Wilburn Boat's Progeny Continues to Widen the Circuit Split Regarding the Breach of Marine Insurance Warranties

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There is a well-known split in the circuit courts of appeals on the issue of whether, under federal admiralty law, a policyholder's breach of a marine insurance warranty excuses the insurer from coverage. Unfortunately for advocates of maritime law uniformity, the most recent circuit decision to address the issue, *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*,[1] further muddies the already murky waters regarding this issue.

I. *Wilburn Boat*

At root is the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[2] nearly 70 years ago, which held state law should govern the field of marine insurance "absent a judicially established federal admiralty rule or the need to fashion one."[3] The case has been much maligned in the decades that have followed – primarily for, as one Past President of the MLA colorfully stated, its "perverse assault on admiralty uniformity."[4] This sentiment is particularly exact with respect to the consequences of an insured's breach of an express warranty contained in a marine policy; specifically, whether the breach of an express warranty voids the entire marine insurance policy notwithstanding any connection between the warranty breached and the ultimate loss.

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[1] Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161 (11th Cir. 2021) [hereinafter Ocean Reef II].
[2] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1954).
[3] Harold K. Watson, *A Fifty Year Retrospective on the American Law of Marine Insurance*, 91 TUL. L. REV. 855, 856 (2017).
[4] Graydon S. Staring, *Wilburn Boat Is A Dead Letter: R.I.P.*, 42 J. MAR. L. & COM. 465, 465 (2011).

In short, *Wilburn Boat* decided that state law, rather than federal admiralty law exclusively, can determine the effect of an insured's breach of warranty contained in a marine insurance policy – whether causally related to the loss or not.[5] The Supreme Court's holding rested on the dubious claim that, at the time, no federal admiralty law controlling the consequences a marine insurance warranty breach had "been judicially established as part of the body of federal admiralty law in this country."[6] Failing to find a sufficiently entrenched federal admiralty rule on this issue, the Supreme Court declined to fashion a new rule itself and summarily declared that "marine insurance contracts, like all others, [are] subject to state control."[7]

Following this decision, the Supreme Court has remained silent as the courts of appeals have struggled to determine the point at which a rule of admiralty becomes sufficiently established or entrenched so as to supersede any conflicting state law on the subject.[8] The end result being that every circuit now seemingly has its very own custom-made collection of warranties that it considers to be established under federal admiralty law, the breach of which will permit the insurer to void the entire policy regardless of any conflicting state law on the subject.

Although certainly disruptive to admiralty uniformity, it must be noted that *Wilburn Boat* generally fails to have a meaningful impact on the outcome of a given case because "[t]he state majority rule also provides that express warranties in marine insurance policies should be strictly

[5] Wilburn, *supra* note 2, at 321.
[6] *Id.* at 316.
[7] *Id.* at 316-17.
[8] *See* DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES: CASES AND MATERIALS (3d ed. 2015).

construed."[9] Thus, many courts of appeals are able to avoid rocking the *Wilburn Boat* decision by adhering to the letter (if not the spirit) of its holding. And even for the minority states that do not require strict performance in marine insurance policies (e.g., Florida, Texas, Washington), the circuits in which they reside continue to apply federal admiralty law to the breach of certain marine insurance warranties.

The remaining pages will first discuss the most recent addition to *Wilburn Boat*'s progeny and then provide a summary of each circuit's determination of whether, and when, a breach of a marine insurance warranty will void coverage under federal admiralty law.

