

The 12th Nicholas J. Healy Lecture on Admiralty Law

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WISH LIST: MARITIME MATTERS OUR GOVERNMENT MIGHT PROFITABLY ADDRESS

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I. INTRODUCTION

It is a distinct honor to be asked to deliver the Fourteenth Nicholas J. Healy Lecture on Admiralty Law. I knew and admired Nick Healy over many years. He was always accommodating to me, and I was in awe of his knowledge and experience.

I have been invited to address my “wish list” for maritime matters that our Supreme Court might profitably address. In undertaking this task, I am reminded of a book my colleague at the University of North Carolina Law School, Herbert R. Baer, published in 1963, titled “Admiralty Law of the Supreme Court”¹, which details substantially all the admiralty cases decided by the Supreme Court of the United States up to that date. Herb Baer and I were colleagues only briefly; I was starting my career as a law professor and he was on the brink of retirement, but I enjoyed discussing with him the Supreme Court decisions on maritime law and his scholarship in our field. Herb was a competent scholar, but his book came in for some criticism in a book review published in 1963 by Eberhard P. Deutsch in the Louisiana Law Review.² Mr. Deutsch, whom it was my pleasure to get to know in 1979, after I joined Tulane Law School as Associate Dean in 1979, was ---- with Nick Healy, our honoree today ---- at the pinnacle of the proctors in admiralty then practicing law, and he did not mince words when discussing Herb Baer’s book, which he called “disappointing”. But Mr. Deutsch did agree with Professor Baer on one important matter: Deutsch says in his review that “the author’s conclusion that the [Supreme Court] has sailed too far off course ... is amply supported.”³

At the outset I want to make clear, however, that I do not share the view of these scholars that the Supreme Court has “sailed off course” with respect to its admiralty jurisprudence. On the contrary, admiralty law in the United States is largely the product of, not only the Congress, but of the Supreme

¹ Herbert R. Baer, Admiralty Law of the Supreme Court (The Michie Company, 1963).

² Eberhard P. Deutsch, Book Review, 23 La. L. Rev. 817 (1963).

³ Ibid at 818.

Court. When one surveys the entire history of the Supreme Court's admiralty jurisprudence, the number of decisions and their range and impact is truly astounding.

The Supreme Court's admiralty jurisprudence dates from August, 1795⁴, when the Court decided two important cases. The first case was *Talbot v. Jansen*⁵, a decision of high interest since a unanimous Court ruled that federal admiralty jurisdiction extended to a claim to a Dutch vessel which had been seized on the high seas by a privateering vessel. The claimant, Talbot, was an enterprising resident of Virginia who had outfitted a vessel, the *Fairplay*, with armament and taken her to the French West Indies island of Guadeloupe, where he took French citizenship and changed the name of the vessel to *Ami de la Liberte*. Talbot argued that the Dutch ship, the *Magdalen*, was a legal prize of war because France and the Netherlands at the time were engaged in hostilities. The Court, although conceding Talbot's French citizenship, ruled that he remained a citizen of the United States and that his seizure and claim to the Dutch ship was in violation of the "law of nations" as well as United States law, the Neutrality Act of 1794.

Two days later the Court, in the case *United States v. Peters*⁶, issued a writ of prohibition to a District Court judge in Philadelphia forbidding the exercise of jurisdiction over *The Cassius*, an armed privateer commissioned by the government of France. As a sovereign commissioned vessel, the ship was immune from seizure despite the fact that there was evidence it had wrongfully commandeered the *William Lindsay*, an American cargo vessel, in Santo Domingo. The French Ambassador then took the extraordinary step of formally abandoning *The Cassius* and discharging her crew. So presumably the owners of the *William Lindsay* recouped at least some of their losses.

These cases were, of course, the first of several hundred admiralty cases handed down by the Supreme Court. Considering this great body of jurisprudence over 220 years, it is truly remarkable how the Supreme Court has carefully monitored this area of law and stepped in when needed to decide key issues and cases. Of course, one can criticize individual decisions, but over the years virtually every area of maritime law has been addressed in a positive way by the Court.

As to the Supreme Court's task with respect to maritime law, I would like to cite with approval Justice Ginsburg's statement in her concurring opinion in *Norfolk Shipbuilding & Drydock Corp. v. Garris*⁷, where she stated (joined by Justices Souter and Breyer): "I see development of the law in admiralty as a shared venture in which federal common lawmaking does not stand still, but harmonizes with the enactments of Congress in the field."⁸ It is interesting and important to note that Justice Ginsburg made this point in *opposition* to the following statement made by Justice Scalia in the opinion of the Court: "Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes allow, to leave

⁴ I want to thank Gordon "Dal" Schreck, distinguished admiralty proctor in Charleston, South Carolina, for alerting me to this case.

⁵ 3 U.S. (Dall.) 133 (1795).

⁶ 3 U.S. (Dall.) 121 (1795).

⁷ 532 U.S. 811, 121 S.Ct. 1927, 150 L.Ed. 2d 34, 2001 AMC 1817 (2001).

⁸ 532 U.S. at 826.

further development to Congress.”⁹ My paper today, I hope, will show the great wisdom of Justice Ginsburg’s statement, and how the Supreme Court’s jurisprudence belies Justice Scalia’s remark.

The principal purpose of my comments today, of course, is to address selected contemporary maritime issues that the Supreme Court might choose to hear in the future. Before undertaking this task, however, I wish to address the matter of whether there are maritime treaties pending over which the United States Senate should give their “advice and consent” leading to ratification.

II. Three Treaties that should be Ratified

As prologue to my main task, which is to address issues which might be decided by the Supreme Court, I would like to briefly advocate that the United States Senate should ratify three pending maritime law treaties.

