

In the
Supreme Court of the United States

ROBERT M. BASSARIDES AND ELIZABETH C. BASSARIDES,

Petitioners,

v.

EMPIRE STATE MARINE INSURANCE CO., INC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

COMPETITION PACKET FOR THE
TWENTIETH ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2013

DAVID MARCOU
Judge John R. Brown Admiralty
Moot Court Competition
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705
tel.: (512) 522 – 9654
fax: (512) 471 – 8585

ALEXANDER D. PINSON
Moot Court Board
Charleston School of Law
81 Mary Street
Charleston, SC 29402
tel.: (843) 329 – 1000
fax: (843) 853 – 2519
(attn: Moot Court)

Competition Committee:

DAVID W. ROBERTSON
MICHAEL F. STURLEY
University of Texas School of Law

MILLER W. SHEALY, JR.
Charleston School of Law

Competition Directors

Table of Contents

MATERIAL THAT CAN BE CITED IN THE BRIEFS AS “APPENDIX TO THE PETITION FOR CERTIORARI”:

Opinion of the United States Court of Appeals for the Fourth Circuit reported as <i>Bassarides v. Empire State Marine Insurance Co.</i> , 679 F.3d 1383, 2012 AMC 3333 (4th Cir. 2012)	1a
Order of the United States Court of Appeals for the Fourth Circuit denying rehearing	7a
Opinion of the United States District Court for the District of Maryland reported as <i>Bassarides v. Empire State Marine Insurance Co.</i> , 2011 AMC 3333 (D. Md. 2011)	8a

ADDITIONAL MATERIAL INCLUDED IN THE PACKET:

Selected Chronology of the Case	1b
---------------------------------	----

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2318

ROBERT M. BASSARIDES AND ELIZABETH C. BASSARIDES,
Plaintiffs-Appellees,

v.

EMPIRE STATE MARINE INSURANCE CO., INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Michele Y. Portia, District Judge.
(6:10-cv-06838-MYP)

Argued: March 5, 2012

Decided: May 17, 2012

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

Reversed and remanded by published opinion. Judge Hammurabi wrote
the opinion in which Judge Justinian joined. Judge Solomon dissented.

HAMMURABI, Circuit Judge:

Defendant-appellant Empire State Marine Insurance Co., Inc., appeals a decision of the United States District Court for the District of Maryland (Portia, J.) granting summary judgment to plaintiffs-appellees Robert and Elizabeth Bassarides and ordering Empire to pay them \$850,000. We reverse.

Introduction

This case arises from a collision on Chesapeake Bay between the plaintiffs' yacht and a commercial vessel insured by Empire. A Maryland state court awarded compensatory and punitive damages in plaintiffs' action (defended by Empire) against the owner of the commercial vessel. Empire paid the compensatory damages but argues that it is not liable for the punitive damages. Now that the owner of the commercial vessel has gone bankrupt, the plaintiffs seek to recover the punitive damages from Empire under Maryland Insurance Code § 19-102(b), which authorizes a direct action by a judgment creditor against an insurer when the creditor is unable to recover directly from the insured for a liability covered by the relevant policy.

The sole issue on appeal is whether the liability policy that Empire issued to the vessel owner covers punitive damages. Resolving that issue requires us to address two questions: What law governs? What does the governing law provide? Our task in addressing those questions is greatly simplified by the parties' agreement on several aspects of the analysis. It is undisputed that the policy, as a contract of marine insurance, is a "maritime contract" and that this controversy is accordingly within the admiralty jurisdiction. *See, e.g., Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 29-36, 1997 AMC 2394, 2403-08 (1871). Under *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955), however, marine insurance cases are generally subject to state law, notwithstanding the existence of admiralty jurisdiction, when no established federal rule applies. The parties agree that no preexisting rule of federal maritime law addresses the insurability of punitive damages. If state law governs here, the parties further agree that New York law governs under a choice-of-law clause in the insurance policy — despite the fact that the policy was issued in Maryland and the case has substantial connections with Maryland.

