RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

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I. INTRODUCTION

This article discusses noteworthy developments and circuit splits that have arisen or endured during the period between October 1, 2013, and September 30, 2014. The selection of topics included in this article reflects areas of the law that are unsettled and to which experienced maritime practitioners should remain alert as the jurisprudence in those areas develops further.

II. REMOVAL OF GENERAL MARITIME LAW CLAIMS

In *Ryan v. Hercules Offshore, Inc.*, the defendants had removed the action to federal district court pursuant to the amended removal statute, 28 U.S.C. § 1441.[1] The district court then denied the plaintiff's motion to remand general maritime law claims to state court and launched a wave of district court cases addressing the issue.[2] Previously established precedent did not permit removal of general maritime claims to federal court in the absence of diversity of citizenship or another basis for jurisdiction.[3]

A. *2011 Amendments to the Removal Statute*

In 2011, Congress amended the removal statute, 28 U.S.C. § 1441, with the intent to make non-substantive changes.[4] The former § 1441 read:

> (a) *Except as otherwise expressly provided by Act of Congress*, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of

1. 945 F. Supp. 2d 772, 779 (S.D. Tex. 2013).

2. One related case, and what may be considered an exception to this statement regarding district-court-only decisions, is *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014), in which the Fifth Circuit allowed removal of claims made under the Outer Continental Shelf Lands Act (OCSLA).

3. *See, e.g.*, Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959); *see also* Gregoire v. Enter. Marine Servs., LLC, 2014 WL 3866589, at *3–7 (E.D. La. Aug. 6, 2014) (offering a thorough discussion of admiralty and maritime jurisdiction and concurrent state jurisdiction as it has developed historically); David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 38 TUL. MAR. L.J. 419, 476 (2014) (noting the statutory basis for "the Romero principle" that "admiralty-only" cases cannot be removed has been widely accepted "[b]ut its statutory basis has never been as clear as could be wished.").

4. The amendments were part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011. *See* H.R. REP. NO. 112-10, 2011 WL 484052, at *11–12, *reprinted in* 2011 U.S.C.C.A.N. 576.

> removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action* shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.[5]

The amended § 1441(a) is nearly identical; the last sentence was slightly reworded and moved into what is now § 1441(b)(1). The last sentence of the former § 1441(b) was reworded and moved to what is now § 1441(b)(2), as follows:

> (b)(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [diversity of citizenship] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.[6]

According to the legislative history, the amendments were for convenience and the moving and rewording of the last sentence of the former § 1441(b) to the present § 1441(b)(2) was merely "restat[ing] the substance" of that sentence.[7] But, Congress may not have taken into account that the deleted and apparently "restate[d]" clause from the last sentence of the former § 1441(b)—"any other such action"—was the clause that a leading Fifth Circuit case had relied upon to hold that maritime cases filed in state court had a limitation on removability.[8]

B. *Starting Point:* Ryan v. Hercules Offshore *Decision*

The *Ryan v. Hercules Offshore* court addressed the application of the amended removal statute to the plaintiff's general maritime law claims, Death on the High Seas Act (DOHSA) claims, and *Sieracki* seamen claims. First, the court noted that Congress is presumed to be aware of case law interpreting a statute it amends.[9] Then, the court discussed Fifth Circuit precedent regarding removal of maritime cases prior to the amendment, summarizing it as follows:

> (1) [F]ederal courts have original jurisdiction over admiralty claims; (2) the saving to suitors clause does not preclude federal courts from exercising

5. *Ryan*, 945 F. Supp. 2d at 774–75; 28 U.S.C. § 1441 (2010) (emphasis added).
6. *Ryan*, 945 F. Supp. 2d at 774-75; 28 U.S.C. § 1441(b)(2) (2014).
7. H.R. REP. NO. 112-10, *supra* note 4, at *11–12 ("Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.")
8. *Ryan*, 945 F. Supp. 2d at 774–75 (citing *In re Dutile*, 935 F.2d 61, 62-63 (5th Cir. 1991)).
9. *Id.* at 775.

> jurisdiction over admiralty claims originally brought in state court; (3) the old version of section 1441(b) was relied upon as the "Act of Congress" that precluded federal courts from exercising removal jurisdiction unless the requirements of section 1441(b) were met; and (4) admiralty cases do not arise under the Constitution, treaties or laws of the United States, so admiralty cases were considered 'any other such actions' under the prior version of section 1441(b) and were thus removable only if none of the parties in interest properly joined and served as defendants was a citizen of the State in which the action was brought.[10]

The *Ryan* court turned next to the amended statutory language of § 1441 and applied a strict reading to the provision. The court noted that § 1441(a) allowed cases of original jurisdiction in district courts to be removed unless an "act of Congress" prohibited it.[11] Then it explained that § 1441(b) no longer contains the clause that was thought to be the "act of Congress" limiting the removal of maritime cases of original jurisdiction to those in which none of the defendants was a citizen of the forum state.[12] The court concluded that the plaintiff's general maritime claims, DOHSA claims, and *Sieracki* seamen claims were all "admiralty claims over which a federal district court has original jurisdiction and the revised removal statute does not limit the removal of these claims."[13]

Several district courts in the Fifth Circuit have followed the rationale of *Ryan* or similar rationales, holding that general maritime claims filed in state courts and once "saved to suitors" could be removed to federal courts.[14] From May 2013 to June 2014, decisions went both ways on the issue with district courts grappling with whether to follow the *Ryan* court's plain reading approach or to follow hundreds of years of precedent finding such claims to be non-removable under the "savings to suitors" clause. While several district courts have followed *Ryan*, others, including

10. *Id.* at 777.
11. *Id.*
12. *Id.*
13. *Id.* at 779.
14. Provost v. Offshore Serv. Vessels, LLC, No. 14-89-SDD-SCR, 2014 WL 2515412 (M.D. La. June 4, 2014); Genusa v. Asbestos Corp. Ltd., 18 F. Supp. 3d 773 (M.D. La. 2014); Garza v. Phillips 66 Co., No. 13-742-SDD-SCR, 2014 WL 1330547 (M.D. La. Apr. 1, 2014); Harrold v. Liberty Ins. Underwriters, Inc., No. 13-762-JJB-SCR, 2014 WL 688984 (M.D. La. Feb. 20, 2014); Carrigan v. M/V AMC AMBASSADOR, No. H-13-03208, 2014 WL 358353 (S.D. Tex. Jan. 31, 2014); Bridges v. Phillips 66 Co., No. 13-477-JJB-SCR, 2013 WL 6092803 (M.D. La. Nov. 19, 2013); Wells v. Abe's Boat Rentals Inc., No. H-13-1112, 2013 WL 3110322, 2013 AMC 2208 (S.D. Tex. June 18, 2013). Section 9 of the Judiciary Act of 1789 granted to lower courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Ch. 20, § 9, 1 Stat. 76–77. However, the Act also includes a "savings to suitors" clause qualifying jurisdiction by "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *Id.* Congress has codified this grant of admiralty jurisdiction in 28 U.S.C. § 1333.

another court within the Southern District of Texas,[15] have denied removal of general maritime law claims[16] and general maritime claims joined with Jones Act claims.[17] Maritime defendants have taken advantage of this new potential for removal and pressed the district courts to grant removal.[18] Defendants have had some success in removing related claims, such as those under the Outer Continental Shelf Lands Act,[19] but have been less successful in removing Jones Act claims joined with general maritime law claims.[20]

Since June 2014, however, the tide appears to have turned, as courts have not allowed the removal of general maritime law claims from state to federal court.[21] Courts have declined to take the plain reading approach following *Ryan*, finding little evidence that Congress intended to

15. Alexander v. Seago Consulting, LLC, No. 4:14-cv-1292, 2014 WL 2960419 (S.D. Tex. June 23, 2014).

16. Barry v. Shell Oil Co., No. 13-6133, 2014 WL 775662 (E.D. La. Feb. 25, 2014), Maturin v. Commerce & Indus. Ins. Co., No. 614-cv-603, 2014 WL 2567150 (W.D. La. June 6, 2014); Gabriles v. Chevron USA, Inc., No. 2:14-669, 2014 WL 2567101 (W.D. La. June 5, 2014); Perrier v. Shell Oil Co., No. 14-490, 2014 WL 2155258 (E.D. La. May 22, 2014); Rogers v. BBC Chartering Am., LLC, No. 4:13-cv-3741, 2014 WL 819400 (S.D. Tex. Mar. 3, 2014); Coronel v. AK Victory, 1 F Supp. 3d 1175 (W.D. Wash. 2014).

