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MARINE INSURANCE AND THE SUBSTANTIVE ADMIRALTY LAW*

A Comment on the Wilburn Boat Company Case

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On January 1, 1954, an admiralty lawyer would have predicted with confidence that the rule governing the breach of express warranties in a marine insurance contract was a part of the general admiralty law and, as such, binding in all courts, state and federal. Although there was no Supreme Court case expressly so stating, he would have based his belief on the assumption that marine insurance was at the "heart" of admiralty law[1] and on the decisions of federal courts of appeal[2] on this precise issue. He would not have been concerned with the absence of congressional action and he would have been fortified by the trend of Supreme Court decisions[3] relating to the rights of maritime workers in which the principle of federal supremacy of the substantive admiralty law had been forcefully reiterated. He probably would not have indulged in the historical reflection that this principle, first enunciated in the *Jensen* case,[4] was of relatively recent origin and had had a checkered career.[5] He might or might not have observed the possible relevance of recent Supreme Court adjudication with respect to state power over choice-of-law rules[6] and particularly state legislative power over insurance

*At the invitation of the editors, Professor MacChesney undertook to write this article especially for the memorial issue as a tribute to Professor Durfee, his former teacher.—Ed.

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1 Gilmore and Black, The Law of Admiralty, c. II (1957), hereinafter cited as Gilmore and Black. The present writer is indebted to these learned writers for their excellent discussion of the Wilburn decision [348 U.S. 310 (1955)] and its possible implications.

2 Aetna Ins. Co. v. Houston Oil Transport Co., (5th Cir. 1931) 49 F. (2d) 121; Home Ins. Co. v. Ciconett, (6th Cir. 1950) 179 F. (2d) 892; and the Wilburn Boat Company case in the Fifth Circuit (1953) 201 F. (2d) 833.

3 The most recent decision was Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

4 Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918), was the first application.

5 See Caldarola v. Eckert, 332 U.S. 155 (1947).

6 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

contracts.[7] State statutory regulation of the terms of other types of insurance policies would also have seemed irrelevant to his prediction.

If the shadow of the decision of the Fifth Circuit in *Cushing v. Maryland Casualty Company*[8] crossed his mind, he would probably have assumed that the Supreme Court would set it right, or that, at most, the decision would be confined to the interrelationship between direct action statutes and the Limited Liability Act.[9] In any event, it is doubtful he would have suspected that it might be the precursor of authoritative holdings that would undermine the basis of his confident prediction.

In the *Cushing* litigation, the plaintiffs, representatives of seamen drowned in a tugboat accident, brought a direct action under the Louisiana Direct Action Statute[10] against the liability underwriters of the tugboat owner to recover for damages under the Jones Act.[11] There was diversity jurisdiction. The district court[12] dismissed the action as to the underwriters by summary judgment because the Louisiana statute was held not applicable to marine insurance, and, if applicable, it was invalid as being in conflict with the Limitation of Liability Act in which Congress, acting under its admiralty powers, had occupied the field. It was also invalid because it impaired the characteristic features of the general maritime law. The damage claims, already filed in the limitation proceeding, must therefore be litigated in that forum.

On appeal, the Court of Appeals for the Fifth Circuit[13] disagreed. The Louisiana Direct Action Statute was held to be applicable. The court held further that the direct action constituted only a cumulative remedy within state power under the saving clause,[14] and was a permissible regulation of insurance under the McCarran Act.[15] It was, therefore, not in conflict with the general admiralty law, nor with the purpose of protecting shipowners in the Limited Liability Act.

7 Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943). Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), might have sharpened the analogy.

8 (5th Cir. 1952) 198 F. (2d) 536.

9 49 Stat. 1479 (1936), 46 U.S.C. (1952) §§183-189.

10 La. Rev. Stat. (1950) §22-655.

11 41 Stat. 1007 (1920), 46 U.S.C. (1952) §688.

12 Cushing v. Texas & P. Ry. Co., (E.D. La. 1951) 99 F. Supp. 681.

13 (5th Cir. 1952) 198 F. (2d) 536.

14 Cf. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

15 59 Stat. 33 (1945), as amended, 15 U.S.C. (1952) §1012.

The Supreme Court[16] vacated this judgment and remanded to the district court with directions to continue the case until completion of the liability proceeding. The Supreme Court was so divided that there was no opinion of the Court. Four of the justices joined in an opinion by Justice Frankfurter,[17] which announced the judgment of the Court. The McCarran Act was held not to be relevant. Without passing on the question of whether the Louisiana statute conflicted with the general admiralty law, the opinion held that it did conflict with the Limited Liability Act as defeating both the *concursus* of claims and the limitation of shipowner's liability. Justice Clark's concurring opinion[18] was the basis for the disposition of the controversy. He found it unnecessary to invalidate the Louisiana statute. By postponing the damage actions until the limitation proceeding was terminated, the shipowner is protected. In this way, there is no interference with the limitation proceeding. He did not regard the *concursus* argument as so clear that a state statute should be invalidated at this stage.

The dissenting views of the four other justices were expressed by Justice Black.[19] They would have affirmed the judgment of the court of appeals. In support of this conclusion, Justice Black's opinion defined the uniformity requirement in admiralty as restricted to the "essential features of an exclusive admiralty jurisdiction." The opinion then cited the extent of previous permitted state power, and stated that neither Congress nor the Court had established uniform rules for the regulation of marine insurance to the exclusion of the states. The jurisdiction of the states over marine insurance policies was said to be concurrent. The opinion added:[20] "No reason has been advanced why marine insurance, long the province of the states, so imperatively requires uniformity that we should now hold that Congress alone can regulate it." Therefore, enforcement of the Louisiana statute would not impair uniformity but would provide additional relief not otherwise available in admiralty.[21] The balance of the opinion was devoted

16 Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954). The case has not as yet been tried on the remand. Depositions are still being taken.