The district court recognized that no preexisting rule of federal maritime law addresses the insurability of punitive damages but concluded that it should fashion a new rule. It accordingly held that punitive damages are insurable in marine insurance policies. If we agree with the district court's reasoning, the judgment below should of course be affirmed. But we must reverse that judgment if we conclude that the district court erred either (1) in deciding to fashion a new rule of federal maritime law or (2) in fashioning that new rule to permit the insurability of punitive damages.

We conclude that the district court erred in deciding to fashion a new rule of federal maritime law. Faithfully applying the Supreme Court's teachings in *Wilburn Boat*, and following the guidance of our sister circuits, we hold that state law should govern the insurability of punitive damages in marine insurance policies. Because the parties agree that the state law to be applied here is that of New York, and because the plaintiffs concede that New York law prohibits the insurability of punitive damages, Empire's policy may not cover such damages and the plaintiffs may therefore not recover from Empire. This conclusion makes it unnecessary to consider what the federal rule might have been if we had found it appropriate to fashion a new federal rule.

Analysis

The plaintiffs correctly point out that the *Wilburn Boat* Court expressly recognized the possibility of fashioning a new federal admiralty rule when no existing rule governs a dispute. *See* 348 U.S. at 314, 1955 AMC at 471. But we think that they misunderstand the significance of the Court's decision not to fashion a new rule in *Wilburn Boat*. We do not read the Court's opinion as a narrowly focused evaluation of the propriety of fashioning a new rule to govern warranties. We instead read it as a broadly focused rejection of the propriety of fashioning any new federal rule to govern any aspect of marine insurance. In other words, *Wilburn Boat* did not

introduce the possibility of fashioning a new federal admiralty rule as an invitation that future courts should henceforth consider on a case-by-case basis. It instead raised that possibility only to reject it for all future marine insurance cases.

The first sentence of the *Wilburn Boat* analysis of this issue sets the tone: “The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties.” 348 U.S. at 316, 1955 AMC at 473. Although warranties are mentioned, the argument is not specific to the topic under consideration. The analysis continues, “The control of all types of insurance companies and contracts has been primarily a state function since the States came into being.” *Id.* That analysis applies just as strongly when considering the insurability of punitive damages (the topic at issue here) as it does to the interpretation of warranties (the topic at issue in *Wilburn Boat*). And that broad, general analysis continues for almost four full pages before the Court turns (in a single paragraph) to the specific issue “[i]n this very case.” 348 U.S. at 319, 1955 AMC at 475. Yet even the arguments in that paragraph would apply just as strongly to practically any issue in marine insurance on which opinions are sharply divided. *See* 348 U.S. at 319-320, 1955 AMC at 475-476.

Here it might seem that the task of creating a new federal rule would be much easier than in the *Wilburn Boat* context because a court faces only two choices: either punitive damages are insurable in marine insurance policies or they are not. In actuality the task is more complicated. Most significantly, more than two choices exist. To take just one example, a number of states draw a distinction between direct and vicarious liability for punitive damages, holding that direct

liability is not insurable but that vicarious liability is insurable.¹ Furthermore, a court fashioning a new rule would need to come to grips with the consequences of whichever rule is selected. If the new rule were to prohibit insurability, for example, would policyholders who reasonably expected coverage for punitive damages (for example, because the policy would have been governed by the law of a state such as Maryland that permits insurability) be entitled for a partial refund of their premiums because they have received less coverage than they expected?

The insurability of punitive damages is a particularly controversial subject in insurance law generally. Not only are the states deeply divided on the issue (as the district court itself recognized), but the choice in each state has been based entirely on policy considerations. Thus the *Wilburn Boat* Court's conclusion in the one paragraph that focused on the particular topic of warranties applies even more strongly here. "[S]uch a choice involves varied policy considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task." 348 U.S. at 320, 1955 AMC at 476.

Our reading of *Wilburn Boat* is supported by the fact that our sister circuits have almost without exception held that state law governs in marine insurance disputes when no prior rule of federal maritime law applies. The only court of appeals to consider whether to fashion a federal rule governing the insurability of punitive damages held that state law applies. *See Taylor v. Lloyds Underwriters of London*, 972 F.2d 666, 668-669, 1994 AMC 607 (5th Cir. 1992) (reversing a district court decision applying federal law), *cert. denied*, 507 U.S. 952 (1993); *see also*

¹ In the present case, the state-court record does not clarify whether the jury found Mid-Atlantic directly or vicariously liable for punitive damages. The misconduct of the *M-A Jennifer* crew is clear, but the jury also heard ample evidence of the misconduct of Mid-Atlantic's senior management in Baltimore. The parties have agreed that if we were to reach the second issue in the case, we would be required to assume that the jury held Mid-Atlantic directly liable for punitive damages.