17. Tilley v. Am. Tugs, Inc., No. 13-6104, 2014 U.S. Dist. Lexis 95478 (E.D. La. May 16, 2014); Rawls v. Phillips 66 Co., No. 14-602, 2014 WL 2003104 (E.D. La. May 15, 2014); Freeman v. Phillips 66 Co., Nos. 14-311, 14-624, 2014 WL 1379786 (E.D. La. Apr. 8, 2014).

18. Interestingly, one owner, Phillips 66 Co., took the issue to court at least four times in district courts in Louisiana, prevailing twice and losing twice. *Compare* Garza v. Phillips 66 Co., No. 13-742-SDD-SCR, 2014 WL 1330547 (M.D. La. Apr. 1, 2014), *and* Freeman v. Phillips 66 Co., Nos. 14-311, 14-624, 2014 WL 1379786 (E.D. La. Apr. 8, 2014), *with* Rawls v. Phillips 66 Co., No. 14-602, 2014 WL 2003104 (E.D. La. May 15, 2014), *and* Freeman v. Phillips 66 Co., Nos. 14-311, 14-624, 2014 WL 1379786 (E.D. La. Apr. 8, 2014).

19. 43 U.S.C. §§ 1331–1356a; Perise v. Eni Petroleum, U.S.L.L.C., No. 14-99-SDD-RLB, 2014 WL 4929239 (M.D. La. Oct. 1, 2014); Hubbard v. Laborde Marine LLC, No. 13-5956, 2014 U.S. Dist. LEXIS 74748 (E.D. La. June 2, 2014); *In re* Deepwater Horizon, 745 F.3d 157 (5th Cir. 2014); *but see* Boutte v. Yamaha Motor Corp. U.S.A., No. 3:13-cv-166, 2013 WL 3816585 (S.D. Tex. July 22, 2013) (denying removal of OCSLA claim).

20. Day v. Alcoa S.S. Co., No. 14-317-BAJ-SCR, 2014 WL 4924363 (M.D. La. Sept. 30, 2014); Marvin v. Am. Exp. Lines Inc., No. 3:14-cv-00316-BAJ-SCR, 2014 WL 4924341 (M.D. La. Sept. 30, 2014); Unterberg v. Exxon Mobil Corp., No. 14-00181 JMS-RLP, 2014 WL 3420779 (D. Haw. July 10, 2014); *Tilley*, 2014 U.S. Dist. Lexis 95478; Rawls v. Phillips 66 Co., No. 14-602, 2014 WL 2003104, at *6; Freeman v. Phillips 66 Co., Nos. 14-311, 14-624, 2014 WL 1379786 (E.D. La. Apr. 8, 2014).

21. *But see Perise*, 2014 WL 4929239 (allowing removal of OCSLA claim); Ronquille v. Aminoil Inc., No. 14-164, 2014 WL 4387337 (E.D. La. Sept. 4, 2014) (same). This writing was submitted in November 2014. For updated information on removal cases by circuit, please see the chart prepared by Caitlin Baroni, a law student at Tulane University. Caitlin Baroni, *A Survey of Recent Jurisprudence on the Removal of Maritime Claims from State to Federal Court*, TUL. MAR. L.J. (Oct. 12, 2014), http://www.tulanemaritimejournal.org/recent-developments-removal-maritime-claims-state-federal-court.; Removal Infographic, http://www.tulanemaritimejournal.org/wp-content/uploads/2014/10/Removal-Infographic-1.jpg (Jan. 13, 2015, 11:30 AM EST). The chart provides useful case citations to supplement the author's research.

upend precedent.[22] Some courts rejecting the *Ryan* approach appear mindful of the Supreme Court's caution in *Romero v. International Terminal Operation Co.*[23] In *Romero*, the Court construed the Judiciary Act of 1875 against the backdrop of one hundred years of concurrent state and federal admiralty jurisdiction under the "savings to suitors" clause, stating:

> We have uncovered no basis for finding the additional design of changing the method by which federal courts had administered admiralty law from the beginning. . . . There is not the slightest indication of any intention, or of any professional or lay demands for a change in the time-sanctioned mode of trying suits in admiralty without a jury, from which it can be inferred that by the new grant of jurisdiction of cases 'arising under the Constitution or laws' a drastic innovation was impliedly introduced in admiralty procedure, whereby Congress changed the method by which federal courts had administered admiralty law for almost a century. *To draw such an inference is to find that a revolutionary procedural change had undesignedly come to pass.*[24]

Comparing the Supreme Court's language in *Romero* with language in the *Ryan* case makes for interesting legal fodder: "While it is possible that Congress *did not intend* for the changes to section 1441 to be substantive, it nevertheless made substantial changes to the text of section 1441(b)."[25] Although the Supreme Court has warned jurists not to assume that a major change regarding federal courts' administration of maritime law can occur by accident, the *Ryan* court did just that based on a plain reading of the amended statute.

Since the original Judiciary Act in 1789, it has been well-established that maritime cases brought in state court cannot be removed to federal

22. Dyche v. U.S. Envtl. Servs, LLC, No. 1:14-cv-394, 2014 WL 5473238 (E.D. Tex. Oct. 30, 2014) (Jones Act claim joined with general maritime claim); Bartel v. Alcoa Steamship Co., No. 14-301-JJB-RLB, 2014 WL 5431544 (M.D. La. Oct. 22, 2014); Bisso Marine Co. v. Techcrane Int'l, LLC, No. 14-0375, 2014 WL 4489618 (E.D. La. Sept. 10, 2014); Riley v. Llog Exploration Co. LLC, No 14-437, 2014 WL 4345002 (E.D. La. Aug. 28, 2014); Henry J. Ellender Heirs, LLC v. Exxon Mobil Corp., No. 14-711, 2014 U.S. Dist. LEXIS 119055 (E.D. La. Aug. 26 2014); Bartman v. Burrece, No. 3:14-cv-0080-RRB, 2014 WL 4096226 (D. Alaska Aug. 18, 2014); Gregoire v. Enter. Marine Servs., LCC, No. 14-840, 2014 WL 3866589 (E.D. La. Aug. 6, 2014); Grasshopper Oysters, Inc. v. Great Lakes Dredge & Dock, LLC, No. 14-934, 2014 U.S. Dist. LEXIS 103284 (E.D. La. July 28, 2014); Cassidy v. Murray, No. GLR-14-1204, 2014 WL 3723877 (D. Md. July 24, 2014); Porter v. Great Am. Ins. Co., No. 13-3069, 2014 WL 3385148 (W.D. La. July 9, 2014); Figueroa v. Marine Inspection Servs., LLC, 2:14-cv-140, 2014 WL 2958597 (S.D. Tex. July 1, 2014); *In re* Foss Mar. Co., No. 5:12-cv-00021-TBR, 2014 WL 2930860 (W.D. Ky. June 27, 2014); Pierce v. Parker Towing Co., No. 14-00073-KD-N, 2014 WL 2569132 (S.D. Ala. June 9, 2014).