II. *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*

The most recent circuit case to grapple with the establishment of federal admiralty rules governing the breach of a marine insurance warranty is *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*.[10] Here, the Eleventh Circuit was asked to decide "whether there exist entrenched federal maritime rules governing captain or crew warranties."[11]

The lower court reasoned that a literal reading of *Wilburn Boat* "left the door open for the creation of judicially established federal rules of admiralty that may not have existed at the time the case was decided."[12] After reviewing thirty years of Eleventh Circuit precedent, the court determined that "the Eleventh Circuit has fashioned an entrenched federal rule of admiralty: express warranties in maritime insurance contracts must be strictly construed in the absence of

[9] Guam Indus. Servs. v. Zurich Am. Ins. Co., 787 F.3d 1001, 1005 (9th Cir. 2015).
[10] Ocean Reef II, *supra* note 1.
[11] *Id.* at 1169.
[12] Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, LLC, 396 F. Supp. 3d 1170, 1175 (S.D. Fla. 2019) [hereinafter "Ocean Reef I"].

some limiting provision in the contract."[13] This necessarily included the captain and crew warranties at issue in the case.[14]

On appeal, the Eleventh Circuit disagreed with the lower court's attempt to fashion a clear, uniform rule of admiralty law and reversed the decision.[15] After providing an emphatic "no" to the question on the existence of a federally entrenched maritime rule governing Captain and crew warranties, the court went further and advised that it was still bound by *Wilburn Boat*'s "holding that there is no established federal maritime rule requiring strict fulfillment of all warranties in marine insurance policies."[16] However, the Eleventh Circuit carved out exceptions to this rule for warranties involving navigation limits and seaworthiness – the breach of either voids coverage even if unrelated to the loss because they are entrenched federal maritime rules – based on circuit precedent.[17]

Despite its professed adherence to *Wilburn Boat*, the Eleventh Circuit does not shy away from criticizing the opinion or the Supreme Court itself. After chastising the Supreme Court for "leaving the lower federal courts at sea without a rudder or compass," the panel strongly suggests that *Wilburn Boat* was wrongly decided for its failure to preserve "a uniform maritime rule regarding the effect of a breach of an express warranty in a marine insurance policy."[18] Nonetheless, being unwilling or unable to find that a federally established maritime rule of strict

[13] *Id.* at 1176.
[14] *Id.* at 1177 ("This Court is bound to adhere to the plain text of the rule and finds that warranties in a maritime insurance contract, like the Captain and Crew Warranties here, must be strictly construed").
[15] Ocean Reef II, *supra* note 1, at 1163 ("conclud[ing] that there is no entrenched maritime rule governing captain or crew warranties, and that as a result Florida law applies to determine the effect of Ocean Reef's breaches").
[16] *Id.* at 1169, 1168.
[17] *Id.* at 1168-69.
[18] *Id.* at 1167 ("If we were writing on a blank slate, we would consider holding that there should be a uniform maritime rule regarding the effect of a breach of an express warranty in a marine insurance policy—and from there determine what that uniform rule should be").

performance had developed in the more than sixty years since *Wilburn Boat* was decided, the Eleventh Circuit widened the ongoing circuit split by adopting a piecemeal approach to the issue. This appears to be the circuit's not-so-subtle intent as the opinion ends with an expression of hope that "[m]aybe, just maybe, this case will prove tempting enough for the Supreme Court to wade in and let us know what it thinks of *Wilburn Boat* today."[19]

III. Review of Current Circuit Positions on Breach of Marine Insurance Warranties

Circuit	**Case(s) and Relevant Details**
First	The First Circuit openly embraces a federal maritime rule of strict performance for all marine insurance warranties. In *Lloyd's of London v. Pagan-Sanchez*, a case concerning a fire extinguisher warranty, the court unequivocally states that "under federal law . . . a breach of a promissory warranty of in a maritime insurance contract excuses the insurer from coverage."[20] This is true even if the breach is "collateral to the primary risk that is the subject of the contract."[21] In its opinion, the court interprets the Supreme Court's 2004 decision in *Norfolk Southern Railway Co. v. Kirby*[22] as having implicitly overruled the need to conduct a *Wilburn Boat* analysis with respect to marine insurance contracts.[23] Instead, the First Circuit – satisfied there exists a "well-established general rule"