17 Id. at 410. Justices Reed, Jackson, and Burton joined.

18 Id. at 423.

19 Id. at 427. The Chief Justice, Justice Douglas, and Justice Minton concurred.

20 Id. at 430-431.

21 See Red Cross Line case, note 15 supra, and Just v. Chambers, 312 U.S. 383 (1941).

to an attempt to refute the majority's construction of the Limited Liability Act. The McCarran Act alone was said to be a sufficient basis for upholding the Louisiana statute.

The attitude toward marine insurance as a subject of uniform general admiralty rules in Justice Black's opinion not only lengthened the shadow cast by the court of appeals but proved to be the precursor of the majority opinion in *Wilburn Boat Co. v. Fireman's Fund Insurance Company*,[22] decided February 28, 1955, a decision decisively upsetting the confident prediction of our admiralty lawyer. Justice Clark, who had stood alone in the *Cushing* decision, joined the *Wilburn* dissenters and thus created an effective majority for this viewpoint. The dissent in *Cushing* could be reconciled with the maritime-but-local doctrine. The Direct Action statute could be assimilated as an additional remedy within the saving clause. But the tenor of the opinion, with its emphasis on state power to regulate insurance in the public interest, the denial of a need for uniformity in marine insurance, and the clear implication of state power in the absence of congressional action, would prove to be the more significant aspect of the dissent.

The central question in the *Wilburn* litigation became whether the consequences of breaches of express warranties in the marine insurance policy issued by the insurer on insured's small houseboat, the *Wanderer,* were to be determined by admiralty law or by state law. The three Wilburn brothers, merchants in Dennison, Texas, had purchased the *Wanderer,* then laid up at Greenville, Mississippi. The Wilburns purchased the boat for use on Lake Texoma, an artificial inland lake on the border of Texas and Oklahoma. Before moving the boat, the Wilburns sought, through their Texas insurance agent, who did not handle marine insurance, marine coverage for the interstate journey through five states to its destination, Lake Texoma, and its use there. A full marine risk policy containing a fire clause was issued by the Chicago office of the insurer, a California corporation, through the Cleaveland Agency, of Rock Island, Illinois, acting for the insurer.

The boat was destroyed by fire of unknown origin on February 25, 1949, as she lay afloat moored 300 yards from the Oklahoma shore of Lake Texoma. The policy provided that the in-

22 348 U.S. 310 (1955).

surance should be void if the vessel was sold, assigned, transferred, or pledged without the previous written consent of the insurers.[23] The policy also contained a warranty by the insured that the vessel would be used solely for private pleasure purposes and would not be hired or chartered unless the insured granted permission by indorsement on the policy.[24]

The insured filed proof of loss. The insurer refused payment because of claimed breaches of these conditions. Insured filed suit in a Texas court, but the cause was removed because of diversity. The parties stipulated that the Wilburns had "sold" the boat to the Wilburn Boat Company, an Oklahoma corporation which they wholly owned; that the boat was chartered and used for hire, and that the vessel was mortgaged. The insurer defended on the basis of these breaches of the warranties. The insured claimed that the policy was a Texas contract by virtue of a Texas statute[25] and that other Texas statutes invalidated an encumbrance clause[26] and made the breach of the pleasure warranty no defense unless it was shown that the breach contributed to the loss.[27] They also asserted that the transfer to the Oklahoma corporation was not a breach and that the insured had waived or was estopped from claiming breach of the pleasure warranty.

23 "It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers."

24 "Warranted by the Assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this Policy and shall not be hired or chartered unless permission is granted by endorsement hereon."

25 Tex. Civ. Stat. (Vernon, 1952) art. 21.42 provides: "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

26 Tex. Civ. Stat. (Vernon, 1952) art. 5.37: "Any provision in any policy of insurance issued by any company subject to the provisions of this law to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void, shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

27 Tex. Civ. Stat. (Vernon, 1952) art. 6.14: "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

The case was tried before the court without a jury. The district court, in a brief opinion in the form of a letter to counsel,[28] dismissed the action. He first held it was a maritime contract covering a vessel on navigable waters in and outside of Texas and that Lake Texoma was navigable. He further held that, being a maritime contract, it was governed by the general admiralty law and not by the law of Texas, and, under that general law, breaches of the warranties voided the policy by virtue of the literal performance[29] rule.

The Court of Appeals for the Fifth Circuit,[30] in affirming the judgment, agreed entirely with the district court. It found the maritime law controlling even though the action commenced in a state court. It held that, under that general maritime law, warranties must be enforced as written. Construing insured's argument to be not that maritime law did not control, but that the Texas statutes modified it, the court acknowledged a conflict and found the state law invalid as hostile to the characteristic features of the substantive maritime law, citing its own decision in the *Cushing* case. The court further rejected the arguments that the statutes were regulatory in nature and that they were validated by the McCarran Act.

The Supreme Court of the United States reversed.[31] In an opinion by Justice Black, the Court held that there was no general admiralty rule covering the case, and that the Court would not "fashion" one. The case was remanded for trial under the "appropriate" state law.[32] The Court majority included Chief Justice Warren and Justices Douglas, Clark, and Minton. Justice Frankfurter concurred[33] in the result as justified by the local character of the controversy but argued in his separate con-

28 Unreported. The opinion may be found at pages 19-20 of the Transcript of Record in the Supreme Court of the United States, October Term, 1954, No. 7, Wilburn Boat Company, Petitioners, vs. Fireman's Fund Insurance Company.

29 See 2 ARNOULD ON MARINE INSURANCE, 14th ed. by Lord Chorley, c. 20 (1954), for a discussion of the development of this rule and its application in England. See, also, Vance, "The History of the Development of the Warranty in Insurance Law," 20 YALE L. J. 523 (1911).

30 201 F. (2d) 833 (1953).

31 348 U.S. 310 (1955).

32 Id. at 321, and footnote 6, p. 313, which reads, in part, as follows: "The Court of Appeals assumed that if any state law applied it was that of Texas. The question of the appropriate state law is not before us, however, and we express no opinion on that aspect of the case. Cf. *Watson* v. *Employers Liability Assur. Corp.*, 348 U.S. 66. . . ."

