

Sailing Beyond *Wilburn Boat*: Evolving Perspectives on Maritime Insurance Contracts

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I. INTRODUCTION

In the bustling world of maritime insurance, where the unpredictable nature of the sea meets the structured land of insurance contracts, Philip Pulley likely never imagined he would be at the forefront of a seminal maritime insurance law Supreme Court decision.¹ The case originates not with Pulley wrecking his eighty-foot motor yacht off the coast of Florida but years before in the office of an insurance agent in Pennsylvania. In his pursuit of obtaining payment for his vessel’s damages, Pulley would intersect with the intricate nuances of legal doctrines, choice-of-law provisions, and the profound impact of state law.²

It was a beautiful day in the summer of 2019 when Pulley set sail and hit an object underwater, causing his vessel to incur over \$300,000 in damages.³ Upon reviewing the claim,⁴ the policy provider, Great Lakes Insurance, denied coverage and filed an action in the Eastern District of Pennsylvania seeking declaratory judgment. In turn, Raiders Retreat countersued, asserting five claims.⁵ Great Lakes moved for judgment on

1. The majority of this material was written prior to the Supreme Court rendering its decision. *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65 (2024).

2. *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, No. 22-500, 2023 WL 4976592 (2019). Pulley, a Pennsylvania resident, owned his yacht under Raiders Retreat Realty Company, a single-member LLC based in Abington, PA.

3. *Id.* at *5 (2019).

4. *Id.* Raiders Realty promptly notified Christi Insurance Group, which forwarded the claim notice to Great Lakes Insurance via Hull & Company, a Florida broker. Upon receipt, Great Lakes Insurance, a subsidiary of German-based MunichRe, investigated and found the vessel’s fire equipment had not been certified since 2014, despite express warranties in the policy regarding certification requirements. This led Great Lakes to deny the claim, asserting that Raiders Retreat had materially misrepresented the equipment’s condition.

5. *Id.* Raiders Retreat asserted five counterclaims against Great Lakes for (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) breach of fiduciary duty,

the last three claims,⁶ invoking the choice-of-law provision and specifying New York law within the policy.⁷ The district court agreed and upheld the provision.⁸ Upon appeal, the United States Court of Appeals for the Third Circuit reversed the decision, ruling that the district court had erred in not considering Pennsylvania's public policy. The Supreme Court granted *certiorari* in order to answer whether a choice-of-law clause in a maritime contract can be rendered unenforceable by the court if enforcement is contrary to the "strong public policy" of the state whose law is displaced. *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 47 F.4th 225 (3d Cir. 2022), *cert. granted*, 143 U.S. 999 (2023).

II. HISTORICAL BACKGROUND

Regulation of maritime law has generally focused on its fundamental purpose, which is to protect and encourage commercial maritime activity.⁹ Maritime law is vital to ensuring that maritime activities are conducted in a safe and responsible manner.¹⁰ Uniform rules of conduct ensure commercial activity is protected by promoting predictability and efficiency in litigation.¹¹ Moreover, uniformity aids in protecting the rights of all parties involved in maritime commerce, including shippers, ship owners, seafarers, and passengers, thus allowing for the continuation and growth of maritime commercial activity. Courts tend to hold the fundamental purpose of maritime law and thus uniformity as the standard when evaluating maritime issues.¹²

A predominant exception to this standard is *Wilburn Boat v. Fireman's Fund Insurance*.¹³ The Supreme Court held that Texas law should apply in a maritime insurance case involving a shipyard insured

(4) bad faith liability in violation of 42 Pa. Cons. Stat. § 8371, and (5) violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

6. *Raiders Retreat*, 521 F.Supp.3d 580, 584, 585, 589 (E.D. Pa. 2021). New York does not recognize a cause of action for a breach of fiduciary duty under counterclaim Count 3, while counterclaims Count 4 and 5 were based on Pennsylvania state law.

7. *Id.* at 584. The provision stated that disputes will be resolved under U.S. Federal Maritime law, but if no applicable law exists, then New York state law will apply.

8. *Id.* at 589. Raiders Retreat argued that the choice-of-law provision could not be enforced, as Pennsylvania had strong public policy that would directly contravene Great Lakes's claim denial. The district court disagreed and ruled to uphold the choice-of-law provision to apply New York law, causing Raiders's counterclaims Count 3 through 5 to no longer have standing.

