Great Lakes Insurance v. Raiders Realty: Waiting for the Supreme Court to Rule

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I. Introduction

As this paper goes to press, *Great Lakes Insurance SE v. Raiders Retreat Realty Co*.[1] — the Supreme Court's first marine insurance case in over 68 years — is fully briefed[2] and awaiting oral argument, which is scheduled for Tuesday morning, October 10, the week before the MLA's fall meetings. When the Uniformity Committee meets in San Francisco and we can discuss this case in person, we will have the benefit of having heard what happened at oral argument. In the meantime, this paper supplies some helpful background to facilitate understanding.

A. Facts of the Case and Procedural History

In *Raiders Retreat*, both the facts and the procedural history are entirely straightforward. The assured's covered yacht ran aground. The insurer preemptively filed an action for a declaratory judgment that it was not liable on the policy because "the yacht's fire-extinguishing equipment had not been timely recertified or inspected" even though "the vessel's damage was not caused by fire."[3] The assured in its counterclaim alleged a breach of contract and various violations of Pennsylvania law. The district court dismissed the state-law counterclaims on the ground that New

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[1] 143 S. Ct. 999 (2023) (granting cert. to 47 F.4th 225 (3d Cir. 2022)).

[2] The petitioner's reply brief, which is generally the last brief to be filed, was filed on August 30, 2023. Of course, it is always possible that the Court could call for supplemental briefing, but that would be unusual.

[3] 47 F.4th at 227; *see also* Brief for Petitioner at 8, *Raiders Retreat*, No. 22-500 (filed May 26, 2023) (conceding that when the yacht ran aground "[n]o fire occurred and the fire equipment was not used").

York, not Pennsylvania, law applied. In reaching that conclusion, the district court relied on a boilerplate choice-of-law clause that the insurer routinely includes in its marine insurance policies.[4] That clause provides:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice[,] but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.[5]

On appeal, the Third Circuit vacated and remanded the case to permit the district court to consider whether Pennsylvania has a strong public policy in favor of its relevant law that would preclude the enforcement of the New York choice-of-law clause.

The insurer petitioned for certiorari, asking the Supreme Court to address two issues. The first question presented — broadly asking the Court to clarify the standard under maritime law for enforcing a choice-of-law clause — would have given the Court the opportunity to reconsider *Wilburn Boat Co. v. Fireman's Fund Insurance Co*.[6] if it had wished to do so.[7] The Court declined to hear that question. The second asked more narrowly whether "a choice of law clause in a maritime contract [is] unenforceable if enforcement is contrary to the 'strong public policy' of the state whose law is displaced."[8] The Court granted certiorari on only that second question.[9]

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[4] *See infra* note 78 and accompanying text.

[5] 47 F.4th at 228 (3d Cir. 2022) (quoting policy) (alteration by court).

[6] 348 U.S. 310 (1955).

[7] *See* Petition for Certiorari at i, *Raiders Retreat*, No. 22-500 (filed Nov. 23, 2022).

[8] *Id.* The insurer did its best to frame the case as one of general maritime law rather than marine insurance.

[9] *See* 143 S. Ct. at 999.

B. Vertical Choice-of-Law Analysis Under *Wilburn Boat*

Because the Supreme Court denied cert on the first question presented in *Raiders Retreat*, the Court is apparently not interested in reconsidering its infamous *Wilburn Boat* decision. We must therefore consider *Raiders Retreat* against the background of *Wilburn Boat*'s vertical choice-of-law analysis.

Like *Raiders Retreat*, *Wilburn Boat* originated in some very mundane facts.[10] In May 1947, the Fireman's Fund Insurance Company, a California corporation, issued a marine hull policy on the *Wanderer*, a small houseboat then located in Mississippi waters. The insurer issued the policy in Illinois through an Illinois broker to assureds who resided in Iowa and Illinois. It provided, among other things, that the vessel could neither be sold nor pledged without the insurer's consent.[11] Furthermore, the assureds could use the vessel "solely for private pleasure purposes," and it could not be "hired or chartered" without the insurer's permission.[12]

In June 1948, three brothers from Denison, Texas — Glenn, Frank, and Henry Wilburn — purchased the *Wanderer*, and the insurer indorsed the policy in favor of the new owners doing business as a partnership known as "Wilburn's Boat Company." They proceeded to move the vessel to Lake Texoma, an artificial lake on the border between Texas and Oklahoma that had been created in 1944 by the Denison Dam. A policy indorsement authorized the trip and provided that the *Wanderer* would thereafter be confined to Lake Texoma.

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[10] As is typical, the Supreme Court's opinion gives only a bare outline of the facts. More details can be found in some of the lower courts' opinions (particularly on remand from the Supreme Court), the Transcript of Record, and in the secondary literature. For the most detailed account of the case that is readily available to most readers, see Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide*, 28 J. MAR. L. & COM. 395 (1997).

[11] *Wilburn Boat*, 348 U.S. at 311 n.1.

[12] *Id.*

In September 1948, the brothers sold the *Wanderer* to the "Wilburn Boat Company," an Oklahoma corporation that they owned. The insurer did not consent to that sale. On three occasions, the Wilburn brothers or their corporation pledged the vessel to secure promissory notes. The insurer did not consent to those transactions. Finally, the owners leased the vessel on several occasions and carried passengers for hire. Although a survey sent to the insurer in February 1949 partially disclosed the planned commercial use of the vessel, the insurer did not give its required permission. It was undisputed that each of those actions breached the policy.