23. *Romero*, 358 U.S. at 368–69.

24. *Id.* (emphasis added).

25. 945 F. Supp. 2d at 777 (declining to consult legislative history and finding the "clear statutory language" in § 1441(b) to be dispositive) (emphasis added).

courts unless diversity of citizenship or another ground for federal subject matter jurisdiction exists.[26] However, since the amendments went into effect—and one district court in Texas performed an otherwise routine plain reading of the amended statute—this rule has been called into question. Although the *Ryan* court's holding appears to have fallen out of favor since June 2014 and the trend is moving away from allowing removal, the issue remains an open question. No federal appellate court has decided the issue. Indeed, the issue is difficult to appeal because a decision to either remand or remove is an interlocutory decision not subject to immediate appeal. There is no indication that any district court judge has certified the issue for immediate appeal under 28 U.S.C. § 1292(b).[27] Removal based on general maritime law may be an issue that district courts will continue to address without further guidance from the circuit courts for some time.

III. MARITIME ATTACHMENT, ALTER EGO, AND FRAUDULENT TRANSFER

Admiralty and maritime law practitioners frequently are challenged when a vessel involved in a dispute leaves the jurisdiction and no entity is available to answer a complaint or the entity no longer has sufficient assets to satisfy a judgment. Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions provides attachment as a remedy to this problem. As the Second Circuit so eloquently stated in *Blue Whale Corp. v. Grand China Shipping Development Co.*:

> part of the reason [Courts] authorize maritime attachment is the peripatetic nature of maritime parties, the transitory status of their assets and the need for parties to obtain security in a world of shifting assets, numerous thinly capitalized subsidiaries, flags of convenience, and flows of currencies.[28]

In *Blue Whale Corp.*, the court addressed how Rule B may be used to attach property belonging to the alleged alter ego of a defendant.[29] The

26. *See*, *e.g.*, *Romero*, 358 U.S. at 368.

27. *See* 28 U.S.C. §§ 1291–1292 (2014) (setting forth appellate jurisdiction over "all final decisions" of district courts and limited jurisdiction over interlocutory orders of district courts); *see also* 28 U.S.C. § 1292(b) (allowing a district judge to certify that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").

28. 722 F.3d 488, 499 (2d Cir. 2013) (internal citations and quotations omitted).

29. Alter ego is defined as "[a] corporation used by an individual in conducting personal business, the result being that a court may impose liability on the individual by piercing the corporate veil when fraud has been perpetrated on someone dealing with the corporation." *Alter Ego*, BLACK'S LAW DICTIONARY (9th ed. 2009). Piercing the corporate veil is defined as "[t]he judicial act of imposing personal liability on otherwise immune corporate officers,

Second Circuit reversed the district court's holding that English law governed an alter ego determination. The court held that when admiralty jurisdiction is properly invoked, federal maritime choice of law rules govern the examination of corporate identity. Therefore, federal common law applies to the alter ego issue.[30] The *Blue Whale Corp.* decision thus instructs that foreign law should be applied in appropriate circumstances. Given flags of convenience, foreign incorporation, and choice of law provisions, however, under maritime choice of law principles, there will be a preference for applying federal common law as a default with regard to piercing the corporate veil.

In the wake of *Blue Whale Corp.*, the Eastern District of Virginia recently addressed the federal maritime common law alter ego factors and how a court should handle the lack of a controlling admiralty rule for fraudulent transfer in *Flame S.A. v. Industrial Carriers, Inc.*[31] The *Flame* case has a complicated procedural and factual history involving a number of countries.[32] Eventually, in August 2014, a bench trial was held to determine: (1) whether four of the defendants were alter egos of one another, and (2) whether one of the defendants fraudulently transferred funds and contracts in order to avoid its creditors.[33] The trial, however, abruptly ended on September 4, 2014, when one of the named defendants, along with his pro hac vice attorney, fled the country in the middle of cross-examination.[34]

All parties to the trial agreed that federal common law applied.[35] Relying on *Blue Whale Corp.*,[36] the court noted that admiralty courts must engage in *Lauritzen*[37] choice of law analysis to determine the law applicable to piercing the corporate veil in admiralty actions.[38] Here, the wrongful acts took place in a number of nations; the *M/V Cape Viewer* flew the Singaporean flag; the plaintiffs were Singaporean and Swiss corporate entities; the defendants were from various nations; and the places of the underlying contracts at issue were numerous.[39] Because the *M/V Cape Viewer*, the property at issue, was under attachment in the Eastern District

directors, or shareholders for the corporation's wrongful acts." *Piercing the Corporate Veil*, BLACK'S LAW DICTIONARY (9th ed. 2009).

30. *Blue Whale*, 122 F.3d at 495, 497–98 ("[T]he federal interest in maintaining uniformity in the quintessentially federal realm of admiralty supersedes any competing interest in applying state law").

31. No. 2:13-CV-658, 2014 WL 4654669 (E.D. Va. Sept. 19, 2014).

32. *Id.* at *4.

33. *Id.* at *1.

34. *Id.*

35. *Id.* at *13.

36. 722 F.3d at 497–500.

37. Lauritzen v. Larsen, 345 U.S. 571, 583–91 (1953).

38. *Flame S.A.*, 2014 WL 4654669, at *13 n.10.

39. *Id.*

of Virginia, that location was the strongest point of contact in the dispute and U.S. federal common law applied.

In determining whether the entities were alter egos, the court noted that in the Fourth Circuit, the federal maritime, common law alter ego factors were set forth in *Vitol, S.A. v. Primerose Shipping Co.*[40] The *Vitol* factors include:

> gross undercapitalization, insolvency, siphoning of funds, failure to observe corporate formalities and maintain proper corporate records, non-functioning of officers, control by a dominant stockholder, and injustice or fundamental unfairness[,] . . . intermingling of funds; overlap in ownership, officers, directors, and other personnel; common office space; the degrees of discretion shown by the allegedly dominated corporation; and whether the dealings of the entities are at arm's length.[41]

The conclusion to disregard the corporate entity must involve a number of the *Vitol* factors and, most importantly, "must present an element of injustice or fundamental unfairness."[42] Natural persons can be the alter ego of a corporation and vice versa.[43] Alter egos are jointly and severally liable for the debts of one another.[44]

In admiralty, courts apply federal common law and may look to state law in situations where there is no admiralty rule on point.[45] The court stated that "[u]like the substantial precedent examining alter ego in admiralty, there [was] no admiralty rule on point for fraudulent transfer."[46] The court therefore applied Virginia law and found fraudulent transfer based on "badges of fraud" that had been proven in the case.[47]

The *Flame* decision is the most significant veil piercing decision since *Blue Whale*. It provides a useful guide of the requirements for piercing the corporate veil and serves as a strong warning that failure to comply with corporate formalities will result in findings of alter ego and assets of alter egos answering for each of the others' debts.