First and foremost, the Senate should urgently ratify the United Nations Convention on the Law of the Sea.¹⁰ This is not the place for detailed explanation of the reasons why ratification of this Convention is in the interests of the United States. Suffice it to state in summary form the main reasons:

- UNCLOS is the internationally recognized “constitution” comprehensively addressing the use of the world’s oceans and natural resources.
- Provisions of UNCLOS guaranteeing ocean navigation and overflight are essential to United States security.
- The 162 UNCLOS parties are shaping the future of many key maritime institutions, such as the International Tribunal for the Law of the Sea, the International Seabed Authority, and the Commission on the Limits of the Continental Shelf. The United States is currently shut out of decisions regarding these important institutions, which will determine international policy with regard to the oceans and their resources.
- Customary international law, upon which the United States currently depends to guarantee its maritime law international rights, is vague and ambiguous in comparison with treaty law rules. The United States is currently without an international forum before which the nation may assert and defend its rights under maritime law.

These and other serious deficiencies may only be ameliorated by becoming a party to UNCLOS.

A second treaty that should be ratified by the United States is the 1976 Convention on Limitation of Liability for Maritime Claims and its 1996 Protocol.¹¹ These two agreements provide a modern system of limitation of liability as well as realistic limitations and procedures. The limitation provisions of these Conventions are also virtually unbreakable and therefore easy to understand and apply by courts. Ratification of these Conventions by the Senate would supersede the antiquated U.S. law, which dates from 1851¹² and under which limitation is relatively easy to break and avoid. The ratification of these

⁹ 532 U.S. at 817.

¹⁰ Montego Bay, Jamaica, December 10, 1982, 1833 U.N.T.S. 397.

¹¹ Text of both treaties is available at <http://www.imo.org>.

¹² Shipowners’ Limitation of Liability Act, 46 USC secs. 30501-30512.

treaties would modernize United States law in this area as well as advance the goals of international uniformity and cooperation in maritime matters.¹³

A third maritime treaty the Senate should consider is the Rotterdam Rules.¹⁴ The Rotterdam Rules constitute a modernized law to govern the multimodal carriage of goods by sea and the Rules also accommodate the international rules that have been adopted for land modes of transport. I have published elsewhere¹⁵ a detailed evaluation of the Rotterdam Rules, to which I refer the reader. The Rotterdam Rules have been approved for ratification by the members of the Maritime Law Association of the United States. The Rules deserve favorable consideration by the U.S. Senate.

III. My “Wish List” for Supreme Court Review

I shall address four areas of maritime law in turn where I think Supreme Court intervention would be a positive step to clarify the law: (1) marine insurance; (2) multimodal carriage of goods; (3) marine pollution; and (4) maritime personal injury and death.

A. Marine Insurance

The Supreme Court should revisit the matter of the applicable law in cases of marine insurance. The marine insurance industry is truly international, and London still reigns supreme as the preeminent *situs* for both underwriting marine risks and settlement of disputes. The English law of marine insurance is one of the greatest accomplishments of the great system of English law.

Much of the substantive law of marine insurance was formulated by the great jurist, Lord Mansfield (William Murray), who was Chief Justice of the Court of King’s Bench from 1756 to 1788. Mansfield’s decision and formulation of marine insurance law reflected the “rule of reason” of the period of the Eighteenth Century known as the “Enlightenment”. Mansfield’s rulings and writings were collected into a published treatise on the law of marine insurance by Sir James Alan Park, and the systematic exposition of marine insurance law was continued by Samuel Marshall, who published “A Treatise on the Law of Marine Insurance Bottomry and Respondentia” in the United Kingdom (1802) and the United States (1810). Justice Joseph Story was no doubt familiar with all these works when he penned his decision (amounting to a treatise on the law of admiralty) in *DeLovio v. Boit*¹⁶, which ruled that a marine insurance contract is maritime contract within the federal jurisdiction of the United States. The English law of marine insurance was codified and enacted as statutory law in the Marine Insurance Act, 1906.¹⁷ For roughly 150 years, the Supreme Court of the United States and lower federal courts were

¹³ See Maritime Law Association of the United States, Report of the Advisory Committee on the Limitation of Liability Act, September 25, 2010, available at <http://www.mlaus.org>.

¹⁴ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, accessible at http://treaties.un.org/doc/publications/CTC/Ch_XI_D_8.pdf.

¹⁵ Thomas J. Schoenbaum, An Evaluation of the Rotterdam Rules, The Hamburg Lectures on Marine Affairs 2011-2013, 21 (Springer, 2014).

¹⁶ 7 F. Cas. 418 (C.C. D. Mass. 1815).

¹⁷ 6 Edw. 7, ch. 41.

content to apply this English law of marine insurance as the applicable American law, since the United States had not enacted its own marine insurance law.¹⁸

This state of affairs fundamentally changed in 1955, with the Supreme Court's decision in *Wilburn Boat v. Fireman's Fund Ins. Co.*¹⁹, which is an example that proves the old adage: "hard cases make bad law." *Wilburn Boat* involved an insured vessel, the *Wanderer*, that was destroyed by fire while moored in Lake Texoma, an artificial inland lake between Texas and Oklahoma. When the insurer denied coverage of the loss because of the insured's violation of policy warranties that stated the *Wanderer* could not be sold or chartered and could only be used for "private pleasure purposes", the company holding legal title to the vessel brought suit to assert coverage. The Supreme Court majority, obviously influenced by the plight of the Texas merchants who had lost their boat, reversed the decisions of the District Court and the Court of Appeals and announced a new rule of choice of law in marine insurance cases. The essential questions in marine insurance cases, the Court stated were: "(1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?"

