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A Tale of Two Payments: *GIC Services, L.L.C. v. Freightplus USA, Inc.*, the Fifth Circuit Addresses Double Payment and Maritime Indemnity

I. INTRODUCTION	31
II. HISTORICAL BACKGROUND	32
A. Maritime Tort Indemnity	32
B. Shipper's Liability in the Face of an Intermediary's Failure to Pay	33
C. Maritime Liens	36
III. COURT'S DECISION	36
IV. ANALYSIS	40
V. CONCLUSION	43

I. INTRODUCTION

While in the mid-Atlantic Ocean, an ocean carrier received a late night e-mail with news no carrier wishes to hear—it was headed to the wrong port.¹ A tugboat, the *Rebel*, was cargo aboard the ship headed to Nigeria where it was supposed to be discharged at port in Lagos.² However, instead, the ship was headed to port in Warri.³ This mishap began when GIC Services, LLC (GIC) contracted with Freightplus, a non-vessel-operating-common-carrier (NVOCC), to arrange carriage for the *Rebel* for a price of \$111,000, which in turn sub-contracted with Yacht Path, a broker, for \$85,000, which contracted with Industrial Maritime Carriers (IMC), a vessel-operating-common-carrier (VOCC), for \$70,000.⁴ However, IMC never received payment by Yacht Path for its transport of the *Rebel*.⁵ Ultimately, despite all parties endeavoring to correct the port of discharge to Lagos, discharge occurred in Warri, where the *Rebel* remained in the custody of a company, Julius Berger, unable to be released until IMC received its freight.⁶ Yacht Path and IMC had

1. GIC Servs., L.L.C. v. Freightplus USA, Inc., 866 F.3d 649, 654, 2017 AMC 1817, 1821 (5th Cir. 2017).

2. *Id.* at 653, 2017 AMC at 1821.

3. *Id.*

4. *Id.* at 654, 2017 AMC at 1820.

5. *Id.*

6. *Id.* at 655, 2017 AMC at 1821.

discussed the terms of the bill of lading by telephone.⁷ During these discussions IMC maintained Warri was the discussed port of discharge as evidenced through their booking note, while Yacht Path maintained Lagos was the port, as shown through their own booking note and bill of lading.⁸

The district court held Freightplus liable to GIC for damages resulting from the *Rebel*'s discharge in Warri and determined that IMC was thirty percent liable for GIC's damages.⁹ Further, the district court held that IMC could recover unpaid freight from GIC.¹⁰ On appeal, IMC claimed it was not required to indemnify Freightplus and that the district court's holding that IMC could not exercise a lien against the *Rebel* for freight costs was erroneous.¹¹ Additionally, Freightplus claimed that the district court erred in not awarding it attorneys' fees and that it was entitled to indemnity from IMC.¹² The Court of Appeals for the Fifth Circuit *held*: (1) the district court erred and a maritime lien could be exercised for unpaid freight; (2) the district court was correct to hold Freightplus liable for the unpaid freight; (3) Freightplus could not receive full indemnity from IMC; and (4) Freightplus was not entitled to attorneys' fees from IMC. *GIC Services, L.L.C. v. Freightplus USA, Inc.*, 866 F.3d 649, 664, 666, 668, 670, 2017 AMC 1817, 1830, 1837, 1840, 1842, 1846 (5th Cir. 2017).

II. HISTORICAL BACKGROUND

A. *Maritime Tort Indemnity*

Departing from its origins as divided damages, modern maritime tort indemnity is available only when "proportionate degrees of fault cannot be measured and determined on a rational basis."¹³ The Fifth Circuit now recognizes few situations in which maritime law still permits tort indemnity, one of which is based on a "special relationship" and duties

7. *Id.*, 2017 AMC at 1820.

8. *Id.* at 654, 2017 AMC at 1820.

9. *Id.* at 655, 2017 AMC at 1821.

10. *Id.* at 655, 673 n.2, 2017 AMC at 1821. Yacht Plus was not a party because it was insolvent. *Id.*, 2017 AMC at 1820 n.2.