33 348 U.S. 310 at 321 (1955).

currence that the opinion of the Court was unnecessarily broad and should not be applicable in a case presenting the need for uniformity in the general maritime law of insurance.

Justice Reed, joined by Justice Burton, dissented.[34] Justice Reed, while indicating a willingness to reconsider the literal performance rule, would have, in the absence of such reconsideration, applied the settled literal performance rule as part of the general admiralty law in existence before the adoption of the Constitution and followed by the lower federal courts since that time. Interference by state law with respect to breaches of warranties in marine insurance contracts is an a fortiori interference with the necessary uniformity of maritime law in its interstate and international relations. Such state interference has been declared invalid in countless other cases and should be forbidden here.

The majority opinion conceded that the policy in issue was a maritime contract within federal jurisdiction under the Admiralty clause of the Constitution. But, while the lower courts had assumed that the substantive admiralty law governed, the Court denied that the terms of such a contract could be governed only by some federal admiralty rule. Remarking that much regulatory power had been left to the states, and particularly with respect to insurance companies and their contracts, the Court noted Congress had not acted and acknowledged that much of the controlling general admiralty law had been fashioned by itself, and that such rules were as supreme as an Act of Congress.

The Court then defined the issues in the case to be (1) whether there was an existing judicially established admiralty rule governing these warranties, and (2) if not, should the Court "fashion" one?

In examining the question of whether there was a judicially established federal admiralty rule, it disposed of its decision in the *Coos County* case,[35] the only Supreme Court decision so cited by the Fifth Circuit, on the ground that marine insurance was not involved and no marine insurance rule was relied on. The decision was explained as part of the "general commercial law" applicable in diversity cases to all insurance warranties prior to the *Erie*[36] decision, and that the literal performance rule has not

34 Id. at 324.
35 Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452 (1894).
36 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

been regarded as one peculiar to the admiralty except in two circuits.[37] Other circuits applying the rule were said to be following state law[38] or applying the "general commercial law"[39] of the *Swift v. Tyson*[40] era. An early dictum in a Supreme Court marine insurance case[41] was not made with reference to a federal admiralty rule. Consequently, it concluded that no literal performance rule had been judicially established, and, therefore, state law must govern unless the Court now established a controlling rule.

Proceeding, then, to the second issue, the Court reviewed the history of insurance regulation and its own precedents[42] concerning federal-state power in this area. It treated this history and these precedents as establishing primary, if not exclusive, state power over insurance, and, specifically, marine insurance as much as any other kind of insurance, at least until its decision in the *South-Eastern Underwriters* case[43] in 1944. The McCarran Act,[44] and previous congressional consideration of the problem, was said to show congressional intention to leave insurance regulation to the states. No distinction was drawn between regulation and the substantive rules governing marine insurance contracts. Both were assumed to be subject to state law in the absence of action by Congress or the Court.

This history was also alleged to demonstrate the greater difficulties of judicial as distinguished from congressional resolution of the problem. While Congress could pass a comprehensive code, the judicial method would result in marine insurance being largely unregulated for many years. To formulate an admiralty rule in the instant case would be difficult. The "harsh"[45] literal performance rule could be adopted, but most states have abandoned it wholly or partially. Some state statutes prohibit forfeiture in the absence

37 Note 2 supra.

38 348 U.S. 310 at 315, cases cited in footnote 12.

39 Ibid., cases cited in footnote 13.

40 16 Pet. (41 U.S.) 1 (1842).

41 Hazard's Administrator v. New England Marine Ins. Co., 8 Pet. (33 U.S.) 557 at 580 (1834).

42 Hooper v. California, 155 U.S. 648 (1895), and Nutting v. Massachusetts, 183 U.S. 553 (1902), were cited as relevant precedents. These two cases involved prosecutions of brokers for obtaining marine insurance from foreign insurance companies that were not licensed in accordance with state statutes governing admission of such companies. They did not involve substantive regulation.

43 United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944).

44 59 Stat. 33 (1945), as amended, 15 U.S.C. (1952) §1012.

45 348 U.S. 310 at 320.

of bad faith or fraud, and others, such as Texas, believing this inadequate, require the breach to contribute to the loss insured against. The choice of the best rule is a policy question for Congress. Therefore, the Court, citing its previous refusal to "fashion" a rule in *Halcyon v. Haenn*,[46] refused to undertake the task. After referring to the growth of the insurance business under state regulation and the reluctance of Congress to act even in marine insurance, where its power to so act is conceded, the Court "leave[s] the regulation of marine insurance where it has been—with the States."[47] Which state's "regulation" was to apply in the instant controversy was left for determination in the new trial to be held after remand.[48]

What will be the consequences of this apparently far-reaching decision? Since Congress has legislated with respect to only a few matters[49] in the marine insurance field, will there be any other part of marine insurance governed by the general admiralty law? Would the Court find any aspects of marine insurance in which a judicially created rule can be said to be controlling? If not, will the decision be confined to marine insurance? Or is it applicable to all questions of admiralty law on which Congress has not acted or for which no judicially fashioned rule can be ascertained? In his petition for rehearing, counsel for the insurance company wrote that losing a judgment was one thing, to lose the "law" was another.[50] Has the principle of federal supremacy of the substantive admiralty law been seriously undermined?

The opinion of the Court made no effort to reconcile its decision with the Court's own recent holdings[51] on federal suprem-

[46] Halcyon Lines v. Haenn Ship C. & R. Corp., 342 U.S. 282 (1952).

[47] 348 U.S. 310 at 321.

[48] Ibid. After the remand, the case was retried by stipulation "on the evidence admitted and judicial admissions of fact heretofore made in this cause in this Court, on which judgment was entered on December 13, 1951." The district court found for the insured, holding the Texas statutes applicable on evidence that the insurer was doing business within Texas. This evidence not being in the record, the Fifth Circuit on appeal held that the case must be reversed for a new trial in which all the issues can be reopened, and new evidence introduced. Petition for rehearing has been denied.