The Court majority answered both of these questions in the negative. First, the Court stated that a rule on warranties in a marine insurance policy "has not been judicially established as part of the body of admiralty law of this country."²⁰ Second, the Court ruled that "the whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties."²¹ The Court then ruled that state insurance law applied to the marine policy at issue.

This decision has caused great confusion in the lower federal courts ever since it was decided. *Wilburn Boat* can be criticized on three grounds. First, the rule expounded by the Supreme Court in *Wilburn Boat* is far from clear. Was the Court stating a preference for the application of state law in marine insurance contracts? Many courts interpret *Wilburn Boat* in this fashion. For example, in the case of *Albany Ins. Co. v. Anh Thi Kieu*²², the Fifth Circuit, citing *Wilburn Boat*, proclaimed: "the U.S. Supreme Court [has] concluded that the regulation of marine insurance is, in most instances, properly left with the states."²³ Some courts, however, state the rule in the converse, stating a preference for federal or English law and holding that state law applies only in the absence of an entrenched federal law rule.²⁴ Some courts take a middle ground, ruling that state law will control a marine insurance policy only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice.²⁵ The idea of these courts seems to be that state law applies because admiralty law is incomplete. A fourth group of courts simply ignore *Wilburn Boat* and state the rule applicable in the particular Circuit for the

¹⁸ E.g., *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493, 44 S.Ct. 176, 68 L.Ed. 402, 1924 AMC 107 (1924).

¹⁹ 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337, 1955 AMC 467 (1955).

²⁰ 348 U.S. at 320.

²¹ 348 U.S. at 321.

²² 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991).

²³ 927 F.2d at 886.

²⁴ E.g., *Kamta AS v. Royal Ins. Co.*, 21 P.3d 1150 (Wa. Ct. App. 2001).

²⁵ E.g., *Kalmbach, Inc. v. Ins. Co. of the State of Pennsylvania*, 422 F. Supp. 44.45 (D. Ark. 1976).

issue at hand, whether it is warranties or utmost good faith or some other matter.²⁶ The fact that after 60 years of cases, there seems to be no one interpretation of the *Wilburn Boat* rule is strong indication that repair is in order.

A second problem with the *Wilburn Boat* rule is that much of the time it leads the court into choice of law questions, which can be tricky at best. Under *Wilburn Boat* state law applies to a marine insurance policy, but what state law? In many cases there may be plausible arguments in favor of the law of two or more states. In *Wilburn Boat* itself this was the case. The boat in question was destroyed by fire on a lake located between Oklahoma and Texas. On remand from the Supreme Court, the lower courts had trouble deciding the choice of law issue; the Fifth Circuit finally decided that the record of the case did not contain enough information to determine which state's law applied so the case was remanded for trial.²⁷ Ultimately, some years later, the Fifth Circuit ruled in favor of the insurers, not on the basis of any state law provision, but rather on the basis of a clause contained in the marine policy itself.²⁸

A third criticism of *Wilburn Boat* is that the ruling endangers admiralty uniformity in marine insurance law. Since shipping is quintessentially an international industry, admiralty uniformity should be paramount with respect to the law applicable to marine insurance contracts. Certainly it is easy to distinguish between ordinary insurance law, where policies of insurance are written with respect to localized or land-based entities, and marine insurance, which applies primarily to ships and shipping. When Congress passed the McCarran-Ferguson Act²⁹ ceding insurance regulation to the states, surely it did not have in mind the business of shipping. The impact of the *Wilburn Boat* rule has been to interject uncertainty at best and splits of authority at worst into the law of marine insurance. For example, courts have rendered inconsistent judgments with respect to two very important areas of marine insurance law: the duty of utmost good faith (*uberrimae fidei*) and the law of warranties. With respect to utmost good faith, although most courts apply this rule in marine insurance cases³⁰, a minority of courts, relying on state law, reject the strict application of this rule.³¹ The law of warranties in marine insurance contracts is similarly diversely interpreted by federal courts³²

²⁶ E.g., see *Catlin at Lloyd's v. San Juan Towing and Marine Services*, 2013 AMC 2724, 2729-30 (D.P.R. 2013).

²⁷ 259 F.2d 662, 1958 AMC 2337 (5th Cir. 1958).

²⁸ *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 1962 AMC 1593 (5th Cir. 1962).

²⁹ 15 U.S.C. sec. 1011 et seq.

³⁰ E.g., *HIH Marine Services, Inc. v. Fraser*, 211 F.3d 259, 2000 AMC 1817 (11th Cir. 2000). In addition, the Second, Third and Ninth Circuits apply utmost good faith. *Puritan Ins. Co. v. Eagle S.S. Co. S. A.*, 779 F.2d 866, 1986 AMC 240 (2d Cir. 1985); *AGF Marine Aviation & Transport Co. v. Cassin*, 544 F.3d 255 (3d Cir. 2008); *Certain Underwriters at Lloyd's, London v Inlet Fisheries, Inc.*, 518 F.3d 645 (9th Cir. 2008). The First Circuit has questioned whether utmost good faith is well-established, but has not decided the issue. *Lloyd's of London v. Pagan-Sanchez*, 539 F.3d 19, 2008 AMC 1900 (1st Cir. 2008). Nevertheless, the lower courts in the First Circuit apply utmost good faith. See *Markel American Ins. Co. v. Jose Leonor Veras*, 2014 AMC 1452 (D. P.R. 2014). A lower court in the Eighth Circuit also applied utmost good faith. See *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda*, 2014 AMC 1494 (D. Minn. 2014).

³¹ E.g., *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991).