11. *Id.*, 2017 AMC at 1822. IMC also on appeal challenged the allocation of damages and claimed that there was error in the determination of GIC's damages. *Id.*

12. *Id.* at 655-56, 2017 AMC at 1822-23. Freightplus also claimed error in the assignment of damages between itself and IMC. *Id.*

13. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 402-405, 1975 AMC 541, 547-48 (1975).

owed therefrom.¹⁴ The relationships between an NVOCC and VOCC are accepted by some courts as proper for maritime tort indemnity claims.¹⁵

General admiralty law, without statutory authorization otherwise, dictates that attorneys' fees are not recoverable outside of a few judicially created exceptions.¹⁶ One exception is an indemnitee may recover attorneys' fees and legal expenses from an indemnitor;¹⁷ this exception does not extend to contribution actions.¹⁸ In indemnity actions, the indemnitee incurs legal fees due to the actions of the indemnitor and, thus it is reasonable to impose that expense upon the indemnitor. By contrast, in contribution actions the tortfeasor is partially at fault and the legal fees would be incurred as a result of the indemnitees' own actions.¹⁹ In such situations, attorneys' fees may not be recovered.²⁰

B. Shipper's Liability in the Face of an Intermediary's Failure to Pay

A non-vessel-operating-common-carrier (NVOCC) is defined statutorily as an entity that does not operate the vessels transporting the cargo, and operates as a shipper in its relationship with the carrier.²¹ Courts often define NVOCCs as "an intermediary between a shipper of goods and an operator of a vessel that carries the goods."²² There is a circuit split regarding whether a shipper should be subject to double-payment where the shipper pays an intermediary and that intermediary fails to remit payment to the ocean carrier.²³ One approach is the "assumption of the risk" or "semi-strict" approach where a shipper remains liable to the carrier until full payment to the carrier is made, regardless of the shipper's payments made to intermediaries, absent a showing that the carrier

14. *Cities Servs. Co. v. Lee-Vac, Ltd.*, 761 F.2d 238, 240-41 (5th Cir. 1985).

15. *See SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526-27, 1994 AMC 1758, 1763 (3d Cir. 1994); *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 941, 1991 AMC 64, 73 (11th Cir. 1990).

16. *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 730 (5th Cir. 1980).

17. *Odd Berge Tankeredri A/S v. S/T Gulf Spray*, 650 F.2d 652, 654 (5th Cir. 1981).

18. *Id.* (citing *Italia Societa v. Or. Stevedoring Co.*, 376 U.S. 315, 321, 1964 AMC 1075, 1080 (1964)).

19. *Id.*

20. *Id.*; *see also Sea-Land Serv., Inc. v. Crescent Towing & Salvage Co.*, 42 F.3d 960, 962-63, 1995 AMC 1073, 1077 (5th Cir. 1995) (upholding the *Odd Berge* rule against a third-party defendant seeking indemnity where it was found partially at fault).

21. 46 U.S.C. § 40102(16) (2012).

22. *AEL Asia Express (H.K.) Ltd. v. Am. Bankers Ins. Co. of Fla.*, 5 Fed. App'x 106, 109 (4th Cir. 2001) (citing *Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 183 F.3d 935, 937, 1999 AMC 2221, 2222 (9th Cir. 1999)).

23. *Hawksphere Shipping Co. v. Intamex, S.A.*, 330 F.3d 225, 236, 2003 AMC 1374, 1386 (4th Cir. 2003).

intended to release the shipper from the obligation to pay.²⁴ The United States Court of Appeals for the Eleventh Circuit adopted this approach in *National Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*,²⁵ as the “best rule” when it reversed the district court’s holding that a carrier extended credit to the freight forwarder rather than to the shipper by the designation “freight prepaid.”²⁶ In that case, the Eleventh Circuit reasoned that the bill of lading was a contract between the carrier and shipper and the carrier has a contractual entitlement to payment under the bill of lading.²⁷ The court noted that, to avoid liability, shippers should take care to assure that the freight forwarders are reputable, and to contract for release by the carrier.²⁸ The Fourth Circuit followed in *Hawksphere Shipping Co. v. Intamex, S.A.*,²⁹ where it relied on the Eleventh Circuit’s decision and adopted the assumption of the risk approach. The court stated, “[s]hippers . . . can always avoid the loss by simply paying their carrier directly . . . it is they who appropriately bear the risk.”³⁰ Most recently, the Ninth Circuit adopted the assumption of the risk approach in *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*,³¹ holding that a carrier’s recovery was not barred by the shipper’s payment to an intermediary.³²

By contrast, the Sixth and Eighth Circuits, under the “equitable estoppel” approach, have held that a shipper is not liable to a carrier when the shipper pays freight to an intermediary and the intermediary fails to remit payment to the carrier, because the carrier induced the shipper to reasonably believe payment to the intermediary released the shipper.³³ The Sixth Circuit also followed this approach in *Oslon Distributing Systems, Inc. v. Glasurit America, Inc.*³⁴ In that case, the court held that double-payment coupled with a lack of indications from the carrier to the shipper that payments by an intermediary were not made and documents establishing that there was an understanding the carrier should seek payment from the intermediary, not the shipper, resulted in equitable estoppel barring recovery.³⁵ Additionally, the Eighth Circuit in *Inman*

24. *Id.* at 236-37, 2003 AMC at 1386.

