Marine Insurance in the United States Supreme Court: *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*

Michael F. Sturley*

Abstract

Earlier this year, the United States Supreme Court announced its decision in *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, the Court's first marine-insurance decision since its infamous *Wilburn Boat* case almost seventy years ago. *Wilburn Boat* had created an unprecedented regime under which most marine-insurance disputes in U.S. courts were governed by state law rather than federal maritime law. The *Raiders Retreat* Court held that choice-of-law clauses in marine-insurance policies are presumptively enforceable. That specific holding endorses a possible solution to many of the problems that the *Wilburn Boat* decision created. More broadly, the *Raiders Retreat* majority opinion and a separate concurring opinion by Justice Thomas call into question the long-accepted understanding of *Wilburn Boat* that the lower courts and the maritime bar have shared for decades. Going forward, it is unclear how broadly *Wilburn Boat* will continue to apply and what that earlier decision will mean when it does apply.

Keywords: choice-of-law clauses, *Wilburn Boat*, United States Supreme Court

1. Introduction

In November 2023, I had the pleasure of delivering a BILA lecture in the Old Library at Lloyd's titled "Marine Insurance Returns to the United States Supreme Court." A month before, the U.S. Supreme Court had heard oral argument in what promised to be its first marine-insurance decision in almost seven decades. In February this year, that promise was realized when the Court handed down its opinion in *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*,[1] the Court's first marine-insurance decision since *Wilburn Boat Co. v. Fireman's Fund Insurance Co*.[2]

To briefly recap my November lecture, *Wilburn Boat* is essential background for any discussion of the law governing marine insurance in the United States. In that 1955 decision, the Supreme Court — evidently seeking to avoid the harsh impact of the strict-compliance rule (*i.e.*, the rule that a breach of warranty by the policyholder discharges the insurer from liability under the policy from the moment of the breach regardless of its causal connection to any subsequent loss) — held that state law (rather than federal maritime law) governed the effect of a breach of an express warranty that was unrelated to the loss suffered. The Court reached that conclusion by asking two questions: "(1) Is there a judicially established federal admiralty rule governing these warranties?

* Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford. I addressed this subject in more detail at the International Colloquium on Commercial Insurance Law sponsored by Swansea University's Institute of International Shipping and Trade Law on Wednesday, 11 September 2024. Informa Law from Routledge will in due course publish my paper from that Colloquium.

[1] 601 U.S. 65 (2024).

[2] 348 U.S. 310 (1955).

(2) If not, should we fashion one?"[3] On the first question, the Court controversially answered in the negative, despite prior Supreme Court decisions that many commentators considered at least relevant if not dispositive; two court of appeals decisions that directly supported the strict-compliance rule; other decisions that at least suggested the strict-compliance rule; unanimous support in relevant treatises for the rule; and a complete lack of contrary authority.[4] On the second question, the Court again answered in the negative, arguing that (in the absence of Congressional action) states were better equipped to develop new rules in the field, particularly because the states had a long history of regulating insurance. The *Wilburn Boat* Court accordingly remanded the case to permit the lower courts to decide it "under appropriate state law."[5]

Justice Frankfurter concurred only in the result.[6] In essence, he argued that cases requiring a uniform rule throughout the country should be governed by federal maritime law while cases of essentially local interest should be governed by state law. Because he thought a case arising on an inland lake was of merely local interest, he had no objection to the application of state law.[7] But because he thought the reasoning in the majority opinion was unnecessarily broad and could be "directed with equal force to oceangoing vessels in international maritime trade,"[8] he refused to join — and, indeed, harshly criticized — the majority opinion.

In *Kossick v. United Fruit Co.*,[9] which was not a marine-insurance case, the Supreme Court signaled that *Wilburn Boat* was not so broad as some had feared. The *Kossick* Court held that an oral contract between a seaman on an ocean vessel in international trade and his employer was governed by federal maritime law rather than the New York statute of frauds, explaining that "the situation presented here [in *Kossick*] has a more genuinely salty flavor than that [in *Wilburn Boat*]."[10] Some courts treated *Kossick* as limiting *Wilburn Boat* to the maritime-but-local context[11] as Justice Frankfurter had suggested in his concurring opinion.[12] Most courts and commentators viewed *Kossick* as showing that *Wilburn Boat* was confined to the marine-insurance context.

