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**STEMMING THE TIDE: UNIFORMITY IN ADMIRALTY
COMMANDS NO RECOVERY FOR RECREATIONAL VESSEL
LOSSES UNDER A MARINE PRODUCTS LIABILITY THEORY
IN MARYLAND COURTS DUE TO THE ECONOMIC LOSS
RULE OF *EAST RIVER STEAMSHIP CORP. v. TRANSAMERICA
DELAVAL, INC.***

I. INTRODUCTION

The Chesapeake Bay and Maryland's nearby seacoast provide marvelous recreational opportunities for avid sailors regardless of whether wind or engine power propels their boats. However, an exhilarating day on the water can become dangerous if the vessel or its equipment is defective. During 1996, 197 boating accidents¹ reportedly² occurred on Maryland's territorial waters.³ These accidents

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1. See *See* U.S. Dep't of Transp., U.S. Coast Guard, Boating Statistics-1996 at 26 (1996).
 2. See *id.* at 7. The operator of a recreational vessel must file a Boating Accident Report if the craft is involved in an accident that results in loss of life, personal injury requiring medical treatment beyond first aid, property damage in excess of \$500 (including the complete loss of the vessel), or the disappearance of a person from the vessel if the circumstances indicate death or injury. See 46 U.S.C. § 6101 (1994); 33 C.F.R. § 173.55 (1998). Maryland's accident-reporting requirements are virtually identical to the federal guidelines. See MD. CODE ANN., NAT. RES. II § 8-724(b) (Supp. 1997). Nationwide, "[t]he Coast Guard received reports for a total of 8,026 recreational boating accidents in 1996; the most ever reported." U.S. DEP'T OF TRANSP., *supra* note 1, at 4 (Executive Summary). Also, in 1996, the Coast Guard reported that a total of 709 fatalities, a record high of 4,442 personal injuries, and property damage of \$22,829,958 occurred during recreational vessel activities nationwide. See *id.* at 4, 24.
 3. See MD. CODE ANN., NAT. RES. II § 8-101(g)(1-5) (1997). Under state law, Maryland territorial waters are:

Both surface and underground waters within the boundaries of the State subject to its jurisdiction[,] . . . [t]hat portion of the Atlantic Ocean within the boundaries of the State[,] . . . [t]he Chesapeake Bay and its tributaries . . . [a]ll ponds, lakes, rivers [within the boundaries of the State] . . . and [t]he floodplain of all free-flowing waters determined by the Department of Environment.

Id.; see also *id.* § 8-701(r) (defining state waters for the purposes of the State Boat Act as "any water within the jurisdiction of the State, [and] the marginal sea adjacent to the State"). Maryland has not been alone in attempting to define "territorial waters." See, e.g., *United States v. One Big Six Wheel*, 987 F. Supp. 169, 176-77 (E.D.N.Y. 1997). In *One Big Six Wheel*, the United States Dis-

resulted in nineteen fatalities⁴ and serious injuries⁵ to 109 persons.⁶ Boating accidents can also result in a constructive total loss⁷ or complete loss of the vessels involved.⁸ In 1996, boating accidents resulted in property damage worth \$794,691 on Maryland waters alone.⁹

The United States Coast Guard attributes many boating accidents to defective recreational vessels' hulls,¹⁰ machinery failures, or equipment failures.¹¹ Defects in the recreational vessel's control system¹² or component parts¹³ causing personal injury or damage to property give rise to a marine products liability cause of action.¹⁴ No matter whether an admiralty action over a defective marine product

trict Court for the Eastern District of New York concluded that territorial waters include " 'those waters within the international boundary line . . . or within 3 nautical miles (3.45 statute miles) from low tide on the coastline.' " *Id.* at 172 (quoting 26 C.F.R. § 43.4472-1 (1997)). Yet, state attempts to define territorial waters is of limited utility in admiralty law; only an Act of Congress or federal court may determine questions of admiralty tort jurisdiction. *See infra* notes 171, 185, and 191 and accompanying text; *see also* Puget Sound Power & Light Co. v. Federal Regulatory Energy Comm'n, 644 F.2d 785, 788 (9th Cir. 1981) (noting that "state law is not determinative of navigability").

4. *See* U.S. DEP'T OF TRANSP., *supra* note 1, at 26.
5. Serious injuries are those that require medical treatment beyond first aid. *See supra* note 2.
6. *See* U.S. DEP'T OF TRANSP., *supra* note 1, at 26.
7. In the maritime context, a constructive total loss occurs when recovery of the vessel is unlikely if sunken or destroyed, the expense of recovery of the vessel exceeds the vessel's valuation after recovery, or the cost of repairs would exceed the value of the vessel after repairs. *See* 1 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 441 (1987).
8. *See* U.S. DEP'T OF TRANSP., *supra* note 1, at 24.
9. *See id.* at 26.
10. *See id.* at 32. In 1996, recreational vessel hull failures were identified as a cause in 80 accidents that resulted in nine fatalities. *See id.*
11. *See id.*
12. *See* Bodnar v. Hi-Lex Corp., 919 F. Supp. 1234, 1235 (N.D. Ind. 1996) (addressing a products liability claim under admiralty law for a design defect in the throttle control system of a pleasure boat).
13. *See* O'Hara v. Bayliner, 679 N.E.2d 1049, 1050 (N.Y. 1997) (addressing a personal injury claim arising from an allegedly defectively designed cleat on a water-ski boat).
14. *See* East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986) ("The paradigmatic products-liability action is one where a product 'reasonably certain to place life and limb in peril,' distributed without reinspection, causes bodily injury." (citing MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051, 1053 (N.Y. 1916))).