Randall v. Chevron U.S.A., Inc., 13 F.3d 888, 909, 1994 AMC 1217, 1249-50 (5th Cir. 1994) (following *Taylor*).

Conclusion

Because the present controversy is properly governed by state law, and because the parties agree that New York law is the relevant state law under the policy's choice-of-law clause, the policy did not cover punitive damages. The plaintiffs are thus unable to recover from Empire the punitive damages that the state court awarded them against Empire's insured.

The decision below is

Reversed.

SOLOMON, Circuit Judge, dissenting:

I would affirm, substantially for the reasons given by the district court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2318

ROBERT M. BASSARIDES AND ELIZABETH C. BASSARIDES,
Plaintiffs-Appellees,

v.

EMPIRE STATE MARINE INSURANCE CO., INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Michele Y. Portia, District Judge.
(6:10-cv-06838-MYP)

July 6, 2012

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SOLOMON, Circuit Judge, dissenting:

As I continue to believe that the district court was correct, I would grant the petition for rehearing and set the case for argument en banc.

United States District Court
for the District of Maryland

ROBERT M. BASSARIDES AND ELIZABETH C. BASSARIDES, Plaintiffs,

v.

EMPIRE STATE MARINE INSURANCE CO., INC., Defendant.

6:10-cv-06838-MYP

September 9, 2011

MEMORANDUM OPINION AND ORDER

PORTIA, J.:

Two dispositive motions are pending before the Court. Plaintiffs Robert M. Bassarides and Elizabeth C. Bassarides move for summary judgment under Fed. R. Civ. P. 56. Defendant Empire State Marine Insurance Co. (“Empire”) moves to dismiss plaintiffs’ complaint under Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the plaintiffs’ motion is granted, the defendant’s motion is denied, and final judgment is entered for the plaintiffs.

Background

This case is a marine insurance coverage dispute arising out of a collision on Chesapeake Bay between the plaintiffs’ yacht and a commercial vessel that was insured by the defendant insurance company. Robert M. Bassarides and Elizabeth C. Bassarides are Easton, Maryland, residents who owned *The Paralus*, a 50' Princess Viking Sport Cruiser Flybridge. *The Paralus*, built in 2003 with a fiberglass hull, was powered by twin diesel inboard engines. Plaintiffs purchased the vessel in 2005 and berthed it at a marina near their home in Easton. They used it for recreational purposes primarily in Chesapeake Bay.

Empire is a New York insurance company licensed to do business in Maryland. In 1998, it issued a liability policy to Mid-Atlantic Shipping Lines, Inc. (“Mid-Atlantic”), a Maryland corporation that was based in Baltimore until its bankruptcy in November 2010. Mid-Atlantic operated “feeder” vessels — relatively small vessels (at least by commercial standards) that carry ocean shipping containers between major ports (where large container ships call) and smaller ports (where the containers are initially shipped or ultimately delivered). Mid-Atlantic served ports on the East Coast, regularly calling at New York, Philadelphia, Baltimore, Newport News, Norfolk, Charleston, Savannah, and Jacksonville.

Working through a broker in Baltimore, Mid-Atlantic obtained liability insurance for all of its vessels under a single marine insurance policy from Empire. Empire concedes that the policy was “issued” in the State of Maryland. By its terms, the policy covers all of Mid-Atlantic’s liabilities arising out of the operation of any of the vessels specifically identified in a schedule to the policy (which was updated from time to time as necessary), subject to certain monetary limits that are not relevant here. The policy contained a choice-of-law clause declaring that the “[p]olicy was governed by the general maritime law of the United States or, to the extent that state law may be held to govern, by the law of the State of New York.”