[19] *Id.* at 1171.
[20] Lloyd's of London v. Pagan-Sanchez, 539 F.3d 19, 24 (1st Cir. 2008).
[21] *Id.* at 24-26; *see also* Maclean v. Travelers Ins. Co., 299 F. Supp. 3d 231, 234-35 (D. Mass. 2017); Markel Am. Ins. Co. v. Leonor Veras, 995 F. Supp. 2d 65, 77 (D.P.R. 2014).
[22] Norfolk Southern Railway Co. v. Kirby, 543 U.S. 14, 22-23 (2004) ("When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation").
[23] *See* N. Assur. Co. of Am. v. Keefe, 845 F. Supp. 2d 406, 413 (D. Mass. 2012); Staring, *supra* note 4, at 475-76.

and that the case did not present an "inherently local dispute" – held that a federal admiralty rule of strict compliance with marine insurance warranties governs.[24]

Second

In *Advani Enters. v. Underwriters at Lloyds*, the Second Circuit relied on *Wilburn Boat* for the proposition that "Federal maritime law requires us to determine the scope and validity of the marine insurance policy provisions involved and the consequences of breaching them by using state law."[25] Unable to find a "specific federal rule governing the construction of marine insurance contracts," courts in the Second Circuit apply state law to determine the effect of warranty breach.[26]

While federal courts in the Second Circuit "look to state law for principles governing maritime insurance policies," those laws unquestionably conform with a recognized federal rule of strict compliance with all warranties contained in a marine policy.[27] Indeed, it has clearly asserted "[u]nder the federal rule and the law of most states, warranties in maritime insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract, if the insured is to recover." [28] Despite such language, the Second Circuit stops short of declaring that strict performance is an established federal admiralty rule, such that it displaces state law on the subject. Instead, because the outcome appears to be strict liability under either federal or state law in most

[24] Lloyd's of London, *supra* note 20, at 25.
[25] Advani Enters. v. Underwriters at Lloyds, 140 F.3d 157, 162 (2d Cir. 1998).
[26] Hartford Fire Ins. Co. v. Mitlof, 208 F. Supp. 2d 407, 411 (S.D.N.Y. 2002); *see also* N. Assur. Co. of Am. v. Rathbum, 567 F. Supp. 2d 316, 319 (D. Conn. 2008) ("Although Connecticut law governs the policy, there are no Connecticut statutes or case law interpreting captain warranties in maritime insurance policies").
[27] Commercial Union Ins. Co. v. Flagship Marine Svcs., 190 F.3d 26, 30 (2d Cir. 1999).
[28] *Id.* at 31.

cases, the Second Circuit more often than not finds that no choice (and therefore no need to confront *Wilburn Boat* head on) is necessary.[29]

Third — In the Third Circuit, only a breach of *uberrimae fidei* (the warranty of utmost good faith) appears to result in avoidance of the entire marine insurance policy due to a rule of federal admiralty. In *AGF Marine Aviation & Trans. v. Cassin*, the court "conclude[d] that the doctrine of *uberrimae fidei* is well entrenched and therefore controls this dispute."[30]

However, at least one lower court in the Third Circuit considers a navigational warranty to be similarly established by federal maritime law.[31]

Fourth — In *Goodman v. Fireman's Fund Ins. Co.*, the Fourth Circuit ended its opinion stating "[i]t is a familiar that the breach of an express warranty in a contract for marine insurance releases the insurer from any liability due to the breach."[32] This case, which does not cite to – nor mentions – *Wilburn Boat*, specifically involved the breach of a lay-up warranty. The courts in this circuit have had little to say on the subject in the ensuing forty years.

While the language above seemingly implies that the Fourth Circuit would endorse the existence of a federal admiralty rule of strict compliance, it is difficult to say for certain. As a result, Fourth Circuit precedent only clearly supports the recognition of established federal admiralty rules governing the breach of lay-up

[29] *See* Staring, supra note 4, at 478.
[30] AGF Marine Aviation & Trans. v. Cassin, 544 F.3d 255, 263 (3d Cir. 2008).
[31] Std. Fire Ins. Co. v. Cesario, 2012 U.S. Dist. LEXIS 133096, at *3-4 (D.N.J. 2012) ("Federal precedents have long held that navigational warranties should be strictly construed").
[32] Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1043 (4th Cir. 1979).

