because it involved a situation in which McDermott sought to supplement the statutory provisions for a judicial sale of a vessel, whereas in the instant case the mortgagee chose a self-help remedy rather than judicial foreclosure and sale.²⁴⁴ The Eleventh Circuit rejected the application of *Nat G. Harrison Overseas Corp.* because it involved a direct conflict between federal and state law—whether the rate of interest was governed by Georgia usury laws or the open-ended, agreed-upon-rate provided for in the Ship Mortgage Act.²⁴⁵

In holding that the Ship Mortgage Act does not preclude state law self-help remedies when provided for by contract, the Eleventh Circuit acknowledged that its holding was in conflict with *Bank of American National Trust & Savings Ass'n v. Fogle*.²⁴⁶ In view of the congressional purpose "to facilitate and promote financing for vessels, and in

237. *Id.* at 1515.

238. *Id.* at 1514.

239. *Id.*

240. *Id.* at 1515.

241. 457 F.2d 815 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

242. 475 F.2d 504 (5th Cir. 1974).

243. 72 F.3d at 1516.

244. *Id.*

245. *Id.* at 1516-17. Section 31322(b) of Title 46 provides: "A preferred mortgage filed or recorded under this chapter may have any rate of interest that the parties to the mortgage agree to." 46 U.S.C.A. § 31322(b).

246. 72 F.3d at 1517.

particular to provide an effective means for enforcing ship mortgages," the Eleventh Circuit opined that its holding was "consistent with and supportive of that purpose."²⁴⁷ Its holding did not mandate but recognized the availability of an optional remedy.²⁴⁸ This decision will no doubt lay to rest many concerns that have arisen about state law self-help remedies in the wake of *Fogle*.

IX. SEAMEN

In *Kasprik v. United States*,²⁴⁹ the Eleventh Circuit addressed the issue of whether the exclusivity provision of the Suits in Admiralty Act ("SAA")²⁵⁰ barred a seaman from bringing an action against an agent of the United States for arbitrary and willful failure to pay maintenance and cure.²⁵¹ The seaman was employed by the United States as a second class assistant engineer aboard a vessel owned by the United States through the Maritime Administration and operated pursuant to contract by two private entities. The seaman was injured when he manually tried to engage the turning gear lever of the main engine. The seaman sued the United States for his injury and the United States and the two private contract operators for the arbitrary and willful failure to pay his maintenance and cure.²⁵² When the contract operators moved to dismiss the suit on the ground that the claim was "barred by the exclusivity provision of the Suits in Admiralty Act," the district court agreed and dismissed the suit against the contract operators.²⁵³

On appeal the Eleventh Circuit noted that the issue of "whether the exclusivity provision of the SAA prevents a seaman from seeking punitive damages from an agent of the United States for arbitrary and willful denial of maintenance and cure" was one of first impression in the circuit.²⁵⁴ There was no question that the seaman was entitled to maintenance and cure. The seaman urged the Eleventh Circuit to apply *Hines v. J. A. LaPorte, Inc.*,²⁵⁵ which held that in a proper case, the seaman could recover both reasonable attorney fees and punitive damages from a private vessel owner who arbitrarily and willfully

247. *Id.*

248. *Id.*

249. 87 F.3d 462 (11th Cir. 1996).

250. 46 U.S.C. app. §§ 741-752 (1988).

251. 87 F.3d at 464.

252. *Id.*

253. *Id.*

254. *Id.*

255. 820 F.2d 1187 (11th Cir. 1987).