is brought in federal¹⁵ or state court,¹⁶ the claim should be governed by the substantive maritime law¹⁷—an area of law where litigants are given an ample opportunity to recover for their bodily injuries and property damages.¹⁸

Occasionally, a dispute arises where the purportedly defective product caused purely economic losses—without personal injury or damage to property other than the vessel.¹⁹ The substantive mari-

15. See *infra* Part III.A.

16. See *infra* Part III.B.

17. See *infra* Part III.C. The substantive maritime law is part of the federal, not state, common law. See *O'Hara*, 679 N.E.2d at 1054. As observed by New York's court of appeals in *O'Hara*, the Supreme Court has noted that:

although State courts are authorized to entertain maritime causes of action, "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards."

Id. (quoting *Offshore Logistics v. Tallentire*, 477 U.S. 207, 223 (1972), *superseded by statute as stated in Delaware v. New York*, 507 U.S. 490, 510 (1993); see also Peter Thompson, *State Courts and State Law: A New Force in Admiralty?*, 8 U.S.F. MAR. L.J. 223, 230 (1996). *But cf.* *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that in a case in federal court sitting in diversity, the substantive law of the forum state is applicable).

The reverse-*Erie* doctrine is one of several approaches commonly used to determine whether federal maritime law preempts state law. See Thompson, *supra*, at 266. This doctrine effectively erases the influence of State law; as observed by one commentator: "Applying 'reverse-*Erie*,' state courts hearing a maritime case are obligated to follow a federal maritime rule of decision just as federal courts in diversity cases are obligated to apply the relevant rule of decision of the forum state." *Id.* *But see* *Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 636, 644 (La. 1992) (holding that predominately local interests and lack of contrary applicable federal legislation mandated application of state law instead of general maritime law).

18. A plaintiff may choose to bring a tort claim under the general maritime law, rather than under state law because the availability of comparative negligence. Compare, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407 (1975) (discussing the general acceptance of comparative negligence in admiralty), with, e.g., *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 446-58, 456 A.2d 894, 895-900 (1983) (comparing comparative and contributory negligence and refusing to disturb the well-established place of contributory negligence in Maryland law). Whereas a plaintiff may be precluded from recovery altogether under Maryland law, the general maritime law leaves the door open to tort recovery even for the negligent plaintiff.
19. See Reeder R. Fox & Patrick J. Loftus, *Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later*, 64 DEF. COUNS. J. 260, 263-64 (1997) ("Economic loss has been defined as 'loss due to repair costs, decreased value, and lost profits' ") (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*,

time law forbids any recovery unless there are personal injuries or property damage other than to the vessel itself;²⁰ therefore, no court may award purely economic damages for a maritime claim.²¹ This principle is known as the *East River* doctrine,²² named for the Supreme Court decision adding this rule to the substantive maritime law²³ or "admiralty" as it is also known.²⁴

This Comment will focus on the complex procedural path to judgment²⁵ in courts applying admiralty law and the restrictive avenues of recovery available to Maryland litigants for economic loss claims arising out of a defective recreational vessel or its component parts.²⁶ Initially, admiralty subject-matter jurisdiction and venue in

476 U.S. 858, 870 (1986)). Economic loss also includes costs of replacement, repair, or lost profits awarded as consequential damages. *See id.* at 263 & n.24 (quoting *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 577 A.2d 631, 634 (Pa. Super. Ct. 1990)). It includes " 'damages resulting from the loss of use of the product.' " *Id.* at 263 & n.25 (quoting *Lucker Mfg. v. Milwaukee Steel Foundry*, 777 F. Supp. 413, 415 (E.D. Pa. 1991)). In addition, "[i]t has also been defined as the 'diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.' " *Id.* at 263-64 & n.26 (quoting Note, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966)).

20. *See infra* Parts V. & VI.B.

21. *See infra* notes 267-320, 311-13 and accompanying text.

22. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986).

23. *See* 8 BENEDICT ON ADMIRALTY § 4.02[B] & 4-14 n.32 (Steven F. Friedell ed., 7th ed. 1998) ("Without question, once the United States Supreme Court has endorsed a principle its status as established substantive maritime law is secure.") (citing *East River S.S. Corp.*, 476 U.S. at 865).

24. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-1 & 1 n.1 (2d ed. 1975) ("[T]he terms 'admiralty' and 'maritime law' are virtually synonymous in [the United States] today, though the first derives from the connection of our modern law with the system administered in a single English court, while the second makes a wider and more descriptive reference.").