³² Compare, e.g., *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1988 AMC 1238 (11th Cir. 1988) [the court ignored *Wilburn Boat* to rule that breach of an express warranty releases the insurer from liability even if there is no causal relationship to the loss]; and *Windward Traders, Ltd. v. Fred S. James & Co. of New York, Inc.*, 855 F.2d

How should the Supreme Court reform the *Wilburn Boat* rule? In my opinion, the Court should overrule *Wilburn Boat* and hold that marine insurance law is federal admiralty law, applying the familiar rule that with admiralty jurisdiction comes the application of substantive admiralty law.³³ Of course familiar rules allowing the application of state law in admiralty would apply; state law is permitted to apply in admiralty where there is no conflict with federal admiralty law and where the application of the state law rule would not adversely impact admiralty uniformity or a characteristic feature of maritime law.³⁴ A ruling of this sort would make clear that marine insurance law is federal admiralty rule and that the federal courts can --- as they could before *Wilburn Boat* was handed down --- look to English law for the federal admiralty law rule. Moreover, doubtless in this circumstance the American Law Institute would commission the drafting of a Restatement of Marine Insurance Law. Such developments would have salutary impacts on the entire corpus of marine insurance law in the United States.

B. Multimodal Carriage of Goods

The Supreme Court has decided several important cases on multimodal carriage of goods by sea³⁵, and it seems that each case the Court decides opens up additional issues of high importance. Particularly interesting is the Court's ruling in the *K Lines case*³⁶ that the Carmack Amendment does not apply to a shipment of cargo originating overseas under a single, through bill of lading.³⁷ The Court upheld a Clause Paramount in the bill of lading making the Carriage of Goods by Sea Act (COGSA) the relevant liability regime as well as a Himalaya Clause protecting subcontractors of the carrier from Carmack liability. In *K Lines* the Court, making the point that in an import shipment from overseas on a multimodal, through bill of lading, it makes no sense to apply two bill of lading legal regimes to the same shipment of cargo. Thus, it is settled that a multimodal through bill of lading issued for overseas import transportation may exclude Carmack liability altogether in favor of COGSA. Lower federal courts have construed the *K Lines* opinion to give effect to a bill of lading provision exonerating subcarriers of the cargo and making the ocean carrier exclusively liable for any cargo damage.³⁸

What about the question that the *K Lines* case left open --- a multimodal *export* transaction on a through bill of lading? In *K Lines* the Supreme Court stated in dicta that multimodal through bills of lading should best be subjected to one liability regime, but the actual holding of the case was somewhat narrower. In *K Lines* the Court established a two-part test for determining whether Carmack applies to a specific transport of cargo:

814 (11th Cir. 1988) [applying Florida law, there must be a causal relationship between the breach of warranty and the loss].

³³ *Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205 (1917).

³⁴ *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 125 S. Ct. 385, 160 L.Ed. 2d 283, 2004 AMC 2705 (2004).

³⁵ E.g., *Norfolk Southern Ry. v. James N. Kirby, PTY Ltd.*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed. 2d 283, 2004 AMC 2705 (2004); and *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 560 U.S. 89, 130 S.Ct. 2433, 177 L.Ed. 424, 2010 AMC 1521 (2010) [hereinafter "the *K Lines case*"].

³⁶ *Kawasaki Kisen Kaisha v. Regal-Beloit Corp.*, 560 U.S. 89 (2010).

³⁷ 560 U.S. at 100.

³⁸ *Sompo Japan Ins. Company of America v. Norfolk Southern Ry Co.*, 2014 AMC 579 (S.D. N. Y. 2013), *aff'd*, 2014 AMC 1817 (2d Cir. 2014).

First, the rail carrier must “provide transportation or service subject to the jurisdiction of the Surface Transportation Board” [STB]. Second, that carrier must “receive” the property “for transportation under this part” [meaning the STB’s jurisdiction over domestic rail transport]. Carmack thus requires the receiving rail carrier --- but not the delivering or connecting rail carrier --- to issue a bill of lading.³⁹

Under this test ascertaining the cargo shipment’s point of origin is critical to deciding whether the Carmack Amendment applies. Not surprisingly, the lower federal courts have split over the issue of whether Carmack applies to the inland segment of an overseas *export* transaction.⁴⁰ To top things off, the Sixth Circuit Court of Appeals in *CNA Ins. v. Hyundai Merchant Marine Co. Ltd.*⁴¹, although agreeing that as a general rule Carmack does not apply to the inland leg of an overseas export shipment, construed a provision of the particular bill of lading involved as importing Carmack liability into the contract, thus imposing full Carmack liability on the multimodal carrier.⁴²

It appears essential, in the light of these confusing and contradictory decisions for the Supreme Court to take up the issues involved in overseas, multimodal *export* transactions. The better view is to treat export and import transactions the same and not to subject export transactions to different liability standards from import transactions.

C. Marine Pollution

A third topic I would like to see the Supreme Court take up is the question of the extent of application and/or preemption of state law relating to oil pollution occurring on the federal outer continental shelf, but affecting the waters and shorelines of a state or states. This question has arisen most recently in connection with the Deepwater Horizon BP oil spill of April 20, 2010, and has been discussed extensively in two court decisions, Judge Barbier’s opinion of August 26, 2011⁴³, and the Fifth Circuit’s decision of February 24, 2014.⁴⁴ Both courts came to the same conclusion --- state law is preempted and does not apply to a discharge of oil on the federal outer continental shelf. While I admire greatly the magnificent job being done by Judge Barbier and his staff as well as the Fifth Circuit in dealing with one of the most complex litigations in American history, I am not sure that they have given the right answer on this important question, and I would like to see the questions involved taken up by the Supreme Court.

³⁹ 560 U.S. at 99.