25. 106 F.3d 1544, 1997 AMC 1708 (11th Cir. 1997).

26. *Id.* at 1546-47, 1997 AMC at 1711.

27. *Id.* at 1547, 1997 AMC at 1711-12.

28. *Id.*

29. 330 F.3d 225, 2003 AMC 1374 (4th Cir. 2003).

30. *Id.* at 237, 2003 AMC at 1386-87.

31. 513 F.3d 949 (9th Cir. 2008).

32. *Id.* at 959-60.

33. *Hawksphere*, 330 F.3d at 237, 2003 AMC at 1387.

34. 850 F.2d 295 (6th Cir. 1988).

35. *Id.*

*Freight Systems, Inc. v. Olin Corp.*³⁶ stated that a consignee must have paid the consignor in full in order to raise an estoppel defense against a carrier from collecting from that consignee.³⁷ In that case, the shipper was held liable because it had never remitted any payment and sought to rely exclusively on the freight prepaid designation.³⁸ A number of district courts have followed this line of reasoning as well.³⁹

The Fifth Circuit in *Strachan Shipping Co. v. Dresser Industries, Inc.*⁴⁰ addressed whether a carrier released a shipper from liability and applied the assumption of the risk approach.⁴¹ The court framed the issue around whether the carrier intended to relieve the shipper of liability for freight payment, which requires looking at the course of dealing within the totality of the circumstances.⁴² In *Strachan*, Dresser, the shipper, shipped cargo on Strachan's, the carrier, vessels through Sierra, a freight forwarder; Dresser paid Sierra, but Sierra never paid Strachan.⁴³ To complicate matters, Sierra was insolvent by the time litigation arose.⁴⁴ The court noted that the strongest factor indicating an intent to release Dresser from payment was Strachan's expectation of payment from the freight forwarder;⁴⁵ ultimately, however, the court concluded this fact was not dispositive.⁴⁶ It reasoned that carriers would not go to shippers directly because of the intermediary's presence—the carrier is expected to go to the intermediary first.⁴⁷ Further, the Fifth Circuit believed that this approach aligned with the “economic reality” of the maritime industry, where freight forwarders have few assets and make arrangements far beyond their net worth.⁴⁸ Even though a carrier can extend credit to the

36. 807 F.2d 117 (8th Cir. 1986).

37. *Id.* at 121.

38. *Id.*

39. See, e.g., *Inversiones Navieras Imparca, C.A. v. Polysar Int'l, S.A.*, 465 F. Supp. 102, 103-04, 1980 AMC 1883, 1885 (S.D. Fla. 1979) (“[T]his [c]ourt likewise rejects the contention that a shipper is absolutely liable where the shipper has paid the freight forwarder the carriage charges and the carrier has issued its Bill of Lading ‘Ocean Freight Prepaid.’”); *Farrell Lines, Inc. v. Titan Indus. Corp.*, 306 F. Supp. 1348, 1350-51, 1969 AMC 1412, 1416 (S.D.N.Y. 1969), *aff'd*, 419 F.2d 835 (2d Cir. 1969) (finding that a carrier extended credit to an intermediary and the shipper paid the intermediary in full before the intermediary went bankrupt, thus the shipper was free of liability for payment of freight to the carrier).

40. 701 F.2d 483, 489-90, 1984 AMC 237, 245-48.

41. *Id.*

42. *Id.* at 489, 1984 AMC at 245.

43. *Id.* at 484-85, 1984 AMC at 238.

44. *Id.* at 484, 1984 AMC at 238.

45. *Id.* at 489-490, 1984 AMC at 245.

46. *Id.*

47. *Id.* at 489, 1984 AMC at 246.