On February 25, 1949, a fire destroyed the *Wanderer* while it was moored approximately 300 feet off the Oklahoma shore of the lake. The origin of the fire remains unknown, but it was undisputed that the policy breaches did not cause the loss. When the Wilburn brothers made a claim under the policy, which by its terms covered loss due to fire, Fireman's Fund declined to pay the claim and instead returned the premiums. It argued that when an assured breaches a warranty in a marine insurance policy the general maritime law permits the insurer to avoid paying a claim for a subsequent loss — even if the breach of warranty was unrelated to the loss. The Wilburns argued that Texas law, rather than the general maritime law, governed the policy. Under Texas law, policy breaches relating to the sale and use of the vessel would not defeat coverage unless they had contributed to the loss,[13] and the anti-encumbrance provision in the policy would be ineffective.[14]

In June 1949, the litigation odyssey began when the three brothers and their company sued the insurer in a Texas state court to recover over $40,000 under the insurance policy. Fireman's Fund, asserting diversity jurisdiction, removed the case to federal district court. In December

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[13] *See* 348 U.S. at 312 n.3 (quoting applicable Texas statute).

[14] *See* 348 U.S. at 312 n.2 (quoting applicable Texas statute).

1951, the district court ruled that federal maritime law governed and that — because of the "literal compliance" rule for marine insurance warranties — the Wilburns were not entitled to any recovery. On appeal, the Fifth Circuit affirmed.[15] Because of the "[i]mportance of the questions involved,"[16] the Supreme Court granted cert.

On February 28, 1955, just over six years after the fire, the Supreme Court reversed the Fifth Circuit's decision and remanded the case to the district court "for a trial under appropriate state law."[17] Justice Black wrote the Court's opinion. Justice Frankfurter concurred in the Court's judgment but rejected much of Justice Black's reasoning. Two justices dissented.

Justice Black, having noted that no relevant federal legislation applied, began his analysis with two questions: "(1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?"[18] In answering the first question, Justice Black distinguished or ignored several cases that appeared on their face to establish the literal compliance

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[15] *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 201 F.2d 833 (5th Cir. 1953), *rev'd*, 348 U.S. 310 (1955).

[16] *Wilburn Boat*, 348 U.S. at 313. After *Wilburn Boat*, the Court's view of the importance of marine insurance cases changed quickly. As of this writing, the Court has not decided a marine insurance case in over 68 years. *Raiders Retreat* is poised to be the first since *Wilburn Boat*.

[17] 348 U.S. at 321. The Supreme Court did not discuss which state's law was "appropriate." *See* 348 U.S. at 313 n.6. On remand, the litigation odyssey continued for over seven more years. Ultimately, the lower courts held that Texas law (rather than Illinois law) governed the warranty question. But the insurer could still avoid the policy under the *uberrimae fidei* doctrine because the Wilburns were guilty of eight material misrepresentations or nondisclosures. *See Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir. 1962). The court of appeals concluded that federal maritime law should govern that question because, under the Supreme Court's decision, state law is relevant "only where 'entrenched federal precedent is lacking' with respect to a specific issue." 300 F.2d at 647 n.12. But the "rule of concealment in marine insurance is solidly entrenched in our body of federal maritime law." *Id.* Because the result was the same under Texas or federal maritime law, however, the court found the point to be "of minimal significance to a decision here."

[18] 348 U.S. at 314.

rule.[19] He thus concluded that the rule "has not been judicially established as part of the body of federal admiralty law in this country."[20] He did not offer any guidance on what is required for a rule to become "judicially established"[21] or any justification for why the question was worth asking in the first place.

Turning to the second question, the Court declined to fashion a "new" admiralty rule for two principal reasons. First, the regulation of insurance has historically been a matter for the states (although the federal government has the power to regulate insurance if it chooses), and Congress has recognized and acted upon that division of responsibility.[22] Second, even if the Court wished to fashion a new rule, doing so would be a complex and difficult task that courts are poorly equipped to undertake.[23] In *Wilburn Boat*, for example, Justice Black was clearly uncomfortable with the "harsh" literal compliance rule, but apparently felt more uncomfortable at the prospect of choosing a new rule to replace it.[24] Deferring the problem to Congress or the states, with their greater expertise and experience, was much easier.

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[19] Scholars have found the rejection of those prior cases to be questionable. *See*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 2-8, at 68 & n.71a (2d ed. 1975); Goldstein, *supra* note 10, at 419-425.

[20] 348 U.S. at 316.

[21] *See infra* notes 33-36 and accompanying text.

[22] 348 U.S. at 316-319. That argument appears to overlook the distinction between the substantive law of marine insurance and the regulatory rules governing those in the marine insurance industry. The substantive law addresses the private, commercial law aspects of the field, covering issues such as the formation and interpretation of marine insurance contracts, subjects of marine insurance, and remedies available under marine insurance contracts. The regulatory rules, in contrast, address the public, administrative law aspects of the subject, covering issues such as the requirements that must be satisfied before a company or a broker is entitled to conduct business, the regulation of insurance companies, and the like.

[23] *Id.* at 319-320.

[24] *Id.* at 320. Professor Goldstein found considerable evidence in several of the Justices' private papers, which have since become available to scholars, that the result in *Wilburn Boat* was largely driven by the equities of the case. *See* Goldstein, *supra* note 10, at 410-417. It is clear that

Justice Frankfurter concurred in the result.[25] In essence, he argued for a middle ground under which cases requiring a uniform rule throughout the country would be governed by federal maritime law while cases of essentially local interest could be governed by state law. Because he thought this case arising on an inland lake was of merely local interest, he had no objection to the application of state law.[26] But because he thought the reasoning in the majority opinion was unnecessarily broad and could be "directed with equal force to oceangoing vessels in international maritime trade,"[27] he refused to join — and, indeed, harshly criticized — the majority opinion.[28]

Justice Reed, joined by Justice Burton, dissented.[29] He hinted that he would be prepared, as a matter of federal maritime law, to modify the literal compliance rule "insofar as the breached

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Justice Black, in particular, wished to avoid the "harsh" literal compliance rule. Requiring the application of state law was an easy way to accomplish this result (assuming that the lower courts applied Texas law on remand — an assumption that was not only obvious in the Court's opinion but also justified by the ultimate events, *see supra* note 17). Formulating a new rule to replace the literal compliance rule would probably have been no more difficult than many of the other tasks that common-law courts regularly undertake, but the *Wilburn Boat* Court may have felt that it still was not worth the effort.