25. In *O'Hara v. Bayliner*, 679 N.E.2d 1049, 1050 (N.Y. 1997), the Court of Appeals of New York observed that this admiralty case had a "complicated procedural path" despite a "relatively straightforward" issue to resolve. *O'Hara*, 679 N.E.2d at 1051; *see also* Jeffery V. Brown, *Good Things Come in Well-Defined Packages: The Simple Elegance of Travelers Indemnity Co. v. The Sam Houston*, 25 STETSON L.R. 123, 123 n.2 (1995) ("At times, in fact, the complexity has been so great that Congress has intervened in an attempt to provide simplification . . . however, admiralty continues to complicate the uncomplicated.").

26. *See infra* Parts VII.A & B.

general will be examined.²⁷ Then specific subject-matter jurisdiction over maritime tort claims²⁸ and maritime contract claims²⁹ will be separately discussed to expose the differing jurisdictional requirements for each cause of action.³⁰ This Comment will then address the limited recovery in tort for a defective marine product that does not cause personal injury or property damage, other than to the product itself.³¹ Next, this Comment will review two marine products liability cases decided with contrary results in the United States District Court for the District of Maryland and contrast them with treatments from courts in other jurisdictions.³² Finally, this Comment will conclude that Maryland courts should uphold the traditional uniformity and consistency associated with admiralty law when addressing a claim that genuinely implicates maritime interests.³³

II. SOURCES OF ADMIRALTY LAW

Admiralty cases are governed by principles of maritime law drawn from case law to form "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."³⁴ Guiding the resolution of maritime claims are these rules of the

27. See *infra* Parts IV.A & B.4. Personal jurisdiction over the parties is required for in personam actions in accordance with the court's rules and appropriate case law. See 14A CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. § 3671, at 261 n.40 (1998) (citing *Volkswagon de Mexico v. Germerischer Lloyd*, 768 F. Supp. 1068 (S.D.N.Y. 1991)). No matter whether a federal or state court hears a claim, the requirement for personal jurisdiction is governed by the same due process principles; however, there are differing procedural rules to consider. See *id.* In contrast, actions involving maritime attachment or the arrest of a vessel are exclusively heard *in rem* in the federal district courts. See *Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 35-36 (1960) (Whittaker, J., dissenting) ("From its earliest history to the present time, this Court has consistently held that an admiralty proceeding *in rem* is one essentially *against the vessel itself as the debtor or offending thing*, and, in such an action, the vessel itself is impleaded as the defendant, seized, judged and sentenced."); see also 1 BENEDICT, *supra* note 23, § 124, at 8-15 ("The right to proceed *in rem* is the distinctive remedy of the admiralty and is administered exclusively by the United States courts exercising admiralty jurisdiction.").

28. See *infra* Part IV.B.1.

29. See *infra* Part IV.B.2.

30. See *infra* Part IV.B.3.

31. See *infra* Part V.

32. See *infra* Parts VII and VIII.A.

33. See *infra* Parts VIII.B and IX.

34. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986). See also *infra* notes 100, 121.

"general maritime law."³⁵ Unlike common law,³⁶ these rules are drawn from ancient sea codes,³⁷ a form of civil law³⁸ codified by maritime trading nations.³⁹

To determine whether to adopt a particular tenet of maritime law, a court sitting in admiralty⁴⁰ will often look to the underlying

35. As an admiralty term of art, "[t]he general maritime law derives from customs, principles and rules of international maritime commerce which developed over many centuries." 8 BENEDICT, *supra* note 23, § 5.01[A][1], at 5-5. *See also infra* note 121.
36. *See* BLACK'S LAW DICTIONARY 276 (6th ed. 1990) ("The 'common law' is all the statutory and case law background of England and the American colonies before the American revolution.") (citing *People v. Rehman*, 61 Cal. Rptr. 65, 85 (Cal. Ct. App. 1967)).
37. *See* WYNDHAM ANTIS BEWES, *THE ROMANCE OF THE LAW MERCHANT* 70-71 (1923 reprinted 1986) (collecting a translation of four articles from the Code of Hammurabi, the most ancient shipping laws known); *see also* 1 BENEDICT, *supra* note 23, § 2 & 1-3 n.1; THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW*, § 1-2 (2d ed. 1994).
38. *See* BLACK'S LAW DICTIONARY 246 (6th ed. 1990). Civil law is defined as "[t]he system of jurisprudence held and administered in the Roman empire, particularly as set forth in the compilation of Justinian and his successors . . . [and] denominated [as] the '*Corpus Juris Civilis*,' as distinguished from the common law of England." *Id.*
39. *See* 1 BENEDICT, *supra* note 23, § 104 & 7-5 n.1 ("American maritime law, like the English maritime law, is not a branch of the common law of England." (citing *Moragne v. States Marine Lines*, 398 U.S. 375 (1970))). As noted by one commentator, "[m]aritime law in England took its [character], and inspiration from the Civil Law." *Id.* & 7-5 n.2 (citing *Moragne*, 398 U.S. at 386-87 n.5). According to the Supreme Court:
- Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles law.
- Moragne*, 398 U.S. at 386-87 & n.5 (citation omitted).
40. *See* GILMORE & BLACK, *supra* note 24, at § 1-9 (explaining admiralty jurisdiction and procedure of the courts). Originally separate prior to 1966, the procedural rules for admiralty and civil cases are now consolidated, but still permit special handling of matters that exist only in admiralty. *See id.* All of the cases heard before the consolidation of the procedural rules:
- are set in the frame of the older terminology and practice. Such cases [from 1787 until 1966] are spoken of as being "in admiralty," the complaint is the "libel" and so on [However,] "today's equivalent to . . . being 'in admiralty' is . . . either a case in which the admiralty ground is the only ground of federal jurisdiction, or a case in which, out of more than one possible ground of such jurisdiction, the plaintiff in [the] complaint designates the admiralty

