CASENOTE

GREAT LAKES REINSURANCE V. DURHAM AUCTIONS: WHY THE LACK OF CLEARLY DEFINED FIFTH CIRCUIT "MARITIME CHOICE OF LAW PRINCIPLES" HAS THE POTENTIAL TO HURT INSUREDS

I. INTRODUCTION

In 2005, a yacht owned by Durham Auctions (Durham), a Mississippi corporation, sank while moored in Mississippi.[1] Durham filed a claim for coverage with its insurer, Great Lakes Reinsurance (Great Lakes), a United Kingdom insurer with its principal place of business in New York.[2] In response, Great Lakes filed a declaratory judgment action in the United States District Court for the Southern District of Mississippi seeking a declaration that it was entitled to rescind the marine insurance policy covering the yacht.[3] Great Lakes asserted that Durham's alleged material misrepresentations and failures to disclose in the application process voided the policy at its inception.[4] Durham responded by attempting to recover under the marine insurance policy for the loss of the yacht.

At the district court, Great Lakes asserted that the vessel sank due to Durham's failure to properly maintain the vessel, while Durham asserted that the vessel sank because of Hurricane Rita.[5] Thereafter, Great Lakes moved for summary judgment based on a choice-of-law (COL) clause included in the policy.[6] The COL clause provided:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well-established, entrenched principles

1. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 237 (5th Cir. 2009); Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., No. 1:07cv460HSO-JMR, 2008 WL 872278, at *1-2 (S.D. Miss. Mar. 27, 2008), *rev'd*, 585 F.3d 236 (5th Cir. 2009).

2. *Great Lakes Reins.*, 585 F.3d at 237; *Great Lakes Reins.*, 2008 WL 872278, at *2.

3. *Great Lakes Reins.*, 585 F.3d at 237; *Great Lakes Reins.*, 2008 WL 872278, at *2, 4.

4. *Great Lakes Reins.*, 585 F.3d at 238; *Great Lakes Reins.*, 2008 WL 872278, at *2, 4.

5. *Great Lakes Reins.*, 2008 WL 872278, at *2.

6. *Great Lakes Reins.*, 585 F.3d at 238-39; *see Great Lakes Reins.*, 2008 WL 872278, at *2-3.

> 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.[7]

The district court denied Great Lakes' motion for summary judgment, declined to enforce the COL clause, and found that Mississippi law would govern the policy.[8] Thereafter, the parties filed a joint motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and reached a bracketed settlement agreement contingent upon the Fifth Circuit's ruling on the enforceability of the COL clause.[9] On appeal, Great Lakes argued that the maritime law doctrine of *ubberimae fidei*[10] was entrenched federal precedent that should apply pursuant to the first clause of the COL provision and, alternatively, that New York law should apply pursuant to the second clause.[11] Durham challenged the validity and enforceability of the COL clause, arguing that Mississippi law should apply.[12] On interlocutory appeal, the Fifth Circuit held that the COL clause was enforceable and, in response to the certified question, stated that either the general maritime law doctrine of *ubberimae fidei* or New York law—rather than Mississippi law—governed the parties' rights under the marine insurance policy.[13]

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7. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 238-39 (5th Cir. 2009); Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., No. 1:07cv460HSO-JMR, 2008 WL 872278, at *3 (S.D. Miss. Mar. 27, 2008), *rev'd*, 585 F.3d 236 (5th Cir. 2009).

8. *Great Lakes Reins.*, 2008 WL 872278, at *3.

9. *Great Lakes Reins.*, 585 F.3d at 240. 28 U.S.C. § 1292(b) permits interlocutory appeals of otherwise non-appealable district court orders when both the district and the appellate court judges agree that the district court 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." *See* 28 U.S.C. § 1292(b) (2006).

10. In his maritime law treatise, Schoenbaum describes the maritime doctrine of *ubberimae fidei* as follows:

> Marine insurance is a contract "*ubberimae fidei,*" requiring the utmost good faith by both parties to the contract. . . . [T]he doctrine *ubberimae fidei* imposes the highest degree of good faith. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge that is material to the risk.
>
> . . . Failure by the assured to disclose all available information will allow the insurer to avoid the policy.

2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 17-4 (4th ed. 2004) (citations omitted).

11. *Great Lakes Reins.*, 585 F.3d at 239; Brief of the Plaintiff-Appellant at 16-28, Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236 (5th Cir. 2009) (No. 08-60898), 2008 WL 7404511.

12. *Great Lakes Reins.*, 585 F.3d at 244; Brief of the Defendant-Appellee at 7-14, Great Lakes Reins. P.L.C. v. Durham Auctions, Inc., 585 F.3d 236 (5th Cir. 2009) (No. 08-60898), 2009 WL 5408863.

13. *Great Lakes Reins.*, 585 F.3d at 244-45.

Although *Great Lakes Reinsurance* originated in a Mississippi district court, the Fifth Circuit's decision regarding the COL clause's enforceability is relevant to admiralty attorneys practicing in Louisiana because marine insurance disputes—which are frequently litigated in Louisiana federal courts—are appealed to the Fifth Circuit. Since *Great Lakes Reinsurance* is the most recent case concerning the enforceability of COL provisions in marine insurance policies, admiralty lawyers will inevitably grapple with this decision in any marine insurance litigation where the enforceability of a COL clause is at issue.

Marine insurance policies frequently contain COL clauses that are drafted by the insurer to select law favorable to their industry. Marine insurers draft COL clauses not merely for certainty, predictability, and uniformity, but to protect their chances of avoiding payment on a policy in the event that litigation arises. Insureds who purchase marine insurance policies containing a COL clause drafted by the insurer often face an uphill battle in arguing that the COL clause should not be enforced, and the Fifth Circuit's decision in *Great Lakes Reinsurance* presents an additional obstacle.

The judicial trend in favor of presumptively enforcing COL clauses in maritime contracts began with a similar trend in favor of presumptively enforcing forum-selection clauses in maritime contracts, yet COL clauses have a more significant (and often more harmful) effect on insureds than forum-selection clauses. Instead of merely dictating where a party can bring a lawsuit, COL clauses dictate the applicable substantive law, which in turn dictates the parties' rights and the insureds' likelihood of recovering under the policy. Moreover, insurers are able to obtain the benefits of forum-selection clauses without actually including forum-selection clauses in their policies by filing declaratory judgment actions in their chosen forum whenever the threat of litigation arises.

In theory, under maritime choice of law principles, COL clauses in maritime contracts and marine insurance policies are not always enforceable, yet the reality is that most courts have devoted inadequate attention to articulating a consistent set of "maritime choice of law principles." As a result, it remains unclear under what circumstances a COL clause in a maritime contract or marine insurance policy is unenforceable. First, this Note aims to familiarize readers with the various authorities that form the foundation of the Fifth Circuit's current maritime choice-of-law principles. Second, this Note examines some of the implications of the Fifth Circuit's failure to clearly define and adhere to a consistent set of maritime choice-of-law principles.

II. BACKGROUND

A. MARITIME CONTRACTS, MARINE INSURANCE, AND THE ORIGINS OF THE MODERN INDUSTRY

A maritime contract is a contract that relates to a ship or to commerce or to navigation on navigable waters or to transportation by sea or to maritime employment.[14] Marine insurance is a type of insurance designed to protect against risks associated with maritime transportation.[15] Normally, it takes the form of a standard policy comprised of clauses defining the specific terms of the contract.[16] Under a marine insurance agreement, an insured pays a premium in exchange for an insurer committing to indemnify them in the event that they sustain some loss or damage as a result of a covered risk.[17] Unlike in the typical case of fire, auto, or other non-marine insurance where "no values are agreed upon in advance and the indemnity is limited to the actual loss sustained[,] in marine insurance . . . values are normally agreed upon in advance and promised to the assured in the event of loss."[18] There are presently three functional categories of marine insurance policies: hull insurance, cargo insurance, and P & I insurance.[19] Hull insurance covers a vessel and its equipment for a particular term.[20] Cargo insurance covers a "specific movement of cargo," and P & I insurance protects against third-party and other liability that is omitted from coverage in a hull policy.[21]

The direct predecessors of the modern marine insurance industry date from the late Middle Ages and Renaissance.[22] "The London market, which is still preeminent in the shipping world, originated in the late seventeenth century when groups of merchants, bankers, and shipowners met for morning coffee in a coffeehouse owned by Mr. Edward Lloyd and agreed to

14. SCHOENBAUM, *supra* note 10, § 17-2.

15. 16 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 49:28 (4th ed. 2000). Marine insurance policies are generally regarded as a type of maritime contract, thus federal district courts sit in admiralty pursuant to 28 U.S.C. § 1333 when they hear marine insurance disputes. That statute provides in relevant part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . . ."

16. SCHOENBAUM, *supra* note 10, § 17-1.

17. *Id.*

18. *Id.*

19. *Id*.

20. *Id*.

21. *Id*.

22. SCHOENBAUM, *supra* note 10, § 17-1.

share the risks of marine ventures among themselves."[23] People signified their "participation in the syndicate by 'underwriting' (signing or initialing at the bottom) a slip of paper in return for a fee."[24] "Eventually more formal arrangements evolved," and Lloyd's—as the group came to be called—"was given a charter by Parliament and incorporated."[25] Even today, most of the marine insurance business is carried on not by the corporation, but by its members, the underwriters.[26]

B. THE LAW OF MARINE INSURANCE: FEDERAL MARITIME LAW

"The law of marine insurance has never been codified in the United States. However, the basic substantive law of marine insurance is federal maritime law . . . ."[27] Historically, United States federal maritime law adopted many of the established English marine insurance rules. In 1924, the Supreme Court stated that United States courts "should look to English law for the applicable rules because of the 'special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.'"[28] In 1931, the Fifth Circuit articulated its understanding of federal maritime law as it related to marine insurance, stating that "[f]ederal courts look to the laws of England for guidance in matters of marine insurance and follow them unless, as a matter of policy, a different rule has been adopted."[29]

However, the Supreme Court's 1955 decision in *Wilburn Boat Co. v. Fireman Fund, Insurance Co.*[30] represented a turning point. In that case, the Supreme Court established a presumption that, in the absence of a controlling federal statute or a judicially established federal admiralty rule governing the particular marine insurance issue presented, courts should apply state insurance rules to govern the marine insurance issue rather than create federal admiralty rules.[31] *Wilburn Boat* suggested that marine insurance policies are governed by federal admiralty law in some instances and state law in others and that the court interpreting a marine insurance contract must struggle to determine whether an established federal

23. SCHOENBAUM, *supra* note 10, § 17-1.

24. *Id.*

25. *Id.*

26. *Id.*

27. SCHOENBAUM, *supra* note 10, § 17-6.

28. *Id.* (quoting Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924)).

29. Aetna Ins. Co. v. Houston Oil & Transport Co., 49 F.2d 121, 124 (5th Cir. 1931) (citing Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924)).

