RICKETY WILBURN BOAT AND ITS DILAPIDATED FLEET: MARINE INSURANCE LAW IN THE SHADOW OF UNCERTAINTY SEVENTY YEARS LATER

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I. The End of Uniformity

Prior to the mid-1950s, a maritime lawyer would have been safely assured that the rule governing the breach of express warranties[1] and the doctrine of *uberrimae fidei*[2] was uniform and binding across the nation in federal courts. Then along came *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*,[3] which led to a departure from uniformity and wreaked havoc on marine insurance because, under *Wilburn Boat,* no question of marine insurance can be determined without first engaging in a choice-of-law analysis.[4] This Comment discusses why *Wilburn Boat* and its progeny should be scuttled and suggests that a new rule headed back toward uniformity should be launched.

The calm seas to which the maritime lawyer's mind was accustomed would have been further disturbed by the 1954 case *Maryland Casualty Co. v. Cushing*.[5] In that case, the Supreme Court vacated a lower court's decision that the Louisiana Direct Action Statute,[6] as opposed to federal maritime law—specifically, the Limitation of Liability Act—applied to an action brought against the liability underwriters of a tugboat owner to recover damages under the Jones Act.[7] The Supreme Court concluded that it was unnecessary to invalidate the Louisiana statute because by "postponing the damage actions until the limitation proceeding was terminated, the shipowner was protected . . . in this way, there is no interference with the limitation proceeding."[8]

The plurality opinion did not rock the boat enough to cause great concern to our 1950s maritime attorney as the Direct Action Statute was unique to Louisiana.[9] The dissenting opinion was authored by Justice Black and joined by three other Justices,[10] who would have affirmed the judgment of the Court of Appeals and stated that the uniformity requirement was only for the

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[1] Graydon S. Staring & George L. Waddell, *Marine Insurance*, 73 TUL. L. REV. 1619, 1636 (1999) ("An express warranty is an agreement by the assured in the policy that 'certain facts are, or shall be, true, or certain acts shall be done.'"); 2 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19:15, at 481 (6th ed. 2018) ("A warranty is an undertaking in a contract of insurance.").
[2] Michael A. Rosenhouse, Annotation, *Construction And Application Of Federal Marine Insurance Doctrine Of Uberrimae Fidei*, 14 A.L.R. Fed. 3d art. 5 (2016) ("'Uberrimae fidei' means 'of the utmost good faith' and refers to the duty imposed on a prospective insured to disclose to an insurer all information that would be perceived by a reasonable person as material to the evaluation of the risk to be undertaken by the insurer, regardless of whether the information is specifically requested by the insurer. In the event an insured violates this duty, the policy may be avoided by the insurer."); SCHOENBAUM, *supra* note 1, § 19:14, at 462 ("[A] showing of a breach of the duty of utmost good faith will void the contract *ab initio* even after the risk has attached.").
[3] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955).
[4] *See* SCHOENBAUM, *supra* note 1, § 19:9, at 438 ("The choice between federal and state law is not as easy as the author of the *Wilburn Boat* majority decision seems to have assumed. The federal courts that try to engage in this exercise frequently call it 'troublesome' or 'enigmatic.'").
[5] Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954).
[6] LA. STAT. ANN. §22:655 (1950).
[7] *See Maryland Casualty Co.*, 347 U.S. at 412, 423.
[8] Brunson MacChesney, *Marine Insurance and The Substantive Admiralty Law: A Comment on the Wilburn Boat Company Case*, 57 MICH. L. REV. 555, 557 (1959).
[9] *Maryland Casualty Co.*, 347 U.S. at 413.
[10] *Id.* at 427 (Black, J., dissenting) (joined by Warren, C.J., and Douglas & Minton, JJ.).

"essential features of an exclusive admiralty jurisdiction."[11] The dissenting Justices maintained that the jurisdiction of states over marine insurance policies was concurrent with federal admiralty jurisdiction and that "[n]o 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."[12]

The dissent in *Maryland Casualty Co.* stated that the enforcement of the Louisiana Statute would run concurrently with other maritime laws and "not impair the uniformity of maritime law,"[13] thereby setting the stage for the majority opinion in *Wilburn Boat.* After the *Wilburn Boat* case was decided, our 1950s maritime lawyer would have truly been uncertain about the future of marine insurance litigation in admiralty courts.[14] *Wilburn Boat*'s central question was whether the consequences of a breach of express warranties in the marine insurance policy were to be governed by general federal maritime law or state law.[15] The lower courts held that warranties must be enforced as written under federal maritime law.[16] The Court of Appeals for the Fifth Circuit noted that the state statute conflicted with a feature of substantive maritime law; therefore, the statute was impermissible.[17] However, the Supreme Court opened the floodgates of uncertainty by reversing the Fifth Circuit's decision.[18] Justice Clark joined the dissenters in *Maryland Casualty Co*. and then wrote for the majority in *Wilburn Boat*,[19] which held that no general admiralty rule covered the case, and that the Court would not fashion one.[20] Thus, state law governed in that instance, and the Court remanded the case to the lower courts.[21]

The Court justified its holding based on the unsettled claim that at no time did general maritime law control the consequences of a marine insurance warranty breach as it has not been "judicially established as a part of the body of federal admiralty law in this country."[22] Prior to the *Willburn Boat* holding, the entrenched rule, based on English marine insurance law respecting express warranties in a hull policy, required literal performance of all express warranties[23] under the doctrine of *uberrimae fidei*.[24] Subsequently, the 'entrenched rule' changed such that "marine insurance contracts, like all others, [are] subject to state control."[25]

As the Eleventh Circuit noted in its recent opinion, *Ocean Reef Charters*, the Supreme Court failed to preserve "a uniform maritime rule regarding the effect of a breach of an express

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[11] *Id.* at 428, 430.
[12] *Id.* at 430–31.
[13] *Id.* at 431.
[14] *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 320–21 (1955).
[15] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 311 (1955).
[16] *See* Wilburn Boat Co. v. Fireman's Mut. Ins., 201 F. 2d 883, 834 (5th Cir. 1953).
[17] *See id.* at 837–38.
[18] *See Wilburn Boat Co.*, 348 U.S. at 321.
[19] *Id.*
[20] *See id.* at 320.
[21] *See id.* at 321.
[22] *Id.* at 316.
[23] *See* Staring, *supra* note 1, at 1627.
[24] *See* SCHOENBAUM, *supra* note 1, § 19:14, at 461.
[25] *Wilburn Boat Co.*, 348 U.S. at 316–17.

warranty in marine insurance policy."[26] When *Great Lakes Insurance v. Raiders Retreat Realty Co.* was argued before the Court in 2023, the Supreme Court had an opportunity to address *Wilburn Boat* but left the lower federal courts at sea without a rudder or a compass.[27] This failure to deal with *Wilburn Boat* yet again has been destructive to the uniformity of maritime law.[28] Due to the Supreme Court's silence, the unpredictable outcomes of disputes resulting in "the disadvantage of both insurers and insureds, owing to uncertainty as to which state law will govern,"[29] will continue. This is because, after *Wilburn Boat*, the lower federal courts have had to determine whether a federal law is so "entrenched" so as to prevent the application of state insurance laws.[30] The Second Circuit even went so far as to hold that foreign law can apply to a marine insurance case.[31]

The uncertainty in the post-*Wilburn Boat* maritime world has led some courts to conclude that federal maritime law—in regard to compliance with warranties—is sufficiently well established and that it may be followed under *Wilburn Boat*.[32] Different courts have concluded that no federal maritime insurance law is well established and, therefore, state law should be applied.[33] Other courts have still concluded that there is no difference between the applicable state and federal law, circumventing the issue entirely.[34] Each circuit has adopted interpretations that run the gamut.[35] There are those that "declare federal law governs the interpretation and effect of policies of marine insurance to those that contain unequivocal declarations that state law governs; there are, of course, various stops along the way."[36] Many circuits have also read *Wilburn Boat* so expansively that they apply it to cases of *uberrimae fidei*, ultimately intertwining the two doctrines.[37]

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[26] Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161, 1165 (11th Cir. 2021).
[27] *See* Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC, 601 U.S. 65, 74 (2024).
[28] *See* SCHOENBAUM, *supra* note 1, § 19:7 at 438 ("*Wilburn Boat* has (1) produced a 'crazy quilt' pattern of federal state regulation of marine insurance; and (2) bogged the courts down in complex and confusing choice-of-law questions.").
[29] *See* Staring, *supra* note 1, at 1627–28.
[30] *See* SCHOENBAUM, *supra* note 1, § 19:7 at 438–39.
[31] *See* Advani Enters., Inc. v. Underwriters at Lloyd's, 140 F.3d 157, 162 (2d Cir. 1998). Though the policy adopted English law as the applicable law, the court, nonetheless, applied maritime choice-of-law rules to determine the validity of the contract and what law applies. *Id*.
[32] *See, e.g.*, AGF Marine Aviation & Trans. v. Cassin, 544 F.3d 255 (3d Cir. 2008); Continental Cas. Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512 (7th Cir. 1999); Guam Indus. Servs. v. Zurich Am. Ins. Co, 787 F.3d 1001 (9th Cir. 2015).
[33] *See, e.g.*, Fireman's Fund Ins. Co. v. Wilburn Boat Co., 300 F.2d 631 (5th Cir. 1962); Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991).
[34] *Advani Enters.*, 140 F.3d 157 (2d. Cir. 1998); Com. Union Ins. Co. v. Flagship Marine Svs., 190 F.3d 26, 31 (2d Cir. 1999).
[35] *See* SCHOENBAUM, *supra* note 1, § 19:7 at 438–39.
[36] Staring, *supra* note 1, at 1629.
[37] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316–17 (1955) (The Court was only dealing with breach of express warranties in *Wilburn Boat,* but since the wording was vague, circuit courts have been applying the analysis to warranties, all marine insurance issues, and even general maritime law at large.); Graydon S. Staring, *Wilburn Boat Is A Dead Letter: R.I.P.*, 42 J. MAR. L. & COM. 465, 467–68 (2011); Starting, *supra* note 1, at 1632.

These different interpretations and applications have led to a circuit split, further deepened by a recent decision out of the Eleventh Circuit in *Travelers Prop. Casualty Co. of America*.[38] At the conclusion of its decision, the judges of the Eleventh Circuit implored the Supreme Court to revisit *Wilburn Boat* by stating, "[m]aybe, just maybe, this case will prove tempting enough for the Supreme Court to wade in and let us know what it thinks of *Wilburn Boat* today."[39]

The Supreme Court has punted the issue once again in *Raiders* and failed to address *Wilburn Boat's* effect on the interpretation of warranty clauses or the doctrine of *uberrimae fidei* pertaining to marine insurance contracts.[40] Yet, the Court remains silent. This uncertainty must be addressed, ideally by the adoption of legislation, as it subjects all private vessel owners to harsh and uncertain realities as they litigate policy disputes with insurance companies. Louisiana alone has more than 315,000 registered vessels, most of which are operated by private citizens and small businesses.[41] If allowed to endure, the *Wilburn Boat* analysis will continue to put those with little bargaining power in precarious waters.

Part II of this Comment addresses the *Wilburn Boat* decision and the chaos it has caused amongst the circuits; Part III discusses the recent Supreme Court case, *Raiders*, that addressed the *Wilburn Boat* analysis; Part IV explores potential solutions to restore uniformity in this area of law; and Part V is a brief conclusion advocating for the United States courts and Congress to finally address the issue left behind by *Wilburn Boat*.