[25] 348 U.S. at 321 (Frankfurter, J., concurring in the result).

[26] *Id.* at 322 (Frankfurter, J., concurring in the result).

[27] *Id.* at 323 (Frankfurter, J., concurring in the result).

[28] Justice Frankfurter — in language foreshadowing his subsequent opinion in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) — was also critical of Justice Reed's dissent:

> [T]he demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests. . . . In rejecting abdication of all responsibility by this Court for uniformities in marine insurance and its complete surrender to the States, one is not required to embrace another absolute, complete absorption by this Court of the field of marine insurance and entire exclusion of the States.

348 U.S. at 323-324 (Frankfurter, J., concurring in the result).

[29] 348 U.S. at 324 (Reed, J., dissenting).

warranty does not contribute to the loss."[30] Until Congress or the Court modified the rule, however, he argued that it should apply in all maritime cases to preserve uniformity.

Immediately after *Wilburn Boat*, it was unclear what impact the case would have. Professors Gilmore and Black speculated in the first edition of their highly respected treatise:

> Wilburn may mean merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean that there is no federal maritime law at all. It may very well turn out to mean anything between these extremes.[31]

In practice, the subsequent cases occupy a broad range between those extremes.

A principal reason for the wide range of views in the lower courts is the Supreme Court's failure to provide any meaningful guidance. The *Wilburn Boat* opinion did not explain how the new rule should be applied. And the Supreme Court has provided no guidance in the intervening decades.[32]

The lack of guidance starts with the most fundamental issues. The Court declared that the first question to consider was whether "a judicially established federal admiralty rule" governed the relevant issue,[33] but it did not explain what was required for a rule to become "judicially established." Presumably two court of appeals decisions would not be enough because the *Wilburn Boat* Court concluded that the literal compliance rule was not sufficiently established when "only two circuits appear to have thought of the rule as a part of the general admiralty law."[34] Would

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[30] *Id.* at 326 (Reed, J., dissenting).

[31] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 2-8, at 63 (1st ed. 1957).

[32] *Raiders Retreat* is poised to end the long drought in Supreme Court marine insurance cases. But the application of the *Wilburn Boat* rule is not an issue before the *Raiders Retreat* Court. *See supra* notes 6-9 and accompanying text.

[33] *Wilburn Boat*, 348 U.S. at 314.

[34] *Id.* at 315.

one Supreme Court decision have been enough? Professors Gilmore and Black argued that *Insurance Co. v. Thwing*[35] "seems squarely to have decided this very point, or at least inevitably to have rested on the assumption of the correctness of the strict rule.[36] But the *Wilburn Boat* Court did not cite *Thwing*, so its potential impact remains a mystery.

Kossick v. United Fruit Co.,[37] which was not a marine insurance action, clarified at least that *Wilburn Boat* did not require state law to govern in every admiralty case. Applying federal maritime law rather than the New York statute of frauds to a contract between a seaman and his employer, the *Kossick* Court distinguished *Wilburn Boat* with the observation that "the situation presented here [in *Kossick*] has a more genuinely salty flavor than that [in *Wilburn Boat*]."[38] Some lower courts picked up on that cue and attempted to limit *Wilburn Boat* to the maritime-but-local context[39] as Justice Frankfurter suggested in his concurring opinion.[40] Most lower courts have applied *Wilburn Boat* more broadly,[41] at least in the marine insurance context.

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[35] 80 U.S. (13 Wall.) 672 (1872).

[36] GILMORE & BLACK, *supra* note 19, § 2-8, at 68 & n.71a.

[37] 365 U.S. 731 (1961).

[38] *Id.* at 742. *Kossick* is particularly relevant to the interpretation of *Wilburn Boat* because four of the five members of the *Wilburn Boat* majority (including Justice Black, the author of the *Wilburn Boat* opinion) joined the *Kossick* opinion.

[39] *See*, *e.g.*, *Aasma v. American Steamship Owners Mutual Protection & Indemnity Association*, 95 F.3d 400, 404 (6th Cir. 1996).

[40] *See* 348 U.S. at 322-323 (Frankfurter, J., concurring in the result). *See also supra* notes 26-28 and accompanying text.

[41] As Professor Goldstein has noted, "if the Court hoped its reinterpretation of *Wilburn* [in *Kossick*] would cabin the decision's mischievous potential its efforts met with limited success. Some failed to get the message; others concentrated on the discussion in *Wilburn* rather than on the dicta in *Kossick*." Goldstein, *supra* note 10, at 571.

