*Summary of Important Cruise Ship, Insurance and NIED Cases 2018-2020*

*Prepared by Attorney Barbara A. Kreitz Cook*

***Weissbergeer v Princess Cruise Lines 2020 WL 3977938 (California CD)*** NIED test limits recovery to two types of Ps: where P sustains **physical impact** as a result of Ds negligent conduct **Metro North v Buckley** (521 U.S. 424 (1997) OR where P is placed in immediate risk of physical harm by Ds conduct (Zone of Danger) AND exhibits physical symptoms from the close call (or symptoms of the disease not just fear of contracting the disease).

**Negron v. Celebrity Cruises, Inc**., 360 F. Supp. 3d. 1358, 1361 (S.D. Fla. 2018) (holding that plaintiff's negligence claim was really a claim for NIED (Negligent Infliction of Emotional Distress) because the plaintiff alleged emotional distress and mental anguish but no physical harm).

***Eslinger v. Celebrity Cruises, Inc.*, 772 F. App'x 872 (11th Cir. 2019)** H passenger claim for negligence and W for loss of consortium. Motion to Dismiss granted to cruise line and upheld on appeal as to consortium claim, as "nonpecuniary recovery not permitted under maritime law" under its 1993 and 1997 precedent and argument "calling into question" by Atlantic Sounding rejected bc "such damages are not recoverable under the statutory regimes of the Jones Act or DOHSA" (Death on the High Seas Act).

Four days later, Sct in **Dutra Group v Batterton** (2019) held that Jones Act seaman may not recover punitive damages in an unseaworthiness claim.

**Azzia v. Royal Caribbean Cruises, Ltd., 785 F. App'x 727 (11th Cir. 2019)** Suit by parents of almost drowned child for negligent infliction of emotional distress (NIED). Partial Summary Judgment for parents denied and affirmed on appeal. The court held that "this Court has already recognized that federal maritime law has adopted the zone of danger test which allows recovery if a plaintiff is placed in immediate risk of physical harm by defendant's negligent conduct". The district court properly applied the zone of danger test under maritime law in dismissing the claim as the plaintiffs failed to show that they sustained physical impact or were placed in immediate risk of physical harm.

**Plott v. NCL Am., LLC, 786 F. App'x 199 (11th Cir. 2019)** Slip and fall. Summary Judgment granted by Southern District of Florida to cruise line on the basis of lack of notice of dangerous condition giving rise to accident. 11th reversed on disputed facts: Constructive notice if defective condition existed for sufficient time to invite corrective measures. Proffered Expert testimony (that no floor mat for rain puddle was unreasonable) inadmissible as legal conclusion based on speculation.

**D'Antonio v. Royal Caribbean Cruise Line, Ltd., 785 F. App'x 794 (11th Cir. 2019)** slip and fall.. Chair leg extending in walkway "maybe" caused fall. Summary Judgment to cruise line reversed. The Eleventh Circuit cited to and reiterated the legal standards set out in Keef v. Bahama Cruise Line, Inc., 867 F.2d 1318 (11th Cir. 1989) and Everett v. Carnival Cruise Lines, 912 F.2d 1355 (11th Cir. 1990), noting that "the carrier's actual or constructive notice of the risk-creating condition is a prerequisite

to imposing liability" must be shown by Ps evidence. The court held that "eighteen minutes was a sufficient period to present a genuine issue of material fact as to whether Royal Caribbean ought to have known of the peril to its passengers."

Page 361 **Sutton v. Royal Caribbean Cruises, Ltd., 774 F. App'x 508 (11th Cir.2019)** Light machine piece fell on passenger. Cruise line showed maintenance records and testimony that no other similar incident occurred. The court noted that a ship operator can only be found liable when they have actual or constructive notice of the risk-creating condition. Liability turns on "whether the ship operator either knew, or else should have known, about the allegedly dangerous condition that the plaintiff claims caused her injury."Res ipsa loquitur requires a plaintiff to present evidence that their injury would not have occurred without negligence. Could have been design or latent defect in or faulty light equipment" not Ps negligence, so Res Ipsa Loquitor not applicable. Summary Judgment granted to cruise line and affirmed on appeal.