48. *Id.* at 490, 1984 AMC at 248.

freight forwarder and expect payment from the shipper through the freight forwarder, “there is no economically rational motive for the carrier to release the shipper.”⁴⁹

C. *Maritime Liens*

Under American law, shipowners generally enjoy a presumption of a maritime lien upon cargo for freight and may retain cargo until the shipowner is paid or may enforce the lien through an action in rem against the cargo itself.⁵⁰ A maritime lien can only be exercised on movable objects engaged in navigation or upon subjects of commerce on the high seas or navigable waters, not upon permanent fixtures such as bridges that simply aid in commerce.⁵¹ An exception applies to cargo, owned by the charterer, shipped under a charter.⁵²

III. COURT’S DECISION

In the noted case, the Fifth Circuit found that (1) IMC was liable to Freightplus for a proportion of damage imposed GIC under tort indemnification; (2) Freightplus could not recover full indemnity from IMC but upheld the allotment IMC’s fault; (3) Freightplus was not entitled to attorneys’ fees from IMC; (4) IMC did not release Freightplus from liability for freight; and (5) the district court erred in barring IMC from recovery against the *Rebel* in rem.⁵³

First, the court concluded that IMC was liable to Freightplus by determining that: (1) the relationship between Freightplus and GIC was proper for a maritime tort indemnification theory; (2) Freightplus operated as an NVOCC; and (3) the district court was not clearly erroneous in its finding that IMC was negligent.⁵⁴ Whether the relationship was sufficient to support maritime tort liability was an issue of first impression for the Fifth Circuit and the court looked to its previous decision in *Cities Services Co. v. Lee-Vac, Ltd.*, which outlined situations where maritime tort

49. *Id.*, 1984 AMC at 249.

50. *The Bird of Paradise*, 72 U.S. 545, 554-55, 2009 AMC 2969, 2972 (1866); *accord*. *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496, 499-500, 1992 AMC 2347, 2352 (5th Cir. 1992).

51. *The Rock Island Bridge*, 73 U.S. 213, 216 (1867).

52. *Lykes Lines Ltd. v. M/V BBC Sealand*, 398 F.3d 319, 323, 2005 AMC 865, 868 (5th Cir. 2005).

53. *GIC Servs., L.L.C. v. Freightplus USA, Inc.*, 866 F.3d 649, 658, 660, 664, 666, 668, 670, 2017 AMC 1817, 1826, 1830, 1837, 1840, 1842, 1846 (5th Cir. 2017).

54. *Id.* at 656-60, 2017 AMC at 1824, 1826, 1829.

indemnification is recognized.⁵⁵ Because the parties stipulated at the trial level that the relationship between an NVOCC and VOCC can constitute a “special relationship,” the court saw no reason to depart from its sister courts.⁵⁶ Thus, the court concluded that the relationship between an NVOCC and VOCC can be a “special relationship” giving rise to maritime tort indemnification, joining the Courts of Appeals for the Third and Eleventh Circuits.⁵⁷

Next, the court reviewed *de novo* Freightplus’s argument that it was not operating as an NVOCC.⁵⁸ First, the court relied on out-of-circuit case law to establish the role of an NVOCC as an intermediary between shippers and ocean common carriers whose indicia includes receiving bills of lading from the VOCC and is commonly paid exclusively by the shipper.⁵⁹ Additionally, the court looked to the statutory definition of an NVOCC as a common carrier that (1) does not operate the vessel involved in transport and (2) is a shipper vis-à-vis the carrier.⁶⁰ The court concluded Freightplus operated as an NVOCC because it issued bills of lading listing Freightplus as the “carrier” and Freightplus was paid exclusively by GIC.⁶¹ This was notwithstanding arguments that Freightplus operated as a freight forwarder because it was not listed as a “shipper” on IMC documents and received bills of lading from IMC.⁶² The court disposed of these arguments, stating conduct was the dispositive factor, not third party labels and the court distinguished Freightplus’s conduct from that of a freight forwarder by showing it issued bills of lading and received compensation solely from the shipper.⁶³ Finally, the court deferred to the district court finding that IMC was negligent and rejected IMC’s argument that it would

55. *Id.* at 656, 2017 AMC at 1823 (citing *Cities Serv. Co. v. Lee-Vac, Ltd.*, 761 F.2d 238, 240 (5th Cir. 1985)).

56. *Id.*, 2017 AMC at 1824.