warranties (*Goodman*) and the breach of Captain warranties in policies of marine insurance.[33]

Fifth — The Fifth Circuit, progenitor of the *Wilburn Boat* case, is the federal court of appeals most unwilling to accept the establishment of federal admiralty rules that govern the breach of marine insurance warranties. In *Albany Ins. Co. v. Anh Thi Kieu*, a decision roundly criticized by fellow circuits, the panel stated that the "presumption of state is, by now, axiomatic" concerning the regulation of marine insurance.[34] It then held "albeit with some hesitation, that the *uberrimae fidei* doctrine is not entrenched federal precedent." Accordingly, a breach of the warranty of utmost good faith in the Fifth Circuit will not void the policy under federal admiralty law, as it seemingly would in every other U.S. court of appeals.

Notwithstanding the above, the Fifth Circuit does recognize entrenched federal maritime rules for both "the implied warranty of seaworthiness and the interpretation of Inchmaree clauses in maritime insurance contracts, which displaces [state] law."[35]

Sixth — There is virtually no relevant case law discussing the issue in the Sixth Circuit. However, in a case decided before *Wilburn Boat* that involved the breach of a watchman warranty, the Sixth Circuit seemingly recognized a federal maritime rule of strict performance when it stating "[i]t is settled that a warranty in a

[33] *See* Capital Coastal Corp. v. Hartfornd Fire Ins. Co., 378 F. Supp. 163 (E.D. Va. 1974).
[34] Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 886 (5th Cir. 1991).
[35] Thanh Long Partnership v. Highlands Ins. Co., 32 F.3d 189, 193 (5th Cir. 1994); *see also* Aguirre v. Citizens Casualty Co., 441 F.2d 141, 146 (5th Cir. 1971) ("The seaworthiness standard is solidly entrenched in federal maritime jurisprudence").

contract of insurance must be literally complied with . . . and that a breach of the warranty releases the company from liability regardless of the fact that a compliance with the warranty would not have avoided the loss."[36]

Seventh

The Seventh Circuit similarly lacks substantial case law on the issue of marine insurance warranty breaches. In *Continental Cas. Co. v. Anderson Excavating & Wrecking Co.*, a panel declared that the "interpretation of [an Inchmaree] clause is governed by federal admiralty law."[37] Otherwise, this court of appeals has been relatively silent on the issue.

Lower courts to address the issue in the Seventh Circuit appear to be split on their interpretation of *Wilburn Boat*. The Northern District of Illinois considers *uberrimae fidei* sufficiently established to displace state law, which it made clear when stating in *St. Paul Ins. Co. v. Great Lakes Turnings Ltd.* the following:

> "to decide that *uberrimae fidei* is not established federal precedent in this dispute would require this court to ignore four hundred years of judicial decisions, the entire history of insurance, and the need for uniformity and coherence of a vital international industry."[38]

However, the Western District of Wisconsin distinguished this clear endorsement to a case involving a recreational boat damaged on an inland lake where the insured made material misrepresentations on his insurance application.[39] In its opinion, the court stated it was "not convinced that *uberrimae fidei* is the proper

[36] Home Ins. Co. v. Ciconett, 179 F.2d 892, 894 (6th Cir. 1950).
[37] Continental Cas. Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 520 (7th Cir. 1999).
[38] St. Paul Ins. Co. v. Great Lakes Turnings, Ltd., 829 F. Supp. 982, 988 (N.D. Ill. 1993).
[39] Progressive Northern Ins. Co. v. Bachmann, 314 F. Supp. 2d 820 (W.D. Wis. 2004).

standard to apply . . . [in a] case [that] does not involve facts of any commercial or international scope."[40] Sowing further confusion, the Northern District of Illinois in a later opinion held that "federal admiralty law requires the strict construction of express warranties in maritime insurance contracts."[41] Accordingly, the Seventh Circuit's true position on the matter remains open to debate.

