Admiralty

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The United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit were busy in 2008 with admiralty cases and other matters of importance to maritime practitioners. The Supreme Court considered a maritime punitive damages case and the Eleventh Circuit continued its trend of tackling important maritime questions in areas such as marine insurance, arbitration, and the Suits in Admiralty Act.[1] A large portion of the cases surveyed in this Article were marked "unpublished" by the Eleventh Circuit, but recent changes in federal law concerning unpublished opinions have rendered these opinions generally more useful to practitioners.[2]

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1. 46 U.S.C.A. §§ 30901-30918 (West 2007).

2. Rule 32.1 of the Federal Rules of Appellate Procedure permits a party to cite unpublished federal court decisions issued after January 1, 2007. FED. R. APP. P. 32.1; Saunders v. Equifax Info. Servs., LLC, 469 F. Supp. 2d 343, 353 n.14 (E.D. Va. 2007). Local Rule 32.1 of the Eleventh Circuit rules essentially tracks Rule 32.1 of the Federal Rules of Appellate Procedure. *See* 11th CIR. R. 32.1. In fact, the Eleventh Circuit is one of seven "permissive" circuits in that there are no restrictions on citation of unpublished opinions, even those drafted prior to the 2006 changes to the Federal Rules of Appellate Procedure. Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, Federal Judicial Center, Mar. 9, 2007, at 1. The United States Supreme Court has embraced this practice, mindful of the persuasive value of unpublished opinions. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2823 n.2 (2008) (Stevens, J., dissenting); Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1403 n.5 (2008); Watson v. United States, 128 S. Ct. 579, 582 n.5 (2007). Thus, this Article reviews a large number

I. UNITED STATES SUPREME COURT

The United States Supreme Court recently addressed limits to punitive damages in maritime tort cases in *Exxon Shipping Co. v. Baker*.[3] As many readers may remember, on March 24, 1989, the M/V EXXON VALDEZ grounded on Bligh Reef in Alaska, fracturing its hull and spilling millions of gallons of crude oil into the Prince William Sound. Then owner, Exxon Shipping Co., and parent company, Exxon Mobile Corp., settled state and federal claims for environmental damage, paying out over $1 billion.[4] Ultimately, Exxon spent approximately $2.1 billion in clean-up efforts; pleaded guilty to violations of the Clean Water Act (CWA),[5] the Refuse Act,[6] and the Migratory Bird Treaty Act;[7] agreed to pay a reduced fine of $25 million plus restitution of $100 million; agreed to a consent decree that provided that Exxon would pay at least $900 million towards restoring natural resources; and expended another $303 million in voluntary settlements with private parties.[8] The present suit was brought by respondent Baker and others for "economic losses to individuals depend[ing] on Prince William Sound for their livelihoods."[9]

At Exxon's behest, the United States District Court for the District of Alaska certified a class of thirty-two thousand largely commercial fisherman plaintiffs seeking punitive damages. The trial for punitive damages was divided into three phases: phase one, in which the jury found Exxon and the master of the vessel, Captain Hazelwood, reckless and potentially liable for punitive damages; phase two, in which the jury awarded $287 million in compensatory damages to commercial fishermen; and phase three, in which the jury awarded $5000 in punitive damages against Captain Hazelwood and $5 billion against Exxon. With respect to the size of the punitive damages award against Exxon, the United States Court of Appeals for the Ninth Circuit twice remanded the case for the lower court to adjust the award on the basis of the Supreme

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of unpublished opinions, mindful that they are not binding precedent yet aware that they may be cited to show the relevant law or at least the prevailing trend.

3. 128 S. Ct. 2605 (2008).
4. *Id.* at 2611.
5. 33 U.S.C. §§ 1251-1387 (2006).
6. 33 U.S.C. § 407 (2006).
7. 16 U.S.C. §§ 703-712 (2006).
8. *Exxon Shipping Co.*, 128 S. Ct. at 2613.
9. *Id.* at 2611.

Court's due process jurisprudence. Ultimately, the Ninth Circuit remitted the award to $2.5 billion.[10]

The Supreme Court granted certiorari to consider the following issues: (1) "whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents," (2) "whether the Clean Water Act . . . forecloses the award of punitive damages in maritime spill cases," and (3) "whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law."[11] The Court only decided the latter two issues.[12] The Court denied Exxon's argument that the CWA preempted the punitive damages remedy under federal common law, reasoning that while the CWA is expressly geared to protecting water, shorelines, and natural resources, it is not intended to eliminate common law duties to refrain from injuring private individuals.[13] Further, the Court stated that there was no clear indication of congressional intent in the CWA to occupy the entire field of pollution remedies.[14] The Court also stated that the CWA did not preempt the respondents' claims for economic injury because those claims do not threaten to interfere with the regulatory aims of the CWA regarding water, shorelines, or natural resources.[15]

The most significant portion of the decision involves the question of whether there should be a limit on punitive damages available in causes of action over which a court exercises maritime jurisdiction.[16] While recognizing its power to develop maritime law, the Court interestingly couched this issue as one that "goes to our understanding of the place of punishment in modern civil law and reasonable standards of process in administering punitive law."[17] The Court noted historical justifications for punitive damages, including punishment for extraordinary wrongdoing, deterrence,[18] and compensation for intangible injuries.[19] The

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10. *Id.* at 2613-14.