30. Wilburn Boat Co. v. Fireman Fund, Ins. Co., 348 U.S. 310 (1955).

31. *See* id. at 313-21.

admiralty rule or state insurance rule applies.[32] For instance, in *Wilburn Boat*, the Supreme Court observed that there was no established federal admiralty law requiring literal performance of warranties.[33] It declined to adopt a federal maritime rule governing the fulfillment of warranties[34] and found that the application of a state rule was appropriate.[35] In a subsequent case, the Supreme Court clarified that application of state law is justified when there is no federal maritime law rule governing the issue presented in the case.[36] Schoenbaum has suggested that because "most federal courts simply recite the rule and apply state law," *Wilburn Boat* has resulted in state law rules dominating marine insurance in the United States.[37]

C. POST-*WILBURN BOAT* CHOICE-OF-LAW CLAUSES IN MARITIME CONTRACTS

The Court's decision in *Wilburn Boat* heightened the risk to marine insurers that federal courts resolving marine insurance disputes would apply pro-insured state law rules rather than pro-insurer English marine insurance rules.[38] This heightened risk likely motivated marine insurers to protect their interests by including COL provisions selecting favorable law in their policies.[39] The insurer would usually select either federal maritime law or the law of a state that recognizes traditional maritime law doctrines like *ubberimae fidei*.[40] The chosen law is significant, since it may determine the amount of recovery, the type of recovery, or even whether there will be a recovery under the policy at all.[41] Under *ubberrimae fidei*, insureds have an affirmative duty to disclose all known material facts regardless of whether the insurer asks about them on the insurance application.[42] The insurer has the option to avoid the policy if the insured fails to disclose all available information.[43] Any misrepresentation or omission to communicate a material fact gives the insurer the option to void the policy[44] The definition

32. *See* Wilburn Boat Co. v. Fireman Fund, Ins. Co., 348 U.S. 310, 314-16 (1955).

33. *Id*. at 316.

34. *Id*. at 316-21.

35. *Id*. at 321.

36. Kossick v. U.S. Fruit Co., 365 U.S. 731, 742 (1961).

37. SCHOENBAUM, *supra* note 10, §17-6.

38. *See* Warren T.R. von Bittner, Jr., *The Validity and Effect of Choice of Law Clauses in Marine Insurance Contracts*, 53 INS. COUNSEL J. 573, 573 (1986).

39. *See id.*

40. *See id.*

41. *Id.*

42. *See* SCHOENBAUM, *supra* note 10, § 17-14.

43. *Id.*

44. SCHOENBAUM, *supra* note 10, § 17-14. The insurer has the option to avoid the policy whether the insured makes the misrepresentation or omission intentionally or accidentally.

of materiality is broad: If the existence of the fact *would have influenced the decisions of a prudent insurer on the risk assumed*, it is material under *ubberimae fidei*.[45] Under *ubberimae fidei*, the insured can avoid coverage, even based on a misstatement or omission that was not causally related to the loss.[46]

Some states place a more substantial burden on an insurer to avoid a policy based on an insured's misrepresentation or failure to disclose.[47] However, not all states increase the burden on the insurer. For example, under Florida law, like under *ubberimae fidei*, an insurer can avoid payment upon a showing of *accidental* omission in the insurance application stage.[48]

In 1986, Warren T.R. von Bittner asserted that "the validity and effect of [the COL clause], and the autonomy of the parties to choose the law of a particular jurisdiction, is qualified and limited by almost all jurisdictions in varying degrees and for a variety of reasons."[49] While this may be true of some states, other states exclude marine insurance from statutes that generally limit party autonomy in the insurance context. For example, Louisiana Revised Statute § 22:868 provides that any condition, stipulation, or agreement in an insurance contract that is delivered or issued for delivery in Louisiana and that covers subjects located, resident, or to be performed in Louisiana requiring the contract to be construed according to the laws of any other state or country is void.[50] However, § 22:851, which defines the

45. SCHOENBAUM, *supra* note 10, § 17-14 (emphasis added).

46. *See id.*

47. *See, e.g.*, Hays v. Jackson Nat'l Life Ins. Co., 105 F.3d 583, 588 (10th Cir. 1997) (recognizing that under Oklahoma law, the insurer must prove intent to deceive before an insurer can avoid the policy on grounds of misrepresentation in the application); King v. Allstate Ins. Co., 906 F.2d 1537, 1538-39 (11th Cir. 1990) (recognizing that under Louisiana law, only intentional concealment or misrepresentation of a material fact during the application process will entitle the insurer to avoid the policy); Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., No. 1:07cv460HSO-JMR, 2008 WL 872278, at *4-5 (S.D. Miss. Mar. 27, 2008) (recognizing that under Mississippi law, materiality is only proven as a matter of law if it is uncontroverted that the truth *would have influenced a prudent insurer's acceptance of the risk* and that Mississippi imposes no duty on insureds to disclose information that is not asked for in the application), *rev'd*, 585 F.3d 236 (5th Cir. 2009); Mayes v. Mass. Mut. Life Ins. Co., 608 S.W.2d 612, 616 (Tex. 1980) (citing Washington v. Reliable Life Ins. Co., 581 S.W.2d 153 (Tex. 1979); Allen v. Am. Nat'l Ins. Co., 380 S.W.2d 604 (Tex. 1964); Clark v. Nat'l Life & Accident Ins. Co., 200 S.W.2d 820 (Tex. 1947); First Cont'l Life Ins. Co. v. Bolton, 524 S.W.2d 727 (Tex. Civ. App.–Houston 1975); Prudential Ins. Co. of Am. v. Torres, 449 S.W.2d 335 (Tex. Civ. App.–San Antonio 1969); Otto E. Wiswell, Note, *Insurance—Fraud Necessary to Avoid Life Insurance Policy*, 11 BAYLOR L. REV. 236, 239 (1959)) (recognizing that under Texas law, to use an insured's misrepresentations to avoid coverage, the insured must prove intent to deceive).

48. *King*, 906 F.2d at 1541 (citing Gulfstream Cargo, Ltd. v. Reliance Ins. Co., 409 F.2d 974, 980 (5th Cir. 1969)).

49. von Bittner, *supra* note 38, at 574.

50. LA. REV. STAT. ANN. § 22:868 (2009). Section 22:868 provides in relevant part:

scope of § 22:868 expressly excludes "ocean marine and foreign trade insurance."[51] Thus, while some states limit party autonomy generally in the insurance context, they specifically exclude at least some types of marine insurance from the limitation. Thus, in at least some states, the limitations on party autonomy in marine insurance do not originate from state legislation, but rather from the case law addressing the enforceability of COL clauses in maritime contracts.

Since the Supreme Court's decision in *M/S Bremen v. Zapata Offshore Co.*[52] (*The Bremen*), courts are increasingly inclined to enforce COL clauses in maritime contracts of all types, including but not limited to cruise tickets, bills of lading, vessel repair contracts, and marine insurance policies.[53] Regardless of whether the maritime contract is negotiated at arm's length between highly sophisticated parties, or is an adhesion contract like passenger cruise tickets, the judicial trend reflects a very strong presumption in favor of enforcement.

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation, or agreement either:
>
> (1) Requiring it to be construed according to the laws of any other state or country . . . .
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.
>
> . . . .
>
> . . . C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

Id.

51. LA. REV. STAT. ANN. § 22:851 (2009). Section 22:851 provides in relevant part: "The applicable provisions of this Part shall apply to insurance *other than* ocean marine and foreign trade insurances." *Id.* (emphasis added).

52. M/S Bremen v. Zapata Offshore Co. (*The Bremen*), 407 U.S. 1 (1972).

53. *See* Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 986 (5th Cir. 1992) ("[COL] [c]lauses such as this one are presumptively valid."); *see also* Mitsui & Co. (USA), Inc. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997). *Mitsui & Co. (U.S.A.), Inc. v. Mira M/V* stated:

> The Supreme Court has consistently held forum-selection and choice-of-law clauses presumptively valid. . . .
>
> . . . .
>
> . . . The presumption of validity may be overcome, however, by a showing that the clause is "unreasonable under the circumstances." The burden of proving unreasonableness is a *heavy* one, carried only by a showing that the clause results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court.

Mitsui, 111 F.3d at 35 (citations omitted) (emphasis added); *see* Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 768 (D.C. Cir. 1992). *Milanovich v. Costa Crociere, S.P.A.*, stated:

> [C]ourts should honor a contractual choice-of-law provision in a passenger ticket unless the party challenging the enforcement of the provision can establish that "enforcement would be unreasonable and unjust," 'the clause was invalid for such reasons as fraud or overreaching," or "enforcement would contravene a strong public policy of the forum in which suit is brought."

Milanovich, 954 F.2d at 768 (citing *The Bremen*, 407 U.S. at 15).

Federal courts determine the enforceability of COL provisions in maritime contracts using maritime choice-of-law principles.[54] The Fifth Circuit resorts to at least three different sources for its understanding of the maritime choice-of-law principles which govern the enforceability of COL clauses in maritime contracts: (1) the Supreme Court's decisions in *The Bremen* and *Carnival Cruise Lines, Inc. v. Shute*,[55] (2) the Restatement (Second) of Conflict of Laws § 187,[56] and (3) the Fifth Circuit's own decision in *Stoot v. Fluor Drilling Services*.[57] Recently, the Fifth Circuit has relied on more than one of these sources within the same opinion, giving rise to some confusion about precisely which method the court is using to determine the enforceability of COL clauses.[58] This commingling of apparently different rules in such opinions may be a manifestation of a type of methodological equivocation which, when it is intentional and appears in the same precedent, has been described by choice-of-law scholars as "eclecticism," a phenomena that has become more frequent in recent years.[59] As noted by one scholar, "'Courts tend to be less interested in theoretical purity, and more interested in reaching what they perceive to be the proper result. The majority of cases . . . tend to use modern approaches interchangeably, and often as *a posteriori* rationalizations for results reached on other grounds.'"[60]

54. Albany Ins. Co. v. Kieu, 927 F.2d 882, 890 (5th Cir. 1991) ("Although a federal court customarily applies the choice of law rules of the forum in which it is located, the court in maritime cases must apply general federal maritime choice of law rules." (citations omitted)); *see also* Triton Marine Fuels, Ltd. v. M/V Pacific Chukotka, 575 F.3d 409, 413 (4th Cir. 2009) (stating that "[i]n determining the enforceability of choice-of-law provision in the [maritime] contract, we look to principles of federal maritime law" (citations omitted)); Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 766 (D.C. Cir. 1992) ("The [plaintiffs'] cruise ticket is a maritime contract and thus the substantive law to be applied in this case is the general federal maritime law, including maritime choice-of-law rules." (citing Hodes v. S,N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905, 909 & 909 n.2 (3d Cir. 1988))).

55. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); *see, e.g.*, Mitsui & Co. (USA), Inc. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997) (citing *Carnival Cruise Lines*, 499 U.S. at 590-92 (1991); M/S Bremen v. Zapata Offshore Co. (*The Bremen*), 407 U.S. 1, 12-13 (1972)); *see also* Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 985-86 (5th Cir. 1992) (citing *Carnival Cruise Lines*, 499 U.S. at 590-92 (1991); *The Bremen*, 407 U.S. at 12-13).

56. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

57. Stoot v. Fluor Drilling Servs., Inc., 851 F.2d 1514 (5th Cir. 1988); *see, e.g.*, BSI Drilling & Workover, Inc. v. Lexington Ins. Co. (*In re* BSI Drilling & Workover, Inc.), 137 F.3d 1351, 1351 (5th Cir. 1998) (per curiam) (citing *Stoot*, 851 F.2d at 1517-19); Dupre v. Penrod Drilling Corp., 993 F.2d 474, 476 (5th Cir. 1993) (citing *Stoot*, 851 F.2d at 1517); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1126 (5th Cir. 1992) (citing *Stoot*, 851 F.2d at 1517).

58. *See, e.g.*, Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 242-44 (5th Cir. 2009).

59. SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 67 (2006).

60. *Id.* at 68 (quoting S. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 124 (2d ed. 2003)).