policy reasons of the general maritime law or some historical basis for a rule's promulgation. Perhaps more than any other substantive area of the law, admiralty draws from historical policies concerning trade.⁴¹ Local, non-commercial concerns were unimportant to the major tenets of the general maritime law as it evolved over time.⁴² Whether state or federal, all courts must defer to the settled principles of the general maritime law; its historical roots⁴³ are "over twice the age of the common law."⁴⁴

ground."

Id. (citations omitted).

41. See GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 1 (1997) ("From its inception . . . maritime law involved navigation and trade between diverse communities so that [judges] were driven to find principles and application that would have common standards between people of different countries."); see also *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-75 (1874). The *Lottawanna* Court held that the Constitution:

assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without [defining] those terms, assuming them to be known and understood. One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Id. (citations omitted).

42. The general maritime law is more than a rule of law of the court in which it is applied. See, e.g., *Park v. United States Lines, Inc.*, 50 Md. App. 389, 398, 439 A.2d 10, 15 (1982). In *Park*, a state court action, the court of special appeals observed that "although the plaintiffs have decided to proceed outside the admiralty of the United States District Courts, they take with them the features peculiar to admiralty law." *Id.* (citing *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-10 (1953)). Once the Supreme Court fashions a rule or Congress enacts legislation to govern maritime law disputes, it is then applied in all subsequent admiralty actions whether heard in federal or state courts. See also *supra* note 23.
43. See *Margate Shipping Co. v. M/V J.A. Orgeron*, 143 F.3d 976, 985 & n.11 (5th Cir. 1998) (citing an ancient sea code as historical authority when examining the underlying policy reasons for a salvage award).
44. Warren J. Marwedel, *Admiralty Jurisdiction Recreational Craft Personal Injury Issues*, 68 TUL. L. REV. 423, 424 & n.1 (1994) (citing EDWARD E. COHEN, ANCIENT ATHENIAN MARITIME COURTS 8 (1973)).

A. *The Sea Codes*

The substantive maritime law grew out of the sea codes of antiquity that now form a part of the *lex mercantia*—the law merchant.⁴⁵ Existing well before English common law,⁴⁶ the law merchant was the first private, international law.⁴⁷ This ancient “dispute-settling activity . . . allowed trading people the competency to iron out their own troubles amongst themselves.”⁴⁸ The recorded sea codes provided settlement predictability for maritime business disputes and encouraged maritime ventures, the success of which were far from predictable due to the perils of the sea,⁴⁹ danger from piracy,⁵⁰ or war between nations.⁵¹

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45. BLACK'S LAW DICTIONARY 886 (6th ed. 1990) (defining law merchant as a “body of law governing commercial transactions which had its origin in common law of England regulating merchants.”). Although “there is some initial obscurity as to what . . . constituted . . . the substance of the *lex mercatoria*, [] it may best be defined as the law administered as between merchants in the consular or commercial courts, some of it being substantive law and some rules of evidence and procedure.” BEWES, *supra* note 37, at 14; see also DAVID R. OWEN & MICHAEL C. TOLLEY, COURTS OF ADMIRALTY IN COLONIAL AMERICA 7-11 (1995) (examining Maryland's colonial era admiralty courts).
46. See GILMORE & BLACK, *supra* note 24, § 1-1, at 1 (discussing the historical origin of substantive maritime law).
47. See BEWES, *supra* note 37, at 15.
48. GILMORE & BLACK, *supra* note 24, § 1-3, at 5.
49. See 1 BENEDICT, *supra* note 23, § 6 & 1-21 to 1-27 n.1 (Rules of Oleron). One court defined perils of the sea as “those perils which are peculiar to the sea, and which are of [such] extraordinary nature . . . or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.” *The Giulia*, 218 F. 744, 746 (2d Cir. 1914).
50. See 1 BENEDICT, *supra* note 23, § 6 & 1-21 to 1-27 n.1 (Rules of Oleron). The corsairs of old are not just a historical curiosity. There are more than 250 pirate attacks on merchant vessels reported each year to the International Maritime Bureau's Piracy Centre. See generally Holger Jensen, *High-Seas Piracy*, J. OF COM., May 14, 1998. These attacks result in annual losses of more than \$16 billion each year. See *id.*; see also Philippe B. Moulrier, et al., *Pirates? What Pirates? A Growing Problem the Shipping Industry Would Like to Ignore*, U.S. NEWS & WORLD REP., June 23, 1997, available in 1997 WL 8332249.
51. See 1 BENEDICT, *supra* note 23, § 6 & 1-21 to 1-27 n.1 (Rules of Oleron). Opposing military forces have historically targeted merchant shipping as a strategic method of stopping lines of supply or as a measure of punishment. For instance, during the armed conflict between Britain and Argentina over the sovereignty of the Falkland Islands, the empty, Liberian-registered oil tanker *Hercules* owned by American interests was attacked without warning by Argentine military aircraft using bombs and air-to-surface rockets. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423 (2d Cir. 1987), *rev'd*,