On August 2, 2008, the *M/V M-A Jennifer*, one of the Mid-Atlantic vessels covered by Empire’s policy, was sailing at a speed of approximately 10-11 knots in a northerly direction in Chesapeake Bay on a voyage from Charleston to Norfolk to Baltimore. The *M-A Jennifer* is a 250' vessel that was carrying 237 ocean shipping containers. Those containers had been carried to Charleston or Norfolk from various ports in Africa, Asia, Australia, Europe, and South America on much larger ships¹ operated by a number of different international shipping lines.

¹ Some of those ships carried as many as 6,000 TEUs. A “TEU” is a twenty-foot equivalent unit. Thus one 20' shipping container is a single TEU and a 40' shipping container is two TEUs.

Mid-Atlantic had contracted to deliver those containers in Baltimore, either to the consignees identified in the governing bills of lading or to inland carriers who would then deliver the containers to the consignees at locations relatively near Baltimore.

At the same time, the plaintiffs were sailing *The Paralus* in a westerly direction from St. Michaels (where they had stopped to visit the Hooper Strait Lighthouse at the Chesapeake Bay Maritime Museum), through Eastern Bay, toward Herring Bay. They had maintained a constant course at a constant speed of approximately 12 knots for over half an hour. Although commercial vessels are commonly equipped with an AIS (Automatic Identification System), the device is much less common on recreational vessels. *The Paralus* did not have an AIS.² If there had been an AIS transponder on board, it would have communicated electronically with AIS devices on other vessels (such as the *M-A Jennifer*) so that the receiving vessel's watch would have noticed the AIS signal from *The Paralus* displayed on its radar or AIS receiver. That signal would have included the name of *The Paralus*, which would have enabled the *M-A Jennifer* to communicate by radio with *The Paralus*.

In clear violation of the applicable regulations,³ no lookout was posted on the *M-A Jennifer* during the fateful voyage⁴ and her watch did not periodically walk out on the bridge wings

² As recreational vessels are rarely equipped with AIS transponders, plaintiffs did not breach any duty in failing to equip *The Paralus* with one. Empire does not contend otherwise. Indeed, Empire does not challenge the propriety of any aspect of the state-court judgment against Mid-Atlantic.

³ If the incident had occurred on the high seas, the governing navigation rules would have been those specified in the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS). Here the Inland Navigation Rules, 33 CFR part 83, apply because Chesapeake Bay is part of "the inland waters of the United States" as defined in 33 CFR § 83.03(o). See 33 CFR § 80.510 (defining the demarcation line at the entrance to Chesapeake Bay). In the present context, the Inland Navigation Rules are substantially the same as the corresponding COLREGS.

⁴ The relevant rule provides as follows:

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circum-

to look for other vessels. The watch instead stayed inside the air-conditioned wheelhouse, with the doors to the wings closed, and relied solely on radar to identify hazards ahead. Unfortunately, the radar was set to the 10-mile range and did a very poor job of detecting relatively small fiberglass vessels close to the *M-A Jennifer*, such as *The Paralus*. Thus no one on the bridge of the *M-A Jennifer* was aware of *The Paralus*'s presence as the two vessels approached.

The plaintiffs were aware of the *M-A Jennifer*'s presence, but they were initially unconcerned. Robert Bassarides (who was at the helm at the time) assumed that he could pass safely in front of the *M-A Jennifer*. In any event, the plaintiffs had the right of way. Because they were travelling essentially from east to west as the *M-A Jennifer* was travelling essentially from south to north, they were aboard a crossing vessel on the *M-A Jennifer*'s starboard bow. Under the governing navigation rules,⁵ the *M-A Jennifer* was obligated to give way⁶ and *The Paralus* was required to "keep her course and speed."⁷ *The Paralus* maintained course and speed and the *M-A Jennifer* should have slowed down or turned right so as to pass astern of *The Paralus*.

Unfortunately, the *M-A Jennifer* neither slowed nor turned. By the time it became obvious to the plaintiffs that they would not pass in front of the *M-A Jennifer* in time and that the much larger commercial vessel was not taking any evasive action, it was already too late to avoid

stances and conditions so as to make a full appraisal of the situation and of the risk of collision.

33 CFR § 83.05 (2011). This corresponds to COLREGS Rule 5.

⁵ See *supra* note 3.