denied maintenance and cure.²⁵⁶ The court of appeals distinguished *Hines* because the instant action was against an operator of a vessel owned by the United States and not a private vessel owner.²⁵⁷ The Eleventh Circuit referred to the specific statutory language in section 745, which provides that "[w]here a remedy is provided under this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter"²⁵⁸ The court of appeals concluded that a seaman's claim for failure to pay maintenance and cure arises from "the seaman's entitlement to maintenance and cure resulting from his injury" aboard the ship.²⁵⁹ The Eleventh Circuit reached that result because of the phrase "by reason of the same subject matter."²⁶⁰ In its view, a claim for failure to pay maintenance and cure, or for arbitrary and willful failure to pay maintenance and cure, fell within the ambit of that phrase because all such claims arose out of the seaman's entitlement to maintenance and cure resulting from his injury.²⁶¹ The Eleventh Circuit noted that "[s]overeign immunity has not been waived with respect to punitive damages."²⁶² This led the court to opine that a seaman's claim against an agent of the United States for "the arbitrary and willful denial of maintenance and cure has been effectively abolished by Congress under the exclusivity provision of the SAA."²⁶³ Since the result reached by the Eleventh Circuit "gives private operators managing ships owned by the United States the ability to willfully and arbitrarily deny maintenance and cure without suffering any consequences," the Eleventh Circuit invited Congress to change the law if the holding was erroneous.²⁶⁴ The seaman was relegated to making his claim against the United States, and it would be only for maintenance and cure.²⁶⁵

In *Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania*,²⁶⁶ the court of appeals had to address the propriety of a district court's order denying alien crew members the right to intervene in an in rem admiralty action.²⁶⁷ The vessel was of Honduran registry with a crew from Central and South America. A lien claimant had the vessel

256. *Id.* at 1189.

257. 87 F.3d at 464.

258. *Id.* at 465 (quoting 46 U.S.C. app. § 745).

259. *Id.* at 466.

260. *Id.*

261. *Id.*

262. *Id.* at 465.

263. *Id.* at 466.

264. *Id.* at 466 n.2.

265. *Id.* at 466.

266. 93 F.3d 728 (11th Cir. 1996).

267. *Id.* at 730.

arrested on March 1, 1995, in Port Everglades. After the appointment of a substitute custodian, the vessel was moved to an offshore anchorage with her crew aboard. The day after the arrest, the vessel owner filed a claim and an emergency motion for a post-arrest hearing. Before the hearing, the lien claimant filed a second amended complaint that almost doubled its lien claim and added in personam claims against the vessel owner and charterer.²⁶⁸ After the magistrate judge set the release bond, the lien claimant moved for an interlocutory sale of the vessel.²⁶⁹ On March 24, 1995, the district court allowed a second lien claimant to intervene, but when the district court learned that the claimant had not complied with the local rules by preparing a supplemental warrant of arrest, it vacated the order allowing the intervention.²⁷⁰ The crew members claimed that although they knew the vessel was under arrest, they had been repeatedly assured by the original lien claimant and the substitute custodian that the dispute would be resolved. For this reason, the crew members asserted that they were not worried about their situation. Fifty-eight days after the arrest, the district court ordered that an interlocutory sale of the vessel take place eighteen days thereafter.²⁷¹ As a result of filing a supplemental warrant of arrest, the second lien claimant was allowed to intervene again five days prior to the sale.²⁷² On the day the sale took place, an attorney "filed an intervenors' Notice of Maritime Liens and Motion to Enforce 46 U.S.C. §§ 971, [sic] Maritime Lien'" on behalf of twelve crew members and a number of other suppliers of necessities.²⁷³

The day after the sale, the district court denied intervention to the twelve crew members and other suppliers because they had failed to file intervening complaints required by the local rules leaving the court without jurisdiction to entertain the notices of maritime liens and motions to enforce.²⁷⁴ The district court also supported its denial by holding that even if the intervenors were properly before the court, denial was proper because they failed to comply with the local rules regarding permissive intervention.²⁷⁵ The crew members then moved to set aside the sale and asked "for emergency interim relief . . . to file

268. *Id.*

269. *Id.* at 730-31.

270. *Id.* at 730.

271. *Id.* at 730-31.

272. *Id.* at 731.