King Richard the Lionhearted introduced one particularly noteworthy sea code, the Rules of Oleron,⁵² to medieval England.⁵³ Portions of this sea code constitute an influential part of the current Anglo-American general maritime law,⁵⁴ law of insurance contracts,⁵⁵ and law governing maritime salvage.⁵⁶ The sea codes were also the source for a captain's command authority,⁵⁷ no matter whether he was serving as the master of a commercial vessel at sea⁵⁸ or sailing

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). While assisting in the rescue of survivors from a sunken Argentine warship, the tanker was attacked 600 miles offshore of Argentina and 500 miles from the Falkland Islands by the Argentine Air Force. See Thomas M. DiBiagio, *Federal Jurisdiction Over Foreign Governments for Violations of International Law: Foreign Shipping Immunity and the Alien Tort Statute After Amerada Hess Shipping Corp. v. Argentine Republic*, 12 MD. J. INT'L L. & TRADE 153, 171 (1988).

52. The Rules of Oleron were said to have been "promulgated, on the small island off the French west coast from which it takes its name, by Eleanor of Aquitaine, on her return from her spectacular course of misconduct in the Holy Land." GILMORE & BLACK, *supra* note 24, § 1-3, at 7; see also MANGONE, *supra* note 41, at 7-9. The Rules of Oleron strongly influenced English admiralty law, which adopted many of them into the *Black Book of Admiralty*. See MANGONE, *supra* note 41, at 7-9. Moreover, the Rules of Oleron have "always been regarded as having an especial importance for the maritime law of England, and hence for that of the United States." GILMORE & BLACK, *supra* note 24, § 1-3, at 7.
53. See GILMORE & BLACK, *supra* note 24, §§ 1-3 to 1-4 (analyzing the historical significance of the medieval sea codes on the English legal system and the subsequent effect on colonial American courts); MANGONE, *supra* note 41, at 7-9.
54. One of the more significant contributions to the general maritime law is the concept of general average. If cargo is jettisoned to save a sinking ship or from other perils of the sea, the saved cargo's owners and the ship jointly contribute to offset the loss. See 1 PARKS, *supra* note 7, at 3-4; see also GILMORE & BLACK, *supra* note 24, § 1-2.
55. See 1 PARKS, *supra* note 7, at 1.
56. See *Margate Shipping Co. v. M/V J.A. Orgeron*, 143 F.3d 976, 985 & n.11 (5th Cir. 1998) (observing that where mariners voluntarily act to save property from a maritime peril, they may be entitled to salvage award and that this doctrine can be found in ancient sea codes, including the Rules of Oleron).
57. See 1 BENEDICT, *supra* note 23, § 6, at 1-21 n.1 (citing a modern translation from a French publication of the Rules of Oleron, dated 1485, entitled "The Judgments of the Sea, of Masters, of Mariners, and Merchants, and all their doings.").
58. See 46 U.S.C. § 10,101(1) (1994) (defining master as "the individual having command of a vessel"); see also *The Transfer No. 12*, 221 F. 409, 412 (2d Cir. 1915) ("[T]here is but one master, who is not only navigator, but judge of and governor over the whole [maritime] adventure."); GEORGE L. CANFIELD & GEORGE W. DALZELL, *THE LAW OF THE SEA* 39 (1926) ("The master . . . has full charge of, and personal responsibility for the navigation and control of the

as skipper of a recreational vessel on the Chesapeake Bay.⁵⁹

Notwithstanding their age, the sea codes are more than historical artifact; throughout the evolution of the general maritime law in the United States, the sea codes have provided useful guidance.⁶⁰ In 1795, a federal court observed:

[F]ar from sound principles becoming obsolete, or injured by time . . . it will be found, on careful investigation, that the oldest sea laws we know . . . furnished the outline and leading character of the whole . . . [and] we need not hesitate to be guided by the rules and principles, established in the maritime laws.⁶¹

More than 200 years later, another federal court again cited the sea codes, specifically one of the surviving Rules of Oleron governing marine salvage, as useful guidance to the resolution of *Margate Shipping Co. v. M/V J.A. Orgeron*.⁶² The master and crew of the tanker *Cherry Valley* saved a space shuttle's external fuel tank from near certain destruction when the tug and barge flotilla delivering it were threatened by a severe tropical storm.⁶³ The court concluded that the sea code was helpful historical authority⁶⁴ underlying the traditional factors⁶⁵ governing the salvage reward for saving a vessel

ship, passengers, crew and cargo.").