1. *THE BREMEN* AND *CARNIVAL CRUISE LINES*

The Supreme Court's decisions in *The Bremen* and *Carnival Cruise Lines* involved forum-selection clauses. Yet many circuits, including the Fifth Circuit, have used the decisions as authority for two interrelated propositions: first, that in international maritime and non-maritime contracts, both forum-selection *and COL clauses* are presumptively valid and enforceable, and second, that the opponent of the clause can rebut the presumption by satisfying the heavy burden of proving that the clause is unreasonable under the circumstances.[61] Such unreasonableness potentially exists where the opponent of the COL or forum-selection clause can prove: (1) the clause resulted from fraud or overreaching; (2) the clause violates a strong public policy of the forum state; (3) enforcement of the clause would have the effect of depriving the opponent of his day in court because of the grave inconvenience or unfairness of the selected forum; (4)thefundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (5) enforcement of the clause would contravene a strong public policy of the forum state.[62]

In *The Bremen*,[63] the Supreme Court vacated a Fifth Circuit judgment declining to enforce a forum-selection clause in an international towage contract.[64] The plaintiff, a Houston-based corporation, contracted with the defendant, a German corporation, to tow the Houston corporation's self-elevating drilling rig from Louisiana to the Italian coast.[65] The contract contained a forum-selection provision, which provided that any dispute

61. *See, e.g.*, Haynsworth v. The Corp., 121 F.3d 956, 962-63 (5th Cir. 1997) (enforcing English COL clause in an international non-maritime contract between an English company and American investors using standards derived from *The Bremen* and *Carnival Cruise Lines*); Mitsui & Co. (USA), Inc. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997); Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 985-86 (5th Cir. 1992) (stating "[t]hat *Carnival Cruise Lines*, *The Bremen*, and *The Monrosa* concern forum selection clauses instead of choice of law clauses makes no difference," and enforcing a COL clause selecting the law of Singapore to govern an international maritime ship repair contract between a Singapore corporation and a Liberian corporation based on *The Bremen* and *Carnival Cruise Lines*); Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 768-69 (D.C. Cir. 1992) (enforcing a COL provision selecting Italian law against the Italian cruise line which drafted the COL provision in the cruise passenger ticket based on *The Bremen* and *Carnival Cruise Lines*); *see also* Richards v. Lloyd's of London, 135 F.3d 1289, 1292-97 (9th Cir. 1998) (enforcing English COL clause in non-maritime international contract between English underwriting market and American investors who provided underwriting capital based on *The Bremen*).

62. *Haynsworth*, 121 F.3d at 963; *Mitsui & Co.*, 111 F.3d at 35; *Sembawang Shipyard*, 955 F.2d at 985-86.

63. M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1 (1972).

64. *Id.* at 2.

65. *Id.*

must be resolved in a London court.[66] The Supreme Court asserted that it was reasonable to view the forum-selection clause as a COL clause because of an English rule that the parties are assumed—absent a contrary indication—to have selected the forum with the intention that the forum should apply its own law.[67]

While the defendants were transporting the rig through international waters, a severe storm arose and caused damage to the rig.[68] The plaintiff filed a suit in admiralty in the United States for negligent towage and breach of contract, seeking damages in excess of three million dollars.[69] The defendant invoked the forum-selection clause in the towage contract and moved to dismiss the action for lack of jurisdiction or forum non conveniens.[70]

After the district court denied the defendant's initial motion to dismiss or stay the plaintiff's action, a divided panel of the Fifth Circuit affirmed the district court's decision.[71] In rehearing en banc, the Fifth Circuit adopted the panel opinion with six of the fourteen judges dissenting.[72] The Supreme Court found, in accordance with the minority, that "far too little weight and effect were given to the forum clause in resolving this controversy."[73] After acknowledging that many state and federal courts had historically refused to enforce forum-selection clauses on the grounds that they were "contrary to public policy" or had the effect of ousting the jurisdiction of the court, the Supreme Court rejected this approach and adopted the view that forum-selection clauses in international contracts are presumptively valid unless proven unreasonable by the opponent.[74] The Court explained that by adopting this view, it was aligning itself with other common law countries, the perspective of many scholars, the Restatement of the Conflict of Laws, and the ancient concept of freedom of contract.[75] The court also asserted that this perspective would benefit American businessmen seeking to participate in international business.[76] Moreover, the court observed that the chosen forum, England, satisfied the standards

66. M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 2 (1972).
67. *Id.* at 14 n.15.
68. *Id.* at 3.
69. *Id.* at 3-4.
70. *Id.* at 4.
71. *Id.* at 6-7.
72. M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 7 (1972).
73. *Id.* at 8.
74. *Id.* at 10.
75. *Id.* at 11.
76. *Id.* at 13-14.

of neutrality and long-experience in admiralty litigation.[77]

The Court also explained that to promote the expansion of American business and industry abroad, it was imperative that American courts enforce freely negotiated forum-selection clauses and avoid the "parochial concept that all disputes must be resolved under our laws and in our courts."[78] In its analysis, the Court focused on several key factual aspects of the case that rendered enforcement appropriate.[79] First, the contract to transport an extremely expensive piece of equipment from Louisiana to Italy was not a routine transaction.[80] Second, in the course of the voyage, the tug needed to pass through the waters of numerous jurisdictions and could potentially sustain damage at any point, a situation that created uncertainty and potential inconvenience if a lawsuit could be maintained in any jurisdiction where the accident occurred.[81] By agreeing in advance to a forum acceptable to both parties, the parties could eliminate such uncertainties.[82] Third, the parties probably conducted their negotiations and agreed to the monetary terms of their bargain with the consequences of the forum-selection clause in mind.[83] Fourth, it was unlikely that the forum-selection clause was the product of overweening bargaining power on the defendant's part because the defendant was not the only corporation bidding on the towage contract, and the plaintiff could have contracted with a different bidder.[84] Finally, the clause was positioned at a point in the contract where the plaintiff would presumably have noticed it, and the plaintiff had altered other terms of the agreement, thereby significantly weakening the notion that the plaintiff suffered from a lack of bargaining power.[85] The Supreme Court concluded that, under the circumstances, the forum-selection clause was enforceable, since the the plaintiff could not clearly make any of the showings required to render the forum-selection clause unenforceable.[86]

77. M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 13 (1972).

78. *Id.* at 8-9.

79. *Id.* at 13-14.

80. *Id.* at 13.

81. *Id.*

82. *Id.* at 13-14.

83. M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 14 (1972).

84. *Id.* at 14 n.14 (citing *In re* Unterweser Reederei, 428 F.2d 888, 907 (5th Cir. 1970) (Wisdom, J., dissenting), *vacated by The Bremen*, 407 U.S. 1).

85. *Id.* (citing *In re* Unterweser Reederei, 428 F.2d 888, 907 (5th Cir. 1970) (Wisdom, J., dissenting), *vacated by The Bremen*, 407 U.S. 1).

86. *Id.* at 15-18 (1972) (citing Boyd v. Grand Trunk W. RR. Co., 338 U.S. 263 (1949)). The Court asserted that the appropriate approach was to enforce the forum-selection clause unless the opponent of the clause could demonstrate any of the following: (1) that enforcement would be "unreasonable and unjust," (2) that the clause was invalid for such reasons as "fraud or overreaching," (3) that enforcement would "contravene a strong public policy of the forum in

In *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court found that the Ninth Circuit erred in refusing to enforce a forum-selection clause included in a maritime adhesion contract, specifically, a cruise passenger ticket provided to the plaintiff.[87] The plaintiff brought an action against the cruise line after she allegedly sustained injuries as a result of slipping on a deck mat during a guided tour of the ship's galley.[88] After the district court granted the defendant-cruise line's motion for summary judgment based on the Florida forum-selection clause included in the passenger ticket, the Ninth Circuit reversed.[89]

The Supreme Court noted that the Ninth Circuit's reversal was based on its observation that, unlike the COL clause in *The Bremen*, the clause was not the product of negotiation, and enforcement of the clause would effectively deprive the plaintiffs of their day in court.[90] The Court noted that there were key factual differences between the two cases that prevented an easy application of the *The Bremen*, and suggested that "crucial differences in the business contexts in which the respective contracts were executed" should be taken into account.[91]

Instead of analyzing the reasonableness of the forum-selection clause based strictly on factors the Court reviewed in *The Bremen*, the Court "refine[d] the analysis of *The Bremen* to account for the realities of form passage contracts."[92] The Court proceeded to explain that a reasonable forum-selection clause in an adhesion contract like a cruise passage ticket could be permissible, since cruise lines regularly carry passengers to and from many different places.[93] Because of the nature of the cruise business, cruise lines have a special interest in limiting the fora where they can be subject to suit, since an accident could potentially subject a cruise line to litigation in several different fora.[94] Second, the Court asserted that the

which suit is brought, whether declared by statute or by judicial decision," or (4) that the maintenance of the suit in the foreign forum selected would be so gravely difficult and inconvenient that the party challenging its enforcement would for all practical purposes be deprived of his day in court. *Id.* at 15.

87. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991).

88. *Id*. at 585, 588.

89. Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, *Carnival Cruise Lines*, 499 U.S. 585.

90. *Carnival Cruise Lines*, 499 U.S. at 592.

91. *Id.* at 593-94.

92. *Id.* at 593.

93. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991)(citing *The Bremen*, 407 U.S. at 13, 13 n.14 (1972); Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905, 913 (3d Cir. 1988), *abrogated on other grounds by* Lauro Lines, S.R.L. v. Chasser, 490 U.S. 495 (1989)).

94. *Id.* (citing M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 13, 13 n.14

clauses tend to eliminate confusion about where lawsuits may be brought and defended, and they eliminate the time and expense of pretrial motions to determine the correct forum.[95] Third, the court suggested that such clauses conserve judicial resources that would otherwise be spent determining such motions.[96] Fourth, the Court suggested that passengers who purchase cruise tickets with forum-selection clauses benefit from reduced fares that reflect the savings the cruise line enjoys as a result of limiting the fora in which it can be sued.[97]

The Court suggested that if a cruise line included a forum-selection clause with a bad-faith motive to discourage cruise passengers from pursuing legitimate claims, the forum-selection clause would not meet the requirements of fundamental fairness.[98] However, the fact that Florida was the cruise line's principal place of business and that numerous cruise ships departed from Florida dispelled any suggestion of such a bad-faith motive on the part of the cruise line.[99] The Court further noted that there was no evidence that the forum-selection clause was the result of fraud or overreaching and that the plaintiff could have rejected the tickets.[100] Having thereby refashioned the reasonableness rule it established in *The Bremen* to suit form passage contracts, the Court enforced the forum-selection clause in the passenger ticket.[101]

Because the forum-selection clause in *The Bremen* also functioned as a COL clause, the circuit courts were likely bound to use the rule and reasoning articulated by the Court in *The Bremen* to analyze the enforceability of COL clauses in international maritime transactions. However, because the forum-selection clause in *Carnival Cruise Lines* did not similarly function as a COL clause, the circuit courts were probably not bound to extend the *Carnival Cruise Lines* holding to COL clauses in maritime contracts, but they have done so anyway. The circuit courts, including the Fifth Circuit, have consolidated the rules of *The Bremen* and

(1972); Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905, 913 (3d Cir. 1988), *abrogated on other grounds by* Lauro Lines, S.R.L. v. Chasser, 490 U.S. 495, 501 (1989) (holding that pre-judgment orders denying enforcement of forum-selection clauses are not immediately appealable, thereby abrogating the Third Circuit's decision in *Hodes* to permit the litigants to appeal the pre-judgment district court order refusing to enforce a forum-selection clause)).

95. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

96. *Id.* at 594 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

97. *Id.*

98. *See id.* at 595.

99. *Id.*

100. *Id.*

101. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596-97 (1991).