273. *Id.*

274. *Id.*

275. *Id.* The crew members' automatic right to intervene had expired under the local rules 15 days prior to the day set for the sale. S.D. FLA. LOCAL ADMIRALTY R. E(2)(b).

as priority creditors.²⁷⁶ The crew members supported their motion with a number of arguments: their claim was superior to the others; they had not been given proper notice of the sale; they learned about the sale only two days prior thereto (when they retained counsel); they had not been paid since the vessel had been arrested; and they were not financially able to return home or maintain themselves.²⁷⁷ The district court denied the application for emergency relief; the crew members were not entitled to automatic intervention because the intervention had not been sought more than fifteen days before the sale of the vessel.²⁷⁸ Further, the district court did not allow a permissive intervention because it "would not be equitable to the interest of all parties."²⁷⁹ Thus, the district court did not consider the petition of the crew members to set aside the sale because they were not properly before the court.²⁸⁰ On June 15, 1995, counsel for the crew members renewed their motion, which was again denied for lack of jurisdiction.²⁸¹ Six days later, the district court confirmed the sale of the vessel, the proceeds of which had been deposited in the registry.²⁸² The disbursement of the proceeds of the sale was stayed pending the appeal.²⁸³

The Eleventh Circuit quickly disposed of two jurisdictional issues: (1) the court had jurisdiction because the sale proceeds were still in the registry of the court, that is, that the funds were substituted for the vessel; and (2) an interlocutory order denying intervention determines the rights and liabilities of the parties and is therefore appealable pursuant to 28 U.S.C. § 1292(a)(3).²⁸⁴

The Eleventh Circuit then stressed that seamen are wards of admiralty in need of protection by the federal courts.²⁸⁵ The court also questioned the role of the original lien claimant, the substitute custodian, and the owner in causing the delay in the seamen's attempted intervention.²⁸⁶ The Eleventh Circuit had no information about when the crew members first learned the vessel was to be sold.²⁸⁷ In view of these concerns and the fact that seamen are wards of the admiralty,

276. 93 F.3d at 732.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 733.

285. *Id.*

286. *Id.*

287. *Id.*

the Eleventh Circuit held that the district court's order dismissing the notice filed by the crew members constituted an abuse of discretion.²⁸⁸ The Eleventh Circuit pointed out that while "[d]enial of a motion to intervene due to procedural deficiencies would not normally constitute an abuse of discretion," it rose to that level because "the District Court ordered an interlocutory sale of the vessel—often the only asset against which seamen can proceed to enforce their claims."²⁸⁹ Moreover, the Eleventh Circuit believed that the notice of lien and motion to enforce the lien could "fairly be construed as a motion to intervene and a complaint."²⁹⁰ The Eleventh Circuit also thought that the district court should have given the crew members at least one chance to amend their request to intervene.²⁹¹ The court of appeals also rejected the original lien claimants' argument that the case was moot because the final rights to the proceeds had not been decided.²⁹² The court still had jurisdiction because the proceeds of the sale were still in the registry of the court as a substitute for the vessel.²⁹³

In *Hutchins v. Tennessee Valley Authority*,²⁹⁴ the Eleventh Circuit was asked to reverse binding precedent when faced with a question regarding the exclusivity provisions of the Federal Employees Compensation Act ("FECA").²⁹⁵ The plaintiff's decedent had drowned while working as a deckhand at TVA's Widows Creek Fossil Plant on the Tennessee River in Alabama. The decedent's widow brought suit as his personal representative and asserted a Jones Act claim. The district court dismissed the wrongful death action as barred by the exclusivity provision of FECA.²⁹⁶

The personal representative faced overwhelming odds in view of United States Supreme Court and Eleventh Circuit precedent.²⁹⁷ The personal representative attempted to distinguish the two leading Supreme Court cases by arguing that they were brought directly against the United States and not against a government corporation, TVA, the

288. *Id.* at 734.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. 98 F.3d 602 (11th Cir. 1996).

295. 5 U.S.C. § 8116(c) (1994).

296. 98 F.3d 602-03.