59. See CHARLES F. CHAPMAN, *PILOTING, SEAMANSHIP AND SMALL BOAT HANDLING* 474 (51st ed. 1974) ("By custom and by law, the skipper of a [recreational] craft has the sole ultimate responsibility and authority, aboard especially in emergencies.").

60. See *Thompson v. The Catharina*, 23 F.Cas. 1028, 1031 (D.C. Pa. 1795) (using the sea codes as a guideline to determine whether seamen were due wages).

61. *Id.* at 1030.

62. 143 F.3d 976 (5th Cir. 1998).

63. See *id.* at 981-83.

64. See *id.* at 985 & n.11.

65. See *id.* at 984 (discussing *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869)). *The Blackwall* factors include:

1. The labor expended by the salvors in rendering the salvage service.
2. The promptitude, skill, and energy displayed in rendering the service, and the saving the property.
3. The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.
4. The risk incurred by the salvors in securing the property from the impending peril.
5. The value of the property saved.
6. The degree of danger from which the property was rescued.

Id. (quoting *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869)).

in danger of foundering.⁶⁶ The federal court cited the Rules of Oleron and noted that “[s]ince time immemorial, the mariner who acted voluntarily to save property from peril on the high seas has been entitled to a reward [and t]his simple rule has been an integral part of maritime commerce in the western world since the western world was civilized.”⁶⁷ As a result, the court re-affirmed the importance of the sea codes to modern admiralty law, but reduced the largest salvage award in recorded history to the tankship’s owner and crew.⁶⁸

B. Historical Roots of American Admiralty Jurisdiction

The historical roots of American admiralty jurisdiction are grounded in a more modern era: the American colonial age.⁶⁹ Maryland, like other colonies of Britain, had its own vice-admiralty courts⁷⁰ to hear prize cases⁷¹ and cases of maritime crimes that occurred on the sea, including piracy⁷² and “instance”⁷³ private maritime claims.⁷⁴ The Articles of Confederation created a general asso-

66. *See id.* at 985.

67. *Id.*

68. *See id.* at 979-80. The District Court for the Eastern District of Louisiana mistakenly overvalued the cost of the space shuttle’s external fuel tank when it “awarded approximately \$6.4 million in salvage.” *Id.* That award was reduced to \$4.25 million by the *Margate Shipping Co.* court. *See id.*

69. *See* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 122 (1993) (“Before the Revolutionary War, Great Britain . . . operated imperial vice-admiralty courts throughout the colonies.”). During the American Revolution and the Confederacy, most states had their own admiralty courts. *See id.* at 122-23. Under the Articles of Confederation, the Continental Congress created the first national court of limited admiralty jurisdiction. *See id.* at 123.

70. *See* OWEN & TOLLEY, *supra* note 45, at 46, 54 (noting that Maryland’s vice-admiralty court was established in 1694).

71. *See id.* at 103 (documenting the early history of Maryland’s admiralty courts). Prize cases were disputes arising out of the capture of enemy vessels by Royal Navy ships or licensed privateers—legally sanctioned pirates under a letter of marque who supplemented regular naval forces in the time of war. *See id.* at 156. These seizures were a means of enforcing navigation laws by obtaining lawful title to the ship and its cargo for violations. *See id.* at 156, 160-62. The authors include one synopsis of a prize case from 1703 where the *HMS Oxford* captured a French merchant ship loaded with a cargo of sugar and brought her to Maryland. *See id.* at 298-99.

72. *See id.* at 170-72 (detailing piracy cases and other maritime crimes in colonial Maryland).

73. *See e.g.*, BLACK’S LAW DICTIONARY 799 (6th ed. 1990). *See also infra* note 74.

74. *See* OWEN & TOLLEY, *supra* note 45, at 150-52.

ciation among the thirteen states and devised a national government with limited powers, including the "narrow admiralty jurisdiction over 'the trial of piracies and felonies committed on the high seas; and . . . appeals in all cases of capture.'" ⁷⁵ However, the Confederacy's national court of limited admiralty jurisdiction ⁷⁶ could not adjudicate some public litigation such as prize cases or cases of instance. ⁷⁷ These cases were left to the states. ⁷⁸ The political flaws in the Articles of Confederation led to the Constitutional Convention's drafting of the United States Constitution, which included "the call for the creation of federal admiralty courts." ⁷⁹

III. THE CONSTITUTIONAL UNDERPINNINGS AND FEDERALISM CONCERNS OF AMERICAN ADMIRALTY LAW

A. *The Constitutional Mandate*

The United States Constitution gave the federal courts the exclusive power ⁸⁰ to hear "all Cases of admiralty and maritime Jurisdiction." ⁸¹ Exercising its own power when creating the lower federal courts, Congress "expressly reserved to state courts the power to hear in personam admiralty and maritime cases." ⁸² Once again, ad-

75. Casto, *supra* note 69, at 128 & n.59 (quoting ART. OF CONFED. art. 9 § 1 (1777)).

76. *See id.* at 122-23.