Commentators and lower courts have suggested several other ways to limit *Wilburn Boat*.[42] At one end of the spectrum, some have suggested that it requires the application of state law only to the effect of warranties (the precise issue before the Supreme Court),[43] although this is a difficult distinction to defend.[44] One district court read *Wilburn Boat* to say "that federal admiralty law should apply to issues that are maritime in nature and that state law should apply to issues that are common to all sorts of insurance contracts."[45]

Within the marine insurance field, the choice-of-law principles remain unclear.[46] Despite widespread criticism of *Wilburn Boat*,[47] the lower courts have not uniformly or predictably limited or distinguished it.[48] For every case that cuts back on the broad application of Justice Black's reasoning, another case extends the reach of the decision. If anything, the sporadic efforts to distinguish or limit the case have probably made the situation worse, as each distinction becomes

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[42] Professors Gilmore and Black propose some potential distinctions that they then reject as unjustifiable. *See* GILMORE & BLACK, *supra* note 19, § 2-8, at 69-70; *cf.* Goldstein, *supra* note 10, at 580-581.

[43] *See*, *e.g.*, Goldstein, *supra* note 10, at 435-437; *id*. at 579 & nn.424-425. Professor Goldstein finds some support for this reading in both *Kossick*, 365 U.S. at 742, and *Romero*, 358 U.S. at 373. *See* Goldstein, *supra* note 10, at 569 & n.348.

[44] *See*, *e.g.*, GILMORE & BLACK, *supra* note 19, § 2-8, at 69-70.

[45] *Home Insurance Co. v. Vernon Holdings*, 1995 AMC 369, 372 (S.D. Fla. 1994).

[46] *Wilburn Boat* ultimately had little influence outside the marine insurance context.

[47] *See*, *e.g.*, George Waddell, *Current Issues and Developments in Marine Insurance*, 6 U.S.F. MAR. L.J. 185, 187 (1993) ("The *Wilburn Boat* decision has been universally criticized. Indeed, there appears to have been little if any favorable comment in the subsequent literature—at least none that is widely known."); Goldstein, *supra* note 10.

[48] A good example of the lower courts' unwillingness forthrightly to limit *Wilburn Boat* can be found in the Second Circuit's two opinions in *Youell v. Exxon Corp*. *See* 48 F.3d 105 (2d Cir.), *vacated* 516 U.S. 801 (1995); and 74 F.3d 373 (2d Cir. 1996) (per curiam). Although the court was willing essentially to disregard *Wilburn Boat* (without principled explanation), it did not take the simple step of declaring that the *Exxon Valdez* disaster "has a more genuinely salty flavor than" the *Wilburn Boat* fire on Lake Texoma.

just one more variable for the parties to consider when predicting how a marine insurance dispute will be resolved.

Even on questions of methodology, lower courts are spread out along a spectrum. Some courts continue to apply federal law in marine insurance cases, usually because they find an established federal admiralty rule[49] but sometimes because they conclude that they should fashion one.[50] Not all courts dutifully proceed through Justice Black's two-question analysis. Indeed, the second question — should the court fashion a federal admiralty rule — is regularly ignored.[51]

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[49] Most of the courts of appeals to address the issue have ruled that the *uberrimae fidei* doctrine is an established federal admiralty rule. *See*, *e.g.*, *Quintero v. GEICO Marine Insurance Co.*, 983 F.3d 1264, 1270-71 (11th Cir. 2020); *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69, 81 (1st Cir. 2015); *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255, 262 (3d Cir. 2008); *Certain Underwriters at Lloyd's v. Inlet Fisheries Inc.*, 518 F.3d 645, 654 (9th Cir. 2008); *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 308 (2d Cir. 1987); *but see Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882, 890 (5th Cir. 1991).

The courts of appeals have also found some other established federal admiralty rules governing marine insurance. *See*, *e.g.*, *GEICO Marine Insurance Co. v. Shackleford*, 945 F.3d 1135, 1142 (11th Cir. 2019) (express navigational-limit warranty); *Galilea, LLC v. AGCS Marine Insurance Co.*, 879 F.3d 1052, 1058 (9th Cir. 2018) (enforcement of arbitration clauses); *Hilton Oil Transport v. Jonas*, 75 F.3d 627, 630 (11th Cir. 1996) (express trading-limit warranty in the absence of a "held covered" clause); *American National Fire Insurance Co. v. Kenealy*, 72 F.3d 264, 270-271 (2d Cir. 1995) (award of attorney's fees); *Thanh Long Partnership v. Highlands Insurance Co.*, 32 F.3d 189, 193–94 (5th Cir. 1994) (implied warranty of seaworthiness and the interpretation of Inchmaree clauses).

[50] *See*, *e.g.*, *Aasma v. American Steamship Owners Mutual Protection & Indemnity Association*, 95 F.3d 400, 404 (6th Cir. 1996). In *Aasma*, personal injury plaintiffs with default judgments against a bankrupt shipowner brought direct actions against the owner's former P & I Clubs, which had provided coverage during the period that the injuries arose. The Clubs asserted defenses under their "pay-to-be-paid" clauses. The Sixth Circuit concluded that no existing federal admiralty rule addressed the validity of such clauses, but that the need for a single, uniform rule in this "uniquely maritime" context justified fashioning one. The court thus recognized the validity of a "pay-to-be-paid" clause as a matter of federal maritime law.