Decades later, in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*[13] — also not a marine-insurance case — the Court distinguished *Wilburn Boat* "because of state regulatory power over [the] insurance industry," but also hinted (in dicta) that the proper rule might be whether the "case [is] inherently local" (without connecting that rule to *Wilburn Boat*).[14]

Turning to *Raiders Retreat*, an assured's yacht ran aground. No fire broke out, and there was no problem with the fire extinguishers, but they had not been timely inspected and recertified. That was a breach of warranty, notwithstanding that "the boat's fire-suppression system did not contribute to the accident."[15] As so often happens,

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[3] 348 U.S. at 314.
[4] *See also infra* note 40.
[5] 348 U.S. at 321.
[6] *See* 348 U.S. at 321 (Frankfurter, J., concurring in the result).
[7] *See id.* at 322 (Frankfurter, J., concurring in the result).
[8] *Id.* at 323 (Frankfurter, J., concurring in the result).
[9] 365 U.S. 731 (1961).
[10] *Id.* at 742.
[11] *See*, *e.g.*, *Aasma v. American Steamship Owners Mutual Protection & Indemnity Association*, 95 F.3d 400, 404 (6th Cir. 1996); *see also infra* notes 48-51.
[12] *See* 348 U.S. at 322-323 (Frankfurter, J., concurring in the result).
[13] 543 U.S. 14 (2004).
[14] 543 U.S. at 27.
[15] 601 U.S. at 68.

the insurer preemptively filed an action for a declaratory judgment that it was not liable on the policy. The assured in its counterclaim alleged a breach of contract and various violations of Pennsylvania consumer-protection laws. The district court dismissed the state-law counterclaims on the ground that New York, not Pennsylvania, law applied.[16] In reaching that conclusion, the district court relied on a boilerplate choice-of-law clause that the insurer has routinely included in its marine-insurance policies for years.[17] That clause provided:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice[,] but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.[18]

On appeal, the United States Court of Appeals for the Third Circuit vacated and remanded the case to permit the district court to consider whether Pennsylvania has a strong public policy in favor of its relevant law that would preclude the enforcement of the New York choice-of-law clause.[19] The Supreme Court granted the insurer's petition for certiorari, meaning that it agreed to hear the case on the merits.

2. The Supreme Court's Decision in *Raiders Retreat*

As I predicted during my lecture in November,[20] the Supreme Court reversed the Third Circuit's decision in *Raiders Retreat*. The Court unanimously held that "choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal maritime law," subject to "certain narrow exceptions" that were inapplicable in *Raiders Retreat*.[21]

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[16] *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 521 F. Supp. 3d 580 (E.D. Pa. 2021).

[17] *See Great Lakes Insurance SE v. Andersson*, 544 F. Supp. 3d 196, 200 (D. Mass. 2021) (noting that Great Lakes "'has relied on this choice of law clause for the past fifteen years to bar the application of state law bad faith statutes.'") (quoting Great Lakes's Reply to Response to Motion for Judgment on the Pleadings 7 (filed Apr. 20, 2021)), *rev'd on other grounds*, 66 F.4th 20 (1st Cir. 2023).

[18] *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, 47 F.4th 225, 228 (3d Cir. 2022) (quoting policy) (alteration by court).

[19] *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, 47 F.4th 225 (3d Cir. 2022).

[20] Predictions based on oral argument are notoriously unreliable. To be fair, I did not predict that the *Raiders Retreat* decision would be unanimous. But the unanimity was not surprising. Even if the private conference vote was not unanimous, the justices who disagreed with the result may not have cared enough to go to the trouble of writing a dissent.