⁶ The relevant rule provides as follows:

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

33 CFR § 83.15(a) (2011). This corresponds to COLREGS Rule 15.

⁷ 33 CFR § 83.17(a)(1) (2011). This corresponds to COLREGS Rule 17(a)(i).

a collision. The plaintiffs watched in terror as the *M-A Jennifer* bore down on them and smashed *The Paralus* to pieces. The bulk of the yacht sank immediately. Fortunately, the plaintiffs themselves were thrown clear of the collision, and were not physically injured. Each of them was wearing a life jacket.

Compounding its fault,⁸ the *M-A Jennifer* did not stop and render aid to the plaintiffs (as required by statute and long-standing principles of maritime law). In the subsequent litigation, Mrs. Bassarides testified that she made eye contact with someone on the commercial vessel as it passed, so the crew was aware of the collision after the fact (even if it had failed to see the yacht in advance). The plaintiffs also introduced evidence showing that the *M-A Jennifer* was running behind schedule and faced serious financial penalties under its contracts of carriage if it lost any more time on the current voyage.

The plaintiffs remained adrift in the water, shouting at every passing vessel that came in sight, until they were finally rescued about three hours later. Fortunately they suffered no serious physical injuries but in the subsequent litigation they presented substantial evidence of the serious emotional injuries that they had suffered, starting with the terror of being run down by a much larger vessel and continuing with the hours adrift when they did not know if or when they would be rescued. Although both plaintiffs had been avid boaters before the incident, they testified over a year after the collision that they were then still afraid to return to the water.

⁸ The Court describes Mid-Atlantic's fault here to provide helpful background to the present controversy, but notes that Mid-Atlantic's fault is not at issue in this case. The state-court proceedings determined not only that Mid-Atlantic was at fault but also the extent of Mid-Atlantic's liability for compensatory and punitive damages. Empire does not challenge those conclusions and they are not at issue here. *Cf. supra* note 2.

The plaintiffs brought a maritime tort action in the Maryland circuit court against Mid-Atlantic,⁹ claiming both compensatory and punitive damages. Mid-Atlantic tendered the case to Empire, which provided a defense of the action in the state court. After trial, the jury awarded the plaintiffs \$475,000 in compensatory damages for their property losses (primarily for the loss of *The Paralus* but also for their personal property that had been on board at the time of the collision), \$425,000 in compensatory damages for their emotional injuries, and \$850,000 in punitive damages. Empire promptly paid the \$900,000 in compensatory damages but declined to pay the punitive damages. The plaintiffs sought to enforce the punitive damages judgment against Mid-Atlantic directly, but Mid-Atlantic had declared bankruptcy shortly before the trial began and no assets were available for unsecured creditors. The plaintiffs were accordingly unable to recover anything further from Mid-Atlantic.

The plaintiffs, asserting admiralty jurisdiction, then brought the present action directly against Empire under Maryland Insurance Code § 19-102, which permits an injured person to recover directly from a tortfeasor's insurance company under certain circumstances. More specifically, § 19-102(b) provides in relevant part as follows:

Each liability insurance policy issued in the State shall provide that:

* * *

(2) if an injured person . . . is unable, after execution on a final judgment entered in an action against an insured, to recover the full amount of the final judgment, the person may bring an action against the insured's insurer in ac-

⁹ The plaintiffs' claim was undoubtedly based on a maritime tort, *see, e.g., Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 1982 AMC 2253 (1982), and a federal court would therefore have had admiralty jurisdiction over the claim under 28 U.S.C. § 1333. The plaintiffs, however, preferred to have a jury trial. They therefore asserted their right under § 1333's "saving to suitors" clause to bring the action in state court. *See, e.g., Matthews v. Howell*, 359 Md. 152, 156 & n.1, 753 A.2d 69, 71 & n.1, 2000 AMC 2067, 2068 & n.1 (2000). Under the "reverse *Erie*" doctrine, the state court was obligated to apply the same substantive law that a federal court sitting in admiralty would have applied. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 1986 AMC 2113, 2125-26 (1986).

cordance with the terms of the policy for . . . the amount of the judgment recovered in the action against the insured

Empire argues that § 19-102 does not help the plaintiffs in the present action because it is not liable under the policy to cover Mid-Atlantic's punitive damages.