II. *Wilburn Boat*'s Legacy: Seventy Years of Confusion

To understand the current circuit split over the entrenchment of strict performance of certain warranties and the doctrine of *uberrimae fidei*, one must first understand the pre-*Wilburn Boat* doctrine, the importance of uniformity in maritime law, and how *Wilburn Boat* changed it.

It is well established that "from the words of the Federal Constitution, the federal courts have spelled out the rule that maritime matters shall be governed by a uniform set of laws."[42] This uniformity is of the utmost importance in maritime law due to the interconnected nature of commerce, whether on interstate waters, territorial waters, or the high seas.[43] This rule applies internationally in a very clear-cut manner.[44] When traversing the oceans, a vessel belonging to one

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[38] Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161, 1171 (11th Cir. 2021).
[39] *Id.* (The parties of the case never applied for *writ* to the Supreme Court, so the Eleventh Circuit's plea was never addressed.).
[40] Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC, 601 U.S. 65, 74–75 (2024).
[41] Joann Muller & Emma Hurt, *Louisiana's $3.9 billion boating industry*, AXIOS (Jul. 26, 2023) https://www.axios.com/local/new-orleans/2023/07/26/louisiana-boating-industry.
[42] William C. Whitehead, *Admiralty - Uniformity Rule*, 40 MICH. L. REV. 260, 260 (1941).
[43] *See* Daniel J. Hoerner, *Maritime or state law?*, WORKBOAT (Aug. 16, 2021) https://www.workboat.com/viewpoints/maritime-or-state-law (explaining that the "underlying goal is uniformity of the legal rights and remedies that affect . . . maritime commerce").
[44] Gordon W. Paulsen, *Admiralty Law Institute Symposium on American and International Maritime Law: Comparative Aspects of Current Importance*, 57 Tul. L. Rev. 1065, 1087 (1983) (Maritime trade is international by its very nature due to the interconnected nature of navigable

nation should be able to operate with assurance that a uniform set of laws applies to its actions as it continues on its journey, or else commerce would be extremely burdened due to uncertainty.[45] That same logic applies between the states of a country, like the United States. If each state had its own set of laws for all maritime-related matters, chaos would ensue. This reasoning is why the Founding Fathers decided to make uniformity within maritime law a fundamental principle of the Admiralty Clause of the U.S. Constitution.[46] The Admiralty Clause vests the power to regulate maritime issues with the Courts of the Federal Government and Congress.[47]

Looking across the pond, under old English common law, the rule of strict performance of a contract is well settled.[48] Much of the development of this rule occurred in eighteenth-century London under a series of decisions by Lord Mansfield.[49] The string of cases he decided firmly established that warranties in maritime insurance contracts must be strictly performed.[50] Maritime authorities across the United States prior to *Wilburn Boat* had long recognized the rule that "warranties in marine insurance policies must receive literal compliance."[51]

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bodies of water, meaning that the ideal legal system to govern such global trade would be uniform in a perfect world).

[45] *See* Norfolk S. Ry. v. James N. Kirby, Pty Ltd., 543 U.S. 14 (2004).

[46] U.S. CONST. art. 3, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to all Cases of admiralty and maritime Jurisdiction.").

[47] Gordon W. Paulsen, *Admiralty Law Institute Symposium on American And International Maritime Law: Comparative Aspects Of Current Importance*, 57 TUL. L. REV. 1065, 1082 (1983) ("The power of the federal government to legislate in maritime matters arises from the application of the Admiralty Clause of the United States Constitution together with the Commerce Clause, which provides that Congress shall have the power to regulate interstate and foreign commerce. All federal legislation in the maritime field rests upon these clauses. However, states have the power to legislate in this field, at least until federal legislation preempts the field.").

[48] Staring, *supra* note 1, at 1620; *see also* William Vance, *The History of The Development Of The Warranty In Insurance Law*, 20 YALE L. J. 523, 526-32 (1911).

[49] Staring, *supra* note 1, at 1620; *see also* Vance, *supra* note 48 at 525.

[50] *See* Vance, *supra* note 48 at 526–32 (Vance discusses the development of the case law under Mansfield in-depth, ultimately concluding that the established rule is "[w]here it is a part of the written policy, it must be performed; as if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed, as being part of the agreement; for there it might be said the party would not have insured without convoy." *Pawson v. Watson,* 98 E.R. 1361 (1778).).

[51] *See e.g.*, Burritt v. Saratoga Cnty. Mut. Fine Ins. Co., 40 Am. Dec. 345, 188 (1843) ("A warranty by the assured in relation to the existence of a particular fact, must be strictly true, or the policy will not take effect; and this, whether the thing warranted be material to the risk or not."); *see also* Joel K. Goldstein, *The Life And Times Of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR. L. & COM. 395, 419 (1997) (citing Goldstein, "Judge John R. Brown, one of this century's leading admiralty judges, subsequently made clear his disagreement with *Wilburn's* holding that no rule existed when, in referring to the literal compliance rule, he wrote: '[t]his was at least the *pre-Wilburn* rule for maritime insurance policies.' (citing F. B. Walker & Sons, Inc. v. Valentine, 431 F.2d 1235, 1239 n.8 (5th Cir. 1970)).

In the 1950s, *Wilburn Boat* ended this established uniformity.[52] *Wilburn Boat* arose from a marine insurance contract on a small houseboat called WANDERER.[53] The three Wilburn brothers purchased the vessel, which was laid up in Greenville, Mississippi, for use on Lake Texoma on the border of Texas and Oklahoma.[54] Before the brothers transported the vessel, they sought marine insurance coverage for the journey and use of the houseboat on Lake Texoma.[55] The policy was a full marine risk policy, including a fire clause.[56] Shortly after the houseboat arrived for use on Lake Texoma, a fire of unknown origin destroyed the vessel as she was moored on the lake.[57] The policy had two express warranties.[58] First, the policy "provided that the insurance should be void if the vessel were sold, assigned, transferred or pledged without the previous written consent of the insurers."[59] Secondly, the policy contained a warranty that the vessel would be used solely for private pleasure purposes and would not be chartered unless the insured was granted permission.[60]

The Wilburn brothers filed a claim under the policy; however, the insurance company refused payment, citing breaches of the aforementioned warranties.[61] The insurer advanced several arguments to claim breach: (1) the Wilburns sold the boat to Wilburn Boat Co., (2) the boat was chartered often, and (3) the vessel was mortgaged.[62] Any or all of which were grounds to find breach of contract by the Wilburn brothers, thereby voiding the policy.[63]

The Wilburn brothers argued that all the breaches the insurer cited were irrelevant because, under Texas law, the insurer must show the breach contributed to the loss.[64] The Court of Appeals for the Fifth Circuit held that maritime contracts are governed by general maritime law, and breaches of warranties voided the policy under the literal performance rule.[65] The literal performance rule regarding warranties was considered established law at the time.[66] The Wilburn brothers applied for *writ of certiorari* to the Supreme Court, which was granted, and the Court reversed the decision to apply general maritime law.[67] The majority opinion hinged on the fact that contract law is typically the province of the states even though the policy at issue was a maritime contract.[68]

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[52] *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955).
[53] *Id.* at 311, 321.
[54] *Id.* at 321.
[55] *Id.* at 321.
[56] MacChesney, *supra* note 8, at 558.
[57] *Wilburn Boat Co.*, 348 U.S. at 311.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Wilburn Boat Co*., 348 U.S. at 311–13.
[63] *Id.*
[64] *Id.* at 312.
[65] *Id.* at 313 (citing Wilburn Boat Co. v. Fireman's Fund Ins. Co., 201 F.2d 833, 837 (5th Cir. 1953).
[66] *See* Staring, *supra* note 1, at 1627–28.
[67] *Wilburn Boat Co.*, 348 U.S at 321.
[68] *See id.* at 319–20.

The Supreme Court identified two issues in the case: (1) whether there was an existing judicially established or "entrenched" admiralty rule governing these warranties, and (2) if none exists, should the court "fashion" one?[69] The Supreme Court disposed of the first issue in short order, holding that there was no entrenched federal law for performance of warranties.[70] The Court justified this conclusion based on two considerations.[71] First, the general commercial law applicable to all insurance warranties in diversity cases does not warrant literal performance, and that literal performance is not peculiar to admiralty.[72] Next, the Court turned to the second issue.[73] After reviewing its precedents and the history of insurance regulation concerning state-federal power in this area, the Court concluded that the state has near-exclusive authority over insurance, including marine insurance.[74] This conclusion was bolstered by the fact that there was no Congressional action, combined with the enactment of the McCarran Act;[75] therefore, the Court assumed Congress intended to leave it up to the states.[76]

Scholars and commentators have widely lambasted this conclusion over the past seventy years, with most arguing that this decision destroys uniformity in maritime law.[77] One of the main criticisms often cited is the lack of certainty:

> This uncertainty about "rules" in the application of *Wilburn Boat* exists at both the state and federal level. In the absence of a clear statute, does the state law, the application of which is being considered, have to be as well established as would be required for the application of federal law?[78]

This "perverse assault on admiralty uniformity"[79] has led to a myriad of holdings in each individual circuit that are often impossible to reconcile with one another. The approach that each circuit uses to address the problems in the wake of *Wilburn Boat* will be discussed below.

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[69] *Id.* at 314.
[70] *Id.* 314–16.
[71] *Id.* at 314.
[72] *Wilburn Boat Co.*, 348 U.S. at 314.
[73] *Id.* at 316.
[74] *Id.* at 316–18.
[75] *See id.* at 319. Much of this holding hinged on the recently passed McCarran Act, which the Court said "contain[ed] a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States." *Id.* at 319. Throughout the opinion, the Court noted the importance of the Congressional intent of the McCarran Act to the ultimate holding.
[76] *See id.* at 320–21.
[77] *See e.g.,* SCHOENBAUM, *supra* note 1, § 19:7 at 438; Staring, *supra* note 1, at 1629; MacChesney, *supra* note 8; GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 69 (2d ed. 1975).
[78] Staring, *supra* note 1, at 1629.
[79] Staring, *supra* note 37, at 465.