[49] 64 Stat. 773 (1950), 46 U.S.C. (1952) §§1281-1294 (war risk insurance); 41 Stat. 992 (1920), as amended, 46 U.S.C. (1952) §868; 52 Stat. 969 (1938), as amended, 46 U.S.C. (1952) §§1271-1279.

[50] Edward B. Hayes, Esq., of Chicago, Illinois, Petition for Rehearing, Supreme Court of the United States, October Term, 1954, No. 7, page 16. "But the effect of the majority opinion goes far beyond the mere loss of a judgment inflicted on a party. To lose a case is one thing. To lose the law is frightening."

[51] See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), and Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

acy in maritime worker cases. It is possible the Supreme Court could assert federal supremacy for maritime workers but not for other maritime questions.[52] But this would be a difficult distinction to defend. The same considerations that make seaworthiness a matter of substantive maritime law would seem equally applicable to other distinctive admiralty subjects, including marine insurance. There are, of course, congressional statutes such as the Jones Act[53] and the Lien Act.[54] But there are subjects such as general average in which the admiralty law, as in marine insurance, is based on case-law, practice, and assumptions as to its exclusively maritime character. In seaworthiness and maintenance and cure, the Court might feel that the rules had been judicially established. Nonetheless, the criterion employed in *Wilburn* would be difficult to apply, and the distinction difficult to justify.

The Court's opinion was conspicuous for its omission of any discussion of the need for uniformity in the admiralty that has been constantly stressed in the *Jensen*[55] and successor cases.[56] In fact, the Court assumed explicitly that in the absence of an Act of Congress or of controlling federal decisions, state law must be applicable. The insurance company contention that state interference with required uniformity was unconstitutional was given short shrift in a footnote.[57] Yet such a contention was soundly based on doctrine upheld in the previous decisions defining the area of exclusive admiralty competence.

The thrust of the Court's opinion was clearly directed at the insurance regulation problem. Dissatisfaction with the harshness of the "literal performance" rule was evident. The emphasis was on the power of the states to change, through corrective legislation, insurance policy provisions believed to be unfair because of inequality in bargaining power. The literal performance rule may be an anachronism in modern American contract law. It has been vigorously criticized.[58] All this enables one to understand the result.

But it does not answer the question as to why the Court chose

52 See GILMORE AND BLACK 63.
53 41 Stat. 1007 (1920), 46 U.S.C. (1952) §688.
54 41 Stat. 1005 (1920), 46 U.S.C. (1952) §§971-975.
55 Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
56 See, e.g., cases cited note 51 supra.
57 348 U.S. 310 at 321, footnote 29.
58 See, e.g., Patterson, "Warranties in Insurance Law," 34 COL. L. REV. 595 (1934), and PATTERSON, ESSENTIALS OF INSURANCE LAW, 2d ed., (1957) *passim.*

not to fashion a new rule of its own that would have abolished or ameliorated the "literal performance" rule. One reason may have been that the existing case law sustained the literal performance rule. It would be more difficult to formulate a completely different rule in the face of these precedents than to choose among previously competing views. Nonetheless, the Court in the past has not hesitated to fashion new rules in the admiralty.[59]

It would have been as possible for the Court to formulate a rule for this situation as it has proved to be in comparable admiralty cases.[60] The dissenting opinion revealed a willingness to reconsider what it considered to be the settled rule of literal performance.[61] Rules of public policy in contracts do not present unfamiliar judicial problems to the same extent as issues that involve complex administrative regulation. A comprehensive code was not required. If the causation rule of the Texas statute[62] had been adopted, the question of causation could have been familiarly dealt with by a jury under appropriate instructions. If a requirement that the breach must materially increase the risk of the New York type[63] had been adopted, this, too, could be similarly administered. Furthermore, a judicial solution of the type envisaged might prove to be more effective in achieving the desired result than reliance on the state law and regulation that would be applicable under the actual decision.[64] Moreover, such a judicial solution would be more certain than the various state laws and regulations. If Congress found the solution unsatisfactory, it could correct it in the light of experience. No code for the whole field would be necessary, and congressional action on this specific narrower issue would be easier to obtain.

The superior ability of the legislative process for the consideration of all viewpoints, while theoretically true, is equally relevant in the many areas in which the Court has fashioned a

[59] In the Halcyon case, note 46 supra, they refused to fashion a rule but said that to some extent admiralty courts have felt "freer than common law courts in fashioning rules," and, in the Hawn case, note 4 supra, where they did fashion a rule, they referred to their "traditional discretion" in developing rules. In Wilburn itself, the Court said it had "fashioned a large part of the existing rules that govern admiralty."

[60] Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), decided after Wilburn, is a good example. See discussion of Bisso case subsequently in text at note 135.

[61] 348 U.S. 310 at 326.

[62] Quoted in note 27 supra.

[63] 27 N.Y. Consol. Laws (McKinney, 1949) §150.

[64] See discussion of state enactments, in text infra, at note 90.

controlling admiralty rule.[65] The historic fact is that Congress has seldom intervened and that the Court has played the major role in the development of admiralty law. Consequently, the Court's reliance on legislation as the superior federal solution is not a convincing basis for its decision.

The Court's most recent previous refusal to "fashion" a rule should not have encouraged such a solution. In *Halcyon v. Haenn,*[66] the Court, in an opinion by Justice Black, had suggested a congressional solution for the determination of the ultimate responsibility for unseaworthiness between shipowners and stevedoring companies, who had both contributed to the condition.[67] Congress did not act, but the lower federal courts,[68] dissatisfied with the result, developed new theories which were eventually adopted by the Supreme Court itself.[69] Thus, in effect, in a relatively short period, the solution adopted by refusing to fashion a rule was rejected by the Court, speaking through a different majority.