More specifically, Empire cites *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955), for the proposition that state law determines whether punitive damages are insurable under a marine insurance policy because there is no established rule of federal maritime law. *See* 348 U.S. at 316-321, 1955 AMC at 473-476. Under the policy's choice-of-law clause, New York law governs whenever state law applies.¹⁰ And under New York law,¹¹ punitive damages are uninsurable. *See, e.g., Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y.2d 392, 399-400, 425 N.E.2d 810, 814-815 (1981). Empire has accordingly moved to dismiss the plaintiffs' complaint.

The plaintiffs admit that there is no established rule of federal maritime law addressing the insurability of punitive damages, but they respond that under *Wilburn Boat* this Court should create a uniform rule of maritime law to address the issue. *See* 348 U.S. at 314, 1955 AMC at 471. Furthermore, they argue that the rule to be created — in keeping with the rule applied in a majority of the states — should recognize the insurability of punitive damages. Because Empire concedes that it is liable for the punitive damages awarded to the plaintiffs in the state-court action if punitive damages are insurable, the plaintiffs move for summary judgment holding Empire liable to the plaintiffs for the punitive damages determined by the state court.

¹⁰ The choice-of-law clause is quoted *supra* at [9a].

¹¹ Under Maryland law, punitive damages are insurable. *See, e.g., First National Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 232-243, 389 A.2d 359, 361-367 (1978). Although the relevant policy was issued in Maryland and Mid-Atlantic's operations were based in Maryland, the plaintiffs concede that New York law governs to the extent that any state law is relevant.

Discussion

This Court has admiralty jurisdiction over the present action under 28 U.S.C. § 1333. Even though the plaintiffs are relying on a state statute, the Supreme Court has recognized that a plaintiff may rely on such a state “direct action” statute when suing in admiralty. *See Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).¹²

On the merits, the Court must resolve two independent but related questions: (1) Should this Court establish a new rule of federal maritime law addressing the insurability of punitive damages in marine insurance policies? If the answer to that question is “no,” the parties agree that New York governs the question, that punitive damages are uninsurable under New York law, and that Empire’s motion should therefore be granted. If the answer to the first question is “yes,” however, then it is necessary to answer the second question. (2) If federal maritime law governs the issue, should it permit marine insurance policies to insure liability for punitive damages? If this Court reaches the second question and answers it affirmatively, the parties agree that Empire is liable to the plaintiffs for the punitive damages awarded in the state-court action and their motion for summary judgment should thus be granted. But if the Court holds that federal maritime law should hold punitive damages to be uninsurable, then Empire’s motion should be granted.

I

The Court first considers whether it should establish a new rule of federal maritime law addressing the insurability of punitive damages in marine insurance policies. Empire’s argument for the application of state law depends entirely on the Supreme Court’s *Wilburn Boat* decision

¹² *Maryland Casualty* also recognizes that a plaintiff’s direct action must be stayed in certain circumstances, but those circumstances are not present here. In any event, Empire concedes that the plaintiffs may bring the present action under § 19-102(b) (although it strongly disagrees with the plaintiffs on the correct substantive result).

— perhaps the most criticized commercial law decision in the Court’s history. Professor Goldstein published the most detailed criticism of *Wilburn Boat* in 1997,¹³ but the criticism runs much deeper than that.¹⁴ This Court, of course, is bound to follow *Wilburn Boat* until either Congress or the Supreme Court overrules it. But this Court is not bound to extend *Wilburn Boat* beyond its actual holding.

Several avenues exist to avoid the unfortunate application of *Wilburn Boat* here. Most obviously, that decision concerned the effect of warranties in a marine insurance policy. The present case concerns the insurability of punitive damages. Even if state law must govern the former, *Wilburn Boat* said nothing about the application of state law to the latter question. Similarly, Justice Frankfurter’s separate opinion in *Wilburn Boat* suggests that the Supreme Court’s decision should be confined to what might be described as the “maritime but local” context. *See* 348 U.S. at 323, 1955 AMC at 478 (Frankfurter, J., concurring in the result). It should have no application to a marine insurance policy on an ocean-going vessel that was carrying goods in international trade. *See also Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 1961 AMC 833, 842 (1961) (distinguishing *Wilburn Boat* as having a less “genuinely salty flavor”).