Eighth — In the Eighth Circuit, only *uberrimae fidei* is sufficiently established to displace state law. In *New York Marine & Gen. Ins. Co. v. Cont'l Cement Co.*, a panel "conclude[d] that the doctrine of utmost good faith is such a judicially established federal admiralty rule."[42] The Eighth Circuit rested its decision, in part, on its determination that the "Supreme Court has long recognized the doctrine."[43]

Ninth — The Ninth Circuit, like the Second, seems to recognize – without explicitly endorsing – the existence of a federally established rule of strict performance for all marine insurance warranties. In *Guam Indus. Servs. v. Zurich Am. Ins. Co.*, it stated:

> "The federal rule, if one in fact exists, is that admiralty law requires the strict construction of express warranties in marine insurance contracts; breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not

[40] *Id.* at 829.
[41] Atl. Specialty Ins. Co. v. AC Chicago, LLC, 272 F. Supp. 3d 1043, 1049 (N.D. Ill. 2017).
[42] New York Marine & Gen. Ins. Co. v. Cont'l Cement Co., 761 F.3d 830, 839 (8th Cir. 2014); *but see* St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc., 798 F.3d 715, 722 (8th Cir. 2015) ("we think clarity is enhanced by preserving actual reliance and objective materiality as distinct elements" of *uberrimae fidei*").
[43] New York Marine & Gen. Ins. Co., *supra* note 41, at 839.

have avoided the loss. The state majority rule also provides that express warranties in marine insurance policies should be strictly construed. [44]

The circuit went on to say that it "has neither announced a federal rule nor disclaimed such a rule" for all marine insurance warranties.[45] However, the Ninth Circuit has recognized strict compliance with warranty provisions in a maritime insurance contract is federally established with respect to *uberrimae fidei*,[46] navigational limits and trading limits,[47] and Captain warranty.[48]

Finally, at least one lower court has found that the breach of a lay-up warranty contained in a marine insurance policy *is not* federally established.[49]

Tenth

In *Openwater Safety IV, LLC v. Great Lakes Ins. SE*, one of the few Tenth Circuit cases to address the issue, the court affirms that "a few circuits have announced that federal rule [of strict performance]."[50] But like the Ninth Circuit, the Tenth Circuit "has neither announced nor disclaimed such a federal rule."[51] Furthermore, it saw no need to do so in *Openwater Safety IV* for the reason that "[u]nder both federal admiralty law and New York state law, this court must

[44] Guam Indus. Servs. v. Zurich Am. Ins. Co., 787 F.3d 1001, 1004-05 (9th Cir. 2015).
[45] *Id.* at n.1; *but see* Certain Interested Underwriters at Lloyd's v. Bear, LLC, 259 F. Supp. 3d 1050, 1057 (S.D. Cal. 2017) ("The effect of a breach of warranty in a marine insurance policy is governed by state law").
[46] Certain Underwriters at Lloyds v. Inlet Fisheries Inc., 518 F.3d 645, 654 (9th Cir. 2008) ("Following the framework of *Wilburn Boat*, we hold that the longstanding federal maritime doctrine of *uberrimae fidei*, rather than state law, applies to marine insurance contracts").
[47] Port Lynch, Inc. v. New England Int'l Assurety, Inc., 754 F. Supp. 816, 823 (W.D Wash. 1991) ("Under this established federal rule of admiralty, a breach of an express trading or navigational warranty releases the insurance company from liability even if compliance with the warranty would not have avoided the loss").
[48] Yu v. Albany Ins. Co., 281 F.3d 803, 808-09 (9th Cir. 2002).
[49] Ins. Co. of N. Am. v. San Juan Excursions, Inc., 2006 U.S. Dist. LEXIS 68240, at *26 (W.D. Wash. 2006); *contra* Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1043 (4th Cir. 1979), *supra* note 31.
[50] Openwater Safety IV, LLC v. Great Lakes Ins. SE, 435 F. Supp. 3d 1142, at n.9 (10th Cir. 2020).
[51] *Id.*

strictly construe the express Named Operator Warranty" in the marine insurance policy.[52]