Carnival Cruise Lines, applied them liberally to both COL and forum-selection clauses in international maritime and non-maritime contracts, and used cases involving forum-selection and COL clause interchangeably. For example, in *Sembawang Shipyard v. Charger, Inc.*, the Fifth Circuit enforced a COL clause selecting the law of Singapore based on Supreme Court authority that addressed the enforceability of forum-selection clauses and expressly stated, "[t]hat *Carnival Cruise Lines*, *The Bremen*, and *The Monrosa* concern forum-selection clauses instead of choice-of-law clauses makes no difference."[102] In *Mitsui & Co. v. MIRA M/V*, after stating that "[t]he Supreme Court has consistently held forum-selection and choice-of-law clauses presumptively valid," the Fifth Circuit cited to a series of Supreme Court cases, not one of which specifically dealt with a pure COL clause.[103] Because the courts use the Supreme Court decisions dealing with COL clauses and forum-selection clauses interchangeably, courts have used *Carnival Cruise Lines*, which involved enforcement of a forum-selection clause, as support for decisions to enforce COL clauses in maritime contracts that are concededly adhesion contracts. However, often courts have used the strong presumption of enforceability to protect the non-drafting party to a maritime adhesion contract.[104]

For instance, in *Milanovich v. Costa Crociere*, the D.C. Circuit based its decision to enforce a COL provision in a cruise passenger ticket partly on *Carnival Cruise Lines*, even though in that case the Supreme Court enforced a forum-selection clause in a cruise passenger ticket, not a COL clause.[105] However, in *Milanovich*, the D.C. Circuit used *Carnival Cruise Lines* not as support for a decision to enforce a COL clause in an adhesion contract against the passenger, but to enforce the COL clause against the cruise line that drafted the COL clause in the adhesion contract.[106]

102. Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 985-86 (5th Cir. 1992).

103. Mitsui & Co. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997) (citing Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 538-40 (1995) (foreign arbitration clause); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (forum-selection clause); M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 15 (1972) (dealing with an English forum-selection clause which was deemed to function as a COL clause due to an English rule that parties selecting England as the forum intend the court to apply English law absent contrary indication); Kevlin Serv., Inc, v. Lexington State Bank, 46 F.3d 13, 15 (5th Cir. 1995) (dealing with a forum-selection clause)).

104. *See* Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1296-97 (9th Cir. 1997) (invoking the presumption of enforceability in section 187 to apply United States law pursuant to a COL clause drafted by the cruise line rather than Liberian law, which the cruise line urged the court to apply since Liberian law, unlike United States law, limited the cruise line's potential damages in passenger injury cases); Milanovich v. Costa Crociere, 954 F.2d 763 (D.C. Cir. 1992).

105. *See* Milanovich v. Costa Crociere, 954 F.2d 763, 768-69 (D.C. Cir. 1992); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594-97.

106. *See Milanovich*, 954 F.2d at 768-69.

The plaintiffs in *Milanovich*, a husband and wife from D.C., booked passage for a one-week cruise on a vessel owned by the defendant, Costa Crociere, an Italian cruise line.[107] After the husband was seriously injured when his chair collapsed during the cruise, the plaintiffs made a demand for damages on the cruise line.[108] A few months later, they filed a personal injury action in the United States District Court for the District of Columbia.[109] Since the suit was filed one year and fifty-three days after the date of the accident, the cruise line moved for summary judgment "claiming that the suit was time-barred by a provision of the passage ticket establishing a one-year time limit for bringing personal injury actions."[110] The plaintiffs argued that there was an Italian COL provision in the contract and that under Italian law, the one-year limitation was unenforceable.[111] The district court rejected the plaintiffs' argument and held that U.S. law, not Italian law, provided the rule of decision regarding the validity of the one-year limitation clause.[112]

On appeal, the D.C. Circuit reconsidered the enforceability of the Italian COL clause. The court observed that because the plaintiffs' cruise ticket was a maritime contract, "the substantive law to be applied in the case was the general federal maritime law, including maritime choice-of-law rules."[113]

The court then cited § 187 of the Restatement (Second) of Conflict of Laws as support for the assertion that American courts usually enforce COL clauses, even when they are drafted in adhesion contracts.[114] However, the D.C. Circuit did not analyze the COL clause under § 187 in detail.[115] Rather, the Court stated:

> Under *The Bremen* and *Carnival Cruise* . . . courts should honor a contractual choice-of-law provision in a passenger ticket unless the party challenging the enforcement of the provision can establish that 'enforcement would be unreasonable and unjust,' 'the clause was invalid for such reasons as fraud or overreaching,' or 'enforcement would contravene a strong public policy of the forum

107. Milanovich v. Costa Crociere, 954 F.2d 763, 764 (D.C. Cir. 1992).

108. *Id.* at 765.

109. *Id.* at 765.

110. *Id.*

111. *Id.*

112. *Id.*

113. Milanovich v. Costa Crociere, 954 F.2d 763, 766 (D.C. Cir. 1992) (citing Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905, 909 & 909 n.2 (3d Cir. 1988), *abrogated on other grounds by* Lauro Lines, S.R.L. v. Chasser, 490 U.S. 495 (1989)).

114. *Id.* at 767 (citing RESTATEMENT (SECOND) OF CONLICTS OF LAWS § 187 (1971)).

115. *Id.*

in which suit is brought.'[116]

Because the plaintiff's ticket provided that Italian law governed the contract, and because the cruise company—the party opposing enforcement of the COL clause (the drafting party)—did not demonstrate that the COL clause was unjust or unreasonable or that its enforcement would violate American public policy, the court enforced the COL provision.[117] Significantly, in *Milanovich*, the D.C. Circuit recognized a strong presumption in favor of enforcement of COL clauses not to protect the cruise line that drafted the clause and then sought to avoid it, but to protect the non-drafting party to a maritime adhesion contract with a COL clause.

2. THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

The Restatement (Second) of Conflict of Laws is "by far the most popular" modern choice-of-law methodology.[118] Twenty-two states follow the Restatement for tort conflicts, and twenty-four states follow it for contract conflicts.[119] For example, many states follow § 187 of the Restatement when deciding COL clause issues, and many federal courts follow the Restatement in federal question cases.[120]

Conflict of laws experts have observed that the popularity of this approach can be attributed to several different qualities of the Restatement, not all of which are complimentary.[121] Specifically, "The Restatement: (a) provides judges with virtually unlimited discretion and, as applied by some judges, it does not require hard thinking; (b) is not ideologically 'loaded'; (c) is a complete 'system'; (d) carries the prestige of the American Law Institute; and (e) has 'momentum'."[122]

In § 187, the drafters of the Restatement "codified" the principle of party autonomy, namely, that parties to a multi-state contract should be permitted to choose the law to govern their contract, subject to certain limits.[123] More American courts follow § 187 than any other provision of

116. Milanovich v. Costa Crociere, 954 F.2d 763, 768 (D.C. Cir. 1992) (quoting M/S Bremen v. Zapata Off-Shore Co. (*The Bremen*), 407 U.S. 1, 15 (1972)).

117. *Id*. at 769.

118. SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 112-13 (Wolters Kluwer 2008) (2001). The Restatement (Second) of Conflict of Laws was drafted by the American Law Institute and officially promulgated in 1969. *Id.* at 113.

119. *Id.* at 112.

120. *Id.*

121. *Id.* at 113.

122. *Id.*

123. SYMEONIDES, *supra* note 118, at 197.

the Restatement.[124] Section 187 provides in relevant part:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188 would be the state of the applicable law in the absence of an effective choice of law by the parties.[125]

Although § 187 recognizes certain limitations on party autonomy, it establishes a presumption that COL clauses are valid and enforceable. In § 187(2)(a) and § 187(2)(b), the Restatement distinguishes between "waivable," "suppletive," or "default" rules that parties may contract out of and "non-waivable," "mandatory," "imperative," or "obligatory" rules that parties may not avoid by contract.[126] Rather than using those terms expressly, § 187 refers to "issues that the parties 'could have resolved by an explicit provision in their agreement directed to that issue,'"[127] to designate waivable rules, such as those "'relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, . . . frustration and impossibility.'"[128] To designate non-waivable rules, § 187 refers to issues "that are beyond the parties' contractual power, such as those involving 'capacity, formalities, and substantial validity.'"[129] Section 187(1) provides that if the particular issue is governed by a waivable rule, the parties' choice of law is not subject to

124. SYMEONIDES, *supra* note 118, at 197.

125. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

126. SYMEONIDES, *supra* note 118, at 198.

127. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

128. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c (1971)).

129. SYMEONIDES, *supra* note 118, at 198 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d (1971)).

any limitations.[130] On the other hand, under § 187(2), if the particular issue is governed by a non-waivable rule, the court will enforce the COL clause unless the party challenging the clause can make one of two showings.[131] First, the challenging party can avoid the clause if they can demonstrate that the chosen state lacks a "substantial relationship" to the parties and that there is no "other reasonable basis" for the choice.[132] Alternatively, the challenging party can avoid the clause if it can prove that the application of the chosen law would contravene a fundamental policy of a state whose law would govern in the absence of the COL clause and which has a "materially greater interest" in the resolution of the particular issue than the chosen state.[133] Proponents of the COL clause can easily satisfy the "substantial relationship" requirement if the selected state has an important connection to the contract; for instance, if it is the place where the parties made or performed the contract, where a party is domiciled, or where a party maintains its principal place of business.[134] When the parties are familiar with the chosen law, or the chosen law is particularly complete and mature, there may be some "other reasonable basis" for the chosen law.[135] While many cases emphasize the importance of this requirement, courts very rarely strike down a COL clause on this ground alone.[136]

Section 187(2)(b) establishes a public policy limitation on party autonomy when the particular issue involves a non-waivable rule. Because the limits on party autonomy vary from one state to another, § 187(2)(b) gives rise to two threshold questions.[137] First, which state's limitations will be used as the standard for regulating party-autonomy in multi-state contracts?[138] Second, which level or gradation of public policy will be employed to regulate/limit party autonomy?[139]

With respect to the first issue, the two options are the law of the forum (*lex fori*) and "the law that would be applicable in the absence of the [COL] clause" (*lex causae*).[140] When the application of the chosen law would

130. SYMEONIDES, *supra* note 118, at 199 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c (1971)).

131. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

132. SYMEONIDES, *supra* note 118, at 199 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971)).

133. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

134. *Id.*

135. *Id.* at 200 (citing Prows v. Pinpoint Retail Sys., Inc., 868 F. Supp. 2d 462 (S.D.N.Y. 2001); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971)).

136. *Id.* at 199.

137. *Id.* at 200.

138. SYMEONIDES, *supra* note 118, at 200.

139. *Id.*

140. *Id.* at 201.

violate the public policy of both the *lex fori* and *lex causae*, or when the two laws coincide in the same state, then the chosen law will not be applied.[141] When the *lex fori* and *lex causae* do not coincide in the same state and the chosen law violates either the public policy limits of the *lex fori*, but not the *lex causae*, or the *lex causae* but not the *lex fori*, the situation becomes more complicated.[142] If the application of the chosen law would violate the *lex fori* but not the *lex causae*, the COL clause should be enforced unless it is "repugnant to the forum's *ordre public*."[143] The *ordre public* exception is extremely limited.[144] It only applies in the most extraordinary class of cases where the foreign law selected in the COL clause is offensive, violative, or shocking to the forum's principles or sense of justice, menaces the public welfare, or violates a "prevalent conception of good morals."[145] When the application of the contractually chosen law violates the public policy of the *lex causae* but not the *lex fori*, the *lex causae* will defeat the parties' choice only if the *lex causae* has a "materially greater interest" in applying its law.[146]

Not every difference between the selected law and the law of the state that determines the limits of party autonomy will render the COL clause unenforceable.[147] Section 187(2)(b) sets a fairly high threshold, requiring the policy be "fundamental" to defeat the COL clause; however, the Restatement does not define "fundamental."[148] Instead, it provides examples of "fundamental polices," including "statutes declaring certain contracts illegal or designed to protect one party from 'the oppressive use of superior bargaining power' (such as statutes protecting against from insurers)."[149] To be "fundamental" in the sense of § 187(2)(b), the policy does not need to rise to the level of a public policy that would justify a court's refusal to enforce the COL clause under the *ordre public* exception.[150]

As the experts have reflected, judicial decisions do not always accept

141. SYMEONIDES, *supra* note 118, at 201.

142. *Id.*

143. *Id.*

144. *Id.* at 83, 201 (citing Loucks v. Standard Oil Co., 120 N.E. 198, 201-02 (N.Y. 1918)).