Rather than distinguishing *Wilburn Boat*, this Court prefers to follow one of the avenues identified in the opinion itself. The Supreme Court described the crucial questions before it as follows: “(1) Is there a judicially established federal admiralty rule governing [the relevant issue]? (2) If not, should we fashion one?” 348 U.S. at 314, 1955 AMC at 471. This Court asks the same two questions. On the first, the parties agree that there is no judicially established fed-

¹³ Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide*, 28 J. MAR. L. & COM. 395 & 555 (1997).

¹⁴ *See, e.g.*, Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, 29 J. MAR. L. & COM. 41, 42-43 & nn.13-14 (1998) (collecting earlier criticism).

eral admiralty rule governing the insurability of punitive damages. Although this Court recognizes that many other courts have jumped from a similar answer on the first question to a conclusion that state law should govern, the Supreme Court expressly raised the second question, too. The *Wilburn Boat* Court answered the question negatively in the warranty context, but it did not hold that the answer should always be “no” in every marine insurance context. If that had been the intent, the Court could easily have said so — and the opinion would have been much more straightforward.

Some courts of appeals have fashioned new rules of federal admiralty law under *Wilburn Boat* to govern specific aspects of marine insurance. See, e.g., *Aasma v. American Steamship Owners Mutual Protection & Indemnity Association, Inc.*, 95 F.3d 400, 403-405, 1997 AMC 1, 3-6 (6th Cir. 1996); cf. *American National Fire Insurance Co. v. Kenealy*, 72 F.3d 264, 270-271, 1996 AMC 584, 594 (2d Cir. 1995) (concluding that a then-recent admiralty case established a federal rule that applied in the marine insurance context). This Court now follows that example in the present context. The entire point of insurance is to provide predictable protection to those who purchase it. Predictability is equally important to underwriters. Whatever the rule may be, both policyholders and underwriters should have a uniform, predictable rule on as many aspects of marine insurance as possible. With the increasing relevance of punitive damages in maritime law, see, e.g., *Atlantic Sounding v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 2008 AMC 1521 (2008), it is particularly important to have a uniform, predictable rule on the insurability of punitive damages.

Defining the governing rule for the insurability of punitive damages is a difficult task. See *infra* at [18a-20a]. But this Court finds it obvious that there should be a uniform rule of some sort. All of the policy criticisms against *Wilburn Boat* in general point against an application of state law here. Even the Supreme Court’s jurisprudence since *Wilburn Boat* points

against an application of state law here. *See, e.g., Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004). This Court thus answers the second *Wilburn Boat* question affirmatively; it will fashion a federal admiralty rule governing the insurability of punitive damages in marine insurance policies.

II

Having concluded that it should establish a rule to govern the insurability of punitive damages in marine insurance policies, the Court now addresses what that rule should be. On this question, there is no help in the federal maritime jurisprudence. Two distinguished maritime practitioners explained the situation as follows:

[T]he only two appellate cases which have addressed [the issue of the insurability of punitive damages in marine insurance policies] are from the Fifth Circuit. In both the court found that there was no “specific and controlling” federal rule on the coverage of punitive damages by marine policies and, therefore, under its strict reading of *Wilburn Boat*, state law must be applied.

Graydon S. Staring & George L. Waddell, *Marine Insurance*, 73 TUL. L. REV. 1619, 1663 (1999).¹⁵

Turning to state law for guidance, one immediately finds the states sharply divided; “[w]hether insurance coverage of punitive damages is against public policy is a hotly debated topic.”¹⁶ For example — as we saw above — punitive damages are insurable in Maryland but

¹⁵ The authors cite *Taylor v. Lloyds Underwriters of London*, 972 F.2d 666, 668-669, 1994 AMC 607 (5th Cir. 1992), *cert. denied*, 507 U.S. 952 (1993), and *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 909, 1994 AMC 1217, 1249-50 (5th Cir. 1994). The *Taylor* opinion indicates that the only additional reported cases on the point may be *Dubois v. Arkansas Valley Dredging Co.*, 651 F. Supp. 299 (W.D. La. 1987), and *Smith v. Front Lawn Enterprises, Inc.*, 1987 AMC 1130 (E.D. La. 1986).