⁴⁰ Compare *American Home Assurance Co. v. Panalpina, Inc.*, 2011 AMC 733 (S.D. N.Y. 2011) [applying Carmack]; *Hartford Fire Ins. Co. v. Expeditors Int’l*, 2012 AMC 1934 (S.D. N. Y. 2012) [applying COGSA]; *Royal & Sun Alliance Ins. v. Service Transfer, Inc.*, 2013 AMC 345 (S.D. N. Y. 2012) [rejecting Carmack]; and *Norfolk Southern Ry. v. Sun Chemical Co.*, 2013 AMC 135 (Ga. Ct. App. 2012) [applying COGSA].

⁴¹ 2014 AMC 609 (6th Cir. 2014).

⁴² One member of the panel filed a persuasive dissenting opinion. 2014 AMC at 664.

⁴³ *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 808 F.Supp. 2d 943 (E.D. La. 2011).

⁴⁴ *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 745 F.3d 157, 2014 AMC 2600 (5th Cir. 2014).

However, on October 20, 2014, the Supreme Court denied certiorari in the latter case, so the Fifth Circuit's ruling that state law is preempted is now final.⁴⁵

The preemption issue is very complex; three separate statutes are relevant to determining if state law applies. Let us walk through the three statutes to understand the issues involved.

The first relevant statute is the Outer Continental Shelf Lands Act (OCSLA).⁴⁶ Section 1333(a) (1) of this Act, which was passed originally in 1953, then amended in 1978, extends the Constitution and laws and civil and political jurisdiction of the United States over the seabed and the subsoil of the outer continental shelf, including "all installations and other devices permanently or temporarily attached to the seabed". [Note that this poorly drafted statutory formulation leaves out the water column, but this is presumed to be included as well]. With regard to state law, section 1333 (a) (2) (A) extends the civil and criminal law of each adjacent state --- state law as surrogate United States law --- "for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf." Importantly, this extension of state law is qualified as follows: "[t]o the extent that [the state laws in question] are not inconsistent with other Federal laws and regulations ... now in effect or hereinafter adopted." Note the inconsistency between these two operative sections: federal law is extended over the entire outer continental shelf, including to devices temporarily attached to the seabed, while state law (surrogate federal law) is extended only to the seabed and subsoil and artificial islands and fixed structures, leaving out devices temporarily attached to the seabed.⁴⁷

The Fifth Circuit employs what is known as the "PLT test"⁴⁸ to determine whether state law is surrogate federal law in any particular case. The PLT test has three prongs; (1) the controversy must arise on a *situs* covered by the OCSLA --- the subsoil, the seabed, or artificial structures either permanently or temporarily attached to the seabed; (2) federal maritime law must not apply of its own force; and (3) the state law in question must not be inconsistent with applicable federal law. [Parenthetically, note that this test is flawed --- 43 U.S.C. section 1333(a) (2) (A) does extend state law *only to structures permanently attached to the seabed* ---but the PLT test includes structures that are temporarily attached as well]⁴⁹.

Application of the PLT test to the Deepwater Horizon oil spill thus excludes the application of state law, according to Judge Barbier's opinion⁵⁰, based on the second prong of the PLT test. Since the Deepwater

⁴⁵ ___ S. Ct. ___ (2014).

⁴⁶ 43 U.S.C. sec. 1331 et seq.

⁴⁷ The reason for this is that Congress amended section 1333(a)(1) in 1978, but neglected to amend section 1333(a)(2)(A). 43 U.S.C. sec. 1333(a)(3) states that the adoption of state law as surrogate federal law shall not be construed as a basis for any state claim or interest in the natural resources of the outer continental shelf.

⁴⁸ This test derives from *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990).

⁴⁹ Practically speaking, the only OCS situs to which state law applies as surrogate federal law is fixed oil and gas drilling platforms. See David Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. Mar. L. & Com. 487 (2007).

⁵⁰ 808 F.Supp. 2d at 953-54.

Horizon was a vessel, admiralty jurisdiction applies, and with admiralty jurisdiction comes the application of substantive admiralty law. Although state law may sometimes supplement admiralty law, Judge Barbier, reviewing the arguments and applicable prior cases, concluded that state law (surrogate federal law in this case) does not apply. I agree with him on this point; there is no reason to apply even the law of the adjacent state to oil that fouls the seabed and water column on the outer continental shelf. The OCSLA by implication also excludes the application of state law as state law on the outer continental shelf, since state law is only applicable, if at all, as surrogate federal law. The Fifth Circuit also reasoned that the borrowing provision of the OCSLA does not apply “either ... because the disaster is governed by maritime law or because the broader language of Section 1333 (a) (1) ... clearly controls.”⁵¹

The second federal statute relevant to a preemption analysis is the Clean Water Act.⁵² The CWA contains a provision specifically saving state laws “with respect to the discharge of oil or hazardous substance into any waters within such state.”⁵³ This section, since it speaks of discharges within state waters, is clearly not broad enough to save state law when the discharge in question does not occur in state waters but on the outer continental shelf. The Fifth Circuit accordingly ruled that the savings clause did not apply to save Louisiana law with respect to the Deepwater Horizon oil spill.⁵⁴ Furthermore, the preemption argument acquires force from the Supreme Court decision in *International Paper Co. v. Ouellette*, which held that a common law nuisance lawsuit filed in a Vermont court under Vermont law to abate a pollution source located in New York was preempted by the Clean Water Act, because this Act regulates point sources of pollution through permitting requirements, and permitting a state law nuisance suit would interfere with this statutory scheme. Both the district court and the Fifth Circuit relied on the *Ouellette* case to hold that the state law claims concerning the Deepwater Horizon oil spill were preempted.⁵⁵

The third federal statute relevant to the preemption analysis is the Oil Pollution Act of 1990 (OPA).⁵⁶ OPA was passed in the wake of the oil spill in Alaskan waters by the *Exxon Valdez* in 1989. OPA was intended by Congress to “create a single federal law providing cleanup authority, penalties, and liability for oil pollution.”⁵⁷ OPA contains a provision saving state law: “Nothing in this Act ... shall be construed ... as preempting the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to--- the discharge of oil or other pollution by oil within such State.”⁵⁸ Both Judge Barbier and the Fifth Circuit have ruled in separate Deepwater Horizon cases that

⁵¹ 2014 AMC at 2609. The Fifth Circuit did not rely on the PLT test, which it labeled “a misfit for the present case.” *Ibid* at note 10.