9. *Aqua Log, Inc. v. Lost & Abandoned Pre-Cut Logs & Rafts of Logs*, 709 F.3d 1055, 1061, 2013 AMC 556 (11th Cir. 2013).

10. *Id.* at 1061.

11. *Sisson v. Ruby*, 497 U.S. 358, 360, 1990 AMC 1801 (1990).

12. *Aqua Log*, 709 F.3d at 1061.

13. *Wilburn Boat v. Fireman's Fund Insurance*, 348 U.S. 310, 321, 1955 AMC. 467 (1955).

by a Texas-based policy that incurred hurricane damage.¹⁴ *Wilburn Boat* established a fundamental principle in maritime law that state law governs maritime insurance contracts in the absence of federal maritime law.¹⁵ The Court noted that the states have a legitimate interest in regulating maritime insurance as a means to protect citizens from potential fraud and abuse.¹⁶ Under the McCarran Act, the absence of action by Congress should not be interpreted as a barrier to the ongoing regulation of insurance by the states.¹⁷

In its decision, the Court in *Wilburn Boat* considered the federal interest in uniformity for maritime law but determined that it did not outweigh state regulation.¹⁸ The Court considered the possibility of creating applicable maritime law and looked towards a common law doctrine, first established in England, which forfeits all rights to recovery if warranties are not strictly and literally fulfilled, otherwise known as strict compliance.¹⁹ However, the Court considered this approach harsh, noting that many states have abandoned this rule due to its tendency to promote injustice and wrongful outcomes.²⁰ Given that states have adopted varying approaches towards the issue, as well as Congress's lack of action on the issue, the Court reasoned that regulation of maritime insurance should be left to the states.²¹

The *Wilburn Boat* decision has been utilized by courts throughout the United States, and it is now the well-established federal rule that state law governs maritime insurance contracts. This means that maritime insurance policies could be subject to a wide variety of state laws, including laws governing contract formation, interpretation, and enforcement.²²

In *M/S Bremen v. Zapata Off-Shore Co.*, a landmark case on the issue of forum selection clauses held that a forum selection clause in a maritime contract is generally valid and enforceable unless the party seeking to avoid it can demonstrate that enforcement would be unreasonable or unjust.²³ The case involved a towage contract that contained a forum selection clause that stipulated any disputes arising out

14. *Id.*

15. *Id.* at 327.

16. *Id.* at 319.

17. *Id.*

18. *Id.* at 322 (Frankfurter, J. concurring).

19. *Id.* at 325.

20. *Id.* at 320.

21. *Id.* at 321.

22. *Id.* at 314.

23. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15, 1972 AMC 1407 (1972).

of the contract would be litigated in the U.K.²⁴ The Supreme Court held that the forum selection clause was valid and enforceable, reasoning that parties to a contract are generally free to choose the forum in which their disputes will be resolved.²⁵

In a Supreme Court decision involving a state-versus-state issue, with the forum selection provision establishing Florida as the proper forum state for disputes even though the plaintiff filed his tort claim in Washington.²⁶ The Court utilized the forum selection clauses framework set forth in *The Bremen* to determine which state would be the proper forum for the injured passenger and cruise ship.²⁷ The Supreme Court determined that the forum selection clause at issue was valid. Given the variety of passengers from different areas, the cruise company had a special interest in limiting the forum it would litigate in.²⁸

The U.S. Court of Appeals for D.C. further extended *The Bremen*'s framework when the court applied it to a case involving a choice-of-law provision that designated Italian law to govern any dispute.²⁹ In *Milanovich v. Costa Crociere, S.p.A.*, the D.C. Circuit applied the choice-of-forum analysis from *The Bremen* to a choice-of-law clause in a maritime contract and ruled that contractual choice-of-law provisions should generally be adhered to.³⁰ The case involved a personal injury lawsuit filed by an American cruise passenger against an Italian cruise line.³¹ The cruise ticket that the passenger purchased contained a choice-of-law provision that stated that Italian law would govern the contract; nevertheless, he filed his lawsuit in federal court.³²

The D.C. Circuit Court held, given the contractual choice-of-law provisions being generally valid and enforceable under maritime law.³³ The Court also held that the choice-of-law provision in the cruise ticket was valid and enforceable as the American passenger had freely agreed to the cruise ticket and had been made aware of the choice-of-law provision before he purchased the ticket. The Court also noted that there was no reason to believe that Italian law was unfair or unjust.³⁴

24. *Id.* at 2.