Justice Frankfurter's concurrence[70] suggested a solution of the controversy by the application of the familiar maritime but local doctrine. The dissent felt this doctrine was not appropriate for marine insurance.[71] The Court's opinion referred to the doctrine[72] but did not discuss the possibility of applying it in the instant case.[73] The doctrine, although a necessary tool for the ad-

65 Congress could, for example, weigh the competing considerations involved in fashioning the right of recovery of injured maritime workers.

66 342 U.S. 282 (1952).

67 The refusal was phrased in terms of not fashioning new judicial rules of contribution as between joint tortfeasors.

68 Notably the Second and Third Circuits. See discussion in GILMORE AND BLACK, c. VI, §§6-57.

69 Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956); Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563 (1958).

70 348 U.S. 310 at 321.

71 Id. at 334-335.

72 Id. at 313.

73 It should be noted that petitioner's brief was in substance an argument based on the maritime but local doctrine and did not urge the broad doctrine adopted by the Court. Petitioner's brief had also suggested a distinction between those terms of a marine insurance policy which were asserted to be peculiarly maritime, such as a perils of the sea clause, and terms asserted to be not peculiarly maritime, such as the anti-lien and pleasure use warranties. Fortunately, none of the opinions adopted this distinction, which would have encouraged litigation and would have resulted in different terms in the same policy being governed by different sources of law. This would not have been a satisfactory solution for either insured or insurers. Compare the similar task created by the decision in Bank of America National Trust & Savings Assn. v. Parnell, 352 U.S. 29 (1956).

justment of national and local interests in admiralty, would be difficult to apply to marine insurance policies and would seem to have limited utility for the national and international operation of marine insurance.[74]

The controversy was remanded with instructions to apply the "appropriate" state law.[75] While the decision has been generally criticized by the commentators,[76] this aspect of the decision has not received much emphasis. Yet, in assessing the consequences of a decision apparently denying the need for uniformity in admiralty, at least in marine insurance, the probabilities of chaos introduced by the application of state choice-of-law rules can not be minimized. The existing confusion in state choice-of-law rules with respect to contracts is well known. There would be more than the usual difficulty in identifying the "place of making."[77] The place of performance would frequently be unpredictable.[78] The "center" of the transaction might be equally difficult to ascertain.[79] The intention of the parties, if not embodied in an express choice-of-law provision, offers no more certainty. One commentator assumed that, for ocean commerce, the law of the state of the home port would apply.[80] Such a choice might be embodied in an express provision. The provision might be valid,[81] but, if it were in conflict with a state regulatory statute deemed applicable, its validity would be doubtful on the basis of current Supreme Court decisions.[82]

Justice Reed's dissent suggests three possible choices of law: "that of the State where the insurance contract was issued, the State of the accident, or the State of the forum?[82a] The first of

[74] Because marine insurance typically involves coverage on a national or international basis, statutes geared to local conditions are not as useful or appropriate as in the case of pilotage statutes, for example. On the other hand, the atypical fact situation in the instant case might justify a special application of the doctrine, as Justice Frankfurter suggested.

[75] Note 32 supra. Cf. Siegelman v. Cunard White Star, Ltd., (2d Cir. 1955) 221 F. (2d) 189; Jansson v. Swedish American Line, (1st Cir. 1950) 185 F. (2d) 212.

[76] GILMORE AND BLACK 44-45, 61-63; 35 BOST. UNIV. L. REV. 435 (1955); 43 ILL. B. J. 741 (1955); 54 MICH. L. REV. 277 (1955); 1 N.Y.L.F. 360 (1955); 103 UNIV. PA. L. REV. 813 (1955); 40 MINN. L. REV. 168 (1956); 29 So. CAL. L. REV. 359 (1956); Yancey, "State Regulation of Marine Insurance," 23 INS. COUNSEL J. 143 (1956).

[77] Cf. Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y.S. 4 (1936).

[78] See Siegelman v. Cunard White Star, Ltd., (2d Cir. 1955) 221 F. (2d) 189.

[79] Cf. Auten v. Auten, 308 N.Y. 155, 124 N.E. (2d) 99 (1954).

[80] 54 MICH. L. REV. 277 (1955).

[81] See Siegelman case, note 78 supra.

[82] See, especially, Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954).

[82a] 348 U.S. 310 at 334.

these may or may not be the place where the contract was made in view of the "localizing" statutes in many states, including Texas.[83] Some commentators[84] have assumed that *Wilburn* decided that the law of the place of making applied and that Texas was the place where the contract was made. This is clearly wrong. The Court stated explicitly that the "applicable" law was to be determined on the new trial.[85] The equally fortuitous possibilities inherent in the use of the place of the accident would lead to the same confusion that the contract rule would involve. The law of the forum has little to be said for it in theory but might be applicable by virtue of the "localizing" statutes.[86] None of these possibilities offer much prospect of certainty of application in the commercial field of marine insurance.

Although the Court's opinion emphasizes the power of the states to legislate on marine insurance policy terms, it is hard to believe that state decisions embodying state policy would not be equally applicable.[87] If not, a distinction between statutes and case-law would fly in the face of the concurrent development of the *Erie*[88] doctrine. The subjection of marine insurance policies dealing with interstate and international maritime risks to the episodic course of state decisions in conflicts cases would be the very negation of the "national" law supposedly immune[89] to the *Erie* thesis. But it seems implicit in the Court's opinion that this is the course to be followed. Such a consequence can hardly be conducive to the orderly development of a body of law for an essentially interstate and international business. It may be doubted that the decisions in the state cases were designed for application to marine insurance problems or that the need of uniformity in maritime matters was considered. In the instant case, the question

83 Note 25 supra.

84 GILMORE AND BLACK, at p. 62, say the case "was remanded with directions to give effect to the Texas statutes." Clark, C.J., in A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., (2d Cir. 1958) 256 F. (2d) 227 at 229-230, where it is assumed that the contract was "made" in Texas and that Texas law was applicable. PATTERSON, ESSENTIALS OF INSURANCE LAW at p. 58 refers to Wilburn as creating "some confusion" by holding applicable "the law of the state where the boat was located and the contract was made."