[21] The Court recognized three exceptions to the enforceability of choice-of-law clauses: An otherwise valid choice-of-law clause may be disregarded (1) "when the chosen law would contravene a controlling federal statute," (2) when the chosen law would "conflict with an established federal maritime policy," or (3) "when parties can furnish no reasonable basis for the chosen jurisdiction." 601 U.S. at 76. The Court did not discuss the first two exceptions, but it commented briefly on the third. Some lower courts had ruled that the chosen law must have a "substantial connection" with the transaction. The Supreme Court countered that "the 'no reasonable basis' exception must be applied with substantial deference to the contracting parties, recognizing that maritime actors may sometimes choose the law of a specific jurisdiction because, for example, that jurisdiction's law is 'well developed, well known, and well regarded.'" 601 U.S. at 77 (quoting Brief for American Institute of Marine Underwriters et al. as *Amici Curiae* 17). Significantly, the Court declined to recognize a fourth exception that is included in the *Restatement* — when application of the chosen law "would be contrary to a fundamental policy" of the state whose law would otherwise govern the transaction. *See* Restatement (Second) of Conflict of Laws § 187(2)(b) (1971).

Justice Kavanaugh's opinion for the Court was a veritable poster child for the importance of uniformity in maritime law. After an extended discussion extolling uniformity,[22] the Court justified its decision to enforce the choice-of-law clause with the explanation that "the uniformity and predictability resulting from choice-of-law provisions are especially important for marine insurance contracts given that marine insurance is 'an integral part of virtually every maritime transaction, and maritime commerce is a vital part of the nation's economy.' "[23] The Court rejected the contrary result because of the "disuniformity and uncertainty" that would result, undermining "uniform and stable rules for maritime actors."[24]

More remarkable is the Supreme Court's treatment of *Wilburn Boat*. The Court read *Wilburn Boat* very narrowly, noting that the "case did not involve a choice-of-law provision."[25] Limiting the prior case almost beyond recognition, the *Raiders Retreat* Court declared that "the *Wilburn Boat* Court simply determined what substantive rule applied when a party breached a warranty in a marine insurance contract."[26] The Court noted the insurer's contention "that *Wilburn Boat*'s reliance on state law is in tension with the Court's modern maritime jurisprudence, which tends to place greater emphasis on the need for uniformity in maritime law."[27] But the Court explained that it did not "need [to] resolve any such tension because *Wilburn Boat* does not control the analysis of choice-of-law provisions in maritime contracts. To reiterate, *Wilburn Boat* did not involve a choice-of-law provision, and the case therefore affords limited guidance on that distinct issue."[28]

Raiders Retreat may also be significant for its comments on the standard for answering Justice Black's first question[29] — determining whether a federal rule has been established. The *Wilburn Boat* Court offered no explicit guidance on that question, but the example of its own analysis suggested that the standard was very difficult to meet.[30] The *Raiders Retreat* Court, in contrast, implicitly suggested that the standard is relatively easy to meet. It acknowledged that "[n]o bright line exists for determining when a federal maritime rule is 'established,' "[31] but, the Court continued, "a body of judicial decisions can suffice."[32] To illustrate what it meant by "a body of judicial decisions," the Court cited *Bisso v. Inland Waterways Corp.*,[33] which was not a marine-insurance case but a towage case.

In the cited passage, the *Bisso* Court adopted "a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence."[34] The "body of judicial decisions" on which the *Bisso* Court relied consisted of two ambiguous Supreme Court decisions[35] and lower-court decisions that had construed

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[22] *See* 601 U.S. at 69-70.
[23] 601 U.S. at 75 (quoting Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the* Wilburn Boat *Problem*, 29 J. MAR. L. & COM. 41, 45 (1998)).
[24] 601 U.S. at 77. Justice Thomas, in his concurring opinion, advocated even more forcefully for uniformity in maritime law. *See infra* notes 46-47 and accompanying text.
[25] 601 U.S. at 73.
[26] 601 U.S. at 73.
[27] 601 U.S. at 73-74.
[28] 601 U.S. at 74.
[29] *See supra* note 3 and accompanying text.
[30] *See supra* note 4 and accompanying text.
[31] 601 U.S. at 70.
[32] 601 U.S. at 70.
[33] 349 U.S. 85 (1955).
[34] 349 U.S. at 90.
[35] *See Compania de Navegacion Interior, S.A. v. Fireman's Fund Insurance Co.* (*The Wash Gray*), 277 U.S. 66 (1928); *The Steamer Syracuse*, 79 U.S. (12 Wall.) 167 (1871).