57. *Id.* (citing *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526-27, 1994 AMC 1758, 1763 (3d Cir. 1994); *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 941, 1991 AMC 64, 72-73 (11th Cir. 1990)). However, the court made clear that it was not deciding as a matter of law that the NVOCC-VOCC relationship is always a “special relationship.” *Id.*

58. *Id.*

59. *Id.* at 657, 2017 AMC at 1824 (citing *Landstar Exp. Am., Inc. v. Fed. Mar. Comm’n*, 569 F.3d 493, 494-95 (D.C. Cir. 2009)).

60. *Id.*, 2017 AMC at 1824-25 (citing 46 U.S.C. § 40102(16) (2012)).

61. *Id.* at 658, 2017 AMC at 1826.

62. *Id.*

63. *Id.*, 2017 AMC at 1827 (citing *Landstar* 569 F.3d at 495; *Prima U.S., Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129, 2000 AMC 2897, 2899-2900 (2d Cir. 2000); *Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 95 (D.C. Cir. 1989)).

be forced to choose between complying with its contractual obligations or facing tort liability.⁶⁴

Second, the court faced two issues on the apportionment of fault between IMC and Freightplus.⁶⁵ IMC contended Freightplus was the majority tortfeasor and therefore was not entitled to recovery, and Freightplus argued it was entitled to indemnity for the full judgment to GIC.⁶⁶ The Fifth Circuit reaffirmed its decision in *Hardy v. Gulf Oil Corp.*,⁶⁷ which held that full indemnity is reserved only where proportionate degrees of fault cannot be made on a rational basis or the party seeking indemnity was not at fault.⁶⁸ Further, the court reaffirmed that partial fault and full indemnity are mutually exclusive,⁶⁹ noting that courts disallow even attorneys' fees in an indemnity action where both parties are at fault.⁷⁰ Moreover, under Fifth Circuit precedent, the court held that Freightplus was not entitled to full indemnity because it was found partially at fault by the district court⁷¹ and neither party disputed the basis for attributing fault.⁷² On this same precedent, the court also rejected IMC's contention that Freightplus could not receive partial indemnity because it was majority at fault.⁷³ The court stated it could find no support for the argument that comparative fault does not apply when one party is more at fault than another.⁷⁴

Third, the court reviewed *de novo* the district court's refusal of attorneys' fees to Freightplus and determined it was not entitled to attorneys' fees.⁷⁵ The court observed its rule in *Odd Bergs Tankrederi A/S*

64. *Id.* at 659-60, 2017 AMC at 1830. The district court found going to Lagos would be complying with its contractual obligations and IMC's argument was therefore unsupported because IMC had negligently listed the wrong port. *Id.*, 2017 AMC at 1828-29.

65. *Id.* at 663, 2017 AMC at 1835.

66. *Id.*

67. 949 F.2d 826, 833 (5th Cir. 1992).

68. *GIC Servs.*, 866 F.3d at 663-64, 2017 AMC at 1835-36.

69. *Id.* at 664, 2017 AMC at 1836 (citing *Seal Offshore, Inc. v. Am. Standard, Inc.*, 736 F.2d 1078, 1080 (5th Cir. 1984); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 500-02, 1984 AMC 1216 (5th Cir. 1982) (AMC reporter summarizing case)).

70. *Id.*, 2017 AMC at 1839 (citing *Sea-Land Serv., Inc. v. Crescent Towing & Salvage Co.*, 42 F.3d 960, 1995 AMC 1073 (5th Cir. 1995)).

71. *GIC Servs., LLC v. Freightplus USA, Inc.*, 120 F. Supp. 3d 572, 584, 2016 AMC 551, 572 (E.D. La. 2015) (finding GIC partially at fault for "its failure to verify that the information on its bill of lading was accurate, issuing an indemnity letter that contained inaccurate statements, and failing to share information regarding the *Industrial Destiny's* vessel agent with GIC").

72. *GIC Servs.*, 866 F.3d at 664, 2017 AMC at 1837 (5th Cir. 2017).

73. *Id.* at 665, 2017 AMC at 1837.

74. *Id.*, 2017 AMC at 1838.