85 See quotation in note 32 supra.

86 See, e.g., the Texas statute, note 25 supra.

87 See GILMORE AND BLACK 63.

88 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

89 Stevens, "Erie R. R. v. Tompkins and the Uniform General Maritime Law," 64 HARV. L. REV. 246 (1950), and cases cited in note 51 supra. See, also, Levinson v. Deupree, 335 U.S. 648 (1953).

interesting the Court was the possible application of the Texas statutes. Only subsequent development will reveal whether state case-law will also prevail over the competing need for uniformity in the maritime law.

Even on the assumption that the Court's opinion was directed to the possible applicability of the Texas statutes or similar statutes of other states in future cases, the decision will not necessarily achieve this result to any substantial degree. Justice Black made footnote reference[90] to the insurance statutes of New York, Louisiana, and Texas as examples of the comprehensive regulation of insurance that the states had found necessary. Yet both Louisiana[91] and New York[92] specifically except marine insurance from the pertinent provisions. Only the Texas statutes[93] are possibly applicable to this problem. Moreover, Professor Patterson, a leading authority in insurance law, has characterized the state statutory developments changing the strict performance rule as "piecemeal, opportunist, and obscurely worded."[94]

Only seven states, including Texas, had adopted the "contributing-to-loss" type of statute.[95] The statutes of Rhode Island,[96] Missouri,[97] and Kansas[98] apply only to life insurance. The applicability of the remaining enactments to marine insurance is far from clear. Nebraska's statute[99] is the most comprehensive. Texas[100] and New Hampshire[101] apply only to fire insurance. Iowa's statute[102] is applicable to insurance on real and personal property. Of the seven states, only two, Texas and Rhode Island, can be considered as maritime states.[103] Moreover, the other types

90 348 U.S. 310 at 319, footnote 25.

91 La. Rev. Stat. (1950) §22.619.

92 27 N.Y. Consol. Laws (McKinney, 1949) §150(3).

93 Notes 25, 26, and 27 supra. Counsel for the insurer in the Wilburn case has argued throughout the controversy that the Texas statutes were inapplicable, and that, if the general admiralty law did not govern, then Illinois law should govern as the place where the contract was "made." The Illinois statutory provision on warranties is expressly inapplicable to marine insurance. Ill. Rev. Stat. (1957) c. 73, §766.

94 PATTERSON, ESSENTIALS OF INSURANCE LAW, 2d ed., 375 (1957).

95 Id. at 359.

96 R.I. Gen. Laws (1938) c. 153, §12.

97 Mo. Rev. Stat. (1949) §§376.580, 377.340.

98 Kan. Gen. Stat. Ann. (Corrick, 1949) §40-418.

99 Neb. Rev. Stat. (Reissue, 1952) §44-358.

100 Note 27 supra.

101 N.H. Rev. Stat. Ann. (1955), c. 407, §4.

102 Iowa Code (1949) §§515.101, 515.106.

103 Yancey ["State Regulation of Marine Insurance," 23 INS. COUNSEL J. 143 at 147 et seq. (1956)] has made a survey of the statutes of eleven leading maritime states, and

of state legislative reforms are also generally inapplicable to marine insurance. For example, the "increase-the-risk" statutes of Illinois[104] and New York[105] specifically except marine insurance. The statutes changing warranties into representations are largely confined to life, health, and accident policies.[106] Professor Patterson concludes his discussion of the strict performance rule by stating: "Neither legislation nor judicial decision has seriously affected the technical doctrine of warranties as applied to marine insurance."[107] He has also written, in a note on state supervision and regulation of insurance, that: "Marine insurance, still an esoteric branch of the business, has largely escaped state regulation."[108]

The significance of Professor Patterson's conclusions is enhanced by his clear disapproval of the strict performance rule in all types of insurance other than marine. In his opinion, the strict performance of marine insurance warranties involves different considerations[109] and raises different problems in the administration of justice.[110] He approves of the "contributing-to-loss" type of statute, which he characterizes as the "most radical" reform[111] only if the burden of proof is placed on the insured,[112] as in Iowa,[113] so far as physical hazards are concerned, and concedes that the juridical risk placed on the insurer is a substantial argument against this type of statute.[114] He does approve of the "in-

found that only Massachusetts and Texas expressly require that breach of a warranty must be causally related to the loss, although the applicability to marine insurance is not explicit in either statute. Three of the states exclude marine insurance from their similar warranty statutes. Two of them in effect have statutes embodying the literal performance rule. Three states have no statute dealing with the problem in general, and one which does omits any provisions concerning warranties.

104 Note 93 supra.

105 Note 92 supra.

106 PATTERSON, ESSENTIALS OF INSURANCE LAW, 2d ed., 350 (1957).

107 Id. at 308. Professor Patterson goes on to say that the applicability of the strict performance rule to the "popular forms of insurance, life, fire, accident, and liability, [it] has led to revolt."

108 PATTERSON, CASES AND MATERIALS ON INSURANCE, 3d ed., 44 (1955).

109 PATTERSON, ESSENTIALS OF INSURANCE LAW, 2d ed., 274 et seq. (1957).

110 Id. at 308.

111 Id. at 353.

112 Id. at 353-361.

113 Note 102 supra. The German law of 1908 is similar on burden of proof. Under the other American statutes, there is no such provision and courts put the burden of proof on the insurer. PATTERSON, ESSENTIALS OF INSURANCE LAW, 2d ed., 357 (1957).

114 Id. at 357-358. He points out that there have been no new statutes of this type in twenty years (as of 1957).

crease-of-risk" type of statute if carefully drafted.[115] As he points out, New York and Illinois except marine insurance from these statutes.[116] Thus it can be seen that the possible application of state statutes is of doubtful efficacy.