A. First Circuit

The First Circuit has held that "under federal law… a breach of a promissory warranty in a maritime insurance contract excuses the insurer from coverage."[80] This holding stems from the circuit's jurisprudence that the Supreme Court's 2004 decision in *Norfolk Southern Railway Co. v. Kirby*,[81] as noted in *Lloyd's of London v. Pagan-Sanchez*,[82] expressly overruled the need to conduct a *Wilburn Boat* analysis concerning marine insurance contracts.[83] However, the First Circuit erred in this conclusion and its interpretation of what *Norfolk* said about *Wilburn Boat.*[84] *Norfolk* had nothing to do with marine insurance contracts but rather bills of lading and whether the bills of lading afforded *Norfolk* protection of the liability limitations contained therein.[85] It is well established that, generally, state law may fill a gap or vindicate a strong local interest in maritime contracts.[86] Conversely, "*Wilburn* assigned state legislatures and courts a leading role in marine insurance."[87] *Norfolk* did not address *Wilburn Boat* directly at all,[88] because *Wilburn Boat* did not involve any bills of lading or limitations of liability but truly only applies in the realm of maritime insurance contracts.[89] "*Wilburn Boat* is not authority outside the field of marine insurance; and, although occasionally inadvertently cited as a general rule, it will not support the

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[80] Llyod's of London v. Pagan-Sanchez, 539 F.3d 19, 24 (1st Cir. 2008).
[81] *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 22–23 (2004) ("When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation").
[82] *Llyod's of London*, 539 F.3d at 24 (insurer action against insured seeking declaratory judgment that insured's breach of maritime insurance contract's fire extinguisher warranty precluded payment of insured's claim for loss of pleasure boat).
[83] *Id.* at 25–26.
[84] *Id.* at 27.
[85] *See Norfolk S. Ry. Co.*, 543 U.S. at 18–22. Norfolk Southern is largely a case of jurisdiction and whether the contract was maritime in nature and thus within admiralty jurisdiction and what law applies. The cargo was damaged on land while being transported by rail. "This suit was properly brought in diversity, but it could also be sustained under the admiralty jurisdiction by virtue of the maritime contracts involved." *Id.* at 23. The Court ultimately concluded that maritime law applied though the cargo was damaged in a railway accident though far from water. *Id.* at 24.
[86] *See e.g., id.* at 16 (holding that federal law governs because the state interests involved cannot be accommodated without defeating federal interest); Madruga v. Superior Court, 346 U.S. 556 (1954) (applying California partition law to the sale of a vessel partially owned by two parties); Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (upholding Florida environmental statute that supplemented federal law under the State's Police power by subjecting shipowners and terminal facilities to liability without fault for cleanup costs as the result of oil spills).
[87] Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR. L. & COM. 395, 396 (1997).
[88] *Norfolk S. Ry. Co.*, 543 U.S. at 27 (The only mention of *Wilburn Boat* is to support the proposition that "not every term in a maritime contract can only be controlled by some federally defined admiralty rule.").
[89] *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955); Staring, *supra* note 1, at 1632.

view that in admiralty generally, if there is no established federal maritime law, state law will apply."[90]

Moreover, the First Circuit's understanding of *Wilburn Boat* is flawed. The *Wilburn Boat* court spent much of its opinion carving out a maritime insurance contract exception for the grant of admiralty jurisdiction, holding that the McCarran-Ferguson Act was "designed to assure that existing state power to regulate insurance would continue."[91] However, the First Circuit attempted to apply *Wilburn Boat* to support the contention that the Constitution's grant of admiralty jurisdiction gives the lawmaking power exclusively to federal courts.[92] Although the First Circuit is correct that the admiralty clause grants admiralty jurisdiction to federal courts, the law that applies, possibly under *Wilburn Boat*, is another matter altogether.

Based on the above, an accurate reading of *Wilburn Boat* and what *Norfolk* meant as applied to *Wilburn Boat* does not lead one to conclude that *Norfolk* had implicitly overruled *Wilburn Boat*.[93] The outcome of *Lloyd's of London* would have likely been the same, considering that Puerto Rico had expressed "its intent to exclude maritime contracts from its statutory provisions governing the interpretation and construction of insurance contracts."[94] This necessarily would leave only federal maritime law to control the issue.

B. Second Circuit

The Second Circuit requires strict performance of all warranties[95] and holds insured to a strict standard of *uberrimae fidei*.[96] The standard of strict performance of warranties is evident in *Advani Enters. v. Underwriters at Lloyd's*.[97] Advani had obtained a marine cargo insurance policy underwritten by Lloyds to cover a shipment of porcelain dishware on its journey from New York to Egypt.[98] The marine insurance contract contained three provisions regarding warranties on the packaging and transport of the porcelain.[99] Upon arrival in Egypt, when it was discovered that the containers and their contents had been damaged, Advani filed a claim for the losses.[100] Lloyd's denied coverage on "the ground that the removal of the cartons from the containers at Port Said constituted a breach of an express warranty in the policy that required the cartons to be shipped in 'full container loads Door to Door.'"[101] Advani brought an action asserting that under English law,

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[90] Staring, *supra* note 1, at 1632 (emphasis added).
[91] *Wilburn Boat Co.*, 348 U.S. at 319.
[92] Lloyd's of London v. Pagan-Sanchez, 539 F.3d 19, 24 (1st Cir. 2008).
[93] *Wilburn Boat Co.*, 348 U.S. at 319; *Norfolk S. Ry. Co.*, 543 U.S. at 27 (The only mention of *Wilburn Boat* is to support the proposition that "not every term in a maritime contract can only be controlled by some federally defined admiralty rule.").
[94] *Id.* at 25.
[95] Fireman's Fund Ins. Co., v. Great American Ins. Co. of N.Y., 822 F.3d 620, 633 (2d Cir. 2016).
[96] *Id.* ("Under federal law, a marine insurance contract is subject to 'the federal maritime doctrine of *uberrimae fidei,* or utmost good faith' ... [t]hus, '[t]he [insured] is bound, although no inquiry be made, to disclose every fact within his knowledge that is material to the risk.'").
[97] *See* Advani Enters. v. Underwriters at Lloyd's, 140 F.3d 157 (2d. Cir. 1998).
[98] *Id.* at 159.
[99] *Id.*
[100] *Id.*
[101] *Id.*

a breach only precludes recovery if causally related to the breach.[102] On the other hand, Lloyd's countered by moving for summary judgment, arguing that the policy is "governed by New York insurance law, which bars recovery under a marine cargo insurance policy if the assured breaches an express warranty contained therein."[103] Ultimately, the appellate court applied federal choice-of-law rules and determined that the choice-of-law provision within the contract was valid.[104]

The court held that "[f]ederal maritime law requires us to determine 'the scope and validity of the [marine insurance] policy provisions involved and the consequences of breaching them' by using state law.'"[105] As there are established federal maritime laws on the choice-of-law issue, it is easy to conclude that the English common law would govern based on the totality of circumstances surrounding the contract.[106] However, had there not been a "specific federal rule governing the construction of marine insurance contracts," the Second Circuit would have applied state law to determine the effect of a breach.[107]

Ultimately, when it comes to warranties in maritime insurance contracts, the Second Circuit has clearly stated that "[u]nder the federal rule and the law of most states, warranties in maritime insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract, if the insured is to recover."[108] The Second Circuit also arrived at this conclusion in the *Flagship Marine* case.[109] In that case, Continental Union Insurance Company brought an action for a declaratory judgment on the coverage for the claim to have the contract declared *void ab initio*.[110] Flagship Marine argued that Florida law should apply to the case, while Continental argued that New York law should apply, requiring the court to engage in the *Wilburn Boat* analysis.[111] However the court effectively ignored it.[112] Noting that

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[102] *Advani Enters*.,140 F.3d at 160. The policy contained a choice-of-law provision, requiring that English law would govern any dispute. Under the recently decided *Raiders* case, the choice-of-law provision is now presumptively enforceable subject to certain exceptions. *See* discussion accompanying Part.III. and Part.IV.

[103] *Id.* at 160.

[104] *Id.* at 162.

[105] *Id.* (citing *Wilburn Boat Co.* 348 U.S. at 316).

[106] *Id.* at 162 ("More concretely, this choice-of-law analysis should include an assessment of the following contacts: (1) any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued, and signed; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.").

[107] Hartford Fire Ins. Co. v. Mitlof, 208 F. Supp. 2d 407, 411 (S.D.N.Y. 2002); *see also* N. Assur. Co. of Am. v. Rathbum, 567 F. Supp. 2d 316, 319 (D. Conn. 2008) ("Although Connecticut law governs the policy, there are no Connecticut statutes or case law interpreting captain warranties in maritime insurance policies.").

[108] Commercial Union Ins. Co. v. Flagship Marine Svs., 190 F.3d 26, 31 (2d Cir. 1999).

[109] *Id.*

[110] *Id.* at 31 (explaining that the tow endorsement warranty included Flagship Marine's promise to limit its towing activities to yachts under 50 feet in length).

[111] *Id.* 29–30, 33. ("We find that the Tow Endorsement is unambiguous and that it precludes coverage under either New York or Florida law for the accident that occurred in this case.").

[112] *See id.*

there was "no specific federal rule governing the construction of maritime insurance contracts," applying either state or federal law would lead to the same outcome.[113]

Thus, the Second Circuit agreed that no specific federal rule governs maritime insurance contracts under *Wilburn Boat*.[114] Needless to say, this would violate any rule of uniformity across the nation, leaving each state to develop its own rules for maritime insurance contracts.

C. Third Circuit

The only case to arise to the Third Circuit Court of Appeals regarding maritime insurance contracts is *AGF Marine Aviation & Transport v. Cassin*.[115] The case is yet another example of a party attempting to bring a claim under state law only to have an "entrenched" maritime rule to apply.[116] *Cassin* involves a dispute over an insurance claim for an 85-foot charter yacht owned by Cassin that sank off the coast of Grenada.[117] Upon reviewing the claim, AGF found that Cassin had misrepresented the yacht's purchase price and denied the claim, arguing that the doctrine of *uberrimae fidei* voided the policy.[118] AGF maintained that *uberrimae fidei* applied because the choice-of-law clause in the insurance contract stated, "any dispute arising [under the Policy] shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law,' when they exist."[119] Even with the choice-of-law provision within the contract, there was still uncertainty as the Third Circuit had to interpret what is the rule for a maritime law to be considered "entrenched."[120]

The issue analyzed by the Third Circuit Court of Appeals is whether *uberrimae fidei* is entrenched under the *Wilburn Boat* analysis to supplant state law.[121] The court concluded that *uberrimae fidei* is sufficiently entrenched to control the issue over state law.[122] It arrived at this holding based on a "lengthy exposition of the history of the doctrine of *uberrimae fidei,* going back 200 years," as well as the fact that many circuits agree that *uberrimae fidei* is well established in maritime law.[123] However, the choice-of-law clause in the contract could have easily been interpreted differently, as not all circuits agree on the application of *uberrimae fidei* or what is entrenched federal maritime law, further indicating the divide amongst the circuits stemming from *Wilburn Boat*.[124]

D. Fourth Circuit

The Fourth Circuit Court of Appeals has not addressed a maritime insurance warranty case in almost forty years since the *Goodman v. Fireman's Fund Ins. Co.* case.[125] *Goodman* involved

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[113] *Commercial Union Ins. Co*, 190 F.3d at 30–32.
[114] *Id.* at 30.
[115] AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255 (3d Cir. 2008).
[116] *See id.* at 263.
[117] *Id.* at 258–59.
[118] *Id.* at 259–60.
[119] *Id.* at 259.
[120] *AGF Marine Aviation & Trans*., 544 F.3d at 259–61.
[121] *Id.* at 262–63.
[122] *Id.* at 263–64.
[123] *Id.*
[124] *Id.; see also* Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991).
[125] Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040 (4th Cir. 1979).

the owner of a 55-foot yacht suing to enforce a marine insurance policy issued by the defendant, which denied coverage on the grounds that the plaintiff breached a warranty contained in the policy.[126] The clause at issue was a layup warranty which stated that the "vessel shall be laid up and out of commission from October 1st, at noon, until May 1st, at noon."[127] The plaintiff attempted to lay up the vessel but left the intake valves open which led to water entering the cooling system and freezing due to the winter temperatures.[128] The freezing water caused the filters to crack, and water then flowed into the hull in such a volume that the yacht sank.[129] The court found that the plaintiff's negligence and subsequent breach of the layup clause was enough to preclude coverage under the policy.[130] Although the court never mentioned *Wilburn Boat*, it stated that "[i]t is a familiar rule that the breach of an express warranty in a contract for marine insurance releases the insurer from any liability due to the breach."[131]

It may appear that the Fourth Circuit falls into the camp of appellate courts that hold that the old maritime rule of strict performance is entrenched in marine insurance law. However, it is not that simple. The Fourth Circuit stopped short of declaring that all warranties require strict performance, or the insurer would be released from performance.[132] The relevant precedent, if not extrapolated to its furthest reaches, would lead to the conclusion that the Fourth Circuit only recognizes federally established admiralty rules governing the breach of lay-up warranties and the breach of captain warranties in marine insurance contracts.[133]