[51] *See*, *e.g.*, *Travelers Property Casualty Co. of America v. Ocean Reef Charters, LLC*, 996 F.3d 1161, 1163, 1171 (11th Cir. 2021); *Royal Insurance Co. of America v. KSI Trading Corp.*, 563 F.3d 68, 73 (3d Cir. 2009); *Carrier v. RLI Insurance Co.*, 854 F. Supp. 2d 1324, 1326 (S.D. Ga. 2010). A First Circuit panel at least explained why it did not give careful consideration to Justice Black's second question:

Some courts ignore even the first question, apparently applying state law simply because the case before it involves marine insurance.[52]

To further complicate the issue, it is surprisingly unclear — at least in one circuit — whether a court will treat a rule as sufficiently "established" under *Wilburn Boat* even when it has announced in a previous case that it is. In *Albany Insurance Co. v. Anh Thi Kieu*,[53] the principal issue was whether the doctrine of *uberrimae fidei* was an established rule of federal admiralty law.[54] In 1962, on remand from the Supreme Court,[55] the Fifth Circuit declared that the doctrine was "solidly entrenched in our body of federal maritime law."[56] Five years later, that court described the doctrine as "established"[57] in the federal law of marine insurance. But in 1991, the *Anh Thi Kieu* court distinguished those cases, dismissed the relevant statements as mere dicta, and held that the "doctrine is entrenched no more."[58] The court reasoned that the "spotty application"

> Under a well-established principle of federal law applicable to cases of this genre [*i.e.*, marine insurance cases], if federal and state law collide, then the federal rule prevails. . . . But in the absence of such a conflict, "*Wilburn Boat* has generally been interpreted, 'in deference to state hegemony over insurance, to discourage the fashioning of new federal law and to favor the application of state law.' "

Acadia Insurance Co. v. McNeil, 116 F.3d 599, 603 (1st Cir. 1997) (quoting *Windsor Mount Joy Mutual Insurance Co. v. Giragosian*, 57 F.3d 50, 54 (1st Cir. 1995) (quoting *Albany Insurance Co. v. Wisniewski*, 579 F. Supp. 1004, 1013-14 (D. R.I. 1984))).

[52] *See*, *e.g.*, *Cal-Dive International, Inc. v. Seabright Insurance Co.*, 627 F.3d 110, 113 (5th Cir. 2010) (citing *Wilburn Boat* for the proposition that "[t]he interpretation of a marine policy of insurance is governed by relevant state law").

[53] 927 F.2d 882 (5th Cir. 1991).

[54] Most circuits treat the *uberrimae fidei* doctrine as an established rule of federal admiralty law. *See supra* note 49.

[55] *See supra* note 17.

[56] *Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n.12 (5th Cir. 1962). *See also supra* note 17.

[57] *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, 409 F.2d 974, 980 (5th Cir. 1969).

[58] *Anh Thi Kieu*, 927 F.2d at 890.

of the *uberrimae fidei* doctrine "in recent years" ("even in other circuits") "suggests" that the doctrine is no longer sufficiently established.[59]

One impact of asking whether a rule is "entrenched" or "judicially established" is that the choice of law depends to some extent on the frequency with which issues are litigated. Some of the most basic legal principles are never litigated (or at least have not been litigated for decades) because they are so basic that no one would challenge them. As a result, courts do not rule on those principles and litigants can argue that they are not "judicially established." That alone may not be a problem; the most basic principles will likely be the same under state or federal law, so it does not matter which applies. But *Anh Thi Kieu* raises the possibility that a rule may be established in federal law and go unchallenged for decades precisely because it is established. If state law evolves in the meantime, a litigant seeking the application of that new state law may then argue that the previously settled federal rule is "entrenched no more," *i.e.*, is no longer "judicially established."

C. Horizontal Choice-of-Law Analysis After *Wilburn Boat*

Although the *Wilburn Boat* Court gave virtually no guidance on how to decide whether federal or state law should apply in any given situation, it at least offered the illustration of its own analysis concerning the literal compliance rule.[60] The Court gave absolutely no guidance on how to decide which state's law should apply when federal law does not. It simply noted that the

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[59] *Id.* at 889-890.

[60] *See supra* notes 33-36 and accompanying text.

horizontal choice-of-law problem was not before it[61] and remanded the case to permit the lower courts to resolve the issue.[62]

Justice Frankfurter's concurring opinion implicitly suggested a choice-of-law rule when he asked, "Is it to be assumed that were the *Queen Mary*, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyd's policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas?"[63] It is doubtful that Justice Frankfurter himself would have adopted a location-of-the-loss rule or a law-of-the-forum rule for determining the law governing a marine insurance contract if he had actually been called upon to make that decision. It is at least clear that he did not think the law governing the *Queen Mary*'s insurance policy should vary as the vessel called at different ports. In any event, the lower courts have not been applying either rule in marine insurance cases.[64]

The complications and difficulties facing the lower courts in deciding horizontal choice-of-law issues are well illustrated by a quartet of marine insurance decisions within a single circuit over just six years. In 1985, the Fifth Circuit held that "the law of the state where the marine insurance contract was issued and delivered is the governing law."[65] Two years later, the same court instead declared that "the law of the state in which the [marine insurance] contract was formed" governs.[66] Another two years later the court announced yet a different rule: "In

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[61] *See Wilburn Boat*, 348 U.S. at 313 n.6.

[62] *See id.* at 321.

[63] 348 U.S. at 323 (Frankfurter, J., concurring in the result).

[64] *See infra* notes 65-70 and accompanying text.

[65] *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir. 1985). *See also Gulf Fleet Marine Operations, Inc. v. Wartsila Power, Inc.*, 797 F.2d 257, 261 (5th Cir. La. 1986).