40. 708 F.3d 527, 544 (4th Cir. 2013).
41. *Flame S.A.*, 2014 WL 4654669, at *13 (citations and internal quotation marks omitted).
42. *Id.* at *13 (quoting De Witt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976); Ost–West–Handel Bruno Bischoff GmbH v. Project Asia Line, 160 F.3d 170, 176 (4th Cir. 1998)).
43. *Id.* at *14 (citing Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966)).
44. *Id.* (citing MedRehab v. Evangeline of Natchitoches, Inc., 1998 WL 671287, at *1 (E.D. La. Sept. 24, 1998); *see* 18 Am. Jur. § 51 at 698–700 (2d ed. 2013)).
45. *Id.* (citing *Ost–West–Handel*, 160 F.3d at 176).
46. *Id.*
47. *Id.*

IV. AVAILABILITY OF PUNITIVE DAMAGES UNDER THE GENERAL MARITIME LAW

The availability of punitive damages under the general maritime law has been largely unsettled and, despite the Fifth Circuit's recent en banc decision in *McBride v. Estis Well Service, L.L.C.*, remains so today.[48]

As background, the U.S. Supreme Court's 1818 decision in *The Amiable Nancy* provided the first indication that punitive damages were available under the general maritime law.[49] In recent years, the Court has handed down *Miles v. Apex Marine Corp.*[50] and *Atlantic Sounding Co. v. Townsend*,[51] addressing the availability of nonpecuniary and punitive damages under the general maritime law.

A. Miles v. Apex Marine Corp.

In *Miles v. Apex Marine Corp.*, a deceased seaman's mother sued the vessel owner for her son's death, alleging Jones Act negligence and general maritime law unseaworthiness.[52] Addressing the availability of nonpecuniary damages to survivors for general maritime law unseaworthiness, the Supreme Court reasoned that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence."[53] Finding that the Jones Act precluded an award for loss of society, the Court held that there could be no recovery "for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."[54]

B. Atlantic Sounding Co. v. Townsend

In *Atlantic Sounding Co. v. Townsend*, a crewmember fell on the vessel's deck, injuring his arm and shoulder.[55] The vessel owner filed an action for declaratory relief regarding its obligation to provide maintenance and cure and moved to dismiss the injured seaman's punitive damages claim.[56] The trial court denied the vessel owner's motion to dismiss, finding that it was bound by the Eleventh Circuit's decision in *Hines v. J.A. LaPorte, Inc.* that punitive damages were available in an action for failure to pay maintenance and cure.[57] On appeal, the Eleventh Circuit affirmed,

48. 768 F.3d 382 (5th Cir. 2014).
49. 16 U.S. 546 (1818).
50. 498 U.S. 19 (1990).
51. 557 U.S. 404 (2009).
52. *Miles*, 498 U.S. at 19.
53. *Id.* at 32–33.
54. *Id.*
55. 557 U.S. 404, 407 (2009).
56. *Id.*
57. *Id.* at 408 (citing Hines v. J.A. LaPorte, 820 F.2d 1187, 1189 (11th Cir. 1987)).

holding that the injured seaman could pursue punitive damages against the vessel owner for willfully withholding maintenance and cure.[58]

The U.S. Supreme Court granted certiorari and held that:

> [P]unitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.[59]

Since *Townsend*, courts have wrangled with whether the availability of punitive damages under the general maritime law is limited to factual circumstances, like those in *Townsend*.[60] The Fifth Circuit's en banc *McBride* decision, discussed below, sheds further light on the debate.

C. McBride v. Estis Well Service, L.L.C.

In *McBride*, the Fifth Circuit addressed whether punitive damages were available to injured seamen or survivors of deceased seamen based on the Jones Act or general maritime law.[61] The *McBride* court followed the holding in *Miles* that "the Jones Act limits a seaman's recovery to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness" and held that "[b]ecause punitive damages are nonpecuniary losses, punitive damages may not be recovered in this case."[62] The court en banc overruled the prior panel's decision awarding punitive damages to both classes of beneficiaries.

The majority opinion relied heavily on *Miles*, reasoning that, in *Townsend*, the Supreme Court confirmed that *Miles* was sound.[63] Although *Miles* was a wrongful death action, the *McBride* majority extended its holding to injured seamen. Reasoning that *Miles* covered general maritime law as well as Jones Act claims and that the Jones Act applies to both wrongful death and personal injury negligence actions, the court found no reason why *Miles* should not control both types of action.[64]

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58. *Id.*
59. *Id.* at 424.
60. Cases have come down on different sides of the issue. *See generally*, *e.g.*, Borkowski v. F/V Madison Kate, 599 F.3d 57 (1st Cir. 2010); *see also* Boney v. Carnival Corp., Case No. 08-22299-CIV, 2009 WL 4039886 (S.D. Fla. Nov. 20, 2009); Mier v. Wood Towing, LLC, Case No. 08-4299, 2010 WL 2195700 (E.D. La. May 28, 2010); Nelon v. Cenac Towing Co., LLC, Case No. 10-373, 2011 WL 289040 (E.D. La. Jan. 25, 2011); Rogers v. Resolve Marine, Case No. 09-4141, 2009 WL 2984199 (E.D. La. Sept. 11, 2009); Wagner v. Kona Blue Water Farms, LLC, No. 09-0060, 2010 WL 3566730, 3566731 (D. Haw. Sept. 13, 2010).
61. 768 F.3d 382, 384 (5th Cir. 2014), *petition for cert filed* (Dec. 24, 2014) (No. 14-761).
62. *Id.*
63. *Id.* at 391 (citing Atl. Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009)).
64. *Id.* at 388–89.

A review of the concurring and dissenting opinions in the *McBride* decision provides further guidance. The first concurrence, joined by five members of the majority, further explained those members' rationale for barring punitive damages in unseaworthiness actions. First, they reasoned that, unlike maintenance and cure claims, the jurisprudence does not support a finding that punitive damages were historically awarded for unseaworthiness. Instead, the jurisprudence supports limiting recovery for unseaworthiness to compensatory damages only.[65] Second, expanding *Townsend*'s ruling to unseaworthiness actions would circumvent *Miles*.[66] Because courts had expanded unseaworthiness causes of action to include negligence actions once available only under the Jones Act, the two actions had essentially become "Siamese twins."[67] Congress's prohibition against punitive damages in Jones Act cases would be irrelevant if a claimant could recover such damages under an unseaworthiness theory.[68] Finally, punitive damage awards would increase the costs of maritime transportation and are ultimately bad for the consumer.[69]

The second concurring opinion joined the majority's holding that *Miles* forecloses nonpecuniary damages for wrongful death actions.[70] This concurring opinion, however, is essentially a dissent with regard to the majority's prohibition of punitive damages for injured seamen. This second concurrence reasoned that any distinction between injured seamen and a deceased seaman's survivors would be novel and should be resolved by the Supreme Court.[71]

In the first dissent, six panelists would hold that punitive damages are available in unseaworthiness actions for both injured seamen and a deceased seaman's survivors because "the Supreme Court has said that they can, and Congress has not said they can't."[72] The panelists argued that *Miles* should not control the availability of punitive damages for unseaworthiness.[73] The panelists interpreted *Townsend* as creating a rule that, because a general maritime law cause of action was established be-

65. *Id.* (citing (1) OSCEOLA, 189 U.S. 158, 175 (1903), in which the Supreme Court found that under both American and English law, an unseaworthy vessel and its owner are "liable to an indemnity" to injured seamen; (2) Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928), in which the Supreme Court found that the unseaworthiness remedy was an "indemnity by way of compensatory damages"; and (3) Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 493–94 (1875), in which the Supreme Court found that a court goes "beyond the limit of indemnity" when it awards "exemplary" damages).

66. *Id.*

67. *Id.* at 400.

68. *Id.*

69. *Id.* at 401.

70. *Id.*

71. *Id.* at 401–04.

72. *Id.* at 404.