25. *Id.* at 12-15.

26. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587-88, 1991 AMC 1697 (1991).

27. *Shute v. Carnival Cruise Lines, Inc.*, 863 F.2d 1437, 1989 AMC 305 (9th Cir. 1988).

28. *Shute*, 499 U.S. at 593-94.

29. *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 n.7, 1993 AMC 1034 (D.C. Cir. 1992).

30. *Id.* at 768-69.

31. *Id.* at 765.

32. *Id.*

33. *Id.* at 768.

34. *Id.* at 769.

Milanovich established a rule to evaluate whether there can be an exception.³⁵ The three prongs of the rule are: (1) if the party contesting the provision can prove that enforcement would be unreasonable or unjust, (2) the clause was invalid due to fraud or overreaching, and (3) or enforcing it would contradict a strong public policy of the forum where the lawsuit is filed.³⁶

A similar dispute occurred in *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.* when a yacht insured by another Great Lakes entity for private use sank.³⁷ The policy dictated New York law in its choice-of-law provision, however, the lower court rejected this provision, deciding that that Mississippi law was more substantially related to the issue.³⁸ Upon appeal, the Fifth Circuit reversed the lower court's decision, holding that a contractual choice-of-law provision is largely valid and enforceable under maritime law, noting the exception that if enforcement of the provision would violate applicable strong public policy of the forum state.³⁹ Mississippi did not have any applicable substantive law concerning insurance policies or choice-of-law provisions, and consequently, the issue in *Durham Auctions* did not fall under the exception.⁴⁰

The Restatement (Second) of Conflicts of Laws has framework that deals specifically with choice-of-law provisions.⁴¹ While other circuits have come to apply *The Bremen* in disputes involving choice-of-law provisions in maritime contracts, the Ninth Circuit utilized Section 187 in *Chan v. Soc'y Expeditions, Inc.*⁴² *Chan* involved a couple that was injured while on a cruise ship; their cruise tickets contained a choice-of-law provision stating that United States law would govern the contract.⁴³ Utilizing the framework in *The Bremen*, the Ninth Circuit upheld the provision, as it determined the choice-of-law provision in a maritime passenger ticket was valid and enforceable.⁴⁴

35. *Id.* at 768.

36. *Id.*

37. *Great Lakes Reinsurance (UK) PLC v. Durham Auctions Inc.*, 585 F.3d 236, 237, 2010 AMC 185 (5th Cir. 2009).

38. *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 2008 WL 872278, at *3 (S.D. Miss. 2008).

39. 585 F.3d at 243.

40. *Id.* at 242, 244-45.

41. *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296, 1997 AMC 2713 (9th Cir. 1997).

42. *Id.*

43. *Id.*

44. *Id.* at 1297.

The injured couple's cruise tickets contained a choice-of-law provision that stated that United States law would govern the contract.⁴⁵ The lower court determined that the choice-of-law provision was valid and enforceable, limiting the Chans' damages reward under Liberian law.⁴⁶ The couple appealed to the Ninth Circuit, which rejected the district court's decision, holding that the choice-of-law provision in the cruise tickets was valid and enforceable.⁴⁷ The Ninth Circuit reasoned that parties to a maritime contract are generally free to choose the law that will govern their relationship.⁴⁸ The court in *Milanovich* also noted that there is a strong presumption in favor of enforcing forum selection and choice-of-law provisions in maritime contracts.⁴⁹ This case is similar to *Carnival Cruise v. Shute*, as it involved a passenger on a cruise ship with a tort claim against a cruise company. However, instead of a forum selection provision as in *Shute*, the issue was a choice-of-law provision.⁵⁰

In the pursuit of uniformity to ensure the fundamental purpose of maritime law, courts tend to uphold both forum selection and choice-of-law provisions in policy-dispute issues. In *Galilea v. AGCS Marine Ins. Co.*, the policy coverage stipulated both a forum selection clause and an arbitration clause.⁵¹ According to the policy, disputes were to be governed under federal maritime law and resolved through arbitration in New York, with New York law supplementing any gap in federal law. The yacht's owner filed suit in federal court in Montana, arguing that Montana law, which strongly opposed enforcing arbitration agreements, invalidated the choice-of-law and choice-of-forum provisions under *The Bremen*.⁵²

The Ninth Circuit disagreed with the yacht owner, pointing out that the arbitration provision was valid under the Federal Arbitration Act (FAA), which governs maritime transactions, thus causing New York or Montana state law to be irrelevant to the issue.⁵³ Unlike *The Bremen*, which considered the balance between the public policy and forum selection clauses, *Galilea* dealt with the conflict between federal maritime law and state law.⁵⁴ The Ninth Circuit emphasized that conflicting state policies could not supersede applicable federal maritime law within

45. *Id.* at 1289, 1296.