¹⁶ THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-18, at 190 (5th Hornbook ed. 2012).

not in New York. The leading New York decision puts the argument against insurability very forcibly, almost dogmatically:

Under no circumstances . . . can the insurer be compelled to indemnify [the insured tortfeasor] for punitive damages. Such damages are, as the name implies, a punishment for intentional wrongdoing. As we have only recently noted, to allow insurance coverage for such damages “is totally to defeat the purpose of punitive damages”

Public Service Mutual, 53 N.Y.2d at 400, 425 N.E.2d at 814 (quoting *Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 228, 397 N.E.2d 737, 744 (1979)).

The reasoning in the leading Maryland decision is considerably more thorough and nuanced, making a number of cogent points including three that this Court finds cumulatively persuasive. See *First National Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 232-243, 389 A.2d 359, 361-367 (1978). First, the purposes of punitive damages include not only punishment but also deterrence, and insurability does not defeat deterrence; tortfeasors with insurance coverage against punitive damages still must fear judgments above policy limits, large increases in insurance premiums, and future difficulties in obtaining insurance coverage. Second, an uninsured/uninsurable exposure to punitive damages could easily wipe out a legitimate and socially valuable small business. Third, insurers who enter into contracts promising to cover punitive damages¹⁷ should be required to honor their promises.

On balance, this Court finds the Maryland reasoning to be more convincing than that of the New York court. Moreover, it is not entirely irrelevant that — although the states are closely divided — evidently the majority of states take the view that public policy does not impede the enforcement of insurers’ promises to indemnify their insureds against punitive damages. See

¹⁷ Empire concedes that the policy here would cover punitive damages but for the legal prohibition that arguably applies under New York law. Although the policy does not expressly mention punitive damages, it covers all liability risks that have not otherwise been excluded. Liability for punitive damages is a well-known risk and the policy does not exclude that risk.

Michael A. Rosenhouse, *Liability Insurance Coverage As Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R.4th 11 (1982 & Supp. 2011). Accordingly, this Court concludes that federal maritime law includes no policy preventing the enforcement of insurance policies covering punitive damages.

Conclusion

For the foregoing reasons, Empire's motion to dismiss under Fed. R. Civ. P.12(b)(6) is *Denied*. The plaintiffs motion for summary judgment is *Granted*. Final judgment is accordingly entered for the plaintiffs.

Selected Chronology of the Case*

Aug. 2, 2008	Collision between the <i>M/V M-A Jennifer</i> and <i>The Paralus</i> in Chesapeake Bay
May 7, 2010	Maryland circuit court judgment against Mid-Atlantic Shipping Lines, Inc., on a jury verdict awarding plaintiffs \$900,000 in compensatory damages and \$850,000 in punitive damages.
Nov. 10, 2010	Mid-Atlantic Shipping Lines, Inc., declares bankruptcy
Feb. 11, 2011	Plaintiffs file suit against Empire State Marine Insurance Co. under Maryland Insurance Code § 19-102(b)
Sept. 9, 2011	District court opinion and order granting summary judgment for the plaintiffs — reported as <i>Bassarides v. Empire State Marine Insurance Co.</i> , 2011 AMC 3333 (D. Md. 2011), reprinted at Pet. App. 8a
Sept. 19, 2011	Defendant files notice of appeal
Mar. 5, 2012	Oral argument in the Fourth Circuit
May 17, 2012	Court of appeals opinion reversing the district court — reported as <i>Bassarides v. Empire State Marine Insurance Co.</i> , 679 F.3d 1383, 2012 AMC 3333 (4th Cir. 2012), reprinted at Pet. App. 1a
May 25, 2012	Plaintiffs-appellees file motion for rehearing with suggestion for rehearing en banc
July 6, 2012	Fourth Circuit denies motion for rehearing — order reprinted at Pet. App. 7a
Oct. 2, 2012	Plaintiffs-petitioners file petition for certiorari raising two issues: (1) whether a federal maritime rule should be created to govern the insurability of punitive damages and (2) if so, whether punitive damages should be insurable under federal maritime law
Dec. 3, 2012	Petition for certiorari granted

* This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.