⁵² 33 U.S.C. secs. 1251 – 1376.

⁵³ 33 U.S.C. sec. 1321(o).

⁵⁴ 2014 AMC at 2612-13.

⁵⁵ 808 F.Supp. 2d at 957; 2014 AMC at 2614-17.

⁵⁶ 33 U.S.C. secs. 2701-62.

⁵⁷ S. Rep. No. 101-94, at 9 (1989).

⁵⁸ 33 U.S.C. sec. 2718(a).

state law is preempted under the OPA despite this savings provision.⁵⁹ Both employed similar reasoning, and both relied upon the Supreme Court's opinion in *Oeullette*, as discussed above.

There are two problems with the two court opinions preempting state law under OPA. First, preemption seems to conflict with the literal terms of the statute. OPA's savings clause, section 2718(a), is clearly broader than the savings clause for state law under the Clean Water Act. The "or" in the sentence of section 2718(a) quoted above clearly means state law will apply to an oil spill in two instances: (1) where the discharge of oil occurs within state waters; and (2) where there is pollution by oil of state waters, regardless of where the discharge occurred. This seems to belie the preemption rulings which state that state law has no application to a discharge of oil that occurs on the outer continental shelf.⁶⁰ The literal terms of OPA section 2718(a) seem to save state law in cases where OCS oil pollution reaches state waters or shorelines.

Nevertheless, both courts considering the issue in the *Deepwater Horizon* case applied conflict preemption to hold that state law does not apply, relying on the *Oeullette* case. But *Oeullette* was decided not under OPA but rather under the Clean Water Act. *Oeullette*, which is certainly correct regarding the Clean Water Act, seems clearly distinguishable and inapplicable when applied to OPA. The Clean Water Act and OPA are fundamentally different statutes with completely different purposes. The Clean Water Act is a regulatory act; one can readily understand and agree why the Supreme Court in *Oeullette* applied conflict preemption because using state nuisance law to deal with a point discharge of pollution clearly would disrupt the federal regulatory scheme of permitting and regulating point discharges of pollution. But OPA is not regulatory, it is remedial; OPA provides damages for losses caused by oil spills. The OPA remedies are very important, but they are specific and limited by the statutory language of the Act. So there seems to be no conflict in allowing state law remedies to coexist and to apply in addition to the OPA remedies. This seems to be the intent of OPA section 2718(a). Of course a claimant should not be allowed to recover twice for the same injury; but state law should apply to the extent that state law remedies are supplementary to OPA's remedies. The Supreme Court has denied certiorari in the *Deepwater Horizon* cases⁶¹, but at some future time I would hope for clarification by the Supreme Court on the extent to which OPA saves or preempts state law.

D. Personal Injury and Death

Interesting and important issues with respect to maritime personal injury and death abound in the lower federal courts. The Supreme Court has not hesitated to wade into the waters of maritime personal injury and death when necessary. For example, in the 1990s the Court reshaped the tests for seaman status.⁶² Another recent example is the Supreme Court's case law defining the term "vessel".⁶³

⁵⁹ 808 F. Supp. 2d at 955-57; 2014 AMC at 2618-21.

⁶⁰ 808 F. Supp. 2d at 956; 2014 AMC at 2619.

⁶¹ ___ S.Ct. ___ (2014).

⁶² See especially *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed. 2d 866, 1991 AMC 913 (1991); and *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed. 314, 1995 AMC 1840 (1995). For a cogent summary of this jurisprudence, see the opinion of the Supreme Court of Alabama in *Frazier v. Core Industries, Inc.*, 39 So. 2d 140 (2009).

Among the many interesting issues I am currently watching closely are, first, the Eleventh Circuit's very important decision in *Patrizia Franza v Royal Caribbean Cruises, Ltd.*⁶⁴, rejecting the *Barbetta* rule⁶⁵ granting immunity to cruise lines from vicarious liability of onboard medical staff; and the Fifth Circuit's *en banc* decision in *New Orleans Depot Services, Inc. v. Director, OWCP*⁶⁶, stating a new legal test for "other-adjointing-area" *situs* under the Longshore and Harbor Workers' Compensation Act. There is, however, no space here to analyze these rulings because I wish to turn to the perennial issue of damages under the general maritime law in personal injury and death cases.

One area where the Supreme Court has been particularly active is maritime wrongful death. In a series of cases involving the Death on the High Seas Act (DOHSA)⁶⁷, the Court decided that DOHSA, where it applies, (1) preempts state law remedies⁶⁸; (2) preempts the general maritime law⁶⁹; and (3) preempts survival actions.⁷⁰ In the landmark case, *Moragne v. States Marine Lines*⁷¹, the Supreme Court overruled the 1886 case, *The Harrisburg*⁷², to create a cause of action for maritime wrongful death for unseaworthiness. In *Norfolk Shipbuilding & Drydock Corp. v. Garriss*⁷³, the Court confirmed the availability of a general maritime law cause of action for negligence as well. In *Yamaha Motor Corp. v. Calhoun*⁷⁴, the Supreme Court ruled that when a non-seafarer (a person who is neither a seaman nor a longshore worker) is killed in state territorial waters, the remedies applicable for general maritime wrongful death may be supplemented by state law, state statutory wrongful death and survival remedies.