While the Tenth Circuit's position remains unspoken, and therefore unclear, one lower court in the Tenth Circuit expressly found both the warranty of seaworthiness and *uberrimae fidei* to be established principles of federal admiralty law.[53]

Eleventh[54] Finally, as discussed in more detail at Section II, the Eleventh Circuit clearly recognizes an established federal admiralty law requiring strict compliance with the warranties of seaworthiness and navigation limits in marine insurance policies.[55] These positions find their origins *Aguirre v. Citizens Casualty Co.* (seaworthiness)[56] and *Lexington Ins. Co. v. Cooke's Seafood* (navigation warranty).[57] While *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC* limited the holding in *Lexington Ins.* to mean only "that the breach of a navigation limit warranty bars coverage as a matter of maritime law,"[58] the earlier panel's decision was in fact much broader and seemed applicable to *all* express

[52] *Id.* at 1156.
[53] Great Lakes Reinsurance (UK), PLC v. Sea Cat I, LLC, 653 F. Supp. 2d 1193, 1200 (W.D. Okla. 2009) ("The warranty of seaworthiness is a well-established and entrenched principle of admiralty law. It attaches at the inception of a time policy and at the commencement of the voyage insured under a voyage policy. The duty of utmost good faith and disclosure of all facts material to the insured risk -- the doctrine of uberrimae fidei -- is also a well-established and entrenched principle of admiralty law").
[54] Congress created the United States Court of Appeals for the Eleventh Circuit in 1981 via the Fifth Circuit Court of Appeals Reorganization Act. The district courts in Mississippi, Louisiana, and Texas remained with the Fifth Circuit. The districts courts in Alabama, Georgia, and Florida joined the new Eleventh Circuit.
[55] *See* Ocean Reef II, *supra* note 1, at 1168-69.
[56] Aguirre v. Citizens Casualty Co., 441 F.2d 141, 145 (5th Cir. 1971) ("The inescapable conclusion remains that the vessel was unseaworthy when she ran aground. Consequently the owners' breach of their express warranty of seaworthiness suspended coverage under the insurance policy").
[57] Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364, 1367 (11th Cir. 1988).
[58] Ocean Reef II, *supra* note 1, at 1168.

warranties.[59] Indeed, this appears to have been the accepted view in Eleventh Circuit for more than thirty years, as indicated by a 2019 opinion (issued by a different set of panel judges) which noted "established federal maritime rules, like the rule requiring absolute enforcement of express navigational warranties, ordinarily control even in the face of contrary state authority."[60]

IV. Conclusion

The foregoing review of circuit decisions displays a terrific diversity of thought concerning the scope (and existence) of federally established admiralty rules that govern the effect of marine insurance warranty breaches. This lack of uniformity between, and sometimes within, the circuits is so pronounced that categorizing them evades clarity. Only the First Circuit has embraced a federally established rule of strict compliance with all express warranties, though the Fourth and Sixth Circuits might agree if pressed. The Second Circuit acknowledges the existence of this federal admiralty rule but does not explicitly adopt it as the basis for its holdings in any cases. The Third and Eighth Circuits recognize a federal maritime law requiring strict compliance only with respect to the warranty of *uberrimae fidei*. The Fifth Circuit rejects a federal rule governing *uberrimae fidei*, although it does accept a federally controlling law for the warranty of seaworthiness. The Seventh Circuit's position is decidedly unclear, while the Ninth and Tenth Circuits will neither confirm nor deny the existence of a federal admiralty rule of strict compliance. Finally, the Eleventh Circuit (which until recently appeared in line with the First) now accepts federal rules governing only the warranties of seaworthiness and navigation limits.

[59] *See* Lexington Ins. Co., *supra* note 56, at 1366 ("admiralty law requires the strict construction of express warranties in marine insurance contracts; breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss").
[60] Geico Marine Ins. Co. v. Shackleford, 945 F.3d 1135, 1142 (11th Cir. 2019) (emphasis added).