145. *Id.* (citing Loucks v. Standard Oil Co., 120 N.E. 198, 201-02 (N.Y. 1918)).

146. *Id.* at 202 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

147. SYMEONIDES, *supra* note 118, at 202 (citing Cherokee Pump & Equip., Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994); Bethlehem Steel Corp. v. G.C. Zarnas & Co., 498 A.2d 605 (Md. 1985)).

148. SYMEONIDES, *supra* note 118, at 202-03 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

149. *Id.* at 203 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971)).

150. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971)).

or understand all of these fine distinctions inherent in § 187, and those that do accept them struggle in practice to apply them.[151] Prior to *Great Lakes Reinsurance*, the Fifth Circuit had not used § 187 to determine the limits of party autonomy in maritime contracts, although in *Albany Insurance Co. v. Kieu*, the Fifth Circuit used § 188 to determine the appropriate state law to govern a marine insurance policy absent a COL clause.[152] In *Milanovich*, the D.C. Circuit made brief reference to § 187 in the process of analyzing the enforceability of the COL clause in the cruise passenger ticket, but ultimately relied more on *The Bremen*.[153]

However, the Ninth Circuit, in *Chan v. Society Expeditions Inc.*, addressed the enforceability of a COL clause in a cruise passenger ticket using § 187.[154] Like the D.C. Circuit, the Ninth Circuit observed a strong presumption in favor of enforcement of COL against the drafting cruise line.[155] The plaintiff family sued several parties, including the sole owner and president of the cruise line, under general maritime law for injuries sustained by the husband and child while on the cruise.[156] The tickets issued to the plaintiffs included a COL provision, which specified that the "[t]icket and all other rights and duties of Passengers and of Society will be construed in accordance with the general maritime law of the United States."[157]

Based on the COL factors articulated in *Lauritzen v. Larsen*[158] for maritime personal injury actions, the district court ruled that because the *World Discoverer* was flagged in Liberia, Liberian law governed the plaintiff's claims despite the presence of a COL clause in the passenger ticket specifying that United States law would apply.[159] The Ninth Circuit reversed on appeal and found that the COL provision specifying application of United States law governed the plaintiffs' claims.[160]

The Ninth Circuit conceded that in the absence of a contractual COL clause, federal courts sitting in admiralty apply federal maritime choice of law principles derived from the Supreme Court's decision in *Lauritzen v.*

151. SYMEONIDES, *supra* note 118, at 203.

152. Albany Ins. Co. v. Kieu, 927 F.2d 882, 891 (5th Cir. 1991).

153. Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 767-68 (D.C. Cir. 1992).

154. Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287 (9th Cir. 1997).

155. *Id.* at 1296-97 (citing *Milanovich*, 954 F.2d at 767-68).

156. *Id.* at 1287.

157. *Id.* at 1296 (quoting the disputed COL clause).

158. Lauritzen v. Larsen, 345 U.S. 571 (1953).

159. *Chan*, 123 F.3d at 1296-97.

160. Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1296 (9th Cir. 1997).

Larsen,[161] however, the Ninth Circuit stated that where "parties specify which law will apply in their contractual agreement, admiralty courts will generally give effect to that choice."[162] The Ninth Circuit cited the D.C. Circuit's decision in *Milanovich v. Costa Crociere*, as support for the proposition that:

> [C]ourts should honor a contractual choice-of-law provision in a passenger ticket unless the party challenging the enforcement of the provision can establish that enforcement would be unreasonable and unjust, the clause was invalid for such reasons as fraud or overreaching, or enforcement would contravene a strong public policy of the forum in which suit is brought.[163]

After mentioning the D.C. Circuit's rule, the Ninth Circuit stated that federal common law applies to choice-of-law determinations in admiralty and that federal common law follows the approach of the Restatement (Second) of Conflict of Laws.[164] The Ninth Circuit remarked that it was error for the district court to interpret the COL clause in the passenger ticket to include a U.S. conflict analysis based on the *Lauritzen* factors.[165] Instead of applying *Lauritzen*, the Ninth Circuit stated that the district court should have analyzed the validity of the COL clause under federal common law conflict rules.[166]

The Ninth Circuit analyzed the enforceability of the COL clause under § 187 of the Restatement (Second) of Conflict of Laws and concluded that the COL clause would be enforced unless the cruise line could demonstrate either that "[(1)] the United States [had] no substantial relationship to the parties or the cruise or [(2)] that the application of U.S. law would be contrary to a fundamental policy of the [Liberia as the *lex causae*, and] that Liberia had a materially greater interest than the U.S." in the resolution of the dispute.[167]

161. In *Lauritzen v. Larsen*, the Supreme Court articulated a seven factor choice-of-law test that applies in maritime tort cases. Chan v. Soc'y Expeditions, 123 F.3d 1287, 1296 (9th Cir. 1997). The *Lauritzen* factors are: "(1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured party, (4) the allegiance of the shipowner, (5) the place of the contract, (6) accessibility of a foreign forum, and (7) the law of the forum." *Chan*, 123 F.3d at 1296 n.6 (citing Dalla v. Atlas Mar. Co., 771 F.2d 1277 (9th Cir. 1985)).

162. *Id.* at 1296-97 (citing Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 767 (D.C. Cir. 1992)).

163. *Id.* at 1297 (quoting Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 768 (D.C. Cir. 1992)).

164. *Id.* (citing Scoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991)).

165. *Id.*

166. *Id.*

167. Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1297 (9th Cir. 1997).

After noting the district court's holding that Liberian law would be the *lex causae* under the *Lauritzen* analysis, the Court observed that the defendants made no showing that the application of United States law, which would permit the plaintiffs full recovery of their damages, "would contravene a fundamental Liberian policy or that Liberia [had] a materially greater interest in the issue than the U.S."[168] Thus, the Ninth Circuit concluded that "according to well-settled conflicts principles as embodied in the Restatement, the choice clause in the passenger ticket is enforceable and United States law governs the [plaintiff's] claims."[169] Again in this case, the Ninth Circuit was relying on the strong presumptive enforceability of COL clauses in a maritime adhesion contract not to protect the drafter of the adhesion contract, but to protect the injured passenger who was attempting to enforce the COL clause in the ticket drafted by the cruise line.

3. THE THIRD CIRCUIT: *AGF MARINE AVIATION & TRANSPORT V. CASSIN*

In contrast with *Milanovich* and *Chan* where the courts used the presumption of enforceability to enforce COL clauses in cruise tickets against the drafting party, in *AGF Marine Aviation & Transport v. Cassin*, the Third Circuit enforced a COL clause in a marine insurance policy against the non-drafting insured.[170] After his yacht sank off the coast of Grenada, the insured filed a claim with his insurer.[171] The insurer filed a declaratory judgment action in the District Court for the Virgin Islands seeking a declaration that the insurance policy was void from its inception.[172] The court was asked to decide whether the maritime doctrine of *uberrimae fidei* applied to the policy.[173] The policy included a COL provision identical to the COL provision in *Great Lakes Reinsurance*. It provided that either entrenched principles and precedents of federal admiralty law or New York law would apply.[174]

Without any analysis of whether or not the COL provision in the policy was enforceable, the court immediately proceeded to determine which law would govern the issue of whether or not a loss payee could recover independently of the insured.[175] After both parties agreed that no well-established admiralty principle existed to govern that issue, the Third

168. Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1297 (9th Cir. 1997).

169. *Id*.

170. AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255 (3d Cir. 2008).

171. *Id*. at 257.

172. *Id.*

173. *Id.*

174. *Id.* at 261-62.

175. *Id.* at 261-63.

Circuit applied New York law pursuant to the COL clause.[176]

4. *STOOT*: A THIRD SOURCE OF FIFTH CIRCUIT MARITIME COL PRINCIPLES?

In 1998, the Fifth Circuit declared in *Stoot* that "under admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law."[177] This statement of the law was derived from *Hale v. Co-Mar Offshore Corp.*, a Western District case that stated a rule based on, but not identical to, that from *The Bremen* and Restatement § 187.[178] While the *Hale* rule bears almost no similarity to *The Bremen*, it is similar to § 187. In *Hale*, the Western District stated:

> Under admiralty law, the law of the state chosen by the parties to govern their contractual rights and duties will be applied unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of the jurisdiction which would provide the rule of decision for the particular issue involved in the absence of an effective contrary choice of law by the parties.[179]

In *Stoot*, the court examined the enforceability of COL clause in the context of a maritime contract to provide catering services to a drilling rig.[180] The maritime contract in *Stoot* contained an indemnity provision requiring one party to indemnify the other against the consequences of that party's negligence, and the enforceability of the indemnity provision was contingent upon the enforceability of a COL provision in the contract selecting Louisiana law.[181] Under Louisiana's Anti-Indemnity statute, agreements to indemnify a person against the consequences of the person's negligence are invalid.[182] Pursuant to Fifth Circuit authority, "[i]n the absence of a [COL] clause, the construction of indemnity provisions . . . is governed by maritime law."[183] While this rule seems to be an adoption of

176. AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255, 266 n.9 (3d Cir. 2008).

177. Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) (citing Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1215 (W.D. La.1984)).

178. *See* Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1215 (W.D. La.1984).

179. *Id.*

180. *Stoot*, 851 F.2d at 1516.

181. *See id.* at 1517-18.

182. LA. REV. STAT. ANN. § 9:2780 (2005).

183. Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) (citing

§ 187 because of the obvious similarities in language, by eliminating § 187(1), it eliminates the distinction inherent in § 187 between waivable and non-waivable rules. Also, it drops the word "state" in favor of "jurisdiction," an alteration that suggests the authors may have contemplated situations when the maritime law, rather than the law of a state, would provide the *lex causae*.

The *Stoot* decision generated confusion as to whether the Fifth Circuit adopted *Hale's* rule and stated it in shortened form due to the facts of the case or whether it created a new rule. According to *Hale*, choice of law clauses are unenforceable if the application of the law of the chosen state would be contrary to a fundamental policy of the jurisdiction that would otherwise provide the rule of decision for the particular issue in the absence of a COL clause.[184] Like § 187, *Hale* implies that before determining whether a COL clause is enforceable, as a threshold issue, the court must first determine the *lex causae*. Next, the court should compare the chosen law with the fundamental policies of the *lex causae* (which according to *Hale* could be federal maritime law or the law of a state) to determine if there is a conflict that renders the COL provision invalid.

What remained unclear after *Stoot* was what effect the decision would have on the public policy limitation on party autonomy in the context of maritime contracts. The rule stated in *Stoot* is susceptible to more than one meaning. *Stoot* could mean that regardless of whether state law or maritime law would provide the *lex causae*, the COL clause is only rendered unenforceable if it conflicts with the fundamental purposes of maritime law. If that is the intended interpretation, there is no need to first determine the *lex causae,* because the maritime law will always provide the public policy limitations, even if it is not the *lex causae*. On the other hand, if the Fifth Circuit impliedly adopted the Restatement/*Hale*'s rule and reasoning in *Stoot*, it could mean a COL clause in a maritime contract is unenforceable if application of the chosen law would conflict with a fundamental policy of the *lex causae*. If this is the case, to determine the public policy limitations on a COL clause in a maritime contract, courts within the Fifth Circuit would need to determine which state law would provide the *lex causae* when the maritime law would not provide the *lex causae*.

In spite of the lack of clarity about its precise meaning, the Fifth Circuit reiterated and applied the rule it stated in *Stoot* to determine the

Thurmond v. Delta Well Surveyors, 836 F.2d 952, 952 (5th Cir. 1988); Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1214 (5th Cir. 1986); Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 332 (5th Cir. 1981); O'Dell v. N. R. Ins. Co., 614 F. Supp. 1556, 1558 (W.D. La. 1985)).

184. Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1215 (W.D. La.1984).

enforceability of COL clauses in a series of cases that were almost identical to *Stoot* factually, including *Campbell v. Sonat Offshore Drilling, Inc.*,[185] *Dupre v. Penrod Drilling Corp.*,[186] and *BSI Drilling & Workover, Inc. v. Lexington Insurance Co*.[187] In each case, the disputed issue was the same: the enforceability of an indemnity provision in a maritime contract,[188] an issue that according to Fifth Circuit authority is governed by maritime law in the absence of a COL provision.[189] Thus, under either the rule as stated in *Hale* or the rule as stated in *Stoot*, the public policy limitation would come from the maritime law, since the maritime law is the *lex causae* with respect to that issue.

To determine whether *Stoot* was consistent with *Hale* and § 187 with respect to the public policy limitations on party autonomy, the Fifth Circuit needed to apply the rule in a maritime contract case where state law rather than maritime law would provide the *lex causae*. In such a case, if the court compared the chosen law with the fundamental purpose of maritime law, rather than the fundamental policies of that state, it would suggest that in *Stoot*, the Fifth Circuit had departed from the principles of § 187 and *Hale*. In *Great Lakes Reinsurance*, the Fifth Circuit was confronted with such a case, since pursuant to its holding in *Albany Insurance Co. v. Kieu*, *ubberimae fidei* was not entrenched federal precedent in the Fifth Circuit.[190] In *Great Lakes Reinsurance*, absent a COL clause, state law rather than federal maritime law would have provided the *lex causae* and governed the issue of whether an insured's misrepresentations and non-disclosures during the marine insurance application process voided the policy. Thus, the Fifth Circuit's treatment of the analysis had the potential to clarify the meaning of the rule it stated previously in *Stoot*.

Prior to *Great Lakes Reinsurance*, the variety of approaches within the Fifth Circuit for determining the enforceability of COL clauses in maritime contracts and marine insurance cases was reflected in the different rules stated by the United States District Court for the Eastern District of Louisiana. For instance, in *Angelina Casualty Co. v. Exxon Corp., USA.*, a

185. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115 (5th Cir. 1992), *abrogated on other grounds by* 1989 Tex. Sess. Law Serv. 1102 (West) (codified at Tex. Civ. Prac. & Rem. § 127.005 (1990)), *as recognized by* Greene's Presssure Testing & Rentals, Inc. v. Fluornoy Drilling Co., 113 F.3d 47 (5th Cir. 1997)..

186. Dupre v. Penrod Drilling Corp., 993 F.2d 474 (5th Cir. 1993).

187. BSI Drilling & Workover, Inc. v. Lexington Ins. Co. (*In re* BSI Drilling & Workover, Inc.), 137 F.3d 1351 (5th Cir. 1998) (per curiam).

188. *Id.* at 1351; *Dupre*, 993 F.2d at 476; *Campbell*, 979 F.2d at 1126.

189. Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1215 (W.D. La.1984).

190. Albany Ins. Co. v. Kieu, 927 F.2d 882, 889 (5th Cir. 1991) ("We therefore conclude, albeit with some hesitation, that the *uberrimae fidei* doctrine is not 'entrenched federal precedent.'").

marine insurance case, the eastern district followed the rule stated by the Fifth Circuit in *Stoot.*[191] On the other hand, in *Global Marine Shipping (No. 10) Limited v. Tidewater, Inc.*,[192] in a dispute about a maritime contract for the sale of a vessel, the eastern district enforced a London COL clause based on *The Bremen*.[193]

III. THE COURT'S DECISION

The panel of Fifth Circuit judges reviewing the COL issue began by noting that they were only asked to decide whether *ubberimae fidei* or New York law was applicable rather than Mississippi law, not which one of the alternatives was applicable.[194] The panel rejected Great Lakes' argument that the court should apply *ubberrimae fidei* pursuant to the first clause of the COL provision.[195] The court then addressed and accepted Great Lakes' alternative argument that the second clause of the COL provision, the clause selecting New York law, should apply to govern the policy.[196] The court began its analysis with the proposition that when a court sits pursuant to its admiralty jurisdiction, it applies general federal maritime choice of law rules.[197]

After observing that in another marine insurance case involving a choice-of-law issue, the Fifth Circuit applied the factors enumerated in Restatement (Second) of Conflict of Laws § 188, the court noted that the prior case did not involve a COL clause.[198] The court also observed that pursuant to the § 187, the relevant § 188 factors were only to be addressed in the absence of an effective COL clause.[199] The court then recited the provisions of § 187 and interpreted them to mean that a COL clause will be enforced under § 187(1) if the "parties could have resolved the issue by an explicit provision in their agreement directed to the issue."[200] The court implied that it proceeds to § 187(2) only if the parties could not have resolved the disputed issue by an express provision in their agreement

191. Angelina Casualty Co. v. Exxon Corp., USA., 701 F. Supp. 556, 559 (E.D. La. 1988).

192. Global Marine Shipping (No. 10) Ltd. v. Tidewater, Inc., No. 02-2570, 2004 WL 1920954 (E.D. La. Aug. 26, 2004).

193. *Id*. at *2.

194. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 241 (5th Cir. 2009).

195. *Id.* As the court explained, "it is settled that one panel of this court may not overrule another." *Id.*

196. *Id.*

197. *Id. at* 241-42 (citing Albany Ins. Co. v. Kieu, 927 F.2d 882, 890 (5th Cir. 1991)).

198. *Id.* at 242.

199. *Id.* at 242.

200. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 242 n.11 (5th Cir. 2009).

directed to the issue.[201] The court then explained that under § 187(2), a COL clause will be enforced even if the parties could not have resolved the disputed issue with an express provision in their agreement directed to the issue, unless either conditions under § 187(2)(a) or § 187(2)(b) were met.[202]

After referring to these sections of the Restatement, the court stated that "[u]nder federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable," and quoted an excerpt from Schoenbaum's admiralty treatise, which states that "[a] choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust."[203] Next, the court observed that the Third Circuit had decided "that New York law applied to the issue of whether a loss payee could recover independently of the insured" in *AGF Marine Aviation & Transport v. Cassin*, the case involving an identical COL provision.[204] After stating that "other courts are in accord," the court cited *Chan v. Society Expeditions, Inc*.,[205] Schoenbaum's Admiralty Treatise,[206] and *Stoot*[207] as examples where other Circuits and the Fifth Circuit enforced COL clauses.[208] Based on these sources, the court *held* that Durham had not carried its burden of showing that application of New York law would be unreasonable or unjust, and found that either *ubberimae fidei* or New York law—rather than Mississippi law—should be applied pursuant to the COL clause.[209]

IV. ANALYSIS

Like other Circuit courts sitting pursuant to their admiralty jurisdiction, the Fifth Circuit began its opinion with the often-repeated proposition that when the court sits in admiralty, it applies maritime law, including maritime choice-of-law principles.[210] However, the Court's

201. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 242 (5th Cir. 2009) ("Generally speaking, under section 187(1) the law of the jurisdiction chosen by the parties will be applied to the issue in question if the parties could have resolved the issue by an explicit provision in their agreement directed to that issue. Even if that is *not* the case . . . .").

202. *Id*.

203. *Id*. (quoting SCHOENBAUM, *supra* note 10, § 17-6).

204. *Id.* (citing AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255, 262, 265, 266 n.9 (3d Cir. 2008)).

205. Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287 (9th Cir. 1997).

206. SCHOENBAUM, *supra* note 10, § 17-6.

207. Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514 (5th Cir. 1988) (addressing the enforceability of a choice-of-law clause in a maritime drilling contract).

208. *Great Lakes Reins.*, 585 F.3d at 242-45 (citing *Chan*, 123 F.3d at 1296; *Stoot*, 851 F.2d at 1517; SCHOENBAUM, *supra* note 10, § 17-6).

209. *Id.* at 244-45.

210. *See* Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 237 (5th Cir.

opinion does not reflect a disciplined adherence to a well-defined set of maritime choice-of-law principles. Rather, it reflects the lack of a clearly defined set of maritime choice-of-law principles in the Fifth Circuit. While the various contributions of *The Bremen*, Restatement § 187, and *Stoot* are confusingly commingled in the opinion, what resonates clearly is that the strong presumption favoring enforcement of COL clauses in the context of cruise tickets is just as strong in the marine insurance context.

Gradually, the types of clauses which courts are willing to enforce as presumptively valid has expanded. For instance, the Supreme Court initially found a presumption of enforceability applicable to a mutually agreed-upon forum-selection clause in maritime contracts negotiated by sophisticated parties at arm's length.[211] Then, the Supreme Court found a presumption of enforceability applicable to a reasonable forum-selection clause in a maritime adhesion contract due to the cruise lines' special interest in limiting the *fora* where it could be subject to suit.[212] The D.C. Circuit and the Ninth Circuit found a similar presumption applicable to COL clauses in maritime adhesion contracts, but only under circumstances where the courts were ultimately protecting the non-drafting party to an adhesion contract.[213]

Unlike the D.C. Circuit and the Ninth Circuit, the Fifth Circuit has followed the Third Circuit's lead and used the presumption to enforce COL clauses drafted by marine insurers against insureds, the non-drafting parties to marine insurance policies. This trend should substantially reduce the likelihood of insureds recovering under the policy in the event that litigation should arise. Such a result would be appropriate if there are special reasons to enforce COL clauses in marine insurance, but neither the Third Circuit nor the Fifth Circuit satisfactorily analyzed the implications of enforcing COL clauses drafted by marine insurers against insureds. This is significant

2009); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590 (1991) ("[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize." (citing Archawski v. Hanioti, 350 U.S. 532, 533 (1956))); Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 766 (D.C. Cir. 1992) ("The [plaintiffs'] cruise ticket is a maritime contract and thus the substantive law to be applied in this case is the general federal maritime law, including maritime choice-of-law rules." (citing Hodes v. S,N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905, 909 & 909 n.2 (3d Cir. 1988))).

211. *See generally*, M/S Bremen v. Zapata Offshore Co. (*The Bremen*), 407 U.S. 1 (1972); *see also Carnival Cruise Lines*, 499 U.S. at 592-93.

212. *See Carnival Cruise Lines*, 499 U.S. at 593.

213. *See generally* Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287 (9th Cir. 1997) (enforcing COL clause in cruise passenger ticket against drafting cruise line that attempted to avoid clause to limit its potential damages); *Milanovich*, 954 F.2d 763 (enforcing an Italian COL clause against the drafting cruise line which attempted to avoid clause and apply the law which would have time-barred the cruise passenger's claim).

in light of the fact that the Third Circuit and the Fifth Circuit opted to use the presumption of enforceability against the non-drafting party to marine insurance policies when the presumption had formerly been used by the Ninth Circuit and the D.C. Circuit to protect the non-drafting parties to another type of maritime adhesion contract, the cruise ticket.

A. ARE *THE BREMEN*, § 187, AND *STOOT* REALLY THAT DIFFERENT?

What at first glance appears to be an amalgam of different choice-of-law approaches might be just that—a manifestation of Fifth Circuit eclecticism in the maritime context. However, the court's integration could also suggest that the three approaches, though expressed in different language, are more similar in meaning than is readily apparent. For instance, *The Bremen*, § 187, and *Stoot* all articulate a presumption of enforceability with respect to COL clauses.[214] *Stoot* traces its origins through *Hale* back to *The Bremen* and § 187.[215] Thus, all three establish the presumptive enforceability of COL clauses, and *Stoot* is based on *The Bremen* and § 187.