77. *See* OWEN & TOLLEY, *supra* note 45, at 123-24.

78. *See* Casto, *supra* note 69, at 127-28.

79. *See id.* at 129.

80. The grant of exclusive original admiralty jurisdiction was expressly conferred by section nine of the Judiciary Act of 1789, which is now codified as 28 U.S.C. § 1333.

81. U.S. CONST. art. III, § 2, cl. 1; *see* Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 469-70 (1925) ("[T]he Convention . . . accept[ed] a uniform Federal system, as essential to maritime commerce."). As noted by one of the Founders: "[C]ases of admiralty and maritime jurisdiction are 'the fifth of the enumerated classes of causes proper for cognizance of the National Courts.'" *Id.* at 469-70 (quoting THE FEDERALIST No. 80 (Alexander Hamilton) (Ford's ed. 1908)).

82. Thompson, *supra* note 17, at 223, 226 & n.15 (citing the Judiciary Act of 1789, now codified as 28 U.S.C. § 1333(1)(1994)); *see also* *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866). In *The Hine*, the Supreme Court explained that:

[i]t must be taken . . . as the settled law of this [C]ourt; that whenever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the Act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law.

Id. at 568-69. As to when admiralty jurisdiction is exclusive, it "has been inter-

miralty jurisdiction was centralized in a nationwide judiciary,⁸³ with the reservation that some admiralty claims could be heard in state courts.⁸⁴ Yet, even with concurrent jurisdiction, “[a] state cannot confer [admiralty jurisdiction] on [its own] State courts.”⁸⁵

Underlying the rationale to leave certain claims within the concurrent jurisdiction of the state courts may have been the lack of national interest over private maritime claims.⁸⁶ Whether the Framers intended a distinction between private⁸⁷ and public⁸⁸ maritime litigation, such as that drawn under the Articles of Confederation,⁸⁹ is open to scholarly debate.⁹⁰

B. *Statutory Adjustments to the Federal System*

Statutorily, Congress also saved the right to a common law remedy for all suitors.⁹¹ The saving to suitors clause grants concurrent jurisdiction for in personam⁹² actions in state courts for some admi-

preted as making federal court admiralty jurisdiction exclusive as to actions in rem against vessels or against other maritime property.” David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 LA. L. REV. 685, 698 (1995). In addition, “ ‘certain statutory actions,’ including petitions for limitation of liability, and suits against the United States under the Suits in Admiralty Act and the Public Vessels Act” are within the exclusive original jurisdiction of the federal district court sitting in admiralty. *Id.* at 698-99.

83. See Marwedel, *supra* note 44, at 425 (“Until a criminal case was reported in 1863, every prior Maryland district court opinion published in the federal reporters had involved the exercise of admiralty jurisdiction.”) (citing *United States v. Cashiel*, 25 F. Cas. 318 (D. Md. 1863)).

84. See Casto, *supra* note 69, at 139-40; see also *infra* Part III.B.

85. MELVIN M. COHEN, ADMIRALTY JURISDICTION, LAW, AND PRACTICE 1 & n.2 (1883).

86. See Casto, *supra* note 69, at 128-29.

87. See *id.* at 128.

88. See *id.*

89. During the Confederacy, there was:

a dichotomy between admiralty cases that directly affected the national interest and private maritime litigation that had at most an indirect impact upon the national interest. Provision was made for a national admiralty jurisdiction over the former while the latter was left to the exclusive power of the individual states.

Id.

90. See *id.* at 118 (“There is no evidence . . . that the Founding Generation thought of maritime litigation primarily in terms of private civil litigation.”).

91. 28 U.S.C. § 1333(a)(1) (1994). This statute provides in pertinent part: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” *Id.* This section is commonly known as the saving to suitors clause.

92. If an action is filed in personam, the plaintiff must still establish personal ju-

ralty claims.⁹³ Once brought in the state court under the saving to suitors clause, an admiralty claim may not be removed⁹⁴ to federal court, unless federal jurisdiction could have been initially exercised under the original jurisdiction statutes.⁹⁵ This is despite the appar-

risdiction over the defendants. *See supra* note 93. In federal court, Federal Rule of Civil Procedure 4(e) governs service of process beyond the reach of the federal court's jurisdiction. *See* FED. R. CIV. PRO. 4(e).

93. To file an action in a Maryland state court that is consistent with due process requirements, the plaintiff must be able to reach the defendant by use of the long-arm statute and provide proper service. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 6-102, 6-103 (1995) (establishing a long-arm statute to the limit of constitutionality); MD. R. CIV. P. 2-121 to -126 (governing service of process on defendants); *see also* *Allen v. Allen*, 105 Md. App. 359, 366-68, 659 A.2d 411, 414-15 (1995) (observing that personal jurisdiction must be established prior to the court imposing an obligation or liability on a defendant). *See also supra* note 27. Actions in rem, which are uniquely maritime claims against the vessel itself and give rise to a maritime lien, are exclusively heard in federal courts sitting in admiralty. *See supra* note 82.