11. *Id.* at 2614 (internal citation omitted).

12. *See id.* at 2614-34. The Supreme Court remained divided on the decision from the Ninth Circuit upholding the phase one jury instruction on corporate liability for acts of managerial agents. *Id.* at 2616. As a result, the decision of the Ninth Circuit concerning this issue stands. *Id.*

13. *Id.* at 2618-19.

14. *Id.* at 2619.

15. *Id.* at 2619 n.7.

16. *See id.* at 2619-34.

17. *Id.* at 2620.

18. *Id.* (citing Wilkes v. Wood, 98 Eng. Rep. 489, 498 (1763)).

19. *Id.* at 2620-21 (citing Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437-38 n.11 (2001)).

Court concluded that today's awards of punitive damages are assessed as a means of retribution and for deterring harmful conduct when a defendant's conduct is outrageous,[20] grossly negligent, willful, wanton, and recklessly indifferent to the rights of others, or worse.[21]

Having established the basis for punitive damages in modern jurisprudence, the Court proceeded to justify a system premised on degrees of relative blameworthiness.[22] As to regulation and procedure of a punitive damages schema, the Court considered the practices of state courts nationwide as well as international punitive damages regimes.[23] Ignoring the distinct nature of available damages and remedies in the general maritime law, the Court turned to an analysis of prevailing trends in the ratio of compensatory damages to punitive damages, concluding that the ratio has generally remained below one-to-one, with the exception of outliers.[24]

After concluding that the norm for the ratio of compensatory damages to punitive damages is less than one-to-one, the Court suggested that due process standards provide a check by preventing unreasonably high punitive awards.[25] Despite this discussion, the Court declined the opportunity to set a standard for punitive damages based on a one-to-one ratio in which the ratio is derived from awards subject to state law.[26] The Court acknowledged that the present case arose under federal maritime jurisdiction and that the purpose of the Court's review of the award was to assure conformity with maritime law rather than to determine the outer limit of awards of punitive damages allowed by due process.[27] Thus, the measure of excessive awards of punitive damages in maritime cases is not the standard of due process "but the desirability of regulating [those awards] as a common law remedy."[28] The Court emphasized that it was choosing predictability over due process as the basis for standardizing punitive awards in the general maritime law, and as such, the award must be reasonably predictable in its severity so that all may know the stakes when making decisions.[29]

Recalling that the damages at issue are punitive, the need to eliminate unjustified disparities in criminal sentencing, and that common sense

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20. *Id.* at 2621 (citing RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).
21. *Id.* (citing 1 LINDA L. SCHULUETER, PUNITIVE DAMAGES § 9.30(A) (5th ed. 2005)).
22. *See id.* at 2621-22.
23. *See id.* at 2622-24.
24. *Id.* at 2624-25.
25. *Id.* at 2626.
26. *Id.*
27. *Id.*
28. *Id.* at 2626-27.
29. *Id.* at 2627.

bars excessive penalties, the Court settled on the notion that more rigorous standards are required in the general maritime law to eliminate the unpredictable punitive awards that are possible in a common law scenario.[30] The Court settled on tacking punitive damages to compensatory damages using a ratio or maximum multiple of one-to-one in order to eliminate unpredictable or outlying punitive awards.[31] The Court defended the use of this maximum multiple by looking to the CWA, wherein daily fines for violation of pollution restrictions are double in the criminal setting for violations that occur knowingly as opposed to those that occur negligently.[32] The Court further justified the one-to-one ratio in maritime spill cases on the basis that the median ratio of punitive damages to compensatory damages in most of the case studies cited in its decision was 0.65:1.[33]

In his concurrence and dissent, Justice Stevens took issue with the concept of imposing a limitation on assessments of damages based on empirical data and favored instead application of an abuse-of-discretion standard when reviewing awards of punitive damages.[34] Justice Stevens pointed to the path of maritime tort remedies,[35] one well-trodden by acts of Congress.[36] Justice Stevens pointed out that the issue of limiting Exxon's liability was already addressed in maritime law under the Limitation of Liability Act,[37] which was unavailable to Exxon because of its knowledge of Captain Hazelwood's condition, and thus, the Court should not limit punitive damages.[38] Justice Stevens also pointed to the fact that intangible injuries are not fully compensated in maritime law; thus, Justice Stevens concluded that punitive damages

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30. *Id.* at 2628-29.