73. *Id.* at 419.

fore the enactment of the Jones Act and the Jones Act does not address the general maritime law cause of action or its remedy, that remedy remains available until Congress intercedes.[74]

Finally, two judges wrote separately to expound upon why the majority's extension of *Miles* to injured seamen was incorrect. Quoting the Supreme Court's holding in *Miles* that "[i]ncorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well,"[75] they reasoned that when the Jones Act was enacted, FELA's pecuniary damage limitation only applied to wrongful death claims and not to plaintiffs asserting claims for their own injuries.[76] According to the second dissent, therefore, there was no justification for applying the Jones Act's prohibition on punitive damages to injured seamen.[77]

V. LHWCA SITUS REQUIREMENT

The Longshore and Harbor Worker's Compensation Act has provided a federally regulated workers' compensation scheme for shore-based maritime employees since 1927.[78] As originally written, there was a location of injury (situs) requirement, limiting compensation under the Act to situations in which "the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock). . . ."[79] That requirement led to a break in uniformity because the Act provided coverage to workers injured on navigable waters, but not for the same workers performing the same jobs injured ashore. Congress's intent to provide shore-based maritime employees with a lucrative and uniform compensation scheme had been undermined by the situs requirement.

Seeking to remedy the situation, Congress passed numerous amendments to the Act in 1972. The amendments created (1) a status requirement, which better defined what types of work an employee must perform to qualify for coverage; and (2) a situs test, making coverage available

> only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area

74. *Id.* at 412.
75. *Id.* at 420 (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)).
76. *Id.* at 420–21.
77. *Id.* at 424.
78. *See* 33 U.S.C. §§ 901–950 (2014).
79. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 40 (2d Cir. 1976), *aff'd* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (quoting former 33 U.S.C. § 903(a)).

> customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .[80]

The amendments led to questions of what Congress meant by "other adjoining area" and how to define "adjoining."

After the 1972 amendments, the Supreme Court touched upon the new situs requirement in *Northeast Marine Terminal Co. v. Caputo*.[81] In *Caputo*, two workers were injured in areas bordering navigable waters.[82] For one worker, there was no situs question because the defendant conceded the issue.[83] The other worker, however, was injured on a pier that was not used for loading and unloading ships.[84] The Supreme Court held that the pier was a covered situs because the statute's "customarily used" qualification applied only to "the immediately preceding phrase, 'other areas,'" and that "'piers, wharves, and terminals'" are covered regardless of use.[85] Alternatively, the court found that the entire area, of which the pier was a part, was an area adjoining navigable waters and that it was used for loading and unloading vessels.[86] In arriving at its holding, the Court reasoned that "when Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here."[87]

The next big case to address the situs requirement was *Brady-Hamilton Stevedore Co. v. Herron*.[88] The plaintiff in *Herron* was injured while unloading equipment at a gear locker situated 2,050 feet outside the port's entrance and 2,600 feet from navigable water.[89] The Ninth Circuit found that each of the status and situs elements of coverage "act[] as a control upon the other so as to diminish the potential for undue expansion of coverage" and that "by operating coordinately, the status and situs tests fix coverage within somewhat more certain bounds than would be the case under either test alone."[90] Analyzing *Caputo*, the court noted that the 1972 amendments were a congressional effort to adapt the law to modern techniques, such as the movement inland of much of a longshoreman's work, as well as an attempt "to provide continuous coverage to workers who would otherwise be covered for only part

80. 33 U.S.C. § 903(a) (1970 ed., Supp. V.).
81. 432 U.S. 249 (1977).
82. *Id.* at 279–80.
83. *Id.* at 279.
84. *Id.* at 279–80.
85. *Id.* at 280 (citing the bill's sponsor, Rep. Lee Daniels (D-IN), 118 CONG. REC. 36381 (1972)).
86. *Id.* at 281.
87. *Id.* (internal citations omitted).
88. 568 F.2d 137 (9th Cir. 1978).
89. *Id.* at 139.
90. *Id.* at 140.

of their activities."[91] *Herron* declined to limit inland coverage to physically contiguous areas only and instead created a factor test for "adjoining areas" to determine whether a situs has a "functional relationship" with navigable waters.[92]

Like *Herron*, the Fifth Circuit held in *Texports Stevedore Co. v. Winchester* that an "adjoining area" did not need to physically border navigable waters, opting instead for a nexus analysis.[93] The situs of the injury in *Winchester* was a gear room, five blocks from the gate of the nearest dock.[94] Through references to dictionaries, the court noted that even though "'adjoin' can be defined as 'contiguous to' or 'to border upon,' it also is defined as 'to be close to' or 'to be near.'"[95] In granting coverage for this situs, the court's primary concern was that Congress did not intend "to substitute for the shoreline another hard line" that would cause more anomalies in coverage due to technology's movement of many maritime tasks ashore.[96]

In 1995, the Fourth Circuit broke from the other circuits in *Sidwell v. Express Container Services, Inc*,[97] reasoning that the previous decisions had ignored the statutory word "adjoining."[98] It held:

> To be sure, dictionaries do include "neighboring" and "in the vicinity of" as possible definitions of "adjoining," but such is not the ordinary meaning of the word; rather, the ordinary meaning of "adjoin" is "to lie next to," to "be in contact with," to "abut upon," or to be "touching or bounding at some point."[99]

Thus, the court held that "adjoin" means geographically "contiguous with" or "touching."[100] Therefore, in the Fourth Circuit, a covered situs must share a physical border with navigable waters.[101] The court reconciled its holding with the Act's and the Supreme Court's direction to facilitate broad coverage by avoiding an interpretation of coverage that is adaptable to the changing nature of the industry (which moves ever inland). Rather, the court interpreted the coverage to extend just beyond a ship's gangway.[102]

91. *Id.* at 140–41 (citing *Caputo*, 432 U.S. at 249).
92. *Id.* at 141.
93. 632 F.2d 504 (5th Cir. 1980).
94. *Id.* at 506–07.
95. *Id.* at 514 (internal citations omitted).
96. *Id.* at 514, 516.
97. 71 F.3d 1134 (4th Cir. 1995).
98. *Id.* at 1136.
99. *Id.* at 1138 (internal citations omitted).
100. *Id.*
101. *Id.* at 1139.
102. *Id.* at 1135–36.

Recently, in a divided opinion, the Fifth Circuit reversed its long-held definition of situs, adopting the Fourth Circuit's *Sidwell* definition "because it is more faithful to the plain language of the statute."[103] The Fifth Circuit added that

> [w]e are also influenced by the fact that the vague definition of "adjoining' we adopted thirty years ago in *Winchester* provides litigants and courts . . . with little guidance . . . a worker's compensation statute should be "geared toward a nonlitigious, speedy, sure resolution. . . ."[104]

Sidwell and the Fifth Circuit's recent precedent reversal may signal a judicial trend toward a textualist approach to statutory interpretation. Such a trend could be due to federalism concerns and judicial economy with the effect of limiting recovery under the Act. Maritime personal injury law has long afforded liberal recoveries to maritime workers, often resulting in substantial nexus tests.[105] Because admiralty courts and scholars hold the Fifth Circuit in such high esteem, however, consideration should be given to its complete reversal of precedent when formulating case strategies, pleadings, and discovery. Likewise, when statutory interpretation may affect the case, experienced practitioners in other fields of law should keep a close eye on their jurisdictions' concerns for judicial economy, federalism, and various other issues while forming early strategies, lest a sudden shift in interpretation catch them unaware.