46. *Id.*

47. *Id.* at 1289, 1297.

48. *Id.*

49. 954 F.2d at 768.

50. *See* 499 U.S. at 588.

51. *Galilea v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 2018 AMC 46 (9th Cir. 2018).

52. *Id.* at 1057.

53. *Id.* at 1056.

54. *Id.* at 1059.

federal admiralty jurisdiction and ruled that the yacht owner's reliance on Montana law based on *The Bremen* was misplaced.⁵⁵

Ensuring uniformity has been the long-held standard in judicial interpretation of insurance policy disputes. *Wilburn Boat* has thrown that uniformity in flux while being the only maritime insurance case heard by the Supreme Court in over sixty years.⁵⁶ Although federal courts have generally chosen to uphold choice-of-law and forum selection provisions, there is no entrenched federal law regarding their enforceability.

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the Third Circuit reversed the lower court's judgment on maintaining New York law as the governing state law, and, in its remand, directed the lower court to consider whether Pennsylvania had a strong public policy to protect its citizens in similar disputed claims.⁵⁷ In *Wilburn Boat*, the Supreme Court established that standard in applying state law in the absence of federal maritime law.⁵⁸ Federal courts tend to follow an established rule that a choice-of-law provision in a marine insurance contract is valid unless there is evidence proving that its enforcement would be unreasonable or unjust. *Great Lakes Ins. v. Raiders Retreat Realty Co.* argued that this federal rule must be applied no matter what.⁵⁹ The District Court seemingly agreed and did not believe that Pennsylvania's public policy could overcome the established rule that the choice-of-law provisions in maritime contracts are presumptively valid.⁶⁰ However, *Raiders* argued that this presumption of enforceability should not be applied in the present case under *The Bremen*.⁶¹

The Bremen was a central issue in both the Third Circuit's and district court's decisions despite their varied interpretations of the Supreme Court's formative conclusion in maritime disputes.⁶² The Third Circuit established its judgement in overturning the lower court's decision by further expanding on *The Bremen*'s view on choice-of-law provisions in several other influential decisions.⁶³ Principally, maritime contracts are

55. *Id.*

56. Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to The Wilburn Boat Problem*, 29 J. MAR. L. & COM. 41, 47 (1998).

57. 47 F.4th 225 (3d Cir. 2022).

58. *See* 348 U.S. 310, 314 (1955).

59. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.* 47 F.4th 225 at 232.

60. *Id.* at 225.

61. *Id.* at 230.

62. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972).

63. 47 F.4th 225 at 230-233.

governed by federal admiralty law. However, if there is no established federal admiralty rule, state law applies.⁶⁴

The Third Circuit looked to the well-established federal rule from *The Bremen* dictating that a choice-of-law provision will be upheld unless there is proof that enforcing it would be unreasonable or unjust.⁶⁵ The Fifth Circuit overturned the lower court's decision and determined that the choice-of-law provision in the insurance policy at issue was not reasonable or unjust given that the insurer was a United Kingdom entity whose most substantial relationship in the United States was in New York.⁶⁶ While the Mississippi-based plaintiff argued that the choice-of-law provision was contradictory to Mississippi law, the court determined that there was no presumptive Mississippi statute that involved the insurance dispute at issue.⁶⁷ The Third Circuit has previously stated that choice-of-law provisions are typically enforced in federal maritime laws, but it did not elaborate on disputes on which they would not be imposed.⁶⁸

In *The Bremen*, the Supreme Court decided that forum selection clauses in international contracts are generally enforceable unless they are shown to be unreasonable and unjust or if there is clear evidence of fraud or overreaching.⁶⁹ While the lower court disagreed with Raider Retreat's assertion that applying New York law in the insurance dispute would oppose Pennsylvania's public policy in its interpretation of the framework laid out in *The Bremen*, the Third Circuit differed.⁷⁰ *The Bremen* involved a forum selection provision that designated the London Court of Justice as the venue for any dispute; nonetheless, the insured American company sued in U.S. federal court when a contractual dispute arose.⁷¹

The Supreme Court determined that the provision was valid and should be honored absent strong reason that makes its implementation untenable.⁷² The Court elaborated that those reasons would include fraud or overreaching such as a provision that contravened with public policy in the forum in which the suit was brought.⁷³ While the lower court in the

64. Royal Ins. Co. of Am. v. KSI Trading Corp., 563 F.3d 68, 73 (3d Cir. 2009) (citing *Wilburn Boat Co.*, 348 U.S. at 313).