31. *Id.* at 2633.

32. *Id.* at 2634 (citing 33 U.S.C. §§ 1319(c)(1)-(2) (2006)). Thus, when one knowingly commits a criminal violation, the CWA mandates that the fine be doubled. *Id.* After the Court's decision in this case, an award of compensatory damages may at most be doubled in a civil case because of the imposition of the one-to-one ratio imposed. *Id.* This appears to accomplish the goals of punitive damages as defined by this decision: retribution and deterrence, as opposed to punishment. *See id.* at 2621.

33. *Id.* at 2633.

34. *See id.* at 2635 (Stevens, J., concurring in part and dissenting in part).

35. *See id.*

36. *See, e.g.*, Jones Act, 46 U.S.C.A. § 30104 (West 2007); Longshore Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (2006); Death on the High Seas Act, 46 U.S.C. app. §§ 761-768 (2006); Admiralty Extension Act, 46 U.S.C. § 30101 (2006); Suits in Admiralty Act, 46 U.S.C.A. §§ 30901-30918 (West 2007).

37. 46 U.S.C.A. § 30505 (West 2007).

38. *Exxon Shipping Co.*, 128 S. Ct. at 2635-36. It seems that this perspective may break with the majority's definition of the modern goals of punitive damages: retribution and deterrence, not as much punishment, *per se*. *See id.* at 2621 (majority opinion).

should not be limited because they may serve as gap fillers, complimenting recovery for plaintiffs that are otherwise limited in the general maritime law.[39] Justice Stevens concluded his critique with the observation that Congress is in a much better position to assess empirical data.[40] Unfortunately, Justice Stevens reached his conclusion evaluating the empirical data the majority used to reach its conclusion,[41] leaving the reader to question whether his justifications are any better than those of the majority.

In a separate concurrence and dissent, Justice Ginsburg specifically detailed why Congress is the better decision maker to set a cap for punitive damages.[42] Namely, data reveals that cases using the present system of assessment for punitive damages have not mass-produced runaway punitive damage awards.[43] While a one-to-one ratio is appropriate for the present case in which Exxon did not act maliciously or in pursuit of financial gain by continuing to employ Mr. Hazelwood, that ratio may not be appropriate for future cases in which the defendant's behavior is malicious or sacrifices the rights of others in pursuit of financial gain.[44]

Finally, Justice Breyer wrote separately, concluding that the punitive damages in this case should not be reduced.[45] Justice Breyer argued for meaningful standards that provide notice but are not assessed on a rigid or absolute standard such as a fixed numerical ratio.[46] Under the rationale of a meaningful but sliding scale for the assessment of punitive damages, Justice Breyer stated that in this case the facts support a larger award of punitive damages.[47]

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39. *Id.* at 2636-37 (Stevens, J., concurring in part and dissenting in part). While this may be an accurate statement of the maritime law of damages, the majority's decision favors consistency in the general maritime law over all other considerations as the measure for punitive damages. Thus, consistency may not be served by leaving the gate open for punitive damages to come in as a gap filler for *purposefully* incomplete recovery in maritime tort cases.

40. *Id.* at 2637.

41. *See id.* at 2636-38.

42. *See id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

43. *Id.*

44. *Id.*

45. *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part).

46. *Id.*

47. *Id.* at 2640-41.

II. ELEVENTH CIRCUIT

A. *Marine Insurance*

1. "Warehouse-to-Warehouse" Clauses. In the unpublished opinion *Great Southern Wood Preserving, Inc. v. American Home Assurance Co.*,[48] the United States Court of Appeals for the Eleventh Circuit considered the effect of a "warehouse-to-warehouse" clause in the context of an insured's claims against its insurer for breach of contract and bad faith.[49] On August 29, 2008, Hurricane Katrina hit the Port of Gulfport, destroying a warehouse Great Southern Wood Preserving (Great Southern) leased from the Mississippi State Port Authority. Great Southern's lumber inside the warehouse was also destroyed, resulting in the loss of twenty percent of one shipment of lumber and the entirety of another shipment. Great Southern filed a claim that American Home Assurance Company (American Home) denied on the basis that coverage under the policy ceased before the time of the loss. In response, Great Southern brought suit against American Home in the United States District Court for the Middle District of Alabama, alleging breach of contract and bad faith on the part of American Home for failure to pay on a marine cargo insurance policy.[50] The district court granted summary judgment to American Home, and finding no reversible error, the Eleventh Circuit affirmed.[51]

Great Southern argued for coverage under the policy's warehouse-to-warehouse clause, which provided insurance from the time the goods left the specified location for commencement of transit until the goods were delivered to the final warehouse at the specified destination.[52] The district court found that the warehouse-to-warehouse clause, which is standard throughout the marine insurance industry, had the settled meaning that once the insured exercises dominion and control over the cargo at issue it is no longer in transit and coverage ceases.[53] The Eleventh Circuit agreed, comparing the housing of Great Southern's lumber in the leased warehouse to the receipt of a shipment of lumber by a consignee that took place in *Lumber & Wood Products, Inc. v. New*

48. 292 F. App'x 8 (11th Cir. 2008).
49. *See id.* at 8-9.
50. *Id.* at 9.
51. *Id.* at 8.
52. *Id.* at 9.
53. *Id.* at 10.