those ambiguous decisions to support the rule that the *Bisso* Court adopted. The *Bisso* Court recognized that the lower courts had not uniformly agreed on the rule that it adopted: in *The Oceanica*,[36] the Second Circuit had adopted the contrary rule. The leading treatises at the time also disagreed on the rule.[37] Moreover, the *Bisso* Court acknowledged that "[s]trong arguments can be made in support of" the Second Circuit's rule.[38] The *Bisso* Court nevertheless concluded that "[b]ecause of this judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule."[39] It follows that the *Raiders Retreat* Court, by citing *Bisso* to illustrate what suffices to establish a federal maritime rule, considered two ambiguous Supreme Court decisions and a body of conflicting circuit-court decisions to be a sufficient "body of judicial decisions" to hold that a federal maritime rule has been "established"[40] — a sharp contrast with what the *Wilburn Boat* Court did.[41]

3. Justice Thomas's Concurring Opinion

Justice Thomas, in a concurring opinion, wrote a blistering condemnation of *Wilburn Boat* and urged lower courts to limit the precedent to inherently local disputes. He argued that that the opinion was flawed from the beginning, resting on "indefensible" reasoning that ignored basic concepts in maritime law.[42] He endorsed the "universal criticism" of the decision.[43] And he argued that the Supreme Court itself "has retreated from *Wilburn Boat* in subsequent decisions, implicitly cabining its reach to 'localized' disputes in accordance with Justice Frankfurter's concurrence."[44]

Justice Thomas's criticisms of *Wilburn Boat* are long overdue. My co-authors and I have described *Wilburn Boat* (in a passage that Justice Thomas quoted) as "the Supreme Court's most disappointing maritime-law decision."[45] Many problems and massive amounts of litigation could have been avoided if this rejection of Justice Black's analysis had come 69 years earlier with the support of a majority of the justices.

Like the full Court,[46] Justice Thomas relied heavily on the importance of uniformity in maritime law. In one paragraph — criticizing *Wilburn Boat* for "its failure to even acknowledge the uniformity principle" — he used

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[36] 170 F. 893, 894 (2d Cir. 1909).
[37] The *Bisso* Court described the scholarly disagreement in a footnote: "Of two leading authors on admiralty one regards the clauses as valid, 1 Benedict, Admiralty (6th ed. 1940), s 100, and the other regards them as invalid, saying 'Thus obliquely it seems to be settled that the contract exempting the tug from its negligence is not valid.' [Gustavus H.] Robinson, [Handbook of] Admiralty [Law in the United States] (1939), 672." 349 U.S. at 90 n.13.
[38] 349 U.S. at 89.
[39] 349 U.S. at 90.
[40] Justice Thomas, in his concurring opinion, more directly discussed the standard for determining when a federal maritime rule is "established." He found the *Wilburn Boat* Court's conclusion "that there was no established federal admiralty rule in that case to be "indefensible." 601 U.S. at 81 (Thomas, J., concurring). He discussed not only the unanimous view in the relevant judicial decisions but also the unanimous views in the contemporary treatises. *See id*.
[41] *See supra* note 4 and accompanying text.
[42] 601 U.S. at 81 (Thomas, J., concurring).
[43] 601 U.S. at 84-85 & n 1 (Thomas, J., concurring).
[44] 601 U.S. at 85 (Thomas, J., concurring) (citing *Wilburn Boat*, 348 U.S. at 322 (Frankfurter, J., concurring)); *see also supra* notes 6-8 and accompanying text (discussing Justice Frankfurter's concurrence).
[45] *See* 601 U.S. at 85 n 1 (Thomas, J., concurring) (quoting DAVID W. ROBERTSON, STEVEN F. FRIEDELL, & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 465 (4th ed. 2020).
[46] *See supra* notes 22-24 and accompanying text.