Thus, DOHSA, the Jones Act, and the Longshore and Harbor Workers' Act wrongful death actions, combined with the general maritime law wrongful death actions, fit together like the pieces of a puzzle. The representatives of a seaman may bring an action for negligent wrongful death under the Jones Act⁷⁵ and combine this with a *Moragne* action for wrongful death due to unseaworthiness.⁷⁶ The Longshore Workers' Compensation Act provides longshore workers with no-fault compensation claims against their employers⁷⁷ and negligence (no longer unseaworthiness) claims against vessels for both injury and

⁶³ See *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) and *Lozman v. City of Riviera Beach, Florida*, 568 U.S. __ (2013).

⁶⁴ 772 F.3d 1225 (11th Cir. 2014).

⁶⁵ *Barbetta v. S/S Bermuda Star*, 848 F.3d 1364 (5th Cir. 1995). Since there is now a split of authority in the Courts of Appeal on this issue, the case is likely to be heard by the Supreme Court.

⁶⁶ 2013 AMC 913 (5th Cir. 2013) (*en banc*). This opinion holds that the definition of "other adjoining area" requires two distinct *situs* components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be customarily used by an employee in loading or unloading a vessel. See *BPU Management, Inc./Ted Sherman Company v. Director, OWCP*, 732 F. 3d 457 (5th Cir. 2013). See also *Global Management Enterprises, LLC v. Commerce and Industry Ins. Co.*, 2014 AMC 1811 (5th Cir. 2014) (*per curiam*).

⁶⁷ 46 U.S.C. secs. 30301 et seq.

⁶⁸ *Offshore Logistics, Inc. v. Tallentire*, 477 U.S.207, 106 S.Ct. 2485, 91 L.Ed. 2d 174, 1986 AMC 2113 (1986).

⁶⁹ *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed. 2d 581, 1978 AMC 1059 (1978).

⁷⁰ *Dooley v. Korean Air Lines, Co.*, 524 U.S. 116, 118 S. Ct. 1890, 141 L.Ed. 2d 102, 1998 AMC 1940 (1998).

⁷¹ 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339, 1970 AMC 967 (1970).

⁷² 119 U.S. 213, 7 S.Ct. 140, 30 L.Ed. 358 (1886).

⁷³ 532 U.S. 811, 121 S.Ct. 1927, 150 L.Ed. 2d 34, 2001 AMC 1817 (2001).

⁷⁴ 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed. 2d 578, 1996 AMC 305 (1996).

⁷⁵ 46 U.S.C. sec. 30104.

⁷⁶ *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 1975 AMC 2137 (5th Cir. 1975).

⁷⁷ 33 U.S.C. sec. 904(b).

death⁷⁸. Seafarers' representatives may sue third parties for wrongful death under the general maritime law. Non-seafarers' representatives may sue under DOHSA (except in the case of a commercial aircraft accident⁷⁹) and, in the case of death in state territorial waters, under the general maritime law for negligence.

However, this intricate puzzle breaks down when it comes to what damages are available. DOHSA⁸⁰ (except for commercial aviation accidents) and the Jones Act⁸¹ allow recovery of only pecuniary damages, while longshore workers can recover non-pecuniary damages as well, at least for deaths in state territorial waters. Non-seafarers who die in state territorial waters can usually recover non-pecuniary damages under applicable state law. Thus, the applicable remedy for wrongful death depends on the decedent's status as well as where he or she was killed.

These somewhat arbitrary differences were highlighted in the recent case of *McBride v. Estes Well Service, LLC*⁸², which faced the question: are punitive damages available under either the Jones Act or general maritime law for injured seamen plaintiffs and/or for the personal representatives of deceased seamen? In 2013, a Fifth Circuit panel⁸³ ruled that punitive (non-pecuniary) damages are available for unseaworthiness under the general maritime law despite the limitations of the Jones Act.⁸⁴ The Fifth Circuit panel reasoned that punitive damages could be awarded by analogy to the Supreme Court's holding in *Atlantic Sounding Co. v. Townsend*⁸⁵, that punitive damages are recoverable by seamen willfully and callously denied maintenance and cure.

In 2014, the Fifth Circuit (en banc) overturned the panel's ruling, holding that punitive damages constitute non-pecuniary damages and that non-pecuniary damages are not available to seamen under the Jones Act.⁸⁶ Furthermore, citing the Supreme Court's decision in *Miles v. Apex Marine Corp.*⁸⁷, the *en banc* majority held that "the *Miles* court established 'a uniform rule applicable to all actions for the [injury or] death of a seaman, whether under DOHSA, the Jones Act or the general maritime law'".⁸⁸

Judge W. Eugene Davis' masterful opinion in *McBride* is undoubtedly correct, and Judge Edith Brown Clement penned a scholarly concurring opinion⁸⁹ pointing out the historical origin of maintenance and

⁷⁸ 33 U.S.C. sec. 905(b).

⁷⁹ Congress amended DOHSA in 2000 to exclude deaths from commercial aircraft accidents occurring 12 nautical miles or less from the shores of the United States. Moreover, non-pecuniary damages are recoverable for wrongful death beyond 12 nautical miles. 46 U.S.C. sec. 30307 (c). Thus wrongful death resulting from commercial aviation accidents is treated differently from wrongful death from vessel accidents.