65. 585 F.3d at 243.

66. *Id.* at 244.

67. *Id.*

68. Neely v. Club Med Mgmt. Servs., Inc., 63 F.3d 166, 197 n.36, 1996 AMC 776 (3d Cir. 1995).

69. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 1972 AMC 1407 (1972).

70. Great Lakes Ins. v. Raiders Retreat Realty Co., 47 F.4th 225, 2022 AMC 274 (3d Cir. 2022).

71. *See Bremen*, 407 U.S. at 2.

72. *Id.* at 15.

73. *Id.*

noted case emphasized that the term forum does not necessarily mean state, the Third Circuit disagreed.⁷⁴ In its consideration of *The Bremen*, the Third Circuit disagreed with the lower court's limited consideration of the case and the later framework that evolved from the decision, as the District Court disagreed with the applicability of *The Bremen* and *Milanovich* in the choice-of-law provision dispute, asserting that *Raiders Retreat* erroneously interpreted the term "forum" to mean the same as the "state."⁷⁵ The district court noted that in *Milanovich*, the D.C. Circuit Court used the term forum in regards to the United States as a whole, not to a specific state or jurisdiction.⁷⁶

In the noted case, the Third Circuit included a prior Supreme Court decision uncited by either party's prior filings. The Court applied the framework established in *The Bremen* to a state-versus-state issue, ending the district court's view that *The Bremen* can only apply to forum-versus-forum issues.⁷⁷ The Third Circuit determined that the district court's limited view of *The Bremen* does not apply to choice-of-law concerns in maritime insurance contracts. *The Bremen* and its progeny apply to one set of circumstances, and another separate regime of laws applies to choice-of-law clauses in maritime insurance contracts.⁷⁸

Further, the Third Circuit differed from the lower court's reliance on *Galilea* to conclude that *The Bremen* did not apply in the noted case given the arbitration issue at dispute in *Galilea* was governed by federal law and did not need state law to fill the gap.⁷⁹ The district court determined that the public policy of the particular state that suit had been filed in cannot overcome the presumptive validity that choice-of-law provisions in maritime insurance contracts are valid so long as the chosen forum has a substantial relationship to the parties or the transaction.⁸⁰ The district court concluded that because federal law exists to govern arbitration, the public policy of the state was irrelevant to the issue; therefore, choice-of-law provisions outweigh the public policy considerations in the state the suit so happened to be brought.⁸¹ The Third Circuit reversed the district court's decision, holding that the public policy exception under *The Bremen* must

74. *Raiders Retreat*, 47 F.4th 225 at 233.

75. *Id.* at 231.

76. *Id.*

77. *Id.* at 233; *Carnival Cruise v. Shute*, 499 U.S. 585, 588, 1991 AMC 1697 (1991).

78. *Raiders Retreat*, 47 F.4th 225 at 233.

79. *The Bremen*, 407 U.S. at 1; *Galilea, LLC v. AGCS Marine Insurance Co.*, 879 F.3d 1052, 2018 AMC 46 (9th Cir. 2018).

80. 585 F.3d at 243.

81. *Galilea, LLC*, 879 F.3d 1052, at 1060-61.

be considered in determining whether Pennsylvania public policy would be contradictory to New York law.⁸²

IV. ANALYSIS

In the noted case, the Third Circuit heralded *The Bremen* as the fortifying foundation for its decision, in direct contravention of the district court's dismissal of *The Bremen*'s applicability to the issue and opposing the district court's assertion that forum selection clauses and choice-of-law provisions should be regulated separately.⁸³ While the district court did not deem *The Bremen* applicable to the choice-of-law provision at issue, federal courts have disagreed. The U.S. Court of Appeals for the D.C. Circuit in *Milanovich*, the Fifth Circuit in *Durham*, and the Ninth Circuit in *Chan* utilized the framework established for forum selection clauses in *The Bremen* towards choice-of-law provisions.⁸⁴ In fact, in *Durham*, the Fifth Circuit emphasized that its ruling would have been impacted if Mississippi had public policy contradictory to the chosen state law.⁸⁵ Although Mississippi did not, it is plainly obvious that Pennsylvania and New York conflict on the claims raised in the noted case.