However, *The Bremen* and § 187 are not identical. Under *The Bremen's* approach, the opponent of a COL clause can challenge the clause even if the issue is one that the parties could have resolved by contract;[216] there is no distinction between waivable and non-waivable rules. Under § 187, an opponent could only challenge the COL clause successfully if the issue is one that the parties *could not* have resolved by contract (one that involved a non-waivable rule).[217] In that sense, the presumption established by § 187 appears to be more difficult to overcome than that established in *The Bremen*. Thus, while both approaches share the same general concept, they differ in what an opponent of a COL clause must demonstrate to render the clause unenforceable. Although *Stoot* is based on both rules, since *The Bremen* and § 187 are not entirely consistent, simultaneous reliance on *both* of them creates ambiguity about what an opponent operating under the *Stoot* framework must demonstrate to overcome the clause. *Stoot*, although it resembles § 187 more than *The Bremen*, appears to eliminate and alter some of the fine distinctions inherent in § 187 concerning waivable and

214. *See, e.g.*, M/S Bremen v. Zapata Offshore Co. (*The Bremen*), 407 U.S. 1, 15 (1972); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971); Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514, 1517 (5th Cir. 1988).

215. *See Stoot*, 851 F.2d at 1517 (citing Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1215 (W.D. La. 1984); *see also Hale*, 588 F. Supp. at 1215 n.4 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971); *The Bremen*, 407 U.S. at 10, 15).

216. *Compare The Bremen*, 407 U.S. at 15, *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

217. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

non-waivable rules and the public policy limitation on party autonomy. *Stoot* seems to imply, like *The Bremen*, that an opponent could potentially overcome a COL clause even if the disputed issue between the parties involved a waivable rule. Further, *Stoot* substitutes the phrase "contrary to a fundamental purpose of maritime law"[218] where § 187 uses the phrase "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."[219] While the comments to § 187 provide guidance on which policies are "fundamental" and how to determine if a state has a "materially greater interest than the chosen state," the rule stated by the Fifth Circuit in *Stoot* offers no guidance on how to determine the "fundamental purpose[s] of maritime law."[220] Using *Stoot*, the Fifth Circuit has never found a COL clause unenforceable, and it is difficult to imagine a scenario when application of the chosen law would contradict the "fundamental purposes of maritime law"[221]—if no one understands what that phrase means.

Thus, the various frameworks that the court mentioned in *Great Lakes Reinsurance* are similar because they all establish a presumption of enforceability with respect to COL clauses and place the burden on the opponent of the clause to demonstrate that the clause is unenforceable. Yet significant differences between the various frameworks emerge when the opponent of a COL clause is confronted with the task of determining what exactly must be demonstrated to successfully challenge the clause. The confusion about what type of evidence is sufficient to overcome a COL clause under any of the three frameworks individually is compounded by the court's decision to refer to all three frameworks within the same opinion. The court's reference to all three approaches with no intention to adopt one to the exclusion of the others results in vast judicial discretion. The judges may simply make their decision, pick one, two, or all three as justification, even if they are not consistent, and give no real explanation of why the presumption of enforceability is so strong under the circumstances.

B. DID THE COURT RELY MOST HEAVILY ON *THE BREMEN* WITHOUT REFERRING TO IT?

Although the court mentioned § 187, it never expressly answered the question of whether the underlying contractual issue—the effect an insured's misrepresentations or failures to disclose information on the insurer's obligation to provide coverage—was a waivable or non-waivable

218. Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514, 1517 (5th Cir. 1988).

219. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

220. *See Stoot*, 851 F.2d at 1517.

221. *Id.*

rule. If the court was analyzing the enforceability of the COL clause under § 187, it should have determined whether the contractual issue involved a waivable or non-waivable rule before it considered Durham's argument that application of New York law would conflict with Mississippi law, which provided the *lex fori* and *lex causae* in the case.. Durham's argument was dependent upon the public policy limitations on party autonomy under § 187(2), which only come into play if the underlying contractual issue is governed by a non-waivable rule.

This issue warranted the court's attention because it is not entirely clear whether laws governing the effect of an insured's misrepresentations and failures to disclose on the insurer's duty to provide coverage are waivable or non-waivable. On one hand, the comments to § 187 specifically use "statutes protecting insureds against insurers" as an example of a "fundamental policy" sufficient to invalidate a COL clause under § 187(2). This could suggest that state case law establishing a higher threshold than *ubberimae fidei* for the insurer to avoid payment on the policy is non-waivable. On the other hand, the official comments to § 187 provide that rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance are within the scope of party autonomy and therefore waivable.[222] An insurer could argue that rules about the accuracy and completeness of representations and disclosure during the application process are waivable because they relate to a condition precedent to the formation of a binding contract or because they determine whether or not an insured's misrepresentation, is an excuse for an insurer's nonperformance. Although the court considered Durham's argument that application of New York law would conflict with a Mississippi statute, the court only did so "assuming arguendo" that such a conflict would be determinative.[223] Ultimately, the court suggested in dicta after the holding that the issue was waivable, because Durham never presented any evidence that the parties could not have resolved the issue by agreement.[224] The fact that much of the court's discussion of issues that are relevant to § 187 came after the holding[225] suggests that the court did not rely on § 187. Although the Court mentions § 187, it does not whole-heartedly adhere to the Restatement's approach, as the Ninth Circuit did in *Chan*.[226] If it had any intention of doing so, it should have determined at the outset whether the parties could

222. *See* Restatement (Second) of Conflict of Laws § 187 cmt. c (1971).

223. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 244 (5th Cir. 2009).

224. *Id.* at 245.

225. *Great Lakes Reins*., 585 F.3d at 244-45.

226. *Compare* Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1297-98 (9th Cir. 1997), *with Great Lakes Reins.*, 585 F.3d at 242-45.

have expressly resolved the issue of the effect of the insured's omissions or misrepresentations with an express provision in the contract. Instead, the court mentioned in a post-script after the holding (which was based on other grounds): "We *also note* that Durham has not demonstrated that any relevant principle of New York law would produce as to any particular issue in this case a result which the parties could not have validly resolved . . . by an explicit provision in the policy directed to that issue."[227]

While the court briefly mentioned *Stoot*, it used that decision more as an example of an instance in which the Fifth Circuit enforced a COL clause in a maritime contract rather than as a foundation for its analysis.[228] Because the court did not appear to base its holding on *Stoot*,[229] it remains unclear whether the court resolved the interpretive issues regarding the rule stated in that case. Specifically, it remains unclear whether, under *Stoot*, a court should compare the law selected in the COL clause with the fundamental purposes of maritime law regardless of whether maritime law provides the *lex causae* to determine the enforceability of the COL clause.

The court deliberately drew attention to the fact that the Third Circuit enforced the identical COL provision in *AGF Marine Aviation & Transport v. Cassin*.[230] Yet it failed to mention that the Third Circuit similarly gave no explanation of its reason for doing so and that the insured in that case, in contrast with the insureds in this case, put up almost no opposition to enforcement of the COL clause.[231]

Oddly, the court relied on Schoenbaum's admiralty treatise—a non-binding secondary source—for its statement that COL provisions are generally enforced in maritime contracts. The quote from Schoenbaum that "[a] choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be *unreasonable or unjust*"[232] partially echoes the series of Supreme Court decisions involving forum-selection clauses, but omits any acknowledgment of the specific circumstances that would render such a clause unreasonable or unjust, and therefore invalid. Although the court never expressly mentioned *The Bremen* in the opinion, the shadow of this case emerges unmistakably in the

227. Great Lakes Reins. P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 245 (2009) (emphasis added).

228. *See id.* at 243.

229. *See id.* at 244.

230. *See id.* at 242 ("The *identical* choice of law provision as that involved in this case was likewise before the Third Circuit in *AGF Marine Aviations & Transportation v. Cassin* . . . ." (emphasis in original)).

231. *See* AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255, 261-63 (3d Cir. 2008).

232. SCHOENBAUM, *supra* note 10, § 17-6.

court's references to Schoenbaum's admiralty treatise and in its reference to the *Milanovich* holding.[233] *Milanovich* held that COL clauses in cruise tickets are enforceable unless enforcement would be unreasonable or unjust, the clause is the product of fraud or overreaching, or enforcement would violate a strong public policy of the forum.[234] Most importantly, the Fifth Circuit's *Great Lakes* holding echoes the concept derived from *The Bremen*, and reiterated in Fifth Circuit cases involving international maritime contracts, that COL clauses are presumptively valid absent a showing that enforcement would be unreasonable or unjust.[235] Without expressly referring to it, the court relied most heavily on *The Bremen* in its holding.

C. WHY DID THE COURT COVERTLY RELY ON *THE BREMEN*?

By covertly relying on the legal framework established by *The Bremen*, the court avoided considering key factual differences between *The Bremen* and *Milanovich* on one hand and *Great Lakes Reinsurance* on the other. First, both *The Bremen* and *Milanovich* involved COL clauses that selected non-United States law. For instance, in *The Bremen*, the court found that the forum-selection clause functioned as an English COL law,[236] and in *Milanovich* the COL clause selected Italian law.[237] By contrast, in *Great Lakes Reinsurance*, neither clause of the COL provision selected foreign law—the two options were federal maritime law and New York law.[238] The Fifth Circuit's covert reliance on *The Bremen* is at odds with its prior pattern of expressly relying on *The Bremen* in cases such as *Mitsui* and *Sembawang*, both of which involved international contracts with clauses selecting foreign law.

In *The Bremen*, *Mitsui*, and *Sembawang*, the extreme deference to the parties' COL clause was driven at least partly by an interest in encouraging the United States' involvement in international commerce. In all three cases, courts were concerned about appearing "parochial" to the international community if they ignored foreign forum-selection and COL clauses and insisted that disputes be decided in American courts and under American law. In this case, since there was no conflict between application of United States law and the application of foreign law, there was no special need to enforce the clause out of respect for the integrity and competency of foreign courts and law.

233. Great Lakes Reins. P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 242-43 (2009).

234. Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 768 (D.C. Cir. 1992).

235. *See Great Lakes Reins.*, 585 F.3d at 244.

236. *See* M/S Bremen v. Zapata Offshore Co. (*The Bremen*), 407 U.S. 1, 3, 13 n.15 (1972).

237. *See Milanovich*, 954 F.2d at 765.

238. *See Great Lakes Reins.*, 585 F.3d at 238-39.

Although there was no conflict between application of United States law and the law of a foreign nation, this dispute did involve a United Kingdom insurer with its principal place of business in New York. The court might have found that the COL clauses would be enforceable to encourage United Kingdom insurers to continue to do business in American markets. It is likely unattractive to United Kingdom marine insurers accustomed to favorable British maritime doctrines like *ubberimae fidei* to risk having unfamiliar, insurer-friendly state law governing their disputes. Courts often tout the benefits of uniformity, predictability, and certainty when deciding to enforce forum-selection and COL clauses, while failing to acknowledge that the drafters of such clauses are often securing not only uniformity and predictability, but an affirmative advantage with respect to the chosen law.

D. IS THERE A PROBLEM WITH A STRONG PRESUMPTION IN FAVOR OF ENFORCEMENT OF COL CLAUSES IN MARINE INSURANCE POLICIES?

While courts regularly use § 187 as support for the existence of a strong presumption in favor of enforcement COL clauses in all types of maritime contracts, they overlook § 193 of Restatement (Second) of Conflict of Laws. Section 187 addresses the enforceability of COL clauses in contracts generally. Section 193 provides that generally insurance policies *without choice of law clauses* are to be construed according to the law of the state which is the principal location of the insured risk.[239] However, the official comments to § 193 suggest that courts should not give effect to COL clauses in casualty insurance policies which designate a state whose law gives the insured less protection than he would receive in the absence of a COL clause.[240] The comments to § 193 specifically mention "ships," suggesting that the pro-insured COL clause policy of § 193 rather than the anti-insured policy of § 187 should apply to least marine insurance.[241] However, at least in the marine insurance context, many courts have thus far ignored this opposing view, according great deference to COL clauses drafted by insurers.