VI. SHIPPING ACT VERSUS CARMACK AMENDMENT PRE- AND POST-*KIRBY*

Norfolk Southern Railway Co. v. Kirby[106] has blurred the distinction in case law between non-vessel-operating common carriers (NVOCC) and freight forwarders and the statutes governing them. Pre-*Kirby* cases apply the Shipping Act,[107] but many post-*Kirby* cases incorrectly apply the Carmack Amendment to the Interstate Commerce Act.[108]

The Shipping Act sets forth the following definitions:

> *Non-Vessel-Operating Common Carrier*—The term "non-vessel-operating common carrier" means a common carrier that (A) does not operate the ves-

103. New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 394 (5th Cir. 2013).

104. *Id.* at 394 (quoting *Winchester*, 632 F.2d at 518).

105. The Supreme Court recently adopted a substantial nexus test over a strict geographic test for situs of injury under the Outer Continental Shelf Lands Act. *See* Pac. Operators Offshore, LLP v. Valladolid, 132 S. Ct. 680 (2012).

106. 543 U.S. 14 (2004).

107. 46 U.S.C. § 40102.

108. 49 U.S.C. § 14702.

> sels by which the ocean transportation is provided; and (B) is a shipper in relationship with an ocean common carrier.[109]
>
> *Ocean Freight Forwarder*—The term "ocean freight forwarder" means a person that (A) . . . dispatches shipments . . . via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation . . . incident to those shipments.[110]

An NVOCC does not own or operate a vessel, but holds itself out to the general public to provide transportation for goods and assumes responsibility for those goods on a bill of lading issued to the shipper. A freight forwarder arranges space for cargo; lines up shipping; and provides order to the chaos of forms, customs, and regulations facing shippers.[111]

The Shipping Act distinguishes between freight forwarders and NVOCCs. Both provide a variety of services to shippers, but NVOCCs provide three services of particular significance: (1) an NVOCC issues a bill of lading to the shipper, (2) it assumes responsibility for the goods, and (3) it purchases transport services from a vessel operating common carrier. These extra tasks make all the difference in the legal treatment of NVOCCs.

The Carmack Amendment, on the other hand, governs rail carriers that issue bills of lading. The definitions governing the Carmack Amendment appear at 49 U.S.C. § 13102:

> *Carrier*—The term "carrier" means a motor carrier, a water carrier, and a freight forwarder.[112]
>
> *Freight forwarder*—The term "freight forwarder" means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation. . . . [113]

The Carmack Amendment makes a freight forwarder a carrier, but it is not a "carrier" in the sense of an "ocean carrier" under the Shipping Act. The Carmack Amendment further complicates matters by allowing freight forwarders to issue bills of lading:

> *Motor carriers and freight forwarder*—A carrier . . . shall issue a receipt or bill of lading for property it receives for transportation under this part.[114]
>
> *Freight forwarder*—A freight forwarder is both a receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation . . . to receive property from a consignor, the motor

109. 46 U.S.C. § 40102(16).
110. 46 U.S.C. § 40102(18).
111. 46 C.F.R. § 515.2(i) lists over a dozen services provided by freight forwarders.
112. 49 U.S.C. § 13102(3).
113. 49 U.S.C. § 13102(8).
114. 49 U.S.C. § 14706(a)(1).

> carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent.[115]

With the varying definitions of "carrier" and "freight forwarder" and the Carmack Amendment equating the two, it is no wonder that the distinction has become confused.

A. *Pre-*Kirby *Jurisprudence*

A number of cases across the circuits have employed the Shipping Act properly when deciding the proper roles of freight forwarders and NVOCCs. The Supreme Court's decision in *United States v. American Union Transport, Inc.* provides the correct application of the Shipping Act.[116] Thereafter, the First Circuit's decision in *Fireman's Fund American Insurance Co. v. Puerto Rican Forwarding Co.* is a model of clarity in which the court found that, despite the defendant's name, it acted as an NVOCC because it issued a bill of lading as a carrier.[117]

The bad apple in the pre-*Kirby* bunch is *Polyplastics, Inc. v. Transconex, Inc.*[118] Citing the Carmack Amendment, the court stated, "[a]s a freight forwarder, an NVOCC is considered the 'carrier.'"[119] The court should have applied the Shipping Act and recognized the distinction between shipping and forwarding. Three pre-*Kirby* cases from the Second Circuit all correctly apply the roles of freight forwarders and NVOCCs—*New York Foreign Freight Forwarders & Brokers Association v. United States*,[120] *Insurance Co. of North America v. S/S American Argosy*,[121] and *Prima U.S. Inc. v. Panalpina, Inc.*[122] The Third, Fourth, Seventh, and Ninth Circuits also have correctly addressed the distinction.[123] Within the Fifth Circuit, the decision by the Southern District of Texas in *Rainly Equipos De Riego, S.R.L. v. Pentagon Freight Services, Inc.* stands for the principle that a company's name is not nearly as important as the functions it performs.[124] Likewise, the Eleventh and D.C. Circuits have continued their faithful

115. 49 U.S.C. § 14706(a)(2).
116. 327 U.S. 437 (1946).
117. 492 F.2d 1294 (1st Cir. 1974).
118. 827 F.2d 859 (1st Cir. 1987).
119. *Id.* at 860 (1st Cir. 1987) (citing 49 U.S.C. § 11707(a)(2)).
120. 337 F.2d 289 (2d Cir. 1964).
121. 732 F.2d 299 (2d Cir. 1984).
122. 223 F.3d 126 (2d Cir. 2000).
123. SPM Corp. v. M/V MING MOO, 22 F.3d 523, 524-25 (3d Cir. 1994); AEL Asia Express (H.K.) Ltd. v. Am. Bankers Ins. Co. of Fla., 5 F. App'x 106, 110-11, 2001 WL 197817 (4th Cir. 2001); Zenith Elec. Corp. v. Panalpina, Inc., 68 F.3d 197 (7th Cir. 1995); Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY, 294 F.3d 1171 (9th Cir. 2002).
124. 979 F. Supp. 1079, 1082–83 (S.D. Tex. 1997).

application of the Shipping Act to cargo cases.[125] These cases preserve the traditional separation of NVOCCs and freight forwarders as seen across the circuits using the Shipping Act in all but one pre-*Kirby* case.

B. *The* Kirby *Decision*

In *Norfolk Southern Railway Co. v. Kirby*, Kirby hired International Cargo Control (ICC), which issued a bill of lading. The Supreme Court called ICC "an Australian freight forwarding company,"[126] although issuing bills of lading is a function that NVOCCs perform under the Shipping Act.[127] Although *Kirby* did not mention the Carmack Amendment, the Court's identification of ICC as a "carrier" would conform to the Carmack Amendment definition.[128] However, the Carmack Amendment applies to land-based, not ocean, carriage. Although the Court's designation of ICC as a freight forwarder rather than an NVOCC is dicta, such statements can quickly become entrenched rules. The question becomes did the Court in *Kirby* make a mistake and use the Carmack Amendment's definition of "carrier" or did it change the law to equate a freight forwarder with an NVOCC?