The previous decisions on choice-of-law provisions have a significant aspect that contrasts with the noted case. While those decisions held that choice-of-law provisions are presumptively valid, the Third Circuit was the first to determine a choice-of-law provision as potentially invalid. In applying the framework set in *The Bremen*, the court in *Milanovich* noted that choice-of-law provisions should generally be upheld 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.⁸⁶

Choice-of-law clauses in maritime contracts became more prevalent following *Wilburn Boat*. Parties engaged in maritime contracts began incorporating choice-of-law provisions in order to rely on a predictable set of established legal principles.⁸⁷ Insurers generally chose New York

82. *Id.*

83. 47 F.4th at 225

84. 954 F.2d 763 at 768; 585 F.3d at 243; 123 F.3d at 1297.

85. 585 F.3d 236 at 244.

86. 954 F.2d at 768.

87. Finley Harckham, *Are Your Companies' Insurance Policies Governed by New York Law—and Should You Care?*, ANDERSON KILL (Sept. 2015), <https://www.andersonkill.com>.

as the applicable state law given its well-developed maritime legal framework as well as its partiality towards insurers.⁸⁸ In contrast to other jurisdictions in the United States and internationally, New York law generally does not allow corporate policyholders to sue their insurers for bad faith in handling claims.⁸⁹ As a result, insurers may face no negative consequences for unfairly denying coverage or delaying claim settlements.⁹⁰ Furthermore, New York law can strictly enforce insurance contract terms, therefore allowing coverage losses for minor policy violations.⁹¹ Conversely, Pennsylvania law is more partial to the insured, given its Bad Faith Statute was established specifically in order to deter and punish insurers who engage in bad faith denials of coverage while conducting business in Pennsylvania.⁹²

Wilburn Boat's establishment of the presumption of enforceability and the public-policy exception, rooted in federal public policy, had remained unchanged until the Third Circuit's ruling in the noted case. Given that other circuit courts generally upheld choice-of-law provisions, the Third Circuit's deviation from that standard due to Pennsylvania's strong public policy to protect the insured likely led to the Supreme Court granting certiorari.

The Supreme Court's decision could have far-reaching ramifications for the maritime insurance industry. If the Court upholds the Third Circuit's ruling, choice-of-law provisions in maritime insurance contracts could be invalidated when the selected law conflicts with strong public policy in the state where the lawsuit is filed. This would allow the varied laws and public policies of all fifty states to override contractual agreements between insurers and policyholders, introducing significant uncertainty and unpredictability into the maritime insurance landscape. This could lead to forum shopping based on state laws, potentially increasing risks and costs for insurers that could result in increased premiums for policyholders.

Uniformity in maritime law is meant to ensure its fundamental purpose, yet *Wilburn Boat* seemingly hindered that notion back in 1955 when the Supreme Court set the standard that state law governs in the absence of applicable federal law. If the Supreme Court were to predominantly cater to uniformity, the Court may need to overturn

com/Custom/PublicationPDF/PublicationID_1359_Are-your-companies-insurance-policies-governed-by-New-York-law-and-should-you-care.pdf.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

Wilburn Boat entirely given that the Supreme Court determined that maritime insurance regulation was to be determined by Congress and the states, given the varying state legislation on the issue, throwing uniformity in flux. Some states have prohibited companies from forfeiting policies unless there is evidence of the insured party's bad faith or fraud; other states view this as inadequate to curb bad faith denials by insurers. The deference shown to state law by the Court in *Wilburn Boat* goes to the heart of the issue in the noted case given Pennsylvania's strong stance on bad faith denials. The Court specifically reasoned that imposing the common law doctrine of strict compliance as a federal rule would be too harsh. Often regarded as favorable to insurers, New York is predictably the most common choice of law for insurance policies given its adaption of the doctrine of strict compliance.