94. *See* 14B WRIGHT ET AL., *supra* note 27, § 3721, at 286-88 ("Removal is quite an anomalous form of subject matter jurisdiction."). *See generally* Kenneth G. Engerrand, *Removal and Remand of Admiralty Suits*, 21 TUL. MAR. L.J. 383, 384-93 (1997) (analyzing the removal statute and several admiralty applications).

95. *See* *Lewis v. United States*, 812 F. Supp. 620, 622-23 (E.D. Va. 1993); *see also* SCHOENBAUM, *supra* note 37, § 2-3 & 82 n.13 ("[T]he rule has developed that admiralty saving-clause cases properly filed in state court cannot be removed unless admiralty jurisdiction is exclusive."). Thus, state in personam claims can remain in state court, unless original federal jurisdiction was proper under diversity jurisdiction or the claim has a federal question element. *See* 28 U.S.C. § 1331 (1994) (providing the requirements for federal question jurisdiction); *id.* (providing the requirements for diversity jurisdiction).

Yet, admiralty jurisdiction itself is not a federal question for the purposes of removal because "it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters—a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 372 (1959), *superseded by statute on other grounds as stated in* *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). Moreover, the *Romero* Court opined:

An infusion of general maritime jurisdiction into the federal question grant would not occasion merely an isolated change; it would generate many new complicated problems. If jurisdiction of maritime claims were allowed to be invoked under § 1331, it would become necessary for courts to decide whether the action arises under federal law, and this jurisdictional decision would largely depend on whether the governing law is state or federal. Determinations of this nature are among the most difficult and subtle that federal courts are called upon to make.

Id. at 375 & n.43 (citing *Caldarola v. Eckert*, 332 U.S. 155 (1968) (internal

ently express command of the federal removal statute.⁹⁶

With the saving to suitors clause, Congress specifically reserved the right of parties to access remedies under state decisional law if the common law court is competent to give it and when the remedy does not offend admiralty uniformity and consistency principles.⁹⁷ Thus, Maryland's state courts are competent to hear in personam maritime cases,⁹⁸ at least "to the extent that distinctive admiralty remedies are not involved and . . . not prohibited by [federal] statute."⁹⁹ Even Maryland state courts must apply general maritime law

quotation marks omitted); see also Engerrand, *supra* note 94, at 386 (discussing the *Romero* Court's rejection of general maritime jurisdiction being brought into federal question jurisdiction).

96. See 28 U.S.C. § 1441(a) (1994). This statute provides in pertinent part:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.; see also SCHOENBAUM, *supra* note 37, § 2-3, at 81-82 ("Removal is a favorite weapon of the defense in maritime cases [A] case is subject to removal if it could have been brought originally in federal district court, unless forbidden by act of Congress. . . .").

97. See SCHOENBAUM, *supra* note 37, § 2-2 & 81-82 n.2 (noting that the courts are competent at least to the extent of "the common law . . . in all cases where the suit is *in personam*") (citing *Bergeron v. Quality Shipyards Inc.*, 765 F. Supp. 321, 322-23 (E.D. La. 1991)).
98. Maryland's appellate reports contain few recent opinions where a party exercised concurrent admiralty jurisdiction conferred by the "savings to suitors" clause to bring maritime tort claims. See *Pine St. Trading Corp. v. Farrell Lines, Inc.*, 278 Md. 363, 379-80, 364 A.2d 1103, 1114 (1976) (addressing a claim where a cargo of beet sugar was damaged by antimony dust); *Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp.*, 193 Md. 20, 24, 65 A.2d 304, 305 (1949) (concerning the injuries of a plaintiff injured while working in a ship's hold); *Park v. United States Lines, Inc.*, 50 Md. App. 389, 397-98, 439 A.2d 10, 15 (1982) (concerning the deaths of crane operators where the defendants failed to suspend cargo operations during a period of very high winds); *Orient Overseas Line v. Globemaster Baltimore, Inc.*, 33 Md. App. 372, 381-82, 365 A.2d 325, 334-35 (1976) (concerning damage to and partial loss of a cargo of handtools).
99. SCHOENBAUM, *supra* note 37, § 1-2; accord 1 PARKS, *supra* note 7, at 14 ("Maritime law was never intended as an all-inclusive and definitive system. The interplay between state law and federal law has always recognized that state law could supplement the maritime law where not otherwise inconsistent and antagonistic to its characteristic features."). See also *infra* note 103.

in admiralty actions,¹⁰⁰ a species of federal common law,¹⁰¹ which is controlling.¹⁰² While Maryland statutory and case law may impact an action characterized as maritime in nature,¹⁰³ it does not normally alter the application of substantive admiralty law.¹⁰⁴

The saving clause has burdened the state courts with the “tolerably to diabolically difficult” task of choosing and applying the proper substantive law and remedy.¹⁰⁵ In *Chelentis v. Luckenbach Steamship Corp.*,¹⁰⁶ the Supreme Court explained that the saving to suitors clause does not “give the complaining party an election