E. Fifth Circuit

The Fifth Circuit is one of the preeminent maritime circuits in the United States due to its location squarely on the Gulf of Mexico, as well as the Mississippi River running through some of

[126] *Id.* at 1041.
[127] *Id.*
[128] *Id.* at 1042.
[129] *Id.*
[130] *Goodman*, 600 F.2d at 1042–43.
[131] *Id.* at 1043.
[132] *See id.*at 1042–43.
[133] *See* Cap. Coastal Corp. v. Hartford Fire Ins. Co., 378 F. Supp. 163 (E.D. Va. 1974) The vessel owner sought coverage under the Inchmaree clause asserting the vessel sank due to the negligence of the captain. *Id.* at 164, 169–70. This would cover the loss but for the fact that the owner breached the express warranty requiring a specific captain and the express provision that the policy does not cover any other captain. *See id.* at 168. The court held that the Inchmaree clause of the insurance contract must be strictly complied with, and therefore, a breach of warranty that the vessel would be operated by a specified captain excused the insurer from performance, thereby voiding the policy on the tugboat. *See id.* 171–72.

its jurisdiction.[134] The controlling case out of the Fifth Circuit is *Albany Ins. Co. v. Anh Thi Kieu*.[135] Anh Thi Kieu owned a vessel called the STACY MARIE and secured hull insurance from Albany Insurance Company.[136] When completing the application for coverage, several inaccurate statements were made, including a misrepresentation of the vessel's purchase price.[137] Albany had ample chance to discover these inaccuracies but continued to accept premiums and extend coverage to the vessel.[138] In November 1988, the STACY MARIE struck an offshore Department of Energy platform, damaging the hull planking and opening a gaping hole on its port bow.[139] After the vessel was floated to a dry dock, the Albany investigators surveyed the damage and recommended that Albany deny any liability.[140] This action followed, and the district court held that Anh Thi Kieu should recover the insured value of the STACY MARIE.[141]

Albany attacked the district court's decision on appeal, arguing that the district court's application of Texas insurance law as opposed to federal maritime rules was in error.[142] Albany contended that the federal law of *uberrimae fidei* should have applied to void the policy due to Anh Thi Kieu's misrepresentations in the insurance application.[143] The Fifth Circuit held that it could not conclude that the district court made a reversible error, thereby affirming the district court's judgment.[144] The court of appeals arrived at this conclusion by applying a three-factor test

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[134] *U.S. Court of Appeals for the Fifth Circuit – Brief History*, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, (last visited Mar. 5, 2025) https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history#:~:text=Today%2C%20the%20court's%20home%20is,Building%20in%20New%20Orleans%2C%20Louisiana.

[135] Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 886 (5th Cir.1991) (This case is widely criticized by the other circuits due to its departure from the established doctrine of *Uberrimae Fidei*); *see e.g.;* QBE Seguros v. Morales-Vázquez, 986 F.3d 1,6 (1st Circ. 2021) (The court held that there is a vast amount of jurisprudence to support the contention that the doctrine of *Uberrimae Fidei* is established in the United States. However, they had to address *Anh Thi Kieu*, the First Circuit said that the case "flies in the teeth of case law from both the Supreme Court and the overwhelming majority of circuits but also has been much criticized."); Certain Underwriters at Lloyds v. Inlet Fisheries Inc., 518 F.3d 645, 653 (9th Cir. 2008)(The Ninth Circuit analyzed Anh Thi Kieu, noting that the Fifth Circuit spent much dicta doing through the history of *uberrimae fidei*, and in the face of all that history still reached the conclusion that *uberrimae fidei* is not entrenched. The Ninth Circuit called this outcome "troublesome" and questioned the logic of the Fifth Circuit; *see also* Thomas J. Schoenbaum*, The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. Mar. L. & Com. 1, 11 (1998)(Noting that the Fifth Circuit had "disregard[ed] over two hundred years of English and American precedents as well as prior case law in the circuit[]" itself.).

[136] *Id.* at 885.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Anh Thi Kieu*, 927 F.2d at 885.

[141] *Id.*

[142] *Id.* at 886.

[143] *Id.*

[144] *Id.* at 885.

formulated under *Wilburn Boat* to determine if a federal maritime rule controls the disputed issues.[145] The court dealt with each factor in turn, stating that the fundamental nature of the Texas and federal maritime laws is the same—the insured should not profit from her material misrepresentation to the underwriter.[146] Next, the court stated that the state has a "material interest in ensuring that marine insurance underwriters do not invalidate the insurance protection of Texas citizens on the basis of misrepresentation that were neither willfully or intentionally asserted."[147] Finally, the panel found that "the application of unfamiliar federal maritime rules engenders undesirable uncertainty among maritime actors; this Court can easily avoid such uncertainty by the application of "already well-developed state laws."[148]

The federal maritime rule at issue was the doctrine of *uberrimae fidei*; and the court's analysis led to the conclusion that "the *uberrimae fidei* doctrine is not 'entrenched federal precedent.'"[149] The holding in *Anh Thi Kieu* hinged on the fact that the Fifth Circuit has never used the doctrine as a basis for the invalidation of a marine insurance policy and that none of the Fifth Circuit cases applied the doctrine to the exclusion of state law.[150] Still, it further shows the dichotomy between the circuits due to the *Wilburn Boat* analysis.

F. Sixth Circuit

The Sixth Circuit has extremely limited case law on maritime insurance contracts. The only case to rise to the Sixth Circuit Court of Appeals is a pre-*Wilburn Boat* case: *Homes Ins. Co. v. Ciconett*.[151] The case involved a breach of warranty that provided that the vessel should always have a competent watchman on board, awake and on duty.[152] The insurer refused to pay the insured under the policy and cited the breach of the watchman warranty to deny coverage.[153] The court strictly applied the rule that "a warranty in a contract of insurance must be literally complied with; that the only question in such cases is whether the thing warranted to be performed was or was not

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[145] *Anh Thi Kieu*, 927 F.2d at 886 (detailing the three-factor test, "(1) whether the federal maritime rule constitutes 'entrenched federal precedent;' (2) whether the state has a substantial and legitimate interest in the application of its law; [and] (3) whether the state's rule is materially different from the federal maritime rule") (instructing that the factors are "instructive and not dispositive).

[146] *Id.* at 887.

[147] *Id.* at 887–88.

[148] *Id.* at 888 (stating that "Maritime law, as federal common law, supersedes state law if the maritime law specifically governs the conduct in question and consistently has been invoked to control such conduct. In the absence of preexisting entrenched federal maritime law, this Court will refuse to impose unfamiliar federal common law maritime requirements on the parties to a marine insurance contract.").

[149] *Id.* at 889. ("The *uberrimae fidei* doctrine, in sum, is a rule which this Court has recognized, *but never applied.* We therefore conclude, albeit with some hesitation, that the *uberrimae fidei* doctrine is not 'entrenched federal precedent.'").

[150] *See e.g.,* QBE Seguros, 986 F.3d at 6; Certain Underwriters at Lloyds, 518 F.3d at 653; AGF Marine Aviation & Transport, 544 F.3d at 263 (3rd Cir.) ("The Fifth Circuit's position had been criticized quite heavily....").

[151] Homes Ins. Co. v. Ciconett, 179 F.2d 892 (6th Cir. 1950).

[152] *Id.* at 893.

[153] *Id.* at 894.

performed."[154] The court held that general maritime law supported this conclusion, thereby releasing the insurance company from performance.[155]

G. Seventh Circuit

Like the Sixth Circuit, the Seventh Circuit has limited case law on maritime insurance contracts. The only case to reach the Seventh Circuit Court of Appeals addressing *Wilburn Boat* is *Continental Cas. Co. v. Anderson Excavating & Wrecking Co.*,[156] which involved the interpretation of an Inchmaree clause.[157] The court concluded that "[t]he interpretation of this clause is governed by federal admiralty law."[158] Continental Insurance Company brought suit against Anderson seeking a declaration that it was not liable to the insured under their policies.[159] Anderson was hired to demolish a concrete lock in the Mississippi River and remove the debris.[160] Anderson procured an insurance policy for any damages suffered by the barges while they were being used to clear the debris.[161] The barges used in the clearing operation were not rock barges, which are specially made for hauling large rocks.[162] Rather, they were lighter deck barges; consequently, they sustained heavy damage from the huge chunks of concrete.[163]

The Inchmaree clause insured Anderson "against losses (including, the parties appear to agree, liability to the owner of the barges, McDonough) of "accidents in loading . . . cargo," provided, however, that the loss "has not resulted from want of due diligence by the . . . owners or managers of the vessel."[164] The court gave no further explanation other than simply stating the clause is governed by federal maritime law.[165]

The lack of case law in the Seventh Circuit Court of Appeals on maritime insurance leads to some cases holding *uberrimae fidei* sufficiently established under maritime law to preempt state law.[166] In contrast, others conclude that the rule of strict performance of express warranties apply.[167] Given the lack of relevant case law, predicting how the Seventh Circuit may address *Wilburn Boat* would be speculative.

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[154] *Id.*
[155] *Id.*
[156] Cont'l Cas. Co. v. Anderson Evacuating & Wrecking Co., 189 F.3d 512 (7th Cir. 1999).
[157] SCHOENBAUM, *supra* note 1, § 19:16, at 509 (An Inchmaree Clause "provides cover against latent defects in a vessel's hull on machinery and negligence of the master or an engineer in the maintenance of a vessel.").
[158] *Cont'l Cas. Co.*, 189 F.3d at 520.
[159] *Id.* at 515.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 520.
[163] *Cont'l Cas. Co.*, 189 F.3d at 519.
[164] *Id.* at 520.
[165] *Id.*
[166] *See* St. Paul Ins. Co. v. Great Lakes Turnings, Ltd., 829 F. Supp. 982, 988 (N.D. Ill. 1993).
[167] *See* Progressive N. Ins. Co. v. Bachmann, 314 F. Supp. 2d 820 (W.D. Wis. 2004).

H. Eighth Circuit

Within the Eighth Circuit, only *uberrimae fidei* is sufficiently entrenched to displace state law in marine insurance claims.[168] *New York Marine & General Ins. Co.* involved a dispute arising under a marine insurance contract between New York Marine and Continental Cement Co.[169] The policy in question covered the barge MARK TWAIN, which sank due to Continental Cement employees failing to fix a leak in the barge's hull.[170] New York Marine denied coverage on the grounds of *uberrimae fidei*, stating, "a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option."[171] Continental had not disclosed that a 2008 study revealed flaws in its barge.[172] Although Continental attempted to argue that the rule of utmost good faith is not entrenched and, therefore, Missouri state law should apply to the contract, the Eighth Circuit concluded that *uberrimae fidei* was sufficiently entrenched under the *Wilburn Boat* analysis and the *Anh Thi Kieu* factors.[173]

Although *New York Marine & General Ins. Co.* is the only case in the Eighth Circuit regarding the *Wilburn Boat* analysis on the entrenchment of federal law, it is yet another example of the high bar for entrenchment under *Wilburn Boat* leading to further inconsistency across the nation via the application of state law.