some version of the word "uniform" eight times to highlight that "the uniformity principle" is "a singularly important concept in admiralty law."[47]

Of course, a single justice lacks the power to overrule a prior decision of the full Supreme Court, no matter how justified the criticism, and lower courts are still bound to follow a Supreme Court decision until a majority of the Supreme Court (or Congress) overrules it. But Justice Thomas gave the lower courts a roadmap for ignoring *Wilburn Boat* in almost every case. Most observers have treated decisions such as *Kossick v. United Fruit Co.*[48] and *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*,[49] both of which concluded that the general maritime law should apply in preference to state law, as limiting *Wilburn Boat* to the marine-insurance context (to the extent that they had any bearing at all on the scope of *Wilburn Boat*).[50] Justice Thomas, however, treated them as "retreat[ing] from *Wilburn Boat* . . . , implicitly cabining its reach to 'localized' disputes in accordance with Justice Frankfurter's concurrence."[51] The *Raiders Retreat* majority implicitly provided some support for that narrow reading of *Wilburn Boat*, not only describing it as limited to the breach-of-warranty context,[52] but also rejecting an " 'insurance exceptionalism' " argument.[53] Justice Thomas could therefore justifiably conclude that "[t]oday's decision further erodes *Wilburn Boat*'s foundation . . . ."[54] As a result, "it is not clear what, if anything, is left of *Wilburn Boat* 's rationale."[55] He concluded his concurring opinion with this advice:

> Litigants and courts should heed our instruction that general maritime law applies in maritime contract disputes unless they "so implicate local interests as to beckon interpretation by state law." *Wilburn Boat* reaches no further.[56]

4. The Impact of *Raiders Retreat*

The near-automatic enforcement of choice-of-law clauses in marine-insurance policies could go a long way to resolving many of the *Wilburn Boat* problems. To the extent that a problem was the uncertainty in not knowing what law governed a marine-insurance dispute, permitting the parties (in a negotiated policy) or the insurer (in a contract of adhesion) to specify the governing law in advance would provide considerable predictability. The choice-of-law clause in *Raiders Retreat* [57] resolved at least the horizontal choice-of-law problem, *i.e.*, deciding which state's law would govern in the absence of a federal rule, an issue that the *Wilburn Boat* Court ignored. The *Raiders Retreat* clause did not address the vertical choice-of-law problem (because the clause left the choice between state and federal law to turn on the existence of "well established, entrenched principles and precedents"

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[47] *See* 601 U.S. at 83-84 (Thomas, J., concurring) (using "uniformity" five times, "uniform" twice, and "uniformly" once.
[48] 365 U.S. 731 (1961). *See supra* notes 9-12 and accompanying text.
[49] 543 U.S. 14 (2004). *See supra* notes 13-14 and accompanying text.
[50] *See*, *e.g.*, *Cal-Dive International, Inc. v. Seabright Insurance Co.*, 627 F.3d 110, 113 (5th Cir. 2010) (citing *Wilburn Boat* for the proposition that "[t]he interpretation of a marine policy of insurance is governed by relevant state law").
[51] 601 U.S. at 85 (Thomas, J., concurring) (citing *Wilburn Boat*, 348 U.S. at 322 (Frankfurter, J., concurring)).
[52] *See* 601 U.S. at 73; *see also supra* notes 25-28 and accompanying text.
[53] 601 U.S. at 75.
[54] 601 U.S. at 85 (Thomas, J., concurring).
[55] 601 U.S. at 85 (Thomas, J., concurring).
[56] 601 U.S. at 86 (Thomas, J., concurring) (quoting *Kirby*, 543 U.S. at 27) (citation omitted).
[57] *See supra* text at note 18 (quoting choice-of-law clause).

of federal maritime law, much as *Wilburn Boat* did). But presumably a choice-of-law clause could be drafted to specify that New York law, or some other well-developed law (such as English law) would govern even when federal maritime law is "well established" and "entrenched."[58] So long as the chosen law does not violate federal policy, nothing in the *Raiders Retreat* analysis would prohibit the choice. As a result, it seems highly likely that more insurers will rely on choice-of-law clauses,[59] that courts will almost inevitably enforce them, and that *Wilburn Boat* issues will arise less frequently as a result.