75. *Id.* at 665-66, 2017 AMC at 1838. The district court originally awarded Freightplus thirty percent of its attorneys' fees from IMC, but amended its judgment. *Id.*

v. *S/T Gulf Spray*⁷⁶ that attorneys' fees are generally not allowed in the contribution context but are allowed under an indemnity situation because the indemnitee must litigate as a result of the indemnitor's conduct.⁷⁷ Analogizing to *Sea-Land Service, Inc. v. Crescent Towing & Salvage Co.*,⁷⁸ the court concluded attorneys' fees are entrenched in the rationale in *Odd Bergs*, determined by whether the indemnitee is there solely because of the indemnitor's action, not upon the distinction of whether the theory is indemnity or contribution.⁷⁹ Accordingly, the court found Freightplus was required to litigate due to its own actions in failing to ensure an accurate bill of lading and GIC's reliance on Freightplus's representations and thus, the defense of the action would be required regardless of IMC's involvement.⁸⁰

Fourth, the court reviewed *de novo* whether IMC released Freightplus of liability for freight and turned to its precedent in *Strachan*,⁸¹ where the court held release of the shipper from liability requires the carrier's intent to do so as evidenced through the course of dealings and totality of the circumstances.⁸² Based on the facts of this case, the court held that IMC did not release Freightplus and in doing so, expanded *Strachan*, which involved liability of a primary shipper and carrier, not to the carrier and an intermediary.⁸³ The court reasoned that, even if IMC did extend credit to Yacht Path by not seeking contemporaneous payment, an extension of credit alone is not dispositive of intent to release the shipper from liability under *Strachan*, which requires a showing that the extension of credit was intended to serve as a release itself.⁸⁴ Further, the court held that under *Strachan*, IMC's initial efforts to seek payment from Yacht Path were also not indicative of an intent to release Freightplus.⁸⁵ Finally, in accordance with *Strachan*, the court held that the term "freight prepaid" on IMC's bill of lading does not establish IMC's intent to release Freightplus because "there is no economically rational motive for the

76. 650 F.2d 652 (5th Cir. 1981).

77. *GIC Servs.*, 866 F.3d at 665, 2017 AMC at 1838-39.

78. 42 F.3d 960, 1995 AMC 1073 (5th Cir. 1995).

79. *GIC Servs.*, 866 F.3d at 666, 2017 AMC at 1839-40.

80. *Id.*, 2017 AMC at 1840 (stating there was "no doubt" that Freightplus litigated under an indemnity theory).

81. *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 1984 AMC 237 (5th Cir. 1983).

82. *GIC Servs.*, 866 F.3d at 667, 2017 AMC at 1840-41.

83. *Id.* at 667-68, 2017 AMC at 1841-42.

84. *Id.* at 668, 2017 AMC at 1842 (citing *Strachan*, 701 F.2d at 489-90, 1984 AMC at 245-46).

85. *Id.*, 2017 AMC at 1843.

carrier to release entities from liability: the more parties that are liable, the greater the assurance for the carrier that he will be paid.” The court requires a carrier’s clear indication of intent to release the shipper.⁸⁶

Finally, the court reviewed *de novo* the district court’s conclusion that IMC was barred from recovering against the *Rebel* in rem because recovery would subject GIC to double payment since GIC already paid Freightplus, the intermediary, and the bill of lading was designated “freight prepaid.”⁸⁷ The court recognized over a century of case law in support of a presumption that a maritime lien exists in favor of the shipowner on cargo for unpaid freight.⁸⁸ The Fifth Circuit disagreed with the district court’s conclusion, turning back to *Strachan*, which the district court acknowledged as “contrary” to its holding.⁸⁹ The court reiterated that, under *Strachan*, the inquiry of whether a shipper is released from freight liability revolves around the carrier’s intent and the totality of the circumstances, noting that “freight prepaid” terms are not dispositive of intent to release by the carrier.⁹⁰ The court again extended *Strachan*, holding the applicable standard in the in rem action against the *Rebel* remained the same as if it was the shipper in personam.⁹¹ Finding no intent by IMC to release the *Rebel*, the court held that the trial court erred in barring IMC from exercising a maritime lien against the *Rebel*.⁹² GIC attempted to argue that privity of contract was a prerequisite to a maritime lien, citing *Lykes Lines Ltd. v. M/V BBC Sealand*.⁹³ However, the court held that *Lykes*, which creates an exception for certain cargo carried under voyage charter, was inapplicable to the common carrier case at bar.⁹⁴

IV. ANALYSIS

In the noted case, the Fifth Circuit as a matter of first impression, recognized the NVOCC-VOCC relationship can be a “special

86. *Id.* (quoting *Strachan*, 701 F.2d at 490, 1984 AMC at 248).

87. *Id.*, 2017 AMC at 1843-44.