Hampshire Insurance Co.[54] This rationale is based on the idea that "Great Southern exercised dominion and control over the [cargo] once it was off-loaded from the vessel" and stored in the shore side warehouse, much like a consignee exercises dominion and control over cargo by receiving it.[55] Great Southern countered that at least part of the lost lumber was not yet in its control and therefore still insured because the United States Department of Agriculture had not cleared and released the lumber.[56] The Eleventh Circuit rejected this argument and affirmed the district court's conclusion that a government hold on goods "does not render the goods 'in transit' for purposes of insurance coverage."[57]

2. *Uberrimae Fidei* and Vessel Purchase Price. In the unpublished decision *Markel American Insurance Co. v. Nordarse*,[58] the Eleventh Circuit considered whether a misrepresentation of the purchase price of a vessel is a violation of the marine insurance doctrine *uberrimae fidei* that may void an insurance policy *ab initio*.[59] The United States District Court for the Southern District of Florida found that the purchase price of the vessel was material to the Markel American Insurance Company's assessment of the risk and, under *uberrimae fidei*, the insurer had the option of voiding the policy *ab initio*.[60] The Eleventh Circuit agreed, citing *Certain Underwriters at Lloyd's v. Montford*,[61] for the proposition that "a vessel's purchase price is unquestionably a fact material to the marine insurance risk to be assumed."[62]

3. Marine Insurance and the Declaratory Judgment Act. The Eleventh Circuit was faced with an interesting procedural issue in the context of marine insurance coverage disputes. In *Great Lakes Reinsurance (UK) PLC v. TLU Ltd.*,[63] the plaintiff insurance company filed a declaratory judgment action in the United States District Court for the Southern District of Florida, seeking a ruling from the federal

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54. *Id.*; 807 F.2d 916 (11th Cir. 1987).
55. *Great S. Wood Preserving, Inc.*, 292 F. App'x at 10.
56. *Id.*
57. *Id.* at 11.
58. 297 F. App'x 852 (11th Cir. 2008).
59. *See id.* at 853 & n.5.
60. *Id.*
61. 52 F.3d 219 (9th Cir. 1995).
62. *Markel Am. Ins. Co.*, 297 F. App'x at 853 (citing *Certain Underwriters at Lloyd's*, 52 F.3d at 222).
63. 298 F. App'x 813 (11th Cir. 2008).

court that a particular policy was void. The defendant insured alerted the district court to a parallel action pending in state court involving the same issues and successfully moved the district court to stay its action pending the resolution of the state court action. Great Lakes appealed the grant of the stay, arguing that the district court had committed a clear error of judgment by failing to apply the proper test to determine whether to stay the declaratory judgment action.[64]

In affirming the district court's stay of the federal action, the court of appeals noted that district courts have "'substantial latitude'" in the decision to stay or dismiss a declaratory judgment action due to the pendency of related state proceedings.[65] The court of appeals first looked to the permissive language of the Declaratory Judgment Act (DJA),[66] and reasoned that it was "'an enabling Act, which confers a discretion on courts rather than an absolute right upon the litigant.'"[67] The court then cited the nine-factor test for determining whether to accept or decline jurisdiction under the DJA when a related state action is pending.[68] Although the district court did not cite the *Ameritas* test, the court of appeals explained that this list was "'neither absolute nor

64. *Id.* at 814.

65. *Id.* (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995)).

66. 28 U.S.C. § 2201 (2006).

67. *Great Lakes Reinsurance (UK) PLC*, 298 F. App'x at 814 (quoting *Wilton*, 515 U.S. at 287).

68. *See id.* at 815 (quoting Ameritas Variable Life Ins. Co. v. Roach, 411 F.3d 1328, 1331 (11th Cir. 2005)). The nine factors include the following:

> "(1) the strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts;
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> (2) whether the judgment in the federal declaratory action would settle the controversy;
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> (3) whether the federal declaratory action would serve a useful purpose in clarifying the legal relations at issue;
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> (4) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' . . .;
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> (5) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction;
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> (6) whether there is an alternative remedy that is better or more effective;
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> (7) whether the underlying factual issues are important to an informed resolution of the case;
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> (8) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and
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> (9) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action."