[66] *Graham v. Milky Way Barge, Inc.*, 811 F.2d 881, 885 (5th Cir. 1987).

identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues."[67] Two years after that, the court reviewed the field and, in an attempt to reconcile the cases, declared that it would follow a two-step process. In step one, the court must identify the states in which the policy was formed, issued, and delivered. In step two, it must decide which of those states has the greatest interest in the application of its law.[68]

Ironically, on remand in *Wilburn Boat* itself the courts in the Fifth Circuit did not follow any of those four choice-of-law approaches. The *Wilburn Boat* policy was originally formed, issued, and delivered in Illinois, but the district court on remand held that the parties "in effect" concluded a new policy when the insurer indorsed the policy in favor of the new owners.[69] Even that new policy was apparently formed, issued, and delivered in Illinois, where the broker was located. The district court nevertheless held (and the Fifth Circuit agreed) that Texas law applied because a Texas statute required the application of Texas law when a company doing business in Texas (such as Fireman's Fund) issues an insurance policy under which the proceeds would be payable to any citizen or inhabitant of Texas (such as the Wilburn brothers).[70]

One problem with the horizontal choice-of-law analysis is that many states do not appear to have much interest in the resolution of marine insurance disputes. Indeed, many states explicitly exclude marine insurance from significant portions of their insurance legislation.[71] To further

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[67] *Truehart v. Blandon*, 884 F.2d 223,226 (5th Cir. 1989). *See also Transco Exploration Co. v. Pacific Employers Insurance Co.*, 869 F.2d 862, 863 (5th Cir. 1989).

[68] *Anh Thi Kieu*, 927 F.2d at 890-891.

[69] *See Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 199 F. Supp. 784, 791 (E.D. Tex. 1960), *rev'd on other grounds*, 300 F.2d 631 (5th Cir. 1962).

[70] *See id.*

[71] *See*, *e.g.*, ALA. CODE § 27-14-2(3) (excepting "[w]et marine and transportation insurance" from chapter governing the insurance contract); LA. REV. STAT. ANN. § 22:851(A) (excepting "ocean marine and foreign trade insurances" from chapter 4 of the Insurance Code, which governs insurance and insurance contract requirements); VA. CODE ANN. § 38.2-300(1)

complicate the analysis, when a court has chosen a particular state's law it is often difficult or impossible to find a relevant judicial decision or statute in the maritime context.[72] The court must therefore resolve a marine insurance dispute with reasoning designed for automobile or homeowners' insurance. In *5801 Associates, Ltd. v. Continental Insurance Co.*,[73] for example, a decision involving the sinking of a barge in the open seas off the coast of South Carolina, the federal court felt compelled to look to the law of the inland state of Missouri. Finding no marine insurance decision on point, it followed an automobile insurance decision.[74]

An even more striking example of the problem arose in the litigation between Exxon and its insurers to determine coverage under a global corporate excess policy for hundreds of millions of dollars of clean-up expenses following the *Exxon Valdez* oil spill. One issue in the coverage dispute was whether the loss was fortuitous. The insurers argued it was not fortuitous because it was caused by Exxon's reckless conduct in permitting a vessel-owning subsidiary to employ a known alcoholic as the captain of the *Exxon Valdez*. Exxon not only denied that it had been reckless but also argued that the loss in question would have been fortuitous even if it had been reckless. Exxon contended that the fortuity rule was the same under any law (state or federal) that might be relevant, but it had filed suit in a Texas state court and taken the position that Texas law

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(excepting "[o]cean marine insurance other than private pleasure vessels" from chapter governing insurance policies and contracts); WASH. REV. CODE ANN. § 48.18.010 (excepting "ocean marine and foreign trade insurances" from chapter governing the insurance contract). In *St. Paul Insurance Co. v. Great Lakes Turnings, Ltd.*, 829 F. Supp. 982, 984-985 (N.D. Ill. 1993), the court relied in part on a statutory exclusion for marine insurance to decide that Illinois had no interest in the application of its law in general to the pending dispute.

[72] *See*, *e.g.*, *Acadia Insurance Co. v. McNeil*, 116 F.3d 599, 600 (1st Cir. 1997) ("This case involves an issue of New Hampshire law as to which we have found no decisive New Hampshire precedent.").

[73] 983 F.2d 662 (5th Cir. 1993) (per curiam).

[74] *See id.* at 666 & n.10 (following *Shelter Mutual Insurance Co. v. Brooks*, 693 S.W.2d 810 (Mo. 1985) (en banc) (automobile insurance decision)).

generally governed. Exxon accordingly needed authority to support its contention that Texas law permits insurance coverage for the unforeseen consequences of reckless or even intentional acts. In the absence of any statute or decision in the marine insurance context, its principal authority on that central issue was a decision of the Texas Supreme Court addressing whether a homeowners' policy covered liability for transmitting genital herpes to a sexual partner.[75]

D. Choice-of-Law Clauses in Marine Insurance Policies

Some insurers have taken advantage of an obvious solution to the *Wilburn Boat* problem by including a choice-of-law clause in their marine insurance policies. As a general rule, U.S. courts will enforce a contractual choice-of-law clause, at least when the chosen law has a sufficient connection with the underlying transaction.[76]

Great Lakes Insurance SE has been particularly aggressive in its reliance on choice-of-law clauses, and a remarkable number of reported decisions have recently addressed the issue. It has routinely included the choice-of-law clause quoted on page 2[77] in its insurance contracts for over fifteen years.[78] Other companies have incorporated substantially the same clause in their

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[75] *See*, *e.g.*, Petition for a Writ of Certiorari at 13 & n.9, *Exxon Corp. v. Youell*, 516 U.S. 801 (1995) (No. 94-1871) (citing *State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374 (Tex. 1993)).

[76] *See*, *e.g.*, *Great Lakes Insurance SE v. Lassiter*, 2022 U.S. Dist. LEXIS 78515, *15, 2022 WL 1288741, *6 (S.D. Fla. Apr. 29, 2022) (upholding the choice of New York law because New York had a substantial connection with the transaction, even if Florida had a stronger connection).

[77] *See supra* note 5 and accompanying text.