88. *Id.* at 668-69, 2017 AMC at 1844 (citing *The Bird of Paradise*, 72 U.S. 545, 554, 2009 AMC 2969, 2972 (1866); *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496, 499, 1992 AMC 2347, 2352 (5th Cir. 1992)).

89. *Id.* at 669, 2017 AMC at 1844.

90. *Id.*

91. *Id.*, 2017 AMC at 1844-45.

92. *Id.*, 2017 AMC at 1846. The court notes in that *in personam* and *in rem* actions are treated the same only to determine carrier intent. *Id.* at 673 n.27, 2017 AMC at 1845.

93. 398 F.3d 319, 2005 AMC 865 (5th Cir. 2005).

94. *GIC Servs.*, 866 F.3d at 669, 2017 AMC at 1845-46.

relationship” giving rise to maritime law tort indemnity.⁹⁵ The court did not provide reasoning beyond finding “no reason to depart” from the decision of the Third and Eleventh Circuit.⁹⁶ An NVOCC is defined as “a shipper in its relationship with an ocean common carrier.”⁹⁷ As a result, the court’s decision to recognize the relationship between an NVOCC and VOCC is supported in *LCI Shipholdings, Inc. v. Muller Weingarten AG*, which rejected a relationship between shipowner and freight forwarder for maritime tort indemnity but stated that, “damages claimed in this case arise from damage to [shipper’s] cargo, and any duty breached by [the carrier] that could have caused the damaged was a duty to [the shipper].”⁹⁸ With the recognition of the NVOCC-VOCC relationship, the relationship required for tort indemnity becomes slightly clearer, but since the court made its finding only to the extent of the opinion, there still may be uncertainty on who is entitled to indemnity under this framework.⁹⁹

Further, the Fifth Circuit reaffirmed its abandonment of many aspects of tort indemnity under maritime law and the use of comparative fault, except in situations where there is no rational basis for determining proportionate fault.¹⁰⁰ This accords with the Supreme Court decision *United States v. Reliable Transfer Co.*, where the Court held that parties at fault should be liable proportionate to their degree of fault in a maritime collision or stranding.¹⁰¹ This is the more equitable outcome because proportionate degrees of fault ensure no party is made to pay the entirety or a disproportion amount of a joint-tort.¹⁰²

Additionally, the Fifth Circuit reaffirmed its assumption of the risk position for liability of unpaid freight by denying Freightplus’s argument that IMC released it from liability, focusing its inquiry upon whether the carrier released the shipper irrespective of whether the shipper paid an intermediary who failed to remit payment to the carrier.¹⁰³ In doing so, the court broadened the application of *Strachan* to intermediaries acting as shippers rather than just limiting the framework to apply to primary

95. *Id.* at 655, 2017 AMC at 1824. The court noted this recognition is only to the extent given within the opinion. *Id.*

96. *Id.* The court noted that the parties had stipulated this issue. *Id.*, 2017 AMC at 1823-24.

97. *Id.*, 2017 AMC at 1824-25; 46 U.S.C. § 40102 (16)(B) (2012).

98. 153 F. App’x 929, 931, 2005 AMC 2993 (5th Cir. 2005).

99. *GIC Servs.*, 866 F.3d at 656, 2017 AMC at 1824.

100. *Id.* at 663-64, 2017 AMC 1835-36.

101. 421 U.S. 397, 411, 1975 AMC 541, 551 (1975).

102. *Id.* at 410-11, 1975 AMC at 551.

103. *GIC Servs.*, 866 F.3d at 666-68, 2017 AMC at 1840-43.

shippers.¹⁰⁴ The burden imposed by the court in this case, absent clear release by the carrier, is high for the opposing party to overcome.¹⁰⁵ In rejecting IMC's intent to release based on: (1) assuming arguendo there was an extension of credit; (2) initial efforts towards the freight forwarder for payment; and (3) a freight prepaid designation on the bill of lading, the court seems to require an express release of liability and will refuse to recognize actions by the carrier alone as release.¹⁰⁶ This is in line with the position taken decades prior by the Fifth Circuit that this approach "comports with economic reality," where the intermediary's operations far exceed its net worth and there is no "economically rational motive for the carrier to release the shipper."¹⁰⁷