Id. (quoting *Ameritas*, 411 F.3d at 1331).

is any one factor controlling.'"[69] Furthermore, the court pointed out that the lower court had addressed several prongs of the *Ameritas* test, including (1) "whether the federal case would serve a 'useful purpose,'" (2) "whether there was a better alternative remedy," and (3) "whether factual issues were important to the resolution of the case."[70]

On appeal, Great Lakes asserted that the district court failed to give sufficient weight to the fact that "uniquely federal" issues of admiralty law were alleged to be central to the federal case.[71] The court of appeals rejected this argument by citing to the "saving to suitors" clause, which "codified the common law right [of an admiralty plaintiff] to seek a jury trial in state court on admiralty issues."[72] The court noted that "Florida courts are regularly required to apply principles of federal maritime law" in cases brought in state court[73] and even went so far as to opine that "state court proceeding[s] actually may provide an alternative remedy that is more effective than the federal action, since it allows for a jury trial on the many fact-intensive questions that are central to this case."[74] Therefore, the court of appeals affirmed the order staying the federal case pending resolution of the state court action.[75]

4. Personal Jurisdiction and Constructive Notice in Marine Insurance. In *Argo Systems FZE v. Liberty Insurance PTE Ltd.*,[76] the Eleventh Circuit affirmed an order of the United States District Court for the Southern District of Alabama dismissing a marine insurers' complaint for lack of personal jurisdiction and entering judgment in favor of a marine insurance broker on the plaintiff's claims of professional negligence and negligent misrepresentation.[77] The plaintiff's vessel sank while in tow to a state not contemplated in the marine insurance

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69. *Id.* at 815-16 (quoting *Ameritas*, 411 F.3d at 1331). While acknowledging that the district court opinion had not expressly cited to the seminal *Ameritas* case or its nine-factor test, the court of appeals also noted that the plaintiff Great Lakes had not cited to the case in its own pleadings either. *Id.*

70. *Id.* at 816.

71. *Id.*

72. *Id.* Also known as the "saving to suitors" clause of maritime jurisdiction, 28 U.S.C. § 1333(1) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [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) (2006).

73. *Great Lakes Reinsurance (UK) PLC*, 298 F. App'x at 816.

74. *Id.* at 817.

75. *Id.*

76. 278 F. App'x 972 (11th Cir. 2008).

77. *Id.* at 973.

policy at issue.[78] The underwriter for the policy denied coverage on the bases that "the vessel was unseaworthy at the inception of the voyage" and it "encountered winds and seas outside of weather parameters recommended by [the plaintiff's marine] surveyor."[79]

The district court granted the insurer's motion to dismiss for lack of personal jurisdiction, finding that the plaintiff unilaterally altered the port of departure to another state, and thus while the policy could attach in the second state, the marine insurers were not purposefully availing themselves of the benefits of doing business in the second state and could not expect to be haled into court in the second state, which was the forum of the plaintiff's suit.[80] As to the plaintiff's claims of professional negligence and negligent misrepresentation against the broker in procuring coverage from the underwriters, the district court found that the broker was not negligent in procuring coverage for the plaintiff because the underwriters had constructive knowledge of the plaintiff's change in port of departure as a result of a trip in tow survey prepared for the underwriters prior to the attachment of coverage over the plaintiff's vessel.[81]

B. Arbitration

In *World Rentals & Sales, LLC v. Volvo Construction Equipment Rents, Inc.*,[82] the Eleventh Circuit considered what circumstances are required to compel a party to arbitrate an agreement it did not sign.[83] The Eleventh Circuit affirmed the United States District Court for the Southern District of Florida's denial of a motion to compel arbitration filed by World Rentals and Sales, LLC and others (World Rentals).[84] World Rentals signed agreements with Volvo Construction Equipment Rents, Inc. (Volvo Rents) to franchise and rent Volvo Rents equipment. The agreements contained two arbitration clauses. In order to finance the deal, World Rentals contracted with Volvo Commercial Finance, LLC (Volvo Finance), an affiliate of Volvo Rents. However, World Rentals did not succeed in the equipment rental business and filed suit against Volvo Rents and Volvo Finance in light of imminent legal action from Volvo Finance to collect on its outstanding loans. Volvo Finance and

78. Argo Systems FZE v. Liberty Ins. PTE, Ltd., 537 F. Supp. 2d 1223, 1225 (S.D. Ala. 2007).
79. *Id.*
80. *Id.* at 1225-26.
81. *Id.* at 1229-30.
82. 517 F.3d 1240 (11th Cir. 2008).
83. *See id.* at 1242.
84. *Id.*

