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Folksamerica Reinsurance Company v. Clean Water of New York, Inc. United States Court of Appeals for the Second Circuit 413 F.3d 307 (Decided on June 30, 2005)

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barrier to the assertion of his rights and the fact that the government would not be prejudiced because it had received notice within the two-year statutory period was not sufficient to warrant equitable tolling.

Kelly Latham
Class of 2006

**THE SECOND CIRCUIT RE-CONCEPTUALIZES THE “MERELY INCIDENTAL”
EXCEPTION TO THE GENERAL RULE THAT MIXED CONTRACTS ARE NOT
MARITIME IN NATURE.**

**Admiralty jurisdiction existed over an insurance coverage dispute where the policy provided both
Comprehensive General Liability and Ship-repairers Legal Liability coverage and the nature of
that coverage was primarily marine.**

Folksamerica Reinsurance Company v. Clean Water of New York, Inc.
United States Court of Appeals for the Second Circuit
413 F.3d 307
(Decided on June 30, 2005)

Milton Rivera (“Rivera”) was injured while cleaning the oil tanks of an ocean-going barge that was docked in New York Harbor when he was overcome by fumes and fell off a ladder into the oil tank. The insured, Clean Water of New York, Inc. (“Clean Water”), was in the business of ship repair and maintenance. It had subcontracted some of its business to Rivera’s employer. Shortly thereafter Rivera brought a negligence suit against Clean Water in state court.

Clean Water was insured by Christiania General Insurance Corp. of New York (“Christiania”). The plaintiff herein, Folksamerica Reinsurance Company (“Folksamerica”), was the successor in interest to the insurer Christiania.

The insured sought defense and indemnification of Rivera’s suit via its insurance policy. The policy’s coverage was defined by a Comprehensive General Liability (“CGL”) section and a Ship-repairers Legal Liability (“SLL”) section.

Folksamerica filed a declaratory judgment suit against Clean Water in the United States District Court for the Eastern District of New York. The plaintiff averred that admiralty jurisdiction existed and sought avoidance of the policy, rescission, and a declaration that it was obligated to neither defend nor indemnify Clean Water. The defendant raised various defenses but the one at issue herein was its challenge to the court’s admiralty jurisdiction.

The district court agreed with the defendant that the CGL section of the policy was a standard “all-risk policy” and that any maritime risks that it covered were merely incidental to the covered non-maritime risks. The court declined jurisdiction because it believed that a CGL policy could not be characterized as one of the three traditional forms of marine insurance—hull insurance, cargo insurance, and indemnity insurance.

The issue before the Court of Appeals for the Second Circuit was simply whether this insurance policy was a maritime contract so as to sustain admiralty jurisdiction. The analysis began with a threshold inquiry, as required by Second Circuit precedent, of whether the subject-matter of the *dispute* involved maritime commerce. Curiously, the district court did not address this question and the Court of

Appeals easily found that the present case passed this threshold: Rivera sustained his injury while cleaning the tanks of oil transporting barges.

Generally, a contract will only be considered maritime if its subject-matter is purely maritime; in other words, a mixed contract falls outside of admiralty's purview. However, one exception to this rule, stressed by the plaintiff herein, is that jurisdiction will be found where non-maritime elements of the contract are "merely incidental." Regarding this exception, the Second Circuit in this case re-conceptualized it by referring to a recent Supreme Court decision.

In *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.*, the Supreme Court found that the important inquiry in the exercise of admiralty jurisdiction over a contract was not whether the non-marine components were merely incidental to the contract as a whole, but rather, whether the shipping contract's principle objective was to accomplish the transport of goods by sea. 125 S.Ct. 385, 393-394 (2004).

The Court of Appeals herein viewed *Norfolk Southern Railway Co.* as contrary to the "merely incidental" exception because the Supreme Court exercised admiralty jurisdiction over a contract with non-marine components that were more than incidental. Accordingly, the Second Circuit turned the "merely incidental" exception into the "principle objective" exception: admiralty jurisdiction will exist over a mixed insurance contract where the principle objective of the contract is to insure against maritime risks.

The Second Circuit reversed the district court's decision and found the insurance policy to be marine based on its CGL and SLL sections. Regarding the former, the defendant, Clean Water made two arguments. First, the CGL policy's form dictated that it was a shore-side policy. The Court rebutted this by pointing-out that the form of the policy is not dispositive; what matters is whether the insurer assumes risks that are marine in nature. Indeed, other federal courts have also treated CGL policies as marine, but those findings were based on the policy's specific coverage and not its form.