I. Ninth Circuit

The Ninth Circuit recognizes, albeit without explicitly stating, that a federally established rule of strict performance exists in some marine insurance warranty clauses.[174] This is evident in *Guam Indus. Servs. v. Zurich Am. Ins. Co.*, a case involving the insurance policy on a dry dock that sank while it was undergoing repairs.[175] Guam Industrial filed a claim under the policy, but the insurer denied coverage on the grounds of breach of the express warranty requiring Guam Industrial to obtain Navy Certification.[176] The court addressed, but ultimately circumvented, *Wilburn Boat* by stating:[177]

> The federal rule, if one in fact exists, is that "admiralty law requires the strict construction of express warranties in marine insurance contracts; breach of the

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[168] *See* New York Marine & Gen. Ins. Co. v. Cont'l Cement Co., 761 F.3d 830, 839 (8th Cir. 2014); *see also* St. Paul Fire & Marine Co. v. Abhe, 798 F.3d 715, 720–22 (8th Cir. 2015).
[169] *Cont'l Cement Co.*, 761 F.3d at 833.
[170] *See id.* at 834.
[171] *Id.* at 837.
[172] *Id.*
[173] *Id.* (citing Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 886 (5th Cir.1991) "(1) whether the federal maritime rule constitutes entrenched federal precedent; (2) whether the state has a substantial and legitimate interest in the application of its laws; (3) whether the state's rule is materially different from the federal maritime rule.").
[174] *See generally* Guam Indus. Servs. v. Zurich Am. Ins. Co, 787 F.3d 1001 (9th Cir. 2015).
[175] *Id.* at 1003.
[176] *Id.*
[177] *Id.* at 1004–05*; but see* Certain Interested Underwriters at Lloyd's v. Bear, LLC, 259 F. Supp. 3d 1050, 1057 (S.D. Cal. 2017) ("The effect of a breach of warranty in a marine insurance policy is governed by state law").

> express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss."[178]

The court noted that typically, under *Wilburn Boat,* it would have to determine whether to apply state law, but here, there was no state law applicable; and the *Guam* Supreme Court was silent on the issue.[179] Therefore, "the federal court must make a reasonable determination of the result the highest state court would reach if it were deciding the case."[180] The opinion of *Guam Indus. Servs.* indicates that had there been a state law on point, the court would have applied the *Wilburn Boat* analysis and not simply applied federal maritime law.[181]

When presented with the *Wilburn Boat* issue in other contexts, the Ninth Circuit has recognized strict compliance with warranty provisions regarding *uberrimae fidei*.[182] The Ninth Circuit also recognizes strict compliance with warranty provisions with respect to navigational limits and trading limits.[183] In addition, the Ninth Circuit further recognizes a captain warranty.[184] However, like many of its sister circuits, it has stopped short of "explicitly endorsing . . . the existence of a federally established rule of strict performance for all marine insurance warranties."[185] Therefore, there is no guarantee that the relevant rule of warranty interpretation is established enough to overcome state law in a given case.[186]

J. Tenth Circuit

The Tenth Circuit, like many of its more landlocked sister circuits, has very limited case law on what it deems to be entrenched federal maritime law. However, several district courts

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[178] *Guam Indus. Servs.*, 787 F.3d at 1004–05.
[179] *Id.* at 1003.
[180] *Id.* at 1005.
[181] *Id.* at 1004 ("Generally, courts are to 'apply state law unless an established federal rule addresse[s] the issue raised, or there [is] a need for uniformity in admiralty practice.' Yu v. Albany Ins. Co., 281 F.3d 803, 808 (9th Cir. 2002). That being said, we do not need to determine whether to apply federal or state law in this instance because both sources of law lead to the same rule: that marine insurance policy warranties are to be strictly construed.").
[182] *See* Certain Underwriters at Lloyds v. Inlet Fisheries Inc., 518 F.3d 645, 654 (9th Cir. 2008) ("Following the framework of *Wilburn Boat*, we hold that the longstanding federal maritime doctrine of uberrimae fidei, rather than state law, applies to marine insurance contracts").
[183] *See* Port Lynch, Inc. v. New England Int'l Assurety, Inc., 754 F. Supp. 816, 823 (W.D Wash. 1991) ("Under this established federal rule of admiralty, a breach of an express trading or navigational warranty releases the insurance company from liability even if compliance with the warranty would not have avoided the loss.").
[184] *See* Yu v. Albany Ins. Co., 281 F.3d 803, 808–09 (9th Cir. 2002).
[185] J. Andrew Black, Wilburn Boat*'s Progeny Continues to Widen the Circuit Split Regarding the Breach of Marine Insurance Warranties*, 20 BENEDICT'S MAR. BULL. 1, 10 (2022) https://mlaus.org/wp-content/uploads/bp-attachments/10486/Black-Breach-of-Marine-Insurance-Warranties.pdf.
[186] *But see* QBE Seguros v. Morales-Vázquez, 986 F.3d 1, 6 (5th Cir. 2021) (reasoning that "Morales does not dispute that *uberrimae fidei* is firmly entrenched in the jurisprudence of this circuit); *see also* Catlin at Llyod's v. San Juan Towing, 778 F.3d 69, 80–81 (1st Cir. 2015) (holding that "without further equivocation that the doctrine of *uberrimae fidei* is an established rule of maritime law in this Circuit").

within the Tenth Circuit have wrestled with the issue left behind by *Wilburn Boat*.[187] Most recently, the Colorado District Court decided a case in 2020 that invoked the *Wilburn Boat* analysis.[188] In *Openwater Safety IV, LLC v. Great Lakes Ins. SE*, the court had to address whether a breach of the named operator warranty voided the policy on the vessel, thereby excusing Great Lakes Insurance from performance.[189] Although the court indicated, in *dicta*, that the Tenth Circuit was headed towards a holding of strict performance for all marine insurance warranties, the court ultimately stopped short of that conclusion.[190] The judge also found it to be a moot point because "under both federal admiralty law and New York state law, this court must strictly construe the express 'Named Operator Warranty' in the Insuring Agreement."[191] The district court also left the door open for the Tenth Circuit Court of Appeals to address the issue and make a firm holding by stating that "[t]he Tenth Circuit has neither announced nor disclaimed such a federal rule,"[192] regarding a federally established doctrine of strict performance for all insurance warranties.[193]

K. Eleventh Circuit

Prior to the recent *Ocean Reef Charters* case, the Eleventh Circuit recognized the doctrine of *uberrimae fidei* as entrenched federal law.[194] The Eleventh Circuit also recognizes navigational warranties[195] and seaworthiness warranties[196] as entrenched under federal law and, therefore, requires strict performance. In the *Ocean Reef Charters* case, the Eleventh Circuit held "that there is no entrenched maritime rule governing captain or crew warranties and that, as a result, Florida law applies to determine the effect of Ocean Reef's breaches."[197] The panel further found only two

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[187] *See e.g.,* Openwater Safety IV, LLC v. Great Lakes Ins. SE, 435 F. Supp. 3d 1142 (D. Colo. 2020); Marandola v. Pueblo Suzuki, Inc., 2022 U.S. Dist. LEXIS 45178 (D. Colo. 2022) (This case addressed whether the innocent seller defense was entrenched as part of federal maritime law, but did not address a question relevant to warranties or *uberrimae fidei.)*; Great Lakes Reinsurance (UK), PLC v. Sea Cat I, LLC, 653 F. Supp. 2d 1193, 1200 (W.D. Okla. 2009) (Although brought in Oklahoma, this case was decided under New York Law, which the court held recognized the warranty of seaworthiness as entrenched under federal maritime law.).
[188] Openwater Safety IV, LLC 435 F. Supp. at 1155 n.9.
[189] *Id.* at 1155.
[190] *Id.*
[191] *Id.* at 1156.
[192] *Id.* at 1155, n.9.
[193] *Openwater Safety*, 435 F. Supp. 3d at 1155, n.9.
[194] HIH Marine Service v. Fraser, 211 F.3d 1359, 1362 (11th Cir. 2000) (holding that "[u]nder *uberrimae fidei,* a material misrepresentation on an application for marine insurance is grounds for voiding the policy").
[195] Allen Black, *The 11th Circuit applies the universal legal principle of 'it depends' to marine insurance disputes*, MILLS BLACK LLP (May 10, 2021), https://www.millsblack.com/news/11th-circuit-applies-universal-legal-principle-of-it-depends-to-marine-insurance-disputes.
[196] Aguirre v. Citizens Cas. Co. of N. Y., 441 F.2d 141, 146 (5th Cir. 1971) ("[W]hich held that the breach of an express warranty of seaworthiness voids coverage even if unrelated to the loss because '[t]he seaworthiness standard is solidly entrenched in federal maritime jurisprudence.'").
[197] Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161, 1162–63 (11th Cir. 2021).

cases on point for breach of captain warranty, and both applied state law to the breaches at issue.[198] The court found no American cases recognizing crew warranties as an entrenched maritime rule.[199] In light of this, the court stated, "[a]ll of this means that Florida law . . . governs the effect of Ocean Reef's breaches of the captain and crew warranties."[200] Under Florida law, the burden is on the insurer to prove that breaching the warranty resulted in an increase of hazard for the insurer.[201] The Eleventh Circuit was reluctant to reach its conclusion based on *Wilburn Boat*.[202] The appellate court urged the Supreme Court to revisit the issue and look to the United Kingdom as an example for solving the bewildering *Wilburn Boat* decision.[203] The United Kingdom Insurance Act of 2015, which the Eleventh Circuit references as a potential template for what the United States Courts should adopt, will be discussed in more detail below.[204]

III. *Great Lakes Insurance SE v. Raiders Retreat Realty Co*: Did the Supreme Court Right the Ship?

This Comment's analysis of the *Raiders Retreat Realty* case focuses solely on the parties' *Wilburn Boat* analysis and the Supreme Court's treatment of *Wilburn Boat*.

A. Background Facts of the Case

Raiders Retreat Realty (hereinafter "Raiders"), a Pennsylvania company, purchased a policy from Great Lakes Insurance Company (hereinafter "GLI"), a United Kingdom company and incorporated in Germany.[205] The policy had a choice-of-law provision that selected New York law to govern any future disputes between the parties.[206] Years after the original policy was purchased, Raiders' vessel ran aground near Fort Lauderdale, Florida; and GLI denied coverage because the policy required the insured to maintain the vessel's fire-suppression system which Raiders had failed to do.[207] GLI argued that the breach of the fire-suppression warranty voided the whole contract, even though the boat's fire-suppression system had nothing to do with the accident.[208]

GLI prevailed at the district court (alternatively "trial court level") level.[209] The trial judge reasoned that federal maritime law regards "choice of law provisions as presumptively valid and enforceable" and therefore "enforced the parties' choice-of-law provision and rejected Raiders'

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[198] *Id.* at 1169.
[199] *Id.*
[200] *Id.* at 1170.
[201] *Id.*
[202] *Travelers Prop. Cas. Co. of Am.*, 996 F.3d at 1170.
[203] *Id.* at 1170–71.
[204] *Id.* at 1170 (The panel was unequivocal, stating that although they prefer the UK Insurance Act of 2015, their hands are tied by the controlling law of the circuit and the Supreme Court. Therefore, the marine insurance doctrine of *uberrimae fidei* is the controlling law of this circuit.).
[205] Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65 (2024).
[206] *Id.* at 68.
[207] *Id.*
[208] *Id.*
[209] *Id.*

Pennsylvania-law contract claims."[210] On appeal, the Third Circuit vacated that judgment, holding that although choice-of-law provisions are presumptively enforceable, Pennsylvania has a strong public policy and strong interest in regulating contracts in which its citizens are involved.[211] Hence, Pennsylvania law should apply.[212] The main issue the Supreme Court had to address relevant to this Comment is whether "there is an established federal maritime rule regarding choice-of-law provisions."[213]

Both litigants in the case highlighted major issues with *Wilburn Boat* for vastly different reasons.[214] Notably, the parties' extremely different stances show that neither courts nor litigants know what law will eventually be applied. GLI argued that *Wilburn Boat* caused widespread chaos,[215] and Raiders argued that federal law should rarely preempt state law due to policy reasons.[216] Both positions will be discussed in more detail below.