[78] *See*, *e.g.*, *Great Lakes Insurance SE v. Andersson*, 66 F.4th 20, 23 (1st Cir. 2023) (quoting the same clause); *Great Lakes Insurance SE v. Wave Cruiser LLC*, 36 F.4th 1346, 1350, 1353 (11th Cir. 2022) (quoting and paraphrasing excerpts from the same clause); *Great Lakes Insurance SE v. Lassiter*, 2022 U.S. Dist. LEXIS 78515, *12-13, 2022 WL 1288741, *5 (S.D. Fla. Apr. 29, 2022) (quoting the same clause); *Great Lakes Insurance SE v. Gray Group Investments, LLC*, 550 F. Supp. 3d 364, 369 (E.D. La. 2021) (same).

policies.[79] Sometimes the choice of law has not been controversial, and a court deciding a controversy arising out of such a contract has simply applied the chosen law without much discussion.[80] But in some contexts, the choice of law is dispositive, and the enforcement of the clause is the primary issue in the case.

Clear Spring Property & Casualty Co. v. Viking Power LLC[81] illustrates how a choice-of-law clause can protect an insurer not only from *Wilburn Boat* problems but also from substantive claims that might otherwise have been effective. The policy at issue in the case included a New York choice-of-law clause and a warranty that the fire-extinguishing equipment would be "maintained in good working order. This includes the weighing of tanks once a year, certification/tagging and recharging as necessary."[82] After the assured's covered vessel was destroyed in a fire, the insurer preemptively filed an action for a declaratory judgment that it was not liable on the policy due to a breach of the warranty — failing to weigh the tanks when they were serviced each year — even though "the fire-suppression system functioned correctly on the day of the fire."[83] The assured counter-claimed for breach of contract. Because "New York law permits marine insurers to deny coverage for breaches of promissory warranties regardless of whether the breach is causally connected to a later loss,"[84] the court granted summary judgment

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[79] *See*, *e.g.*, *Clear Spring Property & Casualty Co. v. Viking Power LLC*, 2022 U.S. Dist. LEXIS 91192, *4-5, 2022 WL 17987099, *2 (S.D. Fla. May 20, 2022) (quoting choice-of-law clause).

[80] *See*, *e.g.*, *Wave Cruiser*, *supra* note 78, at 1353-54 & n.5; *Gray Group Investments*, *supra* note 78, at 371.

[81] 2022 U.S. Dist. LEXIS 91192, 2022 WL 17987099 (S.D. Fla. May 20, 2022).

[82] 2022 U.S. Dist. LEXIS 91192, at *3, 2022 WL 17987099, at *1.

[83] 2022 U.S. Dist. LEXIS 91192, at *4, 2022 WL 17987099, at *2.

[84] 2022 U.S. Dist. LEXIS 91192, at *10, 2022 WL 17987099, at *4.

for the insurer. Under Florida law, in contrast, the insurer at least arguably[85] would not have been allowed to avoid the policy unless it could prove that the breach of warranty had some causal connection to the specific loss.[86]

New York choice-of-law clauses have presumably allowed insurers to avoid many claims that might have succeeded if a different state's law had applied, but *Great Lakes Insurance SE v. Andersson*[87] shows that a choice-of-law clause may not always achieve its intended goal. In *Andersson*, the assured's covered vessel was a constructive total loss after it stranded on a breakwater. The insurer preemptively filed an action for a declaratory judgment that it was not liable on the policy due to a breach of two warranties. The assured in his counterclaim alleged a breach of contract and various unfair claims-settlement practices in violation of Massachusetts insurance law. The district court dismissed the state-law counterclaims on the ground that New York — not Massachusetts — law applied, and New York law recognizes no comparable causes of action.[88]

On appeal, the First Circuit reversed. It concluded that the choice-of-law clause was ambiguous with respect to extra-contractual claims, resolved those ambiguities against the insurer that drafted the document, and held that New York law did not apply to the assured's statutory claims. The court of appeals found it significant that the first branch of the clause (calling for the

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[85] Because the court ruled that New York law applied, it did not discuss whether the assured would have prevailed under Florida law. Perhaps the facts of the case would ultimately have justified the same result. At the very least, however, it seems unlikely that the assured would have prevailed on summary judgment if Florida law had governed.

[86] *See*, *e.g.*, Fla. Stat. § 627.409(2) ("A breach or violation by the insured of a warranty . . . of a wet marine . . . insurance policy . . . does not void the policy . . . unless such breach or violation increased the hazard by any means within the control of the insured.").

[87] 66 F.4th 20, 23 (1st Cir. 2023).

[88] *Great Lakes Insurance SE v. Andersson*, 544 F. Supp. 3d 196, 200 (D. Mass. 2021).

application of established federal law) applied to "any dispute arising hereunder" while the second branch of the clause (calling for the application of New York law) applied to "this insuring agreement."[89] Although the assured's allegations of unfair claims-settlement practices admittedly arose under the insurance contract, resolving those allegations did not require interpretation of the insuring agreement. Because only contractual claims were explicitly subject to New York law, it was reasonable to construe the clause to permit Massachusetts law to apply to extra-contractual claims.[90] Even if the insurer's construction of the clause was also reasonable, the ambiguity had to be resolved in the insured's favor.[91]

An insurer could easily address the ambiguity identified by the *Andersson* court. The boilerplate language in the standard form could be revised to specify that, in the absence of established federal law, New York law governs "any dispute arising" under it.

The dispositive issue for the Third Circuit in *Raiders Retreat* would create more problems for an insurer. It remains to be seen whether the Supreme Court will uphold the Third Circuit's decision.

II. The Parties' Arguments in *Raiders Retreat*

As noted above,[92] *Raiders Retreat* is fully briefed and the Supreme Court is scheduled to hear oral argument on Tuesday morning, October 10. We do not yet know which arguments will most interest the Court, but we at least know which arguments the parties chose to stress in their briefs.