Volvo Rents retaliated with counterclaims, and Volvo Rents moved to stay the pending actions in favor of arbitration. Volvo Finance, however, sought dismissal. World Rentals changed course midstream and moved to arbitrate the entire dispute with Volvo Finance, Volvo Rents, and others. Volvo Finance fought any compulsion to arbitrate, and the district court agreed, concluding that Volvo Finance could not be forced to arbitrate under the World Rentals-Volvo Rents agreement.[85]

World Rentals essentially argued that the agreements between World Rentals and Volvo Rents containing two separate arbitration clauses were binding on Volvo Finance as a matter of contract or, in the alternative, on a noncontractual basis (either an agency, veil-piercing, or estoppel basis).[86] The district court concluded that Volvo Finance could not be compelled to arbitrate, and the Eleventh Circuit agreed, holding that there were no contractual or noncontractual grounds to require Volvo Finance to arbitrate under the terms of the World Rentals-Volvo Rents agreement.[87] The Eleventh Circuit considered the definitions of "franchisee" and "franchisor" (World Rentals and Volvo Rents, respectively) to conclude that while the arbitration clauses of the World Rentals-Volvo Rents agreements were incorporated by reference into the agreements between World Rentals and Volvo Finance, the definitions of the respective parties subject to arbitration ("franchisee" and "franchisor") explicitly did not apply to Volvo Finance.[88] In the sense of maritime arbitration, this case has additional significance because the Eleventh Circuit analyzed and impliedly adopted the rationale of the United States Court of Appeals for the Second Circuit in *Import Export Steel Corp. v. Mississippi Valley Barge Line Co.*[89] In that case, the Second Circuit held that as a charterer's affiliates, a cargo owner or notify party on a bill of lading could not invoke an arbitration clause in a charter party between the charterer and owner incorporated by reference into a bill of lading when the arbitration clause restricts itself to the immediate parties that sign it.[90]

C. Suits in Admiralty Act

In *Captain Chance, Inc. v. United States*,[91] the Eleventh Circuit affirmed the opinion of the United States District Court for the Middle

85. *Id.* at 1243-44.
86. *Id.* at 1244.
87. *Id.* at 1249.
88. *Id.* at 1245-47.
89. 351 F.2d 503 (2d Cir. 1965).
90. *Id.* at 505-06.
91. 276 F. App'x 916 (11th Cir. 2008).

District of Florida, noting that the opinion was well-reasoned.[92] The plaintiffs filed suit against the United States Coast Guard pursuant to the Suits in Admiralty Act (SAA),[93] alleging negligence on the part of the Coast Guard in locating, marking, and notifying mariners of a submerged channel marker which allegedly caused the sinking of the plaintiffs' vessel.[94] The Coast Guard is amenable to suit through the SAA, but this waiver of sovereign immunity is not absolute because it does not apply to suits arising out of "discretionary functions" of the Coast Guard identified in the Federal Tort Claims Act (FTCA).[95] The discretionary function exception is applied to the waiver of sovereign immunity (resulting in immunity from suit) when "[the conduct] involves 'an element of judgment or choice,'" and "'the judgment or choice is grounded in considerations of public policy.'"[96]

The district court found that the standards in the Coast Guard's Aids to Navigation Administration Manual preserved elements of the Coast Guard's judgment and choice, which prevented the establishment of a fixed or readily ascertainable standard regarding the marking of wrecks.[97] This resulted in a negation of the waiver of sovereign immunity under the SAA, per the FTCA exception for such discretionary functions.[98]

D. Salvage

In *Cape Ann Towing v. M/Y UNIVERSAL LADY*,[99] the Eleventh Circuit evaluated findings of the Southern District of Florida regarding whether there was reasonable apprehension of maritime peril, as required for a maritime salvage award.[100] A claim for a salvage award requires that a potential salvor demonstrate the existence of a reasonably apprehended maritime peril.[101] In this case, after the passing of a hurricane, Cape Ann Towing found the M/Y UNIVERSAL LADY in strong wind conditions afloat in a marina, secured by a rope, yet

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92. *Id.* at 916.

93. 46 U.S.C.A. §§ 30901-30918 (West 2007).

94. Captain Chance, Inc. v. United States, 506 F. Supp. 2d 1196, 1199 (M.D. Fla. 2007).

95. *Id.* at 1201 (citing 28 U.S.C. § 2680(a) (2006)); 28 U.S.C. §§ 2671-2680 (2006).

96. *Captain Chance, Inc.*, 506 F. Supp. 2d at 1201-02 (quoting Cranford v. United States, 466 F.3d 955, 958 (11th Cir. 2006)).

97. *Id.* at 1202.

98. *See id.* at 1206.

99. 268 F. App'x 901 (11th Cir. 2008).

100. *See id.* at 902.