⁸⁰ See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 622.

⁸¹ See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed. 2d 275, 1991 AMC 1 (1990).

⁸² 768 F.3d 382 (5th Cir. 2014), revised opinion, 2014 AMC 2409 (5th Cir. 2014).

⁸³ *McBride v. Estes Well Serv., LLC*, 731 F.3d 505 (5th Cir. 2013).

⁸⁴ A district court in California granted punitive damages in such a case in 2012. See *Jonas Rowe v. Hornblower Fleet*, 2013 AMC 873 (N.D. Cal. 2012).

⁸⁵ 557 U.S. 404, 129 S.Ct. 2561, 174 L. Ed. 2d 382, 2009 AMC 1521 (2009).

⁸⁶ 2014 AMC at 2421-22.

⁸⁷ 498 U.S. 19 (1990).

⁸⁸ 2014 AMC at 2417.

⁸⁹ 2014 AMC at 2422.

cure and its distinctness as a remedy from the general maritime law. As Judge Clement stated, while unseaworthiness as a cause of action was first developed by the Supreme Court in the middle of the twentieth century, maintenance and cure is an ancient remedy that first appeared in English maritime law in 1338.⁹⁰ Judge Clement could have further pointed out that maintenance and cure, was not in its original form an English law or common law doctrine. Rather, maintenance and cure is a civil law seaman's remedy that was adopted into English law. For proof of this fact, we need only consult the Rules of Oleron (France)⁹¹, which date from about the year 1266; the European origins of this remedy are lost in the mists of time. Thus, the fact that punitive damages are available for willful and callous non-payment of maintenance and cure does not disturb the clear ruling of the Supreme Court in *Miles*, that statutorily mandated damages under the Jones Act may not be supplemented by the general maritime law. Thus, the ruling of the Court in *Townsend* cannot be carried over as a remedy for unseaworthiness under the general maritime law.

Despite the fact that the Fifth Circuit reached the proper conclusion in *McBride*, the Supreme Court may at some point wish to revisit the issue of remedies under the general maritime law and the relationship between general maritime law remedies and statutory remedies. In *McBride*, six Fifth Circuit judges filed a dissenting opinion valiantly arguing that seamen may recover punitive damages for their employers' willful and wanton breach of the duty to provide a seaworthy vessel.⁹² We must ask, then, what is the reason for this continuing unease and uncertainty regarding general maritime law remedies?

The answer to this question lies in a little-noted aspect of Justice O'Connor's opinion for the Court in the *Miles* case. In *Miles*, the Court partially fleshed out the breadth of the *Moragne* cause of action. First, the Court ruled that, although the Jones Act preempts state wrongful death statutes, the Act does not preempt the *Moragne* general maritime law cause of action for unseaworthiness or the DOHSA statutory cause of action for unseaworthiness.⁹³ The Court's reason for this ruling was concern for uniformity; the Court stated that "we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."⁹⁴ Second, the Court, in defining the damages due in a *Moragne* general maritime law action, cited *Sea-Land Services, Inc. v. Gaudet*⁹⁵, a 1974 case involving the death of a longshore worker in territorial waters. The Court in *Gaudet* ruled that damages under *Moragne* may include both pecuniary and non-pecuniary damages, but that non-pecuniary damages were preempted under DOHSA and under the Jones Act.

It is submitted that upholding and repeating the *Gaudet* ruling on damages available in a *Moragne* action under the general maritime law perpetuates the lack of uniformity that the Court in *Miles* was endeavoring to correct. Pursuant to *Gaudet*, the representative of a longshore worker may recover non-

⁹⁰ 2014 AMC at 2425.

⁹¹ See Article VII of the Rules of Oleron, available <http://www.admiraltylawguide.com>.

⁹² 768 F.3d at 404.

⁹³ 111 S. Ct. at 324-26.

⁹⁴ 111 S. Ct. at 326.

⁹⁵ 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974). Because of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, neither *Moragne* nor *Gaudet* would be viable causes of action today, because the unseaworthy cause of action is no longer available to longshore workers. See *Miles*, 111 S. Ct at note 1, p. 325.

pecuniary damages in a negligence action if the death occurred in state territorial waters, while a Jones Act seaman may not. For example, in the 2013 case, *Eirini Zagklara v. Sprague Energy Corp.*⁹⁶, which involved a death in state territorial waters, the district court awarded the plaintiff *Gaudet* loss of society damages under the general maritime law. For uniformity's sake, therefore, the Court should simply overrule the damages aspect of *Gaudet* and state a single rule for damages available in a *Moragne* wrongful death action under the general maritime law: *pecuniary damages only may be recovered*. Such a rule seems justified given the fact that the substantive cause of action involved is a purely judicial creation, and major statutory enactments such as the Jones Act and DOHSA provide only pecuniary damage remedies. In summary, the Supreme Court should revisit the issue of non-pecuniary damages in maritime personal injury and death cases under the general maritime law, given the substantial dissent by members of the Fifth Circuit in *McBride* and the continuing viability of the *Gaudet* case.

IV. Conclusions

The task of the Supreme Court with respect to admiralty law is ongoing. There are always interesting new issues that the Court may consider and decide. The Constitution of the United States in recognizing the uniqueness of admiralty and maritime law in the federal system of government handed down by the Founders gives a special and important task to the Supreme Court, which is to act in partnership with the Congress in formulating a body of maritime law for our Nation. Although the Supreme Court as an unelected body is the junior partner in this endeavor, nevertheless, the Court's task is an important one. It is important and heartening that the Court continues to take an active interest in admiralty and maritime law cases.

⁹⁶ 919 F.Supp. 2d 163, 2013 AMC 2803 (D, Me. 2013).