Aside from precedent, the Fifth Circuit correctly decided to not adopt the estoppel defense allowed by the Eastern District of Louisiana.¹⁰⁸ The Fifth Circuit's decision is the most efficient outcome. Shippers are not only the best able to bear the financial repercussions but also are free to select which parties to contract with and thus, carriers may proceed without fear of intermediary insolvency since shippers will be liable absent the carrier's clear agreement otherwise.¹⁰⁹ Further, carriers can better rely on the bill of lading's terms because of the assurance of the dual guarantors and a high standard set to prove the shipper's release from freight liability.¹¹⁰ It is not feasible for carriers to check-off on the credit of all the entities dealt with and it is not a guarantee regardless.¹¹¹ The ability to rely on a known guarantor, the shipper, allows for fewer transaction costs with carriers.¹¹²

Finally, the court refused to allow Freightplus to recover attorneys' fees from IMC.¹¹³ The court framed the issue around whether the justifications found in *Odd Bergs* and *Sea-Land* were appropriate under

104. *Id.* at 667, 2017 AMC at 1842.

105. *Id.* at 667-68, 2017 AMC at 1842-43.

106. *Id.* at 668, 2017 AMC at 1841-43.

107. *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 490, 1984 AMC 237, 248 (5th Cir. 1983).

108. *GIC Servs.*, 866 F.3d at 669, 2017 AMC at 1843-44.

109. *See Hawksphere Shipping Co., Ltd. v. Intamex, S.A.*, 330 F.3d 225, 237, 2003 AMC 1374, 1387-88 (4th Cir. 2003).

110. *See Nat'l Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544, 1547, 1997 AMC 1708, 1711-12 (11th Cir. 1997).

111. *See Clearlake Shipping PTE Ltd. v. O.W. Bunkers (Switz.) SA*, 239 F. Supp. 3d 674, 693, 2017 AMC 627, 653 (S.D.N.Y. 2017).

112. *Id.*

113. *GIC Servs., L.L.C. v. Freightplus USA, Inc.*, 866 F.3d 649, 666, 2017 AMC 1817, 1839-40 (5th Cir. 2017).

these facts.¹¹⁴ This was due to Freightplus being held partially liable and therefore, its attorneys' fees are an expense of its own conduct and not a product of another's actions.¹¹⁵ This rule comports with the reasoning in *Odd Bergs*, that litigating under an indemnity theory is not the same as being an actual indemnitee.¹¹⁶ By going beyond the legal theory and analyzing whether a party is at fault allows for attorneys' fees to be reserved only to situations where the expense would not have been incurred but for the conduct of another party.

V. CONCLUSION

In conclusion, the Fifth Circuit affirmed its semi-strict approach to shipper liability when an intermediary fails to remit payment and release is only permitted where the carrier expressly agrees to such release.¹¹⁷ Further, the Fifth Circuit recognized the relationship between an NVOCC and VOCC as a special relationship giving rise to maritime tort indemnity.¹¹⁸ This is of note because it seems the relationship will be recognized down the chain of contracting but not up the chain.¹¹⁹ Finally, the Fifth Circuit echoed its approach to attorneys' fees in an indemnity action, reserving them only in true indemnitee-indemnitor situation.¹²⁰ Thus, the Fifth Circuit will not grant attorneys' fees where the theory is indemnity veiling a situation of contributory fault.¹²¹

Gage Whirley*

114. *Id.*; *Sea-Land Serv., Inc. v. Crescent Towing & Salvage Co.*, 42 F.3d 960, 963, 1995 AMC 1073, 1077 (5th Cir. 1995); *Odd Bergs Tankrederi A/S v. S/T Gulf Spray*, 650 F.2d 652, 653-54 (5th Cir. 1981).

115. *GIC Servs.*, 866 F.3d at 666, 2017 AMC at 1840.

116. *Odd Bergs Tankrederi*, 650 F.2d at 655.

117. *GIC Servs.*, 866 F.3d at 667-68, 2017 AMC at 1841-43.

118. *Id.* at 656, 2017 AMC at 1824.

119. *Id.*; *cf. LCI Shipholdings, Inc. v. Muller Weingarten AG*, 153 Fed. App'x 929, 931, 2005 AMC 2993, 2996 (5th Cir. 2005).

120. *GIC Servs.*, 866 F.3d at 663-64, 2017 AMC at 1835-37.

121. *Id.* at 665-66, 2017 AMC at 1838-40.

* © 2018 Gage Whirley. J.D. candidate 2019, Tulane University Law School; B.A., Political Science, 2016, Virginia Polytechnic Institute and State University. The author would like to thank his mentor, Bryant Gardner of Winston & Strawn LLP, for his comments and guidance during the writing process of this Case Note.