A. Great Lakes' Interpretation of *Wilburn Boat*

GLI adopted the position that *Wilburn Boat* has thrown the maritime industry into complete and utter chaos.[217] To support this conclusion, GLI cited numerous circuit court decisions to show that because of *Wilburn Boat*, "neither courts nor litigants really have any idea what law will eventually be applied":[218]

> Wilburn Boat typically leads to inconsistent appellate decisions which cannot be logically reconciled…. In 1988, the Eleventh Circuit held that a navigational limits warranty which confined the vessel to operation within one hundred miles of shore was governed by an entrenched rule of federal admiralty law, strict or literal compliance. *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364; 1988 A.M.C. 1238 (11th Cir.1988). However, just last year, the Eleventh Circuit held that a warranty requiring that the vessel be manned by one captain and one crewman was not governed by an entrenched rule of federal admiralty law but was governed by Florida law, under which the warranty was ineffective. *Ocean Reef Charters*, at 1170.[219]

GLI argued that even if *Wilburn Boat* stands as a precedent, it nonetheless succeeds in its case because there is a sufficiently established rule in federal maritime law to govern the issue of the choice-of-law clause in this case.[220] After this firm rebuke of *Wilburn Boat*, GLI asked the Court

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[210] *Raiders Retreat Realty Co.*, 601 U.S. at 68.
[211] *Id.*
[212] *Id.* at 69.
[213] *Id.* at 70.
[214] Petition for Writ or Certiorari at 11, Great Lakes Insurance SE v. Raiders Retreat Realty Co., 601 U.S. 65 (2024) (No. 22-500); *see also* Brief in Opposition of Certiorari at 11–12, Great Lakes Insurance SE v. Raiders Retreat Realty Co., 601 U.S. 65 (2024) (No. 22-500).
[215] Petition for Writ, *supra* note 214, at 12.
[216] Brief in Opposition, *supra* note 214, at 11–12.
[217] Petition for Writ, *supra* note 214, at 2–3.
[218] Petition for Writ, *supra* note 214,. at 11.
[219] Petition for Writ, *supra* note 214, at 11.
[220] Petition for Writ, *supra* note 214, at 11–12.

to clear the muddied water of *Wilburn Boat* and hold that "federal choice of law rules, not state choice of law rules," should control in marine insurance contracts.[221]

B. Raiders Retreat's Interpretation of *Wilburn Boat*

In contrast to GLI's position, Raiders maintained that *Wilburn Boat* stands for the proposition that "when adjudicating maritime insurance contract dispute if there is no governing established rule of federal admiralty law, state law applies."[222] Although, on its face, this argument may seem similar to the one made by GLI, this would be a misleading interpretation of Raiders' argument. Raiders claimed that the Court held that the state's power should rarely be usurped by federal maritime laws, adopting a nearly polar opposite interpretation of *Wilburn Boat* as GLI did.[223] This is a significant mischaracterization of *Wilburn Boat* and what it stands for. Raiders cherry-picks language from the *Wilburn Boat* decision to support its conclusion; however, it leaves out the crucial fact that the Court ruled very narrowly under the McCarran Act.[224]

Raiders also attempted to minimize the established choice-of-law rule of federal maritime law shown through the decades of precedent by GLI.[225] The issue involving the *Wilburn Boat* analysis results in the parties debating over what is "entrenched federal maritime law."[226] As noted in Section II of the opinion, *Wilburn Boat* has no bright line rule to guide the federal courts.[227] Ultimately, Raiders' legal argument is a sinking ship, given the precedent and the interpretations of the circuit courts regarding *Wilburn Boat* that apply state law only in the absence of federal maritime law across the country.[228]

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[221] Petition for Writ, *supra* note 214, at 12–13.
[222] Brief in Opposition, *supra* note 214, at 13.
[223] Brief in Opposition, *supra* note 214, at 13.
[224] *See* Brief in Opposition, *supra* note 214, at 14 (The *Wilburn Boat* Court also stated that the ruling only applied to marine insurance warranty clauses.).
[225] *See* Brief in Opposition, *supra* note 214, at 17–19.
[226] *See* Brief in Opposition, *supra* note 214, at 5; *see also* Petition for Writ, *supra* note 214, at 7.
[227] Great Lakes Insurance SE v. Raiders Retreat Realty Co., 601 U.S. 65, 70 (2024).
[228] *See e.g., Wilburn Boat*, 348 U. S., at 320–21 (When no established rule exists, and when the federal courts decline to create a new rule, federal courts apply state law.); *Anh Thi Kieu*, 927 F.2d at 888 (The Fifth Circuit applied state law to a marine insurance dispute, emphasizing that federal maritime law supersedes state law only when an entrenched federal precedent governs the issue.); *Travelers Prop. Cas. Co. of Am.*, 996 F.3d (The Eleventh Circuit found no entrenched federal maritime rule governing captain or crew warranties in a marine insurance policy. Therefore, the court applied state law.); *Advani Enters.*,140 F.3d at 162–63 (The Second Circuit applied federal maritime choice-of-law rules to determine that English marine insurance law governed the policy. The court relied on *Wilburn Boat* to conclude that state law governs marine insurance disputes unless a federal statute, judicially fashioned admiralty rule, or need for uniformity exists.); *QBE Seguros*, 986 F.3d at *7, *11 (The First Circuit upheld the application of the doctrine of *uberrimae fidei* in a marine insurance dispute, emphasizing that Congress had been silent on marine insurance issues and that federal courts should not abandon established doctrines without compelling reasons. The court reaffirmed that state law governs in the absence of federal statutes or judicially fashioned admiralty rules.).

The strongest argument Raiders advanced is that there are policy considerations for Pennsylvania in this case:[229]

> The outcome that Great Lakes seeks would diminish the very state regulation of insurance companies that *Wilburn Boat* sought to maintain. Although a maritime insurance company surely may decide what state's law will govern the construction and application of an insurance policy in the absence of any established federal admiralty rule, insurance companies doing business in Pennsylvania should not be permitted to contract out of that Commonwealth's insurance bad faith and unfair trade practices law.[230]

The crux of the issue is that sophisticated insurance companies can contract out of unfavorable state law by implementing a choice-of-law provision.[231] Raiders' arguments and reading of *Wilburn Boat*, however, lacks support from case law.[232]

C. Majority Opinion

Justice Kavanaugh authored the unanimous opinion in favor of GLI.[233] The Court begins by discussing the importance of uniformity in maritime law[234] as well as a brief overview of the present state of the law.[235] Justice Kavanaugh spends much of the opinion discussing the validity of choice-of-law provisions.[236] However, this Comment focuses specifically on the majority opinion's treatment of *Wilburn Boat*. Justice Kavanaugh clarifies that "the *Wilburn Boat* Court simply determined what substantive rule applied when a party breached a warranty in a marine insurance contract,"[237] and that *Wilburn Boat* does not need to be addressed here because it "does not control the analysis of choice-of-law provisions in maritime contracts."[238] According to the Court, *Wilburn Boat* was only meant to be a "gap filler" while no established maritime rule on a warranty issue existed; here, there is no gap because an established "uniform federal rule governs the enforceability of choice-of-law clauses in maritime contracts."[239]

The crux of the Court's *Wilburn Boat* analysis is that the parties here elected what governing law should apply,[240] and nothing in "*Wilburn Boat* purports to override parties' choice-of-law clause in maritime contracts."[241] The Court stated that if it adopted Raiders' argument for applying state law under *Wilburn Boat*, uniformity of maritime law would be thrown

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[229] Brief in Opposition, *supra* note 214, at 47.
[230] Brief in Opposition, *supra* note 214, at 47.
[231] Brief in Opposition, *supra* note 214, at 12, 47.
[232] *See* Brief in Opposition, *supra* note 214 (bolstering its argument with one case out of the Third Circuit).
[233] *Raiders Retreat Realty Co.*, 601 U.S. at 67, 79.
[234] *Id.* at 69 ("The purposes of that uniform system include promoting 'the great interests of navigation and commerce and maintaining the United States' 'diplomatic relations.'").
[235] *Id.*
[236] *Id.*
[237] *Id.* at *13.
[238] *Raiders Retreat Realty Co.*, 601 U.S. at 74.
[239] *Id.*
[240] *Id.* at 75.
[241] *Id.*

further into the wind.[242] The Court noted that choice-of-law provisions emerged after the *Wilburn Boat* conundrum to answer the problem.[243]

D. Justice Thomas's Concurrence

Justice Thomas concurred to specifically address how "*Wilburn Boat* rests on flawed premises and, more broadly, how the decision is at odds with the fundamental precept of admiralty law."[244] First, he noted that in *Wilburn Boat*, the Court's "first conclusion, that there was no established federal admiralty rule requiring literal compliance with express warranties, is indefensible."[245] Second, the Justice attacked the *Wilburn Boat* Court for not creating a federal maritime rule.[246] He points out that just because the states have traditionally provided rules of decision for insurance contracts in general, there is no reason to leave marine insurance law to them.[247] Justice Thomas goes on to critique the *Wilburn Boat* Court for failing to acknowledge the fundamental concept of uniformity in maritime law.[248] He ends his concurrence by firing one final salvo at *Wilburn Boat*, stating that "[t]oday's decision further erodes *Wilburn Boat*'s foundation, and rightly so."[249] Notably, no other Justice joined Justice Thomas's concurrence.[250]

IV. *Wilburn Boat* Should be Scuttled.

The majority opinion fails to truly grapple with the issue of *Wilburn Boat*. Justice Kavanaugh puts it this way: "[w]e need not resolve any such tension because *Wilburn Boat* does not control the analysis of choice-of-law provisions in maritime contracts.[251] To reiterate, *Wilburn Boat* did not involve a choice-of-law provision, and the case, therefore, affords limited guidance on that distinct issue."[252] Justice Kavanaugh and the rest of the Court appear satisfied to punt on the issue, at least expressly.[253] Still, the unanimous opinion noted that choice-of-law clauses were created to answer the problems of uncertainty created by the *Wilburn Boat* court.[254]

Turning to Justice Thomas's concurring opinion, he argued that *Wilburn Boat* is unsound and ultimately irrelevant given the distance the Supreme Court has placed between itself and the

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[242] *Id.* at 78.
[243] *Raiders Retreat Realty Co.*, 601 U.S. at 73–74.
[244] *Id* .at 80 (Thomas, J. concurring).
[245] *Id.* at 82 (Thomas, J. concurring) ("Treatises from the early 19th century to the 20th century recognized the literal compliance rule as part of the general maritime law governing marine insurance.").
[246] *Id.* (Thomas, J. concurring) (The *Wilburn Boat Court "*reasoned that general insurance regulation is an area that historically has been left to the States and that courts are ill suited for crafting marine insurance law on a case-by-case basis.")
[247] *Id.* at 82–83 (Thomas, J. concurring).
[248] *Raiders Retreat Realty Co.*, 601 U.S. at 83 (Thomas, J. concurring).
[249] *Id.* at 85.
[250] *Id.*
[251] *Id.* at 74.
[252] *Id.*
[253] *Raiders Retreat Realty Co.*, 601 U.S. at 74.
[254] *Id.* at 75.

flawed opinion.[255] This assessment, however, is inaccurate. First and foremost, Justice Thomas's concurrence was not joined by any other Justice.[256] Second, contrary to what Justice Thomas believed, the majority opinion did not do much to erode *Wilburn Boat*.[257] In fact, the majority questioned its relevance to the case at hand and seemingly steered around the issue of *Wilburn Boat* by distinguishing it on the ground that *Wilburn Boat* did not involve a choice-of-law provision.[258] The only grounds that one could point to that this decision eroded *Wilburn Boat* at all is that the court failed to expand it beyond the gap-filler regarding warranty clauses that it was meant to be; however, if one follows the language of *Wilburn Boat*, that is exactly the rule that can be gleaned from that case.