Second, Clean Water argued that the coverage provided by the CGL section was for shore-side risks such as personal injury and property damage to third parties: the CGL section herein excluded all the risks covered by hull and protection and indemnity ("P & I") insurance.

The Court responded to this by illustrating how the CGL section of the policy had been tailored to specifically cover marine risks. Normally, CGL policies exclude liabilities resulting from the ownership of watercraft. The policy here had an endorsement that specifically provided watercraft liability coverage. Additionally, there was an endorsement covering any loss involving an *in rem* suit. Further, an endorsement was added covering pollution, which is widely recognized as marine in nature.

Next, the Court viewed the coverage set out in the CGL's completed operations coverage and products hazard coverage as primarily maritime because their principle purpose was to insure against marine risks. Initially, it was noted that the Fifth Circuit has also treated a CGL policy as one of marine insurance. Next, since the defendant, Clean Water, was in the business of ship repair and maintenance, it necessarily follows that the risk of injury after negligent maintenance or repair was maritime in nature and as such could affect maritime commerce. Finally, with a ship repair and maintenance business, the losses covered by the completed operations and products hazards sections overlap with the risks normally covered by P & I insurance, such as the injury or death of a seaman or passenger, collision with other ships, allision with a stationary object, and towage liability.

The SLL section of the policy was also viewed as marine. The SLL section provided coverage for vessels lost or damaged while undergoing repairs by the insureds. It was viewed as marine based on the fact that numerous courts have exercised admiralty jurisdiction over SLL policies and not one has declined to do so.

Ultimately, the Court of Appeals reversed the district court and found the insurance contract at issue to be marine because its principle purpose was to insure against losses associated with maritime risks. Accordingly, the exercise of admiralty jurisdiction herein was proper.

Jeremy Barberi
Class of 2006

**PLAIN MEANING OF SETTLEMENT AGREEMENT BETWEEN INSURER AND
SHIPOWNER GUIDES COURT'S RESOLUTION OF A DISPUTE OVER RECOVERY
FROM A THIRD PARTY**

The Court of Appeals held that a shipowner breached a settlement agreement with its insurer by not seeking the latter's consent to a suit settlement with a third party and by not giving the insurer a share of the settlement. Under Puerto Rican law, if the terms of a contract are clear and leave no doubt to the intentions of the contracting parties, then the court will look to the plain meaning of the agreement.

The Home Insurance Company v. Pan American Grain Manufacturing Co., Inc.
United States Court of Appeals for the 1st Circuit
397 F.3d 12
(Decided February 4, 2005)

Plaintiff-Appellant Home Insurance Company ("Home") appealed from a decision of the district court awarding summary judgment to Defendant-Appellee Pan American Grain Manufacturing Co., Inc. ("Pan American"). Home, Pan American's insurer, alleged that Pan American had breached a settlement agreement by not seeking its approval of a settlement Pan American reached with Ochoa Fertilizer, Inc. ("Ochoa"), and by failing to award Home one-third of the amount of that settlement.

Home had issued a marine hull insurance policy ("the policy") to Pan American that provided coverage up to \$6,500,000 in the event that Pan American's ship ITB Zorra ("Zorra") was lost. The Zorra caught fire April 24, 1995, resulting in her destruction. Pan American filed a claim which Home denied; the insurer alleged that the loss was a result of the Zorra's unseaworthiness and thus amounted to a policy exception. Home brought suit seeking a declaratory judgment of non-coverage and Pan American counterclaimed. The two parties entered into a settlement agreement under which Home paid \$3,333,000 to Pan American and Pan American promised: 1) to seek written approval from Home for any future recovery from third parties stemming from this claim, and 2) that Home would receive one-third of any recovery from third parties. The settlement agreement contained a provision stating that Home was not entitled to share in any "verdict or award... for punitive damages and/or loss of use."

One year after the parties entered into the settlement agreement, Pan American settled a suit with Ochoa for \$800,000. Pan American did not give Home prior notice of the settlement or one-third of the award. Home responded by filing suit, seeking one-third of the \$800,000, plus interest and attorney's fees. Pan American claimed that the Ochoa settlement was for damages for "loss of use" of the Zorra and therefore excluded from the settlement agreement. Home made two arguments: 1) that under maritime law, a shipowner was barred from recovering for loss of use where the insured vessel was a total loss, and 2) the Ochoa settlement did not result from a "verdict or award."