**Broberg v. Carnival Corp., 798 F. App'x 586 (11th Cir. 2020)** Alleged negligent over-service of alcohol to passenger, who fell overboard, body never recovered. Trial Judgment for Carnival upheld. The evidence showed that in the last hour before her fall, she did not appear visibly intoxicated to Carnival employees. Other witnesses testified that they believed she was fine and that they were not concerned for her safety. The Eleventh Circuit concluded that the district court did not err in concluding that "Carnival was not on notice that Mrs. Broberg was so intoxicated that she was in serious danger."

**K.T. v. Royal Caribbean Cruises, Ltd., 931 F.3d 1041 (11th Cir. 2019)** Minor P inebriated, served by other passengers and later sexually assaulted. Motion to Dismiss granted to cruise lines and reversed and remanded on appeal. The plaintiff had stated a claim against Royal Caribbean for both negligence and negligent failure to warn. The court reasoned that the cruise line owes its passengers a duty of reasonable care to warn about known or potential hazards, and that this could include sexual assault aboard the ship by other passengers, and it is possible cruise line had a duty to warn where agency reports noted prior instances of reported sexual assault aboard the defendant's ships.
Therefore, the plaintiff asserted a proper cause of action against Royal Caribbean.

**Heinen v. Royal Caribbean Cruises Ltd., No. 19-13750, 2020 U.S. App.**
**LEXIS 9754 (11th Cir. Mar. 30, 2020)** NIED claim for cancelled cruise due to hurricane. The second amended complaint only contained a "kitchen sink" list of alleged injuries none of which were specific to any of the plaintiffs. The dismissal was appealed to the Eleventh Circuit. On appeal the court found that the second amended complaint was nothing more than a "threadbare recital" of the elements of negligence. The plaintiffs also failed to assert they suffered any physical harm as required for a NIED claim. The Eleventh Circuit also found the plaintiffs' claim for financial losses from the delay in cancellation barred by maritime law's economic loss rule. The plaintiffs did not allege that they suffered any physical damages in conjunction with the alleged financial loss; therefore, their claims were barred by the economic loss rule. The dismissal of the second amended complaint was affirmed.

Page 365 **Lebedinsky v. MSC Cruises, S.A., 789 F. App'x 196 (11th Cir. 2019)** P purchase cruise ticket, a few days into cruise fell and was injured. She was disembarked and flown to NY for treatment. Contract Forum selection clause dictated Italy court and that Athens Convention applied, including monetary cap on PI claims. The Eleventh Circuit noted that forum selection clauses are "presumptively valid and enforceable unless the plaintiff makes a strong showing that enforcement would be unfair or

unreasonable under the circumstances." Id. at 200. The plaintiff argued that the forum selection clause was not enforceable because: it was not reasonably communicated to her; the invocation of the Athens Convention contravenes public policy and deprives her of a remedy; and her medical treatment in New York makes Naples, Italy an inconvenient forum. Court applied a two part test of "reasonable communicativeness" of the Ts&Cs of contract. This test looks at the clause's physical characteristics and whether the plaintiff had the ability to become meaningfully informed of the clause and to reject its terms. The court found that the MSC clause met both prongs of this test. The court noted that "the potential for decreased recovery is not the same as no remedy." Id. at 203. The plaintiff failed to make a strong showing that enforcement of the forum selection clause would be unfair or unreasonable since the vessel sailed to and from Italy.

**Longshore Harbor Workers Compensation Act – Turnover Duty**

1. **Purvis v. Maersk Line A/S, 795 F. App'x 756 (11th Cir. 2020)** Hatch cover fell on P, who sued the vessel/Maersk Line A/S ("Maersk") pursuant to Section 905(b) of the LHWCA alleging that the vessel breached its turnover duty by leaving a hatch cover open. The Southern District of Georgia granted summary judgment for Maersk, and the Eleventh Circuit affirmed on appeal. The plaintiff appealed based solely on the turnover duty arguing the hatch was either defective or a Maersk employee opened the hatch cover and failed to latch or secure it properly. There was "no evidence, other than speculation, that the hatch cover and lock were defective on the day of the accident." or that Maersk employee left the hatch open but failed to secure it. The Eleventh Circuit reasoned that if the hatch door was not latched, it should have been open and obvious to Purvis "when he, as an experienced longshoreman, could have remedied the potential hazard.