Although, as previously noted,[117] the scope of the holding presents an important issue, only one[118] subsequent controversy has raised specifically the question of the effect of the *Wilburn* ruling on other admiralty rules.[118a] In *Amador v. A/S J. Ludwig Mowinckels Rederi,*[119] the court held the shipowner liable to a longshoreman for violating the duty of seaworthiness because of failure to correct conditionally improper stowage. Consequently, it became necessary to determine whether the shipowner could recover over, either by implication or under the contract between them, against the stevedoring company, which had been found negligent in discharging the cargo. The contract provision on indemnity was identical in language with that involved in *American Stevedores, Inc. v. Porello,*[120] in which the Supreme Court reversed a finding that the stevedore was liable and remanded for evidence on the intention of the parties. The court of appeals remarked that it was clear that the Supreme Court in that case intended that the meaning on remand was to be determined under the admiralty law. The court of appeals referred to *Wilburn* and raised the question of whether the indemnity contract in the case at bar should now be determined under the law "of the state where it was made,"[121] and not in accordance with admiralty law. "If there is no difference in this regard between an indemnity contract like this and a contract of marine insurance, the state law ap-

115 Id. at 373.

116 Id. at 372.

117 See text at note 49 supra.

118 In Saskatchewan Government Insurance Office v. Ciaramitaro, (1st Cir. 1956) 234 F. (2d) 491, a finding of the court below that no breach of a marine insurance warranty had occurred was affirmed without reliance on the Massachusetts warranty statute "apparently applicable here," citing Wilburn.

118a In Booth Steamship Co. v. Meier and Oelhaf Co., (2d Cir., Dec. 29, 1958), unreported at this writing, Wilburn was held inapplicable to *implied* warranties in maritime service contracts, relying on the Mowinckels case, note 126 infra.

119 (2d Cir. 1955) 224 F. (2d) 437, cert. den. 350 U.S. 901 (1955). Learned Hand, C. J., wrote the opinion. The other members of the court were Judges Swan and Frank.

120 330 U.S. 446 (1947). There is a slight variation in wording in the two indemnity clauses but the Second Circuit described them as "identical." Note 119 supra, at 441. It might, of course, be argued that the Porello decision was itself conclusive on the establishment of a federal admiralty rule, and therefore that Wilburn was inapplicable.

121 224 F. (2d) 437 at 441. See text supra at note 84.

plies. . . ."[122] The choice between federal and state law was to be made on the new trial.

On the remand, Judge Edelstein held that state law would apply.[123] Even though the stevedoring contract itself is a maritime contract and the right of injured workers to recover for maritime torts is "rooted in federal maritime law,"[124] the shipowner does not acquire rights rooted in admiralty law in its contracts with the stevedore. Although the indemnity clause is related to maritime tort problems, there is not as much apparent need for uniformity in the interpretation of indemnity clauses as there is in contracts for marine insurance. Inasmuch as the whole transaction was centered in New York, the place of contracting, that law should apply, and under that law there could be no recovery over. Since the reviewing court might disagree, Judge Edelstein considered what ruling would result if admiralty law applied, and found there could be recovery over on the basis of the previous holdings in the *Porello*[125] litigation.

On appeal, the Second Circuit, an entirely different panel sitting, reversed,[126] holding that admiralty law governed, and that under the previous decisions in *Porello*[127] the stevedore was liable by virtue of the indemnity clause in the contract. The issue as to implied indemnity[127a] was, therefore, not reached The court concluded that the *Wilburn* case was intended to apply only to the "limited area" of marine insurance. In support of this conclusion, the court cited the *Jensen*[128] line of cases, *Pope & Talbot v. Hawn*[129] on the federal nature of the rights of maritime workers, and the recent implied indemnity cases[130] in which the Supreme Court had not mentioned the possible relevance of state law under *Wilburn*. Noting the emphasis the Court in the *Wilburn* case had given to

122 Ibid.

123 Amador v. The Ronda, (S.D. N.Y. 1956) 146 F. Supp. 617.

124 Id. at 622.

125 Note 120 supra; the earlier decision in Porello v. United States, (2d Cir. 1946) 153 F. (2d) 605; and the decision on remand from the Supreme Court, Porello v. United States, (S.D. N.Y. 1950) 94 F. Supp. 952.

126 A/S J. Ludwig Mowinckels R. v. Commercial Stevedoring Co., 256 F. (2d) 227 (1958). Clark, C.J., wrote the opinion and the other members of the panel were Lumbard, J., and Dimock, J. Petition for certiorari was filed, 27 U.S. LAW WEEK 3096 (Aug. 27, 1958) (No. 312), but the case has been settled.

127 Note 125 supra.

127a See subsequent decision on implied indemnity, note 118a supra.

128 Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

129 346 U.S. 406 (1953).

130 Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956); Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563 (1958).

the history of state regulation of insurance, the Court believed there was no intention in *Wilburn* to rule on the validity of state regulation of other types of maritime contracts. In support of this belief, the subsequent *Bisso* case[131] was cited where the validity of a contractual provision excusing a towboat owner from liability for negligence was decided without reference to state law. Therefore, *Porello*[132] is still good law, and the indemnity provision, construed in accordance with the admiralty law, permits recovery over against the stevedore.

This decision[133] of the Second Circuit, a court of great prestige and experience in admiralty matters, should have an important influence in determining the extent of the *Wilburn* holding. By stressing the *Wilburn* emphasis on state regulation of insurance, and confining the holding to the "limited area" of marine insurance, it should avoid sterile inquiries into the logical and theoretical implications of *Wilburn* as to the need for uniformity in admiralty.

The most persuasive aspect of the decision is its reliance on the subsequent opinions of the Supreme Court itself in cases where the *Wilburn* rationale might have been theoretically applicable. Thus, in the cases relating to implied indemnity,[134] there had been no discussion of state law. It would be impractical as well as illogical to turn to state law when the indemnity was express.