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[89] *See supra* text at note 5.

[90] *Andersson*, 66 F.4th at 26-27.

[91] *Id.* at 27-28.

[92] *See supra* text following note 2.

A. The Arguments of Petitioner Great Lakes (the Insurer)

The insurer, in its efforts to avoid Pennsylvania law, makes a two-part argument. First, it argues that the general maritime law (*i.e.*, judge-made federal maritime law) governs the enforceability of choice-of-law clauses in maritime contracts. Second, it argues that a choice-of-law clause is presumptively enforceable under the general maritime law subject to narrow exceptions, including when the chosen law contravenes *federal* maritime policy — not state public policy.

On the first point, the insurer relies on what it describes as a long history of courts' applying the federal general maritime law to determine the enforceability of choice-of-law clauses in maritime contracts. Before *Wilburn Boat*, state law played virtually no role in maritime law, but courts applied the general maritime law to enforce choice-of-law clauses calling for the application of foreign law. Once "*Wilburn Boat* created a gap-filling role for state substantive law,"[93] parties began to use choice-of-law clauses to select state law, and the courts applied the general maritime law to enforce them. Congressional policy supports that historical practice because it permits choice-of-law and forum-selection clauses with only one exception — to protect passengers with personal injury or wrongful-death claims.[94] Supreme Court decisions supporting this analysis include *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*,[95] *Carnival Cruise Lines, Inc. v. Shute*,[96] *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,[97] and *Mitsubishi Motors Corp. v. Soler*

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[93] Brief for Petitioner at 19, *Raiders Retreat*, No. 22-500 (filed May 26, 2023).

[94] *See* 46 U.S.C. § 30527.

[95] 561 U.S. 89 (2010).

[96] 499 U.S. 585 (1991).

[97] 515 U.S. 528 (1995).

Chrysler-Plymouth, Inc.[98] Maritime law's core values of uniformity and predictability also support this analysis.

On the second point, the insurer argues that the choice-of-law clause is enforceable because it has a substantial connection to New York (the chosen law) and New York law does not conflict with any federal maritime policy. Indeed, respondent Raiders Realty (the assured) does not cite any federal maritime policy that is inconsistent with New York law. Its sole argument is that New York law conflicts with Pennsylvania public policy.

B. The Arguments of Respondent Raiders Realty (the Assured)

The assured, in its efforts to take advantage of the protection of Pennsylvania law, argues that in the context of the case Pennsylvania law should determine the enforceability of the choice-of-law clause, and under Pennsylvania law the state's public policy should be considered. The argument depends primarily on *Wilburn Boat*, which calls for the application of state law here. But if the Court were to adopt a federal rule governing the enforceability of choice-of-law clauses in marine insurance policies, it should adopt the approach of *Restatement (Second) of Conflict of Laws* § 187, which looks to the public policy of the state whose law would govern in the absence of the choice-of-law clause.

The parties agreed that no established federal rule precludes the assured from raising its state-law counterclaims and that under *Wilburn Boat* Pennsylvania law would govern those counterclaims in the absence of the New York choice-of-law clause. Under the standard established in *Wilburn Boat*, no established federal rule governs the enforceability of choice-of-law clauses in marine insurance policies. State law should therefore govern. Pennsylvania, like

[98] 473 U.S. 614 (1985).

most states, follows the *Restatement* approach and looks to the substantive law that would be displaced by the choice-of-law clause. If the Supreme Court wishes to adopt a federal rule in this context, it should also follow the *Restatement* approach.[99]

III. Tentative Conclusion

Because the case is still very much pending as this paper goes to press, it is far too early to have a true conclusion. Even when the MLA Uniformity Committee meets in San Francisco, it is extremely unlikely that the Supreme Court will have publicly announced any decision.[100] But oral argument may provide at least some insight into what the Court is thinking.

Starting with the questions presented in the cert petition,[101] the insurer has consistently done its best to frame the case as one of general maritime law rather than of marine insurance.[102] In contrast, the assured's brief heavily stresses that this is a marine insurance case and puts *Wilburn Boat* at the center of the conversation.[103] If the questions at oral argument suggest that the justices are thinking about the case in general-maritime-law terms, with little regard for its marine-insurance character or the applicability of *Wilburn Boat*, that will be a good sign for the insurer.

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[99] Professors John F. Coyle and Kermit Roosevelt III filed an amicus brief that was nominally "in support of neither party," but it urged the Supreme Court to adopt the *Restatement* approach as a matter of general maritime law to resolve maritime choice-of-law issues. Professor Coyle, who teaches at the University of North Carolina School of Law, is a scholar with particular expertise in choice-of-law and forum-selection clauses. Professor Roosevelt, who teaches at the University of Pennsylvania School of Law, is the Reporter for the *Restatement (Third) of Conflict of Laws*.

[100] If the Court decides to "DIG" the case — Dismiss the petition for certiorari as Improvidently Granted — we may see a resolution soon after oral argument. Although DIGs are not unheard of, they are still rare. It is far more likely that the Court will issue an opinion on the merits sometime in 2024.

[101] *See supra* notes 6-8 and accompanying text.

[102] *See supra* at 21-22.

[103] *See supra* at 22-23.

But if the justices' questions demonstrate that they understand how *Wilburn Boat* made the choice-of-law analysis in marine insurance different from the rest of maritime law — and that they took *Wilburn Boat* off the table when they denied cert on the insurer's first question presented — that will be a good sign for the assured. But it is always risky to put too much weight on what the public can see at oral argument, and in any event it is likely that the questioning will be ambiguous and the clues conflicting.

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