101. *Id.* (citing Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir. 1985)).

positioned next to and above broken concrete pilings. The district court found that these circumstances did not amount to a maritime peril that is required for a salvage award.[102] The court of appeals affirmed this holding under a review for clear error, noting that the district court's factual findings should be upheld despite the vessel's proximity to several broken concrete pilings because amid improving weather conditions, testimonial evidence and photographs demonstrated that the vessel was afloat in a marina and secured by rope to another yacht, without any apparent damage that would have put her at risk of sinking.[103]

E. Admiralty Jurisdiction and "Vessel" Status

In *Board of Commissioners of the Orleans Levee District v. M/V BELLE OF ORLEANS*,[104] the Eleventh Circuit was presented with an opportunity to tackle the "vessel" status question and its application to gaming boats in the wake of the recent United States Supreme Court decision in *Stewart v. Dutra Construction Co.*[105] *BELLE OF ORLEANS* centered around a dispute in the United States District Court for the Southern District of Alabama[106] concerning the BELLE OF ORLEANS, a paddlewheel vessel used for riverboat gaming, and certain maritime lien, tort, and contract claims that arose after the vessel broke loose from her moorings during Hurricane Katrina.[107]

The BELLE OF ORLEANS was purchased at a time when Louisiana law required that riverboat casinos cruise in navigable waters when engaged in gaming operations.[108] After that law was abolished in 2001, the BELLE OF ORLEANS began conducting its gaming operations in a "continuously moored status," although she continued to be manned

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102. *Id.* at 902-03.

> In order to establish a claim for a salvage award, a potential salvor must demonstrate (1) the existence of a maritime peril from which the property could not have been saved without the salvor's assistance; (2) a voluntary act on the part of the salvor; and (3) the salvor's success in saving the property.

Id. at 902 (citing *Klein*, 758 F.2d at 1515).

103. *Id.* at 903.

104. 535 F.3d 1299 (11th Cir. 2008).

105. *See id.* at 1306; 543 U.S. 481 (2005).

106. Although the BELLE OF ORLEANS was operated in Louisiana, the case originated in the courts of Alabama after a Rule B attachment proceeding was brought against the vessel after it was towed to Mobile, Alabama, for post-hurricane repairs. *See* Bd. of Comm'rs v. M/V BELLE OF ORLEANS, 439 F. Supp. 2d 1178, 1184-85 (S.D. Ala. 2006) *reversed by M/V BELLE OF ORLEANS*, 535 F.3d at 1316.

107. *BELLE OF ORLEANS*, 535 F.3d at 1302-04.

108. *Id.* at 1303-04 (citing LA. REV. STAT. ANN. § 27:65 (2001)) (current version at LA. REV. STAT. ANN. § 27:65 (Supp. 2009)).

by a full complement of captain and crew and maintained her engines, generators, and equipment in working order.[109]

The Board of Commissioners of the Orleans Levee District (the Board) brought suit to enforce a maritime lien against the gaming vessel after the Board's marina sustained damage as a result of the vessel's breakaway[110] and also sued the vessel's owner for failure to make rent payments to the Board.[111] After the vessel and its owners disputed the existence of admiralty jurisdiction, the threshold and principal issue in the case became the status of the BELLE OF ORLEANS as a vessel for the purpose of establishing admiralty jurisdiction.[112] The district court held that the BELLE OF ORLEANS was not a vessel, and thus there was no admiralty jurisdiction over either the tort or contract claims.[113]

After acknowledging that the Supreme Court and the Eleventh Circuit have historically taken an "'expansive view' of admiralty jurisdiction,"[114] the Eleventh Circuit undertook the difficult task of comparing the various cases' factual elements to the BELLE OF ORLEANS's situation.[115] The district court relied heavily on a line of Fifth Circuit cases beginning with *Pavone v. Mississippi Riverboat Amusement Corp.*,[116] while the Eleventh Circuit placed greater emphasis on the reasoning of *Pleason v. Gulfport Shipbuilding Corp.*[117] *Pavone* involved Jones Act claims brought by employees stationed on a moored dockside casino in Biloxi, Mississippi, called the BILOXI BELLE.[118] The BILOXI BELLE was originally constructed as a barge and maintained "'no engine, no captain, no navigational aids, no crewquarters and no lifesaving equipment.'"[119] The court determined that the BILOXI BELLE was not a vessel for the purpose of Jones Act jurisdiction.[120] *Pleason*, on the other hand, involved a former Navy salvage and repair vessel called the CAROL ANN, that had been converted into a shrimp-processing plant.[121] The CAROL ANN had a deck, a cabin,