When lower courts still conduct a *Wilburn Boat* analysis,[60] *Raiders Retreat* suggests some changes from the practice that has evolved in recent decades. The standard for determining whether a "judicially established federal admiralty rule govern[s]"[61] is likely to be much more relaxed. While *Wilburn Boat*, by the example of its own analysis, set a ridiculously high standard for finding an established federal admiralty rule,[62] the *Raiders Retreat* Court — in its reliance on *Bisso* [63] — implied a ridiculously low standard (if *Wilburn Boat* is to have any meaning at all).[64] Justice Thomas also made a strong argument that courts should be more willing to create a new federal rule when a prior rule does not exist,[65] and the full Court's emphasis on uniformity strongly supports that suggestion.

Another possibility is that the lower courts will so limit *Wilburn Boat* that it becomes virtually irrelevant.[66] Justice Thomas made the strongest argument for reading *Wilburn Boat* narrowly,[67] but the Court's opinion also supports a much narrower reading than virtually all of the lower courts had adopted.[68] Justice Thomas was clear that *Wilburn Boat* should apply, if at all, only "to 'localized' disputes in accordance with Justice Frankfurter's concurrence."[69] The Court's opinion could support limiting *Wilburn Boat* to cases addressing the effect of a breach

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[58] Perhaps a choice-of-law clause that selects a governing law with no connection to the transaction would not be enforced. Lower-court decisions have applied such a principle. But the *Raiders Retreat* Court was open to the possibility that such a clause would be enforced so long as the parties could show a reasonable basis for that choice. *See* 601 U.S. at 76-77; *see also* Restatement (Second) of Conflict of Laws § 187(2)(a) (1971) (recognizing an exception to the enforceability of choice-of-law clauses when the chosen law "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice").

[59] Some insurers have already been relying on choice-of-law clauses in their policies. The greater visibility of a Supreme Court decision is likely to alert more insurers to the possibility.

[60] Presumably, courts will still need to consider *Wilburn Boat* when the policy does not include a choice-of-law clause. A partial *Wilburn Boat* analysis may also be relevant when a choice-of-law clause follows the example of the Great Lakes clause, *see supra* note 18 and accompanying text, and specifies a particular jurisdiction's law only when there is no established federal law.

[61] *Wilburn Boat*, 348 U.S. at 314.

[62] *See supra* note 4 and accompanying text.

[63] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

[64] *See supra* notes 30-40 and accompanying text.

[65] *See* 601 U.S. at 82-83 (Thomas, J., concurring).

[66] Even before *Raiders Retreat*, some courts were willing to limit Wilburn Boat to "inherently local" disputes. *See*, *e.g.*, *Lloyd's of London v. Pagán-Sánchez*, 539 F.3d 19, 24 (1st Cir. 2008) (citing *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004)). But such decisions were unusual.

[67] *See supra* notes 48-56 and accompanying text.

[68] *See supra* notes 25-28 and accompanying text.

[69] 601 U.S. at 85 (Thomas, J., concurring) (citing *Wilburn Boat*, 348 U.S. at 322 (Frankfurter, J., concurring)). Limiting *Wilburn Boat* to localized disputes is very appealing in theory, but it would likely create problems in practice. The "maritime but local" doctrine has generally proven unsatisfactory in other contexts. *See*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 6-49, at 419-420 (2d ed. 1975) (discussing the inadequacy of the "maritime but local" doctrine in the context of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950); David W. Robertson, *Displacement of State Law by Federal*

of warranty in a marine-insurance contract,[70] which is probably the narrowest reading that prior commentators have ever suggested. Following the implications of both the Court's opinion and Justice Thomas's concurrence, lower courts could even limit *Wilburn Boat* to "localized" disputes addressing the effect of a breach of warranty in a marine-insurance contract.