Many of Justice Thomas's criticisms of *Wilburn Boat* are widely held by numerous maritime commentators that have covered the subject over the last seventy years.[259] But the *Raiders* case and Justice Thomas's concurrence do little to substantively address the issue of uniformity in the law of maritime insurance policies.[260] The majority's holding in the *Raiders* case—that choice-of-law clauses are presumptively enforceable—allows *Wilburn Boat* to live on.[261] This holding implicates a major policy issue because if *Wilburn Boat* is still afloat, it spells doom for the average policyholder.

The Court is correct that the choice-of-law clause does solve the issue of uniformity created by *Wilburn Boat* in the sense that if all insurance companies elect choice-of-law provisions in insurer-friendly states, the law would be "uniform."[262] However, if *Wilburn Boat* were substantively addressed and overturned, the solution posed by the choice-of-law provisions would become unnecessary. The issue with allowing the choice-of-law clause in *Raiders* to stand in conjunction with *Wilburn Boat* leads to an outcome more favorable to the insurer. The Court has created an environment wherein insurance companies can use their superior bargaining power and sophistication against the average policyholder. As the current post-*Raiders* situation stands, the insurance companies can elect to use New York law, thereby circumventing the law of the State with the greatest interest in the dispute.[263] Insurers often use New York law and similar states because they require strict performance of all warranties and strictly recognize and apply the

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[255] *Id.* at 80.
[256] *Raiders Retreat Realty Co.*, 601 U.S. at 79 (Thomas, J. concurring) (meaning this is a persuasive authority at best).
[257] *See id.* at 74–76.
[258] *Id.* at 74.
[259] *See e.g.* Joel K. Goldstein, *The Life And Times Of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR L. & COM. J., 395, 419 (1997); Staring, *supra* note 37 at 468–69; SCHOENBAUM, *supra* note 1 § 19:7; MacChesney, *supra* note 8, at 564; GILMORE & BLACK, THE LAW OF ADMIRALTY 69 (2d ed. 1975) (calling the *Wilburn Boat* decision "nightmarish").
[260] *See* SCHOENBAUM, *supra* note 1, § 19:14, at 462 ("A showing of a breach of the duty of utmost good faith will void the contract *ab initio* even after the risk has attached.") (meaning that no matter how small the misrepresentation is, the policy is entirely void).
[261] *Raiders Retreat Realty Co.*, 601 U.S. at 70, 74.
[262] *Id.* at 75.
[263] *Raiders Retreat Realty Co.*, 601 U.S. at 72.

uberrimae fidei doctrine.[264] If the Court had to go through a *Wilburn Boat* analysis, the conclusion would likely remain unchanged when interpreting warranty clauses in marine contracts or the effect of the duty to disclose. This is due to the fact that even if the insured successfully argues that federal maritime law applies under *Wilburn Boat*, the only laws that could be established—given the high bar to prove entrenchment of maritime law—would be those that require literal performance regardless.[265]

The Court in *Raiders* errs on this point because it assumes that the selection of New York law was a choice.[266] Whether Raiders was in a position to negotiate this clause is a matter of speculation. By calling this a choice, the Court set the standard that insurance companies can select laws more favorable to the insurer, like in the *Raiders* case.[267]

The current situation creates 'uniformity and certainty' in the sense that a choice-of-law clause within the contract is presumptively valid. This allows insurance companies to dictate the applicable law. The Court puts the wagon before the horse here by addressing the problems created by *Wilburn Boat*, including the need for uniformity, and proposing the choice-of-law clause as a solution.[268] However, it would be much simpler to address *Wilburn Boat* itself, as Justice Thomas proposed, and scuttle that wrongly decided case. *Wilburn Boat* should be addressed at the source and in the absence of legislative intervention, the Court should make an affirmative statement on warranties and the doctrine of *uberrimae fidei* should be strictly complied with. Although not ideal for the insured, such a decision would bring back uniformity and certainty of applicable law; and the outcome of policy disputes would once again be predictable. The Court in *Raiders* instead decided to deal with the symptoms of the problem created by *Wilburn Boat* instead of the root of the issue and took this path without giving much weight to prevailing policy considerations.

However, assuming *arguendo* that Justice Thomas is correct, and *Wilburn Boat* is indeed a dead letter,[269] what policy should step into the void? The one that the Court adopted fails to solve

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[264] *See* Com. Union Ins. Co. v. Flagship Marine Servs., 190 F.3d 26, 32 (2d Cir. 1999); *see also* Fireman's Fund Ins. Co., v. Great American Ins. Co. of New York, 822 F.3d 620, 644–45 (2d Cir. 2016)..

[265] *See e.g.*, AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255, 263 (3d Cir. 2008) (holding that the doctrine of *uberrimae fidei,* which went back 200 years, was "entrenched"); *see* Certain Underwriters at Lloyds v. Inlet Fisheries Inc., 518 F.3d 645, 654 (9th Cir. 2008) ("Following the framework of *Wilburn Boat*, we hold that the longstanding federal maritime doctrine of uberrimae fidei, rather than state law, applies to marine insurance contracts"); *see* Port Lynch, Inc. v. New England Int'l Assurety, Inc., 754 F. Supp. 816, 823 (W.D Wash. 1991) (basing its conclusion on old English common law, the court reasoned that "[u]nder this established federal rule of admiralty, a breach of an express trading or navigational warranty releases the insurance company from liability even if compliance with the warranty would not have avoided the loss").

[266] *See Raiders Retreat Realty Co.*, 601 U.S. at 78.

[267] *See id.*; *see also* Hailey G. Cummiskey & Matthew C. Guy, *"Raiders of the Lost Ark": SCOTUS Sides with Great Lakes, Reverses Raiders' Win in Maritime Case*, ADAMS AND REESE LLP (Feb. 21, 2024), https://www.adamsandreese.com/news-knowledge/raiders-of-the-lost-ark-scotus-reverses-raiders-appellate-win-in-maritime-case.

[268] *See Raiders Retreat Realty Co.*, 601 U.S. at 74.

[269] *See id.* at 84–86 (Thomas, J. concurring).

the uniformity issue at its source and is also heavily tilted in favor of insurance companies. There is a much better option, and one needs only look across the pond to see it.

A. United Kingdom Insurance Act of 2015

"The Court has long acknowledged that there are special reasons for keeping the marine insurance laws of the U.S. and England in harmony."[270] Therefore, this Comment proposes that the best path forward is to look to the United Kingdom Insurance Act of 2015 (the 2015 Act) to bring the U.S. back in line with the U.K. and regain uniformity in marine insurance law amongst the fifty states.

The U.K. Insurance Act was partly adopted as an answer to the growing criticisms over the harsh realities of the strict performance rule of marine insurance warranties at the common law.[271] Before the Act was enacted in 2015, the U.K. had adopted the English Marine Insurance Act of 1906 (MIA), which codified the strict performance rule found in common law doctrine.[272] The 2015 Act laid outcomes remedies much less severe than the MIA regarding breach of warranty in a marine insurance contract.[273] The 2015 Act addresses the doctrine of *uberrimae fidei* by only allowing insurers to void the agreement when the breach was "deliberate or reckless,"[274] or there was a misrepresentation that "would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms."[275]

This does not leave the insurers liable for unagreed upon risk; rather, it alters the remedy to the insured by allowing the insurer to offset the risk of the misrepresentation by proportionally reducing the claim such that "insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract.'"[276] The 2015 Act signifies a large departure from the common law doctrine allowing for the automatic rescission of a policy for any breach of *uberrimae fidei*.[277] Under the new standard, recission can only occur if the insured would not have issued the contract at all, and reduction is allowed when the terms of the premium would have been affected when the insurer initially wrote the policy.[278] The 2015 Act deals with the harsh realities of the strict performance of *uberrimae fidei*.[279] It greatly benefits non-

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[270] Queens Ins. Co. of Am. v. Globe & Rutgers Fire Ins Co., 263 U.S. 487, 493 (1924).
[271] *See* Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, LLC, 996 F.3d 1161, 1170 (11th Cir. 2021).
[272] *See generally* Marine Insurance Act, 6 Edw. 7, ch. 41 (1906) (Eng.) (amended 2015).
[273] *See* Insurance Act 2015, c. 4, (UK); *see* Explanatory Notes of Insurance Act 2015 *Consequential amendments*, at *4, ¶ 20, http://www.legislation.gov.uk/ukpga/2015/4/pdfs/ukpgaen_20150004_en.pdf [hereinafter Insurance Act Explanatory Notes].
[274] Hugh D. Baker, *Sailing to Calmer Seas: The United Kingdom Insurance Act 2015 and Its Potential Effect on United States Marine Insurance Markets and Law*, 41 TUL. MAR. L.J. 159, 179 (Winter 2016) (citing Insurance Act Explanatory Notes, note 280, at *22, ¶ 154) (explaining that "deliberate or reckless" breaches allow the insurer to deny all claims and retain any premiums previously paid).
[275] Insurance Act 2015, c. 4, § 7(3) (UK).
[276] Baker, *supra* note 274, at 176 (quoting Insurance Act 2015, c. 4, § 8(2), sch. 1, § 6(1) (UK)).
[277] Baker, *supra* note 274, at 176.
[278] Baker, *supra* note 274, at 176.
[279] Baker, *supra* note 274, at 174.

consumer marine insurance contracts by offering the insured greater forgiveness for non-material misrepresentations.[280]

The other important change the 2015 Act made is the approach to warranties in marine insurance contracts.[281] The change permits coverage suspension, but only "from the time of the breach until the resolution of the breach."[282] This change "applies to both implied and express warranties."[283] The insured also benefits because during the time of the warranty breach, the suspension of the contract only applies to claims substantially related to the breach.[284] This means that the insurer can only avoid its obligations to pay the policy claim if the claim is related to the breach or substantially caused by the breach.[285] This solution offers a balanced remedy by offering greater protection to the insured without exposing the insurers to undue risk.

The Eleventh Circuit also seems to favor adopting this path, as noted in the prior discussion of the *Ocean Reef* case.[286] There, the Eleventh Circuit pointed out that the U.K. has abandoned the literal compliance rule and that if there are still "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, it will be interesting to see what effect the 2015 Act has on American maritime law (and on how *Wilburn Boat* is viewed)."[287] The Supreme Court in *Raiders* did not consider the U.K.'s 2015 Insurance Act as an option to address *Wilburn Boat*, much to the detriment of maritime lawyers in the U.S. and the average policyholder.

Using the U.K. Insurance Act of 2015 as a guide would also greatly help the insurance companies that currently use *Wilburn Boat* and choice-of-law clauses. The 2015 Act has been a boon for the marine insurance market in England, which has become even more competitive after its passage.[288] The United Kingdom has controlled a quarter of the marine insurance market for the last decade, whereas the U.S. market has shrunk to nearly 5% market share in the last 20 years.[289] The U.K. Law Commission found that the act allows for "a better product for the insured and a [more] competitive market for the insurer," as it brings the common law more in line with insured-friendly countries.[290]

New legislation is the best path forward, as it brings back uniformity by eliminating the need for a *Wilburn Boat* analysis and benefits both the insured and the insurer. The likelihood of its implementation is relatively slim, given Congressional inaction over the past seventy years

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[280] Baker, *supra* note 274, at 176.
[281] Insurance Act Explanatory Notes, *supra* note 273.
[282] Baker, *supra* note 274, at 180.
[283] Baker, *supra* note 274, at 180.
[284] Baker, *supra* note 274, at 180.
[285] Baker, *supra* note 274, at 180.
[286] *See* Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161, 1170 (11th Cir. 2021).
[287] *Id.* (citing *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).
[288] Baker, *supra* note 274, at 189.
[289] Baker, *supra* note 274, at 189.
[290] Baker, *supra* note 274, at 189.

since *Wilburn Boat* was decided.[291] Moreover, the MLA has been advocating for the codification of maritime insurance law for decades, but its lobbying has fallen on deaf ears.[292] This means the most likely path forward, post-*Raiders,* is among the other inferior options discussed below.