C. *Post-*Kirby *Jurisprudence*

Following *Kirby*, courts have not strictly adhered to the Shipping Act and some have inappropriately applied the Carmack Amendment. The district court's decision in *Talbots, Inc. v. Dynasty International, Inc.* demonstrates that a company's title and the documents it issues are vitally important to determining its legal status and the laws by which it is governed.[129] In contrast, the Southern District of New York has a murky post-*Kirby* line of cases. In *Scholastic Inc. v. M/V Kitano*, Navtrans International Freight Forwarders sometimes operated like a freight forwarder, but at other times like an NVOCC, particularly by issuing bills of lading.[130] Nevertheless, the *Scholastic* court deemed it a freight forwarder. Interpreting the

125. Ins. Co. of N. Am. v. M/V OCEAN LYNX, 901 F.2d 934, 937 (11th Cir. 1990); Itel Container Corp. v. M/V TITAN SCAN, 139 F.3d 1450, 1451 (11th Cir. 1998); Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 94 (D.C. Cir. 1989). Then-Judge Ruth Bader Ginsburg wrote the *National Customs Brokers* opinion and knew the difference between freight forwarders and NVOCCs, with NVOCCs issuing bills of lading. She would later be an Associate Justice on the *Kirby* Court and join the opinion allowing freight forwarders to issue bills of lading.

126. 543 U.S. at 18–19.

127. *See* Andrew D. Kehagiaras, *NVOCC: Secret Agent*? 17 U.S.F. MAR. L.J. 207, 231 (2004–05) (pointing out the problematic designation of ICC as a freight forwarder as early as the appellate level in *Kirby v. Norfolk S. Ry. Co.*, 300 F.3d 1300 (11th Cir. 2002)).

128. *See id.* at 321–33 (generally arguing that courts may be confused and have parts of the Carmack Amendment in mind when dealing with ocean carriers).

129. 808 F. Supp. 2d 351, 357 n.35 (D. Mass. 2011).

130. 362 F. Supp. 2d 449 (S.D.N.Y. 2005).

Code of Federal Regulations, the court analyzed the Shipping Act and cited to a Shipping Act decision; however, it incorrectly allowed a freight forwarder to issue a bill of lading, just as in *Kirby*.[131]

Two other Southern District of New York cases have come to correct decisions, but with unsound reasoning. In *A.P. Moller-Maersk A/S v. Ocean Express Miami*, the court quoted from the Shipping Act to rule that Ocean Express acted as an NVOCC, despite earlier referring to the firm as a freight forwarder.[132] The court did demonstrate that it was aware of the difference, even after quoting the correct statute, but left the issue clouded, losing sight of clearly drawn distinctions in statutory law and from earlier cases. In *Royal & Sun Alliance Insurance PLC v. Ocean World Lines, Inc.*, the court stated that "*Kirby* is indistinguishable from the case" at hand.[133] However, the *Royal & Sun* court appears to have forgotten that *Kirby* allowed a freight forwarder to issue a bill of lading to the shipper. The *Royal & Sun* court was aware that freight forwarders differ from NVOCCs and noted that the Carmack Amendment applies to freight forwarders but not to NVOCCs.[134] Although the court came to the correct conclusion, it erroneously relied on the Carmack Amendment rather than the Shipping Act.

In *Kawasaki Kisen Kaisha, Ltd v. Plano Molding Co.*, the Seventh Circuit twice referred to a party as a "freight forwarder" despite the party having issued a bill of lading but referred to it as an NVOCC elsewhere in the decision.[135] Perhaps *Kirby*, cited twice by the *Plano* court, influenced the murky delineation of roles and titles.[136]

Fortunately, the Ninth Circuit does not have the same muddled streak as cases from the Second and Seventh Circuits. In *Strickland v. Evergreen Marine Corp.*, the court cited the Shipping Act in holding that a party was an NVOCC because it issued a bill of lading.[137] The district court in *Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.* clearly understood which laws governed and the roles of different parties.[138]

In the Eleventh Circuit, *Bello v. Atlantic Container Line AB* conflates the roles of a freight forwarder and an NVOCC, stating, "AFL's intermediary

131. *Id.* at 455.

132. 550 F. Supp. 2d 454, 464 (S.D.N.Y. 2008).

133. 572 F. Supp. 2d 379, 389 (S.D.N.Y. 2008), *aff'd* 612 F.3d 138 (2d Cir. 2010). *Royal & Sun* is indistinguishable only to the extent that Carmack did not apply in *Kirby*.

134. *Id.* at 393.

135. 696 F.3d 647, 650, 656 (7th Cir. 2012) (stating "[a]s a freight forwarder, World contracted with THI Group LTD and K-Line. . . ." ; "World as the freight forwarder. . . ."; and "World, a non-vessel operating common carrier, was selected . . .").

136. However, the *Plano* court also loses some credibility for twice referring to the "Cermack Amendment." *Id.* at 651–52, 653 n.1.

137. No. 05-695, 2007 WL 539424 at *4–5 (D. Or. Feb. 15, 2007).

138. 913 F. Supp. 2d 780, 783 (N.D. Cal. 2012).

role was that of a freight forwarding 'non-vessel operating common carrier.'"[139]

Although the Shipping Act clearly differentiates between NVOCCs and freight forwarders, case law post-*Kirby* often conflates the two by incorrectly applying the Carmack Amendment. In addressing this issue, courts should begin with the statute on point—the Shipping Act rather than the Carmack Amendment—and avoid perpetuating the error in *Kirby*'s dicta, allowing freight forwarders to issue bills of lading.

VII. SAFE PORT AND SAFE BERTH PROVISIONS

Third parties may also have a stake in the protections of a charter party that are not explicitly reflected in the agreement even if they are not signatories to the contract.[140] Time and voyage charters often contain express or implied obligations that a charterer not require a vessel to go to an unsafe port or enter an unsafe berth. A port is deemed safe where "the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship."[141] Typically, under a safe port or safe berth clause, the Master may refuse to enter an unsafe location nominated by the charterer.[142] Notwithstanding this interpretation, a Third Circuit decision has brought to light a split between the Second and Fifth Circuits regarding the charterer's duty to exercise care in selecting a safe port or safe berth. The Second Circuit has historically held that, absent negligent navigation of the vessel by those in charge, a voyage charterer is strictly liable for damages resulting from an unsafe berth.[143] On the other hand, the Fifth Circuit has historically held that the party directing the vessel need only show due diligence in selecting a berth to avoid liability under a safe berth clause.[144]

In *Frescati*, the Third Circuit was faced with deciding whether to follow the Second Circuit's or Fifth Circuit's rationale when the *M/T ATHOS I* struck an abandoned anchor approximately nine hundred feet from the intended berth, spilling heavy crude oil into the waterway.[145] The vessel,

139. No. 01:08-cv-02071-RLV, 2009 WL 1408248 at *2 (N.D. Ga. Feb. 5, 2009). Perhaps the confused "freight forwarding NVOCC" influenced the decision not to publish this case, given the growing trend post-*Kirby* to conflate freight forwarders and NVOCCs.

140. *See generally* Frescati Shipping Co. v. Citgo Asphalt Refining Co., 718 F.3d 184 (3d. Cir. 2013).

141. JULIAN COOKE ET AL., VOYAGE CHARTERS ¶ 5.137 (3d ed. 2007).

142. *Id.* ¶ 5.150.

143. Venore Transp. Co. v. Oswego Shipping Corp., 498 F.2d 469, 473 (2d Cir. 1974).

144. *See, e.g.*, Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1156–57 (5th Cir. 1990).