The *Bisso*[135] case is even stronger support for treating *Wilburn* as not intended to go beyond state regulation of insurance. The issue in that case was the validity of a contractual provision exempting a towboat owner from liability for its own negligence. No mention was made of state law. The Court stated explicitly that, in the absence of a controlling statute, the question "must be decided as a part of the judicially created admiralty law."[136] In *Bisso,* unlike *Wilburn,* there were conflicting decisions in the Circuits. It was, therefore, easier to "fashion" a rule in resolving this conflict than it would have been in *Wilburn* where all the previous federal decisions were in accord. Nonetheless, the basic

131 Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).
132 330 U.S. 446 (1947).
133 Note 126 supra.
134 Notes 130 and 69 supra.
135 349 U.S. 85 (1955).
136 Ibid.

policy question in the two cases is essentially the same. In both, the decisions struck down provisions that were thought to reflect inequality of bargaining power. In *Wilburn,* this was accomplished by holding state law controlling. In *Bisso,* the same result was achieved by "fashioning"[136a] a controlling admiralty rule. It is, therefore, submitted that *Bisso* is of crucial importance in predicting the extent of the *Wilburn* holding.

In summarizing the impact of the *Wilburn* decision after nearly four years, what should our admiralty lawyer predict on January 1, 1959? Has the substantive admiralty law been "lost"?[137] Has it had the possible consequences foreseen by some learned commentators?[138]

So far as the scope of the decision is concerned, the Supreme Court itself, particularly in the *Bisso*[139] case, has indicated it will not be extended on a theoretical basis. This is confirmed by the Second Circuit decision on the second appeal in the *Mowinckels* case,[140] answering Judge Hand's query on the first appeal,[141] which raised, to some extent, implications more disturbing than *Wilburn* itself.

The practical consequences of the decision appear to have been quite limited. Only one[141a] litigated controversy has presented the question squarely. The admiralty practitioners[142] do not seem to have been as disturbed by the decision as the law writers[143] have been. There has been little comment in industry journals or related professional publications.[144] What is the explanation of this disparity in emphasis?

In the first place, state laws, including regulatory statutes,[145] have not proved, on examination, to be sufficiently different from the general admiralty law to cause as much change as might have

136a Rather than "fashioning" a rule, the Court could be said to have "recognized" an existing admiralty rule.

137 See quotation in note 50 supra.

138 GILMORE AND BLACK 44-45 and 61-63.

139 349 U.S. 85 (1955).

140 Note 126 supra.

141 Note 119 supra.

141a There are now two. See note 118a supra.

142 This statement and much of what follows is based on interviews with some of the leading admiralty lawyers in Chicago and New York. Their generosity and courtesy were much appreciated by the writer.

143 Note 76 supra, and, it must be confessed, this writer, or otherwise this article would have not been undertaken.

144 Yancey, note 76 supra, is the principal such contribution found.

145 See discussion in text supra, at note 90.

been suspected. State and federal courts should be able to decide marine insurance questions much as before unless an issue similar to *Wilburn* was involved and relevant state legislation or case-law pointed to a result differing from the previous admiralty rule. The same approach to the governing rule could be taken in negotiated settlements, and marine underwriters are not inclined to litigate doubtful cases. It is significant that the Maritime Law Association's Committee appointed to consider the *Cushing* and *Wilburn* decisions has not had occasion to report any serious results flowing from these decisions.[146] Moreover, no congressional action has been proposed with respect to the *Wilburn* decision.

The factual operation of the marine insurance business may provide a further explanation. The policy in the *Wilburn* case was not sought by established shipowners nor obtained directly through a specialized marine broker or underwriter. Substantial shipowners have experienced staffs which try to check the state of compliance with warranties. If a rider is necessary to cover a known additional risk that would breach an existing warranty, then these specialists can and do obtain it. Marine underwriters and marine insurance brokers also try to keep a watchful eye on their policies, and would not normally permit a *Wilburn* situation to arise. Such a controversy is most likely to develop out of the unusual combination of a small boat owner and the utilization of a broker not familiar with marine insurance.

Despite these preventive measures, however, a *Wilburn* situation could occasionally develop and present the difficulties engendered by that decision. The central difficulty is the transitory location of the ship as a moving object. Consequently, it is not practicable to police effectively the performance of policy conditions, even by the staffs of large shipowners. Furthermore, no changes in policy terms can be devised that will be effective in every jurisdiction where the vessel goes under the policy, and where the insurer may be subject to suit. Different characterizations and different statutory and judicial choice of law rules would lead to different results. Thus, in *Wilburn* itself, the warranties would have had a different effect in Illinois[146a] than in Texas.[146b] These

[146] The Maritime Law Association of the United States, Document No. 398, pages 4033-4040 (1956); No. 407, page 4132 (1957); No. 420, page 4312 (1958).

[146a] Note 93 supra.

[146b] Notes 25, 26, and 27 supra.

are cogent reasons why it would have been better to have decided *Wilburn* under the general admiralty law.

Wilburn may, nonetheless, be a maritime but local decision in its practical consequences, although it was not decided on this doctrinal basis, as Justice Frankfurter had suggested.[147] The net impact of the decision has been in the direction Justice Frankfurter had hoped for. Not only will the decision probably be confined to the "limited area"[148] of marine insurance theoretically, but practically it is not apt to have the consequences that were feared. Thus, an unnecessarily broad decision that threatened the uniformity concept in admiralty may be chiefly significant as a salutary reminder[149] of the Supreme Court's disapproval of contract clauses thought to have been dictated by superior bargaining power.

Finally, by placing the decision on broad grounds of federal-state power, the Court made the task of bench and bar more difficult. Moreover, choosing to settle the controversy on a basis not urged by petitioner's counsel, the Court may not have had the benefit of full argument as to the practical consequences of its decision. Since congressional action was unlikely, the Court's apparent policy objectives might have been more effectively achieved by "fashioning" a new rule[150] than by leaving the question with the states.

147 348 U.S. 310 at 321-324.

148 Note 126 supra.

149 In this context, Wilburn is a successor to the decision in United States v. Atlantic Mutual, 343 U.S. 236 (1952), invalidating the "Both-to-Blame" clause.

150 See discussion in text supra, at note 60.