B. Maritime Law Association's Solutions

The Maritime Law Association of the United States (MLA) has been grappling with the issues created by *Wilburn Boat* for the last seventy years. During that time, it tried several methods to fix the issues left in its wake. Since *Wilburn Boat,* the MLA has been filing amicus briefs in cases that might have been headed for the Supreme Court; but, the Supreme Court has not often accepted the cases.[293] When the Court does accept them, it often punts on the *Wilburn Boat* issue as in *Raiders.*[294] As noted above, the MLA has also advocated for the passage of legislation since 1991.[295] The organization "adopted a resolution advocating the passage by Congress of a statute reading, '[t]he interpretation and effect of policies of marine insurance and other insurances of marine risks shall be governed by the general maritime law and statutes of the United States.'"[296] The MLA even conducted a study to demonstrate that a statute modeled after the English Marine Insurance Act of 1906, would not involve significant changes in the United States law governing marine insurance.[297]

The final solution to *Wilburn Boat* offered by the MLA is to create and widely adopt a Restatement of Marine Insurance.[298] The main issue with trying to create a Restatement of Marine Insurance is the issue of adoption. Getting jurisdictions to adopt a Restatement is challenging, and the timeline for such an adoption may be decades. Moreover, without a bright line rule on what is established or entrenched maritime law, the Restatement would have no set standard to guide courts and practitioners. Ultimately, the solution may be viable in the long term, but it faces an uphill battle between nationwide adoption and a need for more enumerated standards.

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[291] *See* Thomas Belknap, Jr., *What is the Insured's Duty Under a Marine Insurance Policy? It Depends…*, MARINE LINK (Mar. 11, 2022), https://www.marinelink.com/news/insureds-duty-a-marine-insurance-policy-494964 (highlighting that the "chances of Congress addressing this issue in legislation anytime in the foreseeable future are virtually nil"); *see* Malcolm Clarke, *Marine Insurance System in Common Law Countries – Status and Problems*, Presented at the MARINE INS. SYMPOSIUM (June 4-6, 1998), https://www.bmla.org.uk/annual_report/rep_marine_clark.htm (noting that a "comprehensive statute would [be] the ideal solution," skepticism exists concerning a timely congressional response).

[292] Staring, *supra* note 1, at 1634.

[293] Staring, *supra* note 1, at 1634.

[294] *See* Staring, *supra* note 1, at 1634.

[295] Staring, *supra* note 1, at 1634.

[296] Staring, *supra* note 1, at 1634 (quoting Maritime Law Ass'n, The Report of the Committee on Marine Insurance, General Average, and Salvage, M.L.A. Spring Meeting, May 3, 1991, M.L.A. Doc. No. 688, at 9849-50 (1991)).

[297] Staring, *supra* note 1, at 1634.

[298] *Id.*; *see also* Clarke, *supra* note 291.

These solutions posited by the MLA would solve the uniformity issue *Wilburn Boat* and its progeny created. However, they would still not address *Wilburn Boat*'s deleterious effect on the insured or the boon it has given insurance companies to skirt liability on small technicalities.[299]

C. Allow *Wilburn Boat* to Keep Cruising through the Post-*Raiders* World

Now that *Raiders* has been decided, it appears that the Supreme Court, notwithstanding Justice Thomas, is content with allowing *Wilburn Boat* to keep puttering along.[300] The main argument in favor of *Wilburn Boat* is the same argument advanced by the Supreme Court in the original decision: that state law should apply to marine insurance contracts as it does to normal insurance contracts because that has been the case historically.[301] However, prior to *Wilburn Boat,* when maritime law was uniform, the issue was governed exclusively by federal maritime law, which was drawn from the common law.[302] The Supreme Court precedent on this issue is abundantly clear—federal courts develop law in all areas, typically in the province of the states.[303] As Justice Thomas points out in his concurrence in *Raiders*, just because the *Wilburn Boat* Court doubted the "ability of judges to craft marine-insurance rules on a case-by-case basis is simply a critique of the common-law process."[304] Justice Thomas went on, "[b]ut, federal courts exercising admiralty jurisdiction act as common-law courts, and the difficulties inherent in that role do not justify abandoning it."[305] If the circuits adopt Justice Thomas's concurrence, the path away from *Wilburn Boat* may have been navigated. However, the issue of uniformity would take decades to be addressed as the Supreme Court would have to clarify the numerous interpretations on the performance of warranties and the doctrine of *uberrimae fidei*, as addressed in this Comment.

The ultimate holding in Raiders is that *Wilburn Boat* can be contracted around via choice-of-law clauses;[306] however, this is just a band-aid solution. The Court failed to address *Wilburn Boat* in any substantive way except to state that it does not apply to choice-of-law provisions in marine insurance contracts.[307] Using the choice-of-law clause to deal with *Wilburn Boat* is like plugging a leak in the hull of a boat with a cork instead of patching the hull. It allows parties to

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[299] Under Wilburn Boat, insurers often void policies for breach of warranty and *uberrimae fidei* in the absence of causation to the event causing the loss. *See e.g.*, Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 68 (2024) (claim was not linked to fire suppression system being out of order); Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161, 1162–1164 (11th Cir. 2021) (captain being contracted to drive boat would not have prevented hurricane damage that led to claim); Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364, 1366 (11th Cir. 1988) (". . . breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss."); AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255, 257 (3d Cir. 2008) (slightly inflated purchase price had nothing to do with the boat sinking).

[300] *See Raiders Retreat Realty Co.*, 601 U.S. at 74–76.

[301] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316–18 (1955).

[302] *See Raiders Retreat Realty Co.*, 601 U.S. at 82 (Thomas, J. concurring).

[303] *Id.* at 83 (citation omitted) ("States have traditionally provided rules of decision for general contract and tort law, yet federal courts continue to develop maritime law in those areas.").

[304] *Id.*

[305] *Id.*

[306] *Id.* at 75.

[307] *See Raiders Retreat Realty Co.*, 601 U.S. at 73–75.

have certainty in a literal sense, but it does not create certainty within the field of maritime law. Moreover, as Justice Kavanaugh in *Raiders* pointed out, some exceptions can invalidate a choice-of-law clause.[308] *Raiders* may have had some success under the exception that "courts may disregard choice-of-law clauses when parties can furnish no reasonable basis for the chosen jurisdiction"[309] as GLI is a company organized in Germany and headquartered in the United Kingdom.[310] The choice-of-law solution creates artificial uniformity; and although the clauses are presumptively enforceable, they can be invalidated, which does not provide the bedrock certainty typical of maritime law.[311]

As GLI pointed out, *Wilburn Boat* creates a situation in which neither the litigants nor the courts know what law will apply, even when the parties contracted for a choice-of-law clause.[312] Nonetheless, litigants and courts have clear-cut rules regarding the validity of choice-of-law clauses, but nothing beyond that. But, the issues created by *Wilburn Boat* remain.

V. Conclusion

The Supreme Court failed to address *Wilburn Boat* despite the pleadings of both litigants and a concurrence by Justice Clarence Thomas.[313] The *Raiders* case only settled one issue: the choice-of-law clause is not subject to a *Wilburn Boat* analysis.[314] The federal circuit courts are still left adrift in the vast ocean of marine insurance warranties and disclosures without a rudder.

The uncertainty and lack of uniformity regarding marine insurance warranties will continue in the absence of judicial or legislative intervention. Although Justice Thomas is correct in his concurrence that federal courts exercising admiralty jurisdiction should be able to develop this area of law on a case-by-case basis, so much damage has been done in the past seventy years.[315] It would take decades to clear the debris and remedy the circuit splits regarding warranties within

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[308] *Id.* at 76 ("Courts should disregard choice-of-law clauses in otherwise valid maritime contracts when the chosen law would contravene a controlling federal statute. Courts may disregard choice-of-law clauses when parties can furnish no reasonable basis for the chosen jurisdiction.").

[309] *Id.*

[310] *Id.* at 68.

[311] *See id.* at 70; *see* John Coyle, *Thoughts on the Petitioners' Brief in* Great Lakes, TRANSNATIONAL LITIGATION BLOG (Jul. 13, 2023), https://tlblog.org/thoughts-on-the-petitioners-brief-in-great-lakes/ (noting that in earlier cases courts have speculated that while "state policy may be used to invalidate a choice-of-law clause in a maritime contract").

[312] *See* Brief for Petitioner at 6, Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC, 601 U.S. 65 (2024) (No. 22-500).

[313] *See* Charlie McCammon, *U.S. Supreme Court addresses marine insurance*, WILLIS TOWERS WATSON, (Feb. 28, 2024) https://www.wtwco.com/en-us/insights/2024/02/us-supreme-court-addresses-marine-insurance.

[314] *See Raiders Retreat Realty Co.*, 601 U.S at 78–79.

[315] Joshua Carback, *SCOTUS Clarifies Choice of Law in Admiralty Litigation*, FRANKLIN & PROKOPIK (2024), https://www.fandpnet.com/insight/scotus-clarifies-choice-of-law-in-admiralty-litigation/, (noting severe criticism of *Wilburn Boat* as "undermining legal uniformity" and its perpetuation of roughly cobbled "federal-state regulation of marine insurance" included in Justice Thomas' concurrence).

marine insurance law alone. Federal courts have already been sailing under *Wilburn Boat* far too long for Thomas's solution to be viable.

Choice-of-law clauses also fall short of remedying certainty and uniformity because, although they create uniformity in a literal sense, insurer-favorable states, like New York, are often selected as the chosen law under the insurance policy.[316] Another insurer may select Illinois or Massachusetts, furthering the lack of uniformity. Ultimately, the choice-of-law solution falls short of the uniformity goal because the rest of the country still has different laws governing disputes. The only way for total uniformity would be for all parties to agree to the handful of states with the same uniform laws governing breach of warranty. Moreover, there are policy reasons to avoid such a solution. The average policyholder lacks bargaining power and sophistication when agreeing and understanding insurance policies; this ultimately undermines the freedom to contract. The policyholder has no choice; if they do not like the policy terms, the insurance company would be unwilling to bargain, and the insured has to settle with potentially unfavorable laws.

Looking to the United Kingdom Insurance Act of 2015 as a template is the best path out of the wreckage that is *Wilburn Boat*. The Supreme Court seems content to allow the Circuit split to endure and make narrow rulings on disputes that could potentially settle *Wilburn Boat* once and for all. As the circumvention of *Wilburn Boat* continues, there is no certainty in sight for maritime lawyers regarding marine insurance contracts and the warranties contained therein.

[316] *See* Keriann Langley, *Great Lakes Reinsurance v. Durham Auctions*, 56 LOY. L. REV. 1072, 1073 (2010) ("Marine insurance policies frequently contain [choice-of-law] clauses that are drafted by the insurer to select law favorable to their industry . . . not merely for certainty, predictability, and uniformity, but to protect their chances of avoiding payment on a policy in the event that litigation arises.").