However, if the standard established in *Wilburn Boat* remains, the Court could further determine whether *Wilburn Boat* established that state law is to be adopted as the federal common rule, or alternatively, only state law is applicable in the absence of federal law. The distinction is significant given the absence of federal law governing the enforcement of choice-of-law provisions in maritime insurance contracts. While the Court in *Wilburn Boat* reasoned that regulation of maritime insurance law should be left to the states and Congress, the Supreme Court may look to the Restatement (Second) of Conflict of Laws and establish a uniform federal law rule regarding the enforceability of choice-of-law provisions.⁹³

Section 187 of the Restatement establishes that choice-of-law provisions will apply unless *either* (1) the designated state does not have a "substantial relationship" to the parties or transaction and there is no other "reasonable basis" for the parties' choice or (2) applying the law of the designated state would be contrary to a fundamental policy of the state whose law would otherwise apply and that state has a materially greater interest in the determination of the particular issue than the designated state.⁹⁴ The test set forth in Section 187 has similar aspects to the framework in *The Bremen*. While Section 187 is choice-of-law provision specific, the Court in *The Bremen* applied the forum selection clause-specific test set forth in Section 80 of the Restatement (Second) Conflict of Laws. Given that most states have either adopted Section 187 or follow

93. Brief of Professors John F. Coyle and Kermit Roosevelt III as Amici Curiae Supporting Neither Party, *Great Lakes v. Raiders Retreat Reality Co.*, 143 U.S. 999 (petition for cert. filed Nov. 30, 2022) (No. 22-500), 2023 WL 3847425 at 2-3.

94. *Id.*

a similar test, the Supreme court has the foundation to create a uniform federal test on the issue.⁹⁵

As noted by the Court in *Wilburn Boat*, insurance is a major industry in the United States. However, increased deference towards insurers with reliance on the aged common law doctrines of strict compliance and utmost good faith, also known as *uberrimae fidei*, could have adverse effects on the country's industry.⁹⁶ The common law doctrines are based in English law that even the United Kingdom considers too severe for the insured and no longer upholds. Rather than following the doctrine of utmost good faith, the United Kingdom established a statute that obligated "fair presentation" of risks by the insured, requiring only that the factual representations made by the insured be "substantially correct" and made "in a manner which would be reasonably clear and accessible to a prudent insurer."⁹⁷ Given the United Kingdom's favorability towards the insured, if the United States were to develop a system more favorable towards the insurer, entities could choose to be insured in the London market rather than the American market. Given that insurers in the American market tend to utilize New York law that, in turn, follows the common law doctrine of strict compliance and utmost good faith, the system is already showing partiality towards insurers. While being insured in the London market rather than the American market will result in increased premiums, they are undeniably preferable over coverage denials like the issue in the noted case.

V. CONCLUSION

In navigating the intricacies of maritime insurance law, the noted case has shed light on the differing aspects of legal interpretation and policy considerations in maritime insurance. The development of choice-of-law provisions underscores the delicate balance between the fundamental purpose of maritime law and the safeguarding of states' rights. In its landmark decision, the Supreme Court has definitively addressed the complexities of choice-of-law provisions in maritime insurance contracts. The justices' unanimous ruling establishes a clear precedent that prioritizes uniformity in maritime law, shifting the balance between predictability and state-specific policies. Although, the majority

95. *Id.* at 12-13.

96. Martin Davies, *Marine Insurance, Utmost Good Faith, and the Role of the Broker*, 52 J. MAR. L. 1, 4 (2022)

97. *Id.* at 2.

opinion bypassed considering *Wilburn Boat*,⁹⁸ Justice Thomas lambasted its rationale.⁹⁹ The Supreme Court's unanimous decision reflects a shift in the balance between federal and state power, as *Wilburn Boat* emphasized state regulation. Conversely, its recent decision prioritizes upholding the contractual choices of parties involved in maritime commerce.

Although the Supreme Court's decision brings more clarity to the legal landscape, some may argue that the adherence to choice-of-law provisions could incentivize insurers to operate in jurisdictions with more favorable legal environments. While the long-term impact on fairness and coherence remains to be seen, the industry must now conform to this new legal framework, even though it appears well-established.¹⁰⁰

Sabrina Mallavarapu*

98. Justice Kavanaugh concluded that *Wilburn Boat* did not need to be considered because it did not involve choice of law provisions. 601 U.S. at 66.

99. Justice Thomas opined that “*Wilburn Boat*’s rationale is deeply flawed . . .” and is “. . . at odds with the fundamental precept of admiralty law.” 601 U.S. at 80-81 (Thomas, C., concurring).

100. Harkham, *supra* note 87.

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