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109. *Id.* at 1304.
110. *Id.* at 1304-05.
111. *Id.* at 1305 n.8.
112. *Id.* at 1305-06.
113. *Id.* at 1302.
114. *Id.* at 1306 (quoting Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 901 (11th Cir. 2004)).
115. *See id.* at 1306-12.
116. 52 F.3d 560 (5th Cir. 1995).
117. 221 F.2d 621 (5th Cir. 1955); *see BELLE OF ORLEANS*, 535 F.3d at 1308-09.
118. *BELLE OF ORLEANS*, 535 F.3d at 1307 (citing *Pavone*, 52 F.3d at 562-63).
119. *Id.* at 1307-08 (quoting *Pavone*, 52 F.3d at 564).
120. *Id.* (citing *Pavone*, 52 F.3d at 570).
121. *Id.* at 1306 (citing *Pleason*, 221 F.2d at 622).

and a superstructure and was capable of being used as a means of water transportation, even though her propellers and main engine had been removed.[122] The court held that the CAROL ANN was indeed a "vessel" for the purpose of being subject to a maritime lien enforceable by suit in rem.[123]

The "vessel" status analysis then turned to *Stewart* and its emphasis on a craft's *capability* to be used as a vessel, as opposed to its *present use or station*.[124] Both parties attempted to argue that *Stewart* supported their position, but the court of appeals focused on the language in *Stewart* instructing the courts to decide whether the craft's use "'as a means of transportation on water is a practical possibility or merely a theoretical one.'"[125] After reviewing a litany of cases involving indefinitely-moored casino boats,[126] the court ultimately determined that the craft had not been "'rendered practically incapable of transportation or movement'"[127] when she was moored in 2001 because "all her crew would have had to do was unmoor her cables and start up her engine" in order to sail.[128] The BELLE OF ORLEANS was therefore determined to be a vessel for purposes of admiralty jurisdiction, and the district court's jurisdictional findings based on nonvessel status were reversed.[129]

F. Forum Non Conveniens

In the unpublished opinion of *Vega v. Cruise Ship Catering & Service International*,[130] the Eleventh Circuit revisited the question of whether a plaintiff's inability to file suit in an alternative forum due to unavailability of contingency fee arrangements could, standing alone, render a forum unavailable.[131] The Colombian crewman Vega—who had signed an employment contract in Colombia—was injured aboard a vessel

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122. *Id.* at 1307 (quoting *Pleason*, 221 F.2d at 622-23).

123. *Id.* (quoting *Pleason*, 221 F.2d at 623).

124. *Id.* at 1309-10 (citing *Stewart*, 543 U.S. at 496).

125. *Id.* at 1310 (quoting *Stewart*, 543 U.S. at 496).

126. *See id.* at 1311-12 (citing De La Rosa v. St. Charles Gaming Co., 474 F.3d 185 (5th Cir. 2006); Tagliere v. Harrah's Ill. Corp., 445 F.3d 1012 (7th Cir. 2006); Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973)).

127. *Id.* at 1312 (quoting *Stewart*, 543 U.S. at 494).

128. *Id.*

129. *Id.* The district court's finding of no admiralty jurisdiction over the Board's in rem contract claim for unpaid rent was upheld on grounds other than the vessel status issue because only five percent of the total land leased under the agreement was related to a wharf, with the remaining ninety-five percent being land whose primary purpose was not related to wharfage. *Id.* at 1315-16.

130. 279 F. App'x 946 (11th Cir. 2008).

131. *See id.* at 947.

located off the coast of Italy. The crewman was treated by a physician on board the vessel and underwent surgery in Italy days later. After recuperating, he returned to Colombia, and three years later he moved to the United States where he underwent additional medical treatment for his injury.[132]

The crewman later filed suit under the Jones Act, and the United States District Court for the Southern District of Florida dismissed the suit for forum non conveniens,[133] without prejudice, so that the suit could be refiled in the event that the suit was not accepted by an alternative fora.[134] As the plaintiff, the crewman filed a notice of appeal from the district court's order and later dismissed that appeal with prejudice. Almost a year later, the plaintiff filed a motion to reinstate the case on the basis that the alternative fora identified in the district court's order of dismissal did not allow for contingency fee arrangements. The district court denied this motion.[135] The Eleventh Circuit reviewed the district court's denial of the motion to reinstate for abuse of discretion and affirmed, noting that a plaintiff's need for a contingency-based fee arrangement due to financial circumstances is but one factor to be weighed against others in a forum non conveniens analysis.[136]

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132. *Id.*

133. For a recent discussion of basic concepts concerning forum non conveniens, see *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), wherein the Supreme Court granted certiorari to resolve a conflict among the Circuits on whether forum non conveniens can be decided prior to matters of jurisdiction. *Id.* at 428-29. For further research, consult *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Membreno v. Costa Crociere S.P.A.*, 425 F.3d 932 (11th Cir. 2005); and *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985).

134. *Vega*, 279 F. App'x at 947.

135. *Id.*

136. *Id.* at 947-48.

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