Some courts and scholars have acknowledged that insurance policies are often adhesion contracts rather than freely negotiated contracts between parties with equal bargaining power.[242] Although the definition of an

239. *See* Restatement (Second) of Conflict of Laws § 193 (1971) (emphasis added).

240. *Id.* cmt. (e). The comments specify that it is more likely that COL clauses should be given effect if the insured possesses bargaining power. *See id.*

241. *Id.* cmt. (a).

242. *See e.g.*, Allstate Ins. Co. v. Heil, No. 07-00097 JMS/BMK, 2007 WL 4270355, at *4 (D. Haw. Dec. 6, 2007); Barber v. Chatham, 939 F. Supp. 782, 787 (D. Haw. 1996) (citing Fortune v. Wong, 702 P.2d 299 (1985)); DiSanto v. Enstrom Helicopter Corp., 489 F. Supp. 1352, 1361

adhesion contract can vary by state and court, courts generally use the term to refer to a standardized form contract that is unilaterally drafted by a party with superior bargaining power and offered on a take-it-or-leave it basis.[243] The offeree can accept or reject the unilaterally dictated terms, but often has no practical alternative other than to accept.[244] This recognition motivated some courts to abandon strict contractual approaches that often had a detrimental effect on insureds.[245]

At least one commentatorr has asserted that the policy concerns justifing the invalidation of COL clauses in other types of insurance policies are not present in the marine insurance context.[246] According to this commentator, marine insurance is usually negotiated at arm's length between sophisticated parties who have power to bargain for the terms of the policy.[247] Thus, there is no reason not to enforce a COL provision freely bargained for by the parties.[248] In those circumstances, the strongest presumption of enforceability is undoubtedly justified, regardless of whether the COL clause clearly militates in favor of the insurer, because the insured had bargaining power, negotiated terms, and likely saw the terms of the bargain reflected in the price paid for the coverage. Moreover, while auto and health insurance have attained a level of modern necessity, owning and insuring a yacht has not, so courts should be less inclined to invalidate clauses in marine insurance policies covering those vessels.

Assuming, for the sake of argument, that the strongest presumption of enforceability is justified in the majority of marine insurance cases, it remains highly unlikely that marine insurance policies are *never* adhesion contracts.[249] First, certain sole proprietors, such as fisherman and

(E.D. Penn. 1980) (citing Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1350-51 (Pa. 1978)); Vuarnet Footwear, Inc. v. Sea-Rail Servs. Corp., 759 A.2d 1230, 1234-36 (N.J. Super. Ct. App. Div. 2000) (citing Harr v. Allstate Insurance Co., 255 A.2d 208, 217-18 (N.J. 1969)).

243. *See e.g.*, Mattes v. National Fidelity Life Ins. Co., 506 F. Supp. 955, 959-60 (1980) (citing Brokers Title Company v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 1179 (3d Cir. 1979)).

244. *See e.g.*, *Mattes*, 506 F. Supp. at 960 (citing *Brokers Title Co*., 610 F.2d at 1179).

245. *See e.g.*, *Allstate Ins. Co*., 2007 WL 4270355 at *4 (stating that "because insurance policies are contracts of adhesion . . . they must be construed liberally in favor of the insured); *DiSanto*, 489 F. Supp. at 1361 (*citing Collister*, 388 A.2d at 1350-51); *Mattes*, 506 F. Supp. at 959 (stating that when "the arrangement amounts to an 'adhesion contract,' . . . the insured merits special protection.").

246. *See* von Bittner, *supra* note 38, at 574.

247. *See id.* (suggesting that while it is proper for courts to refuse to enforce COL provisions in inland insurance policies which "are, more often than not contracts of adhesion," there is no corresponding need for courts to refuse to enforce COL provisions in the marine insurance realm where policies "are to a considerable degree open to negotiation and are frequently tailor-made").

248. *See id.*

249. *See e.g.*, Barber v. Chatham, 939 F. Supp. 782, 787 (D. Haw. 1996) (applying principles of construction applicable to adhesion contracts to a marine insurance policy covering a yacht);

shrimpers, are dependent upon their vessels for their livelihood. For such people, marine insurance could reasonably be considered a necessity, since if their vessel is lost or damaged, their means of supporting themselves financially is gone. If this class of sole proprietors is ignorant of the implications of a COL clause selecting New York law or *ubberimae fidei* in a standard form policy when insuring their vessels, it will never occur to them to attempt to bargain for greater protection. Moreover, if they attempted to negotiate for more favorable state insurance law principles, success is unlikely if all insurers use similar COL clauses to protect themselves.

Within a period of a few years before and after *Great Lakes Reinsurance*, Great Lakes successfully avoided payment on several policies using the exact same strategy it used in this case, filing a declaratory judgment action to control the forum and then moving for summary judgment based on a COL clause selecting New York law/*ubberimae fidei*.[250] If insureds have the power to bargain for the terms of the policy, it is suspicious that more of them do not opt for the application of more reasonable state insurance law principles. Then again, while insurers are consistently paying attorneys to find ways to reduce their liability, most insureds do not have counsel to educate them as to the effect of a COL clause that selects *ubberimae fidei* or New York law. If an insured has no idea that a COL clause selecting *ubberimae fidei* gives their insurer the power to legally refuse to provide coverage based on their failure to provide information that the insurer never asked for, then an insured should not be bound by the COL clause.

When the D.C. Circuit and the Ninth Circuit initially recognized a presumption in favor of enforcing COL clauses, they used the presumption to protect the non-drafting parties to maritime adhesion contracts.[251] Although in this case, the Fifth Circuit used *Milanovich* as support for its

Vuarnet Footwear, Inc. v. Sea-Rail Servs. Corp., 759 A.2d 1230, 1234-35 (N.J. Super. Ct. App. Div. 2000) (applying principles of construction applicable to adhesion contracts to marine cargo insurance); Sorkin, Goods in Transit 56.11 (1999) (discussing marine insurance policies as contracts of adhesion).

250. *See* Great Lakes Reins., P.L.C. v. Yellow Fin 36 L.L.C., No. 8:08-CV-1851-T-17TBM, 2010 WL 3394716, at *1-2 (M.D. Fla. Aug. 26, 2010) (granting Great Lakes declaration of non-coverage based on COL clause calling for application of New York law); Great Lakes Reins., P.L.C. v. Sea Cat I, L.L.C., 653 F. Supp. 2d 1193, 1195-98 (W.D. Okla. 2009) (granting Great Lakes declaration of non-coverage for the loss of a vessel, based on a COL clause calling for application of New York law); Great Lakes Reins., P.L.C. v. S. Marine Concepts, No. G-07-276, 2008 WL 6523861, at *1-2 (S.D. Tex. Oct. 21, 2008) (granting Great Lakes declaratory judgment to void the policy based on the COL clause calling for application of New York law).

251. *See generally* Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287 (9th Cir. 1997); Milanovich v. Costa Crociere S.P.A., 954 F.2d 763 (D.C. Cir. 1992).

decision to find the COL clause enforceable, it ignored the crucial difference that in *Milanovich* the D.C. Circuit was enforcing a COL clause against the party that drafted it, not against the non-drafting party.[252] To protect the non-drafting party, the D.C. Circuit used the presumption to enforce a COL clause against a cruise line that attempted to avoid the COL clause they drafted into a maritime adhesion contract.[253] In this case, the Fifth Circuit enforced a COL clause containing law favorable to the insurer against the non-drafting party to the marine insurance policy. While such an approach is likely correct where marine insurance policies are negotiated by sophisticated parties at arm's length or procured to insure luxury yachts, unsophisticated sole proprietors deserve a separate approach when insuring the vessels upon which their livelihoods rely.

Admittedly, the Supreme Court has enforced forum-selection clauses against cruise passengers despite the fact that that the tickets were maritime adhesion contracts. Because the cruise line was exposed to a substantial risk of defending lawsuits worldwide, and because the cruise contract was not a necessity for passengers, the inclusion of the forum-selection clause in an adhesion contract was permissible. The Fifth Circuit has treated COL and forum-selection clauses as the same for purposes of analyzing their enforceability. Yet, enforcing a COL clause in an adhesion contract against a non-drafting party has a more devastating impact on an insured than enforcing a forum-selection clause. While forum-selection clauses have no bearing on the substantive rules applicable to the case and do not necessarily give the drafting party an affirmative advantage on the merits, insurer-drafted COL clauses virtually ensure that the insurer will win.

The marine insurance policy at issue in *Great Lakes Reinsurance* was probably not an adhesion contract, and the outcome was likely proper. As a corporation insuring a yacht who was represented by an agent in procuring the policy, Durham was the antithesis of the unsophisticated sole proprietor procuring insurance to cover a vessel used for self-employment. The district court also found that Durham also misrepresented the purchase price of the vessel.[254] Perhaps part of the reason why the Fifth Circuit found the COL clause enforceable was to minimize the extent to which Durham could benefit from a misrepresentation. However, *ubberimae fidei* goes beyond penalizing those who intentionally misrepresent by penalizing those who fail to disclose information for which the application policy does not ask.

252. *See* Great Lakes Reins. P.L.C. v. Durham Auctions, Inc., 585 F.3d 236, 243 (2009).

253. *See Milanovich*, 954 F.2d at 769.

254. Great Lakes Reins., P.L.C. v. Durham Auctions, Inc., No. 1:07cv460HSO-JMR, 2008 WL 872278, at *5 (S.D. Miss. Mar. 27, 2008), *rev'd*, 585 F.3d 236 (5th Cir. 2009) ("The Court must conclude that Durham Auctions' answer regarding the purchase price on the Application amounted to a misrepresentation as a matter of law.").

Under the doctrine of *ubberimae fidei*, the result would have been the same if the insured was a local fisherman who inadvertently misrepresented the purchase price of his vessel in the application process but lost his vessel because of a hurricane.

Durham's allegation that the yacht sank as a result of Hurricane Rita exposes the potential for another type of insurer misbehavior based on COL clauses selecting *ubberimae fidei*: bad faith Under the doctrine of *ubberimae fidei*, there is no requirement that a misrepresentation or omission by an insured be intentional or causally related to the loss. This means that an insurer facing an unusually large number of claims due to a natural disaster like a hurricane could potentially mitigate its losses by looking for inconsequential misrepresentations made by insureds during the application process which are causally unrelated to the losses the insureds ultimately suffered. When the insured seeks to recover under its policy, the insurer could then seek to avoid payment based on a relatively insignificant misrepresentation or omission that was wholly unrelated to the loss of the vessel. By including a COL clause in a marine insurance policy that selects *ubberimae fidei*, an insurer gives itself this option to the detriment of uninformed insureds.

V. CONCLUSION

Although the Fifth Circuit likely decided this case correctly, the lack of a clear framework for determining the enforceability of COL clauses could open the door for courts to regularly enforce COL clauses against non-drafting parties in other types of marine insurance policies where the policy is arguably an adhesion contract. Although COL clauses have been cited as eliminating the time and expense of pretrial motions to determine choice-of-law, they actually do not have that effect because parties most often challenge the clauses anyway. *Great Lakes Reinsurance* serves as an example. Despite the presence of a COL clause, the parties appealed their choice-of-law issue to the Fifth Circuit as part of their settlement agreement. One way to avoid the necessity for numerous appeals is by adopting and consistently adhering to a set of COL principles that are not only clearly defined, but fair. If the rules were more clearly articulated, litigants could gauge the merit of their choice-of-law arguments more accurately, which would encourage more settlement. Moreover, the Fifth Circuit's approach pays more attention to the presumptive validity of COL clauses than to the circumstances that justify invalidating a COL clause, thereby ignoring the potential for abuse.

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