Whether courts are more willing to find an established federal rule, more willing to create a new federal rule, or more willing to conclude that *Wilburn Boat* does not apply to most marine-insurance disputes, the bottom line would be that state law — which has dominated the field for decades — would likely become less relevant except when the policy includes a choice-of-law clause that explicitly calls for the application of state law.[71]

Of course, yet another possibility must be mentioned. Just as the *Raiders Retreat* majority hinted that *Wilburn Boat* should be limited to the narrow issue before it,[72] some lower courts might limit *Raiders Retreat* to the enforceability of choice-of-law clauses. Several of the arguments in the majority opinion are very specific to choice-of-law clauses,[73] and that could provide a basis to distinguish *Raiders Retreat* in future cases. Justice Thomas's advice could be dismissed as representing the views of only a single justice; some courts may find it significant that no other justice joined his concurring opinion. In short, it is entirely possible that some courts will continue to follow their prior understanding of *Wilburn Boat* when a choice-of-law clause does not compel it to apply a particular governing law.

5. Conclusion

As this paper goes to press, *Raiders Retreat* is barely six months old. Lower courts have had little opportunity to apply the decision, let alone consider its implications. Only ten lower-court decisions have even cited *Raiders Retreat*. Only five of those decisions involved marine insurance, only two had any real discussion of the case, and one of those was the trial court's decision in *Raiders Retreat* on remand. It will probably take years before we fully understand the impact of the Supreme Court's latest decision. In the meantime, a range of possibilities continue to exist — particularly on the continued role (if any) of *Wilburn Boat*.

Maritime Law, 26 J. MAR. L. & COM. 325, 341-343 (1995) (discussing the inadequacy of the "maritime but local" approach to vertical choice-of-law questions).

[70] *See* 601 U.S. at 73; *see also supra* notes 25-28 and accompanying text. Limiting *Wilburn Boat* almost beyond recognition is easy to understand (given all the criticism) but also difficult to justify. It is undeniably true as a technical matter that "the *Wilburn Boat* Court simply determined what substantive rule applied when a party breached a warranty in a marine insurance contract." 601 U.S. at 73. But as Professors Gilmore and Black explained, there is no rational basis for limiting the *Wilburn Boat* reasoning to the law governing a breach of warranty. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 2-8, at 69-71 (2d ed. 1975). In short, if *Wilburn Boat* "determined what substantive rule applied when a party breached a warranty in a marine insurance contract," then it logically must apply to a great deal more.

[71] If Great Lakes retains its current choice-of-law clause, quoted *supra* text at note 18, state law would still be less relevant if courts become more willing to find an established federal rule. Recall that New York law applies under the clause only "where no such established, entrenched [federal] precedent exists."

[72] *See supra* notes 25-28 and accompanying text.

[73] *See*, *e.g.*, 601 U.S. at 74 (distinguishing *Wilburn Boat* because the Court had no need to determine the content of federal substantive law "when the question is whether the parties may choose the governing law to apply"); *id.* (noting that "States' traditional responsibility for regulating insurance" was not affected when the issue is "which state law applies in a given case"); *id.* at 75 (arguing that the result was equitable because "most maritime actors have justifiably believed that choice-of-law provisions are presumptively enforceable as a matter of federal maritime law").

At the very least, however, the *Raiders Retreat* Court has unequivocally endorsed the use of choice-of-law clauses in marine insurance contracts. If insurers are able to include favorable clauses in their policies, that would resolve horizonal choice-of-law questions and would very likely resolve vertical choice-of-law questions, as well. And to the extent that happens, the lower courts will never need to consider whether *Wilburn Boat* should continue to control marine-insurance decisions.