145. *Frescati*, 718 F.3d at 189.

owned by Frescati Shipping Company, Ltd,, was time chartered to Star Tankers, Inc.[146] Star Tankers voyage chartered the vessel to CARCO, a CITGO affiliate, to transport the crude oil from Venezuela to CARCO's facility.[147] After the allision and spill, Frescati assumed responsibility for the cleanup.[148] The district court found no evidence to support a finding that Frescati was a third-party beneficiary of the voyage charter's safe port and safe port warranties and denied Frescati the right to claim that it was entitled to the benefit of the voyage charter's safe port and safe berth warranties.[149] In addition, the district court adopted the Fifth Circuit's due diligence standard of care and determined that CARCO had no liability under the safe berth or safe port provisions of the voyage charter even if Frescati was a third party beneficiary under the contract.[150]

On appeal, the Third Circuit held that the district court's inquiry did not go far enough and that the voyage charter unambiguously conferred Frescati third party beneficiary status as a matter of law because the voyage charter named the vessel and the safe berth and safe port provisions were intended to benefit the vessel.[151] In reaching its decision the court relied in part on two prior Supreme Court cases that held a vessel and its owner were third party beneficiaries of implied warranties of workmanlike performance owed by a stevedore.[152] Further, the Third Circuit stated that the Second Circuit had previously held that an owner was entitled to the benefit of a safe berth warranty as contained in a sub-charter.[153] Thus, the Third Circuit adopted the Second Circuit's position and found that Frescati was a third-party beneficiary entitled to the safe port and safe berth warranties in the charter party.[154] On February 24, 2014, the Supreme Court denied certiorari on the *Frescati* decision.[155] The circuit split endures regarding the meaning and application of a common charter party term for the time being.

VIII. FAIR OPPORTUNITY DOCTRINE

Generally, the Carriage of Goods by Sea Act (COGSA) provides that when loss or damage to cargo is not the fault of the carrier, the carrier may limit its liability for loss or damage to $500 for each package specified

146. *In re* Frescati Shipping Co., 2011 WL 1436878, at *1 (E.D. Pa. Apr. 12, 2011).
147. *Id.* at *2.
148. *Frescati*, 718 F.3d at 193.
149. *Frescati*, 2011 WL 1436878, at *6–7.
150. *Frescati*, 718 F.3d at 195.
151. *Id.* at 196.
152. Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960).
153. Paragon Oil Co. v. Republic Tankers, S.A. 310 F.2d 169 (2nd Cir. 1962).
154. *Frescati*, 718 F.3d at 199.
155. CITGO Asphalt Refining Co v. Frescati Shipping Co., 134 U.S. 1279 (2014).

on the bill of lading.[156] The $500 package limit applies unless the shipper declares a different value for the cargo on the bill of lading.[157] A carrier that fails to provide a shipper with the right to declare a higher value cannot limit liability under COGSA's carrier immunities.[158]

Although courts usually agree that the shipper is entitled to declare a higher value, the extent of the opportunity to declare a higher value differs by circuit.[159] Seven circuits have considered what this opportunity to declare value requires. All but one, the Third Circuit, applied the common law fair opportunity doctrine to frame the analysis of what qualifies as opportunity to declare a higher value.[160] The Third Circuit determined the fair opportunity doctrine as inconsistent with COGSA because Congress intended COGSA to provide a warning to parties when departing from the default liability scheme, protect unsophisticated parties, and provide parties with equal bargaining power.[161] Accordingly, the Third Circuit is the only court in which the fair opportunity doctrine does not apply to transactions governed by COGSA.[162]

Recently, the New Jersey District Court reiterated the Third Circuit's position on the fair opportunity doctrine in dicta as it analyzed a damages limitation issue under the Interstate Commerce Act (ICC) in *Phoenix Insurance Co., Ltd. v. Norfolk Southern Railroad Corp.*[163] In the *Phoenix* decision, the court acknowledged the Third Circuit's rejection of the fair opportunity doctrine and articulated that the fair opportunity doctrine is inconsistent with COGSA because COGSA does not have an explicit notice provision.[164] The court then distinguished COGSA from the Interstate Commerce Act, which does have an explicit notice provision.[165]

The Second Circuit, which recognizes the fair opportunity doctrine within the COGSA framework, also recently reiterated its position on a

156. COGSA § 4(5), *reprinted* in note following 46 U.S.C. § 30701 (2012).
157. *Id.*
158. *Id.*
159. Ferrostaal, Inc. v. M/V SEA PHOENIX, 447 F.3d 212, 214 (3d Cir. 2006).
160. *See, e.g.*, Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY, 408 F.3d 1250,1255 (9th Cir. 2005); Nippon Fire & Marine Ins. Co. v. M/V TOURCOING, 167 F.3d 99, 102 (2d Cir. 1999); Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244, 1251–54 (8th Cir. 1994); Acwoo Int'l Steel Corp. v. Toko Kaiun Kaish, Ltd., 840 F.2d 1284, 1288 (6th Cir. 1988); Gen. Elec. Co. v. MV NEDLLOYD, 817 F.2d 1022, 1028–29 (2d Cir. 1987); Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND, 784 F.2d 1161 (4th Cir. 1986), *rev'd on other grounds en banc*, 804 F.2d 837 (4th Cir. 1986); Brown & Root, Inc. v. M/V PEISANDER, 648 F.2d 415, 424 (5th Cir. 1981); *but see* Ferrostaal, Inc. v. M/V SEA PHOENIX, 447 F.3d 212, 224 (3d Cir. 2006).
161. *Ferrostaal*, 447 F.3d at 221–22.
162. *Id.*
163. Civ. No. 11-00398, 2014 WL 2008958, at *14 (D.N.J. May 14, 2014).
164. *Id.*
165. *Id.*

motion for summary judgment in a COGSA case in *OOO "Garant-S" v. Empire Lines Co., Inc.*, as follows:

> COGSA provides that the carrier's liability is limited to $500 per package unless a higher value is declared by the shipper and inserted in the bill of lading, or the parties agree to a higher limit. Under the "fair opportunity" doctrine, however, the COGSA limit is inapplicable if the shipper does not have a fair opportunity to declare higher value and pay an excess charge for additional protection. The carrier bears the initial burden of proving fair opportunity. Once the carrier presents *prima facie* evidence that an opportunity existed—something that can be established from the language of the bill of lading—the burden shifts to the shipper to demonstrate that a fair opportunity did not exist.[166]

The court then analyzed the language in the bill of lading at issue and found it to unambiguously notify the shipper that the COGSA package limit applied.[167] The shipper countered with other Second Circuit precedent requiring the carrier to provide a space on the bill of lading to declare another value, which the carrier failed to do.[168] While the court agreed that it is a best practice to provide the shipper with a space in a bill of lading, the court determined that the impact of a failure to provide a space is not an issue for summary judgment, but rather a question for a jury.[169]

In contrast to the conclusion in *OOO "Garant-S,"* in *Jean-Baptiste v. New York Terminal 1, Inc.*, the court found that the carrier did not satisfy the fair opportunity requirement after it produced two bills of lading, neither of which unambiguously provided the shipper with a chance to declare a different value.[170] In reaching its conclusion, the court looked at the standards in circuits that apply the fair opportunity doctrine to COGSA issues.[171] Curiously, however, *Jean-Baptiste* was decided in a Third Circuit district court, which, as explained above, rejects the application of the fair opportunity doctrine within the COGSA framework. Thus, the Third Circuit's departure from the other federal circuits' application of the fair opportunity doctrine to COGSA cases has resulted in not only a circuit split in what is supposed to be a uniform body of admiralty law, but also either confusion or dissent within its own circuit as to the application of the fair opportunity doctrine.

166. 557 F. App'x 40, 44 (2d Cir. 2014) (internal quotations and citations omitted).
167. *Id.*
168. *Id.* (citing Binladen BSB Landscaping v. M/V NEDLLOYD ROTTERDAME, 759 F.2d 1006, 1017 n.12 (2d Cir. 1985)).
169. *Id.*
170. No. 13-1656, 2014 WL 495160, at*15 (D.N.J. Feb. 6, 2014).
171. *Id.*