297. *Johansen v. United States*, 343 U.S. 427 (1952); *Patterson v. United States*, 359 U.S. 495 (1959); *Flippo v. TVA*, 486 F.2d 612 (5th Cir. 1973); *Posey v. TVA*, 93 F.2d 726 (5th Cir. 1937).

immunity of which had been specifically waived in the TVA Act.²⁹⁸ Even if the Eleventh Circuit had found the Supreme Court precedent inconclusive on the issue, the Eleventh Circuit was required to follow its own precedent, which held "that FECA is the exclusive remedy for an injured seaman employed by the TVA."²⁹⁹ The Eleventh Circuit rejected the personal representative's plea that the court reject its prior case law in favor of permitting suit against the TVA under "plain reading of the Jones Act,"³⁰⁰ saying that could only be done by the court en banc.³⁰¹

In *Larue v. Joann M.*,³⁰² a seaman employed as a deckhand on a tug was injured when a two hundred pound tow line was suddenly released from a vessel it was assisting to berth, fell approximately thirty feet, and struck the seaman.³⁰³ The seaman did not assert a Jones Act³⁰⁴ claim, but brought suit on a negligence theory based on general maritime law against the vessel owner in Florida state court.³⁰⁵ The action was removed to the district court where the shipowner filed a third party complaint against the tug owner for contribution and indemnity.³⁰⁶ The tug owner in turn counterclaimed against the shipowner for contribution and indemnity, which was dismissed by the district court.³⁰⁷ By agreement the parties submitted the entire case, including the admiralty claims of contribution and indemnity, to the jury, which found that the shipowner was one hundred percent negligent and returned a verdict for the seaman against the shipowner.³⁰⁸ After the district court denied the shipowner's post-trial motions for judgment as a matter of law and for a new trial, it entered a judgment on the verdict against the shipowner and a take-nothing judgment against the shipowner on its contribution and indemnity claim against the tug owner.³⁰⁹ The judgment also allowed the tug owner to recover its maintenance and cure payments to the seaman as well as its payments in settlement of the seaman's claims against it.³¹⁰ After the shipowner appealed, it settled with the seaman, leaving only the shipowner's claim

298. 98 F.3d at 603.

299. *Id.* (citing *Flipppo*, 486 F.2d 612, and *Posey*, 93 F.2d 726).

300. *Id.*

301. *Id.*

302. 73 F.3d 325 (11th Cir. 1996).

303. *Id.* at 326.

304. 46 U.S.C. app. § 688 (1993).

305. 73 F.3d at 326.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

against the tug owner for indemnity and contribution and the tug owner's counterclaim against the shipowner for contribution for review by the Eleventh Circuit.³¹¹

The shipowner raised three issues on appeal: (1) improper jury argument by counsel for the tug owner; (2) refusal of the district court to give a requested jury charge; and (3) failure to enter judgment in favor of the shipowner on its claim for indemnity against the tug owner.³¹² The shipowner claimed that counsel for the tug owner had unduly prejudiced the jury by arguing that the members of the ship's crew who released the tow line were foreigners.³¹³ The Eleventh Circuit found that it was the shipowner who initially brought up that issue when it argued to the jury that the crew members of the ship were Filipinos who may have misunderstood the English used by the tug crew.³¹⁴ The Eleventh Circuit found that the "overriding deficiency" in the shipowner's argument was that it failed to preserve the issue for appeal because its counsel had not objected to the comments.³¹⁵ Regarding the refused jury charge, the shipowner had sought the benefit of the Jones Act statutory standard of negligence in its contribution and indemnity claim against the tug owner.³¹⁶ The district court had rejected that standard in favor of the general maritime law negligence standard that governed the seaman's negligence claim against the shipowner.³¹⁷ Although this issue was one of first impression for the Eleventh Circuit, it avoided a decision on that basis by finding that the proposed jury instruction was "confusing and misleading."³¹⁸ The Eleventh Circuit also found that because the parties had agreed to a jury determination of the allocation of fault, the jury verdict could be fairly read to find that the shipowner was one hundred percent at fault.³¹⁹ In that event, the tug owner was wholly free from fault, and the standards of causation relating to its fault had no application. This was also the basis of the Eleventh Circuit's rejection of the shipowner's contention related to the district court's denial of the shipowner's indemnity action against the tug owner.³²⁰ The Eleventh Circuit reasoned that the jury finding of one hundred percent negligence of the

311. *Id.*

312. *Id.*

313. *Id.* at 327-28.

314. *Id.* at 327.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 328.

shipowner "the possibility that [the tug owner] engaged in conduct that 'prevented or seriously hampered [the shipowner's] performance of its duty in accordance with the warranty of workmanlike service.'"³²¹

321. *Id.* (quoting *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986)).