Page 368 C. **Marine Insurance**

**1. GEICO Marine Ins. Co. v. Shackleford, 945 F.3d 1135 (11th Cir. 2019)** Loss declined due to Breach of nav limits in Geico insurance policy, which specified geographical limits north of Cape Hatteras June 1-Nov 1. After haul out in Florida changed policy to port risk ashore. Then decided to sail to Ft Lauderdale for further repairs prior to June 1 and changed back to nav limits. But didn't get hauled out and was anchored after June 1 when storm caused anchor to drag and damaged. DC found coverage due to ambiguity but appellate court held there was no ambiguity
created by using the term "cruising limits" on the declaration page instead of "navigational area" referenced elsewhere in the policy.

2. **Reliable Marine Towing v Thomas & State Farm 789 F.App'x 805 (11th Cir 2019)**

John Thomas' boat partially sank in a storm off the coast of Florida. The plaintiff Reliable Marine Towing & Salvage, LLC ("Reliable Marine") provided assistance in refloating the vessel and Thomas was able to get the boat to shore. Thomas then filed a claim against his marine insurer State Farm Fire and Casualty Company ("State Farm"). State Farm's policy with Thomas covered up to $6,750.00 worth of damage to the boat as well as wreck removal; however, wreck removal costs were included in the overall policy limit. If the combined costs of repair to the vessel wreck removal exceeded the policy limit, the policy provided for additional coverage of 5% over the limit or $337.50. The policy had an additional coverage of $500.00 for emergency services. Id. at 806. Reliable claimed its rescue services were covered separately under the policy as "sue and labor". The Eleventh Circuit, citing to First Circuit precedent, noted that if a marine insurer does not expressly agree to reimburse for "sue and labor expenses" it is a not a true ancient sue and labor clause." Id. The language in question was not a sue and labor clause, and,

therefore, State Farm had no obligation to pay Reliable Marine's invoice beyond the policy limits already paid to the owner and no duty to pay Reliable otherwise. Summary judgment for State Farm was affirmed.

Page 371
D. Foreign Arbitration Award
1. **Cvoro v. Carnival Corp., 941 F.3d 487 (11th Cir. 2019)** The plaintiff Cvoro, was a Serbian national working aboard a Carnival cruise ship. Her employment agreement contained an arbitration clause calling for arbitration in whatever country from a list of several countries was the jurisdiction closest to her home. For Cvoro, this was Monaco. The employment agreement also contained a choice of law provision based on the law of the flag state of the ship she was working aboard. In this case, it was Panamanian law that applied.

An issue of first impression in the Eleventh Circuit was whether depriving a seaman of a Jones Act remedy violates U.S. public policy for the purposes of Article V(2)(b) of the New York Convention. After assessing the available remedies under Panamanian law and the Jones Act, the court held that the remedies provided by Panamanian law were not so inadequate that enforcement of the Monegasque arbitration award would be fundamentally unfair such that it would violate public policy of the U.S. to allow the award to stand. Simply because the remedies may not be the same in different forums does not mean that the foreign arbitral award conflicted with basic notions of morality and justice such that U.S. public policy was violated for purpose of the New York Convention. The Monegasque arbitration award in favor of Carnival was upheld.

**E. Government Immunity**

**1. Evergreen Marine, Ltd. v. United States, 789 F. App'x 798 (11th Cir. 2019)**
The plaintiff purchased a vessel believing it was unencumbered by any mortgage or lien based on a search of the U.S. Coast Guard's National Vessel Documentation Center ("NVDC"). In fact, there was a mortgage on the vessel, which was recorded in 2003 on paper but that had not been transferred into electronic format. The NVDC electronic records were incorrect. The mortgage holder seized and initiated foreclosure proceedings on the vessel. Evergreen settled with the mortgage holder and sued the United States pursuant to the Federal Tort Claims Act ("FTCA") alleging that the NVDC negligently failed to record the prior mortgage. The U.S. moved for dismissal based on the misrepresentation exception to the FTCA. See 28 U.S.C. § 2680(h). This exception prevents suits against the government "arising out of … misrepresentation." Id. at 800. The district court noted that regardless of how Evergreen pled its claim, it was in essence a claim that the NVDC made misrepresentations by way of an incorrect abstract of title. On appeal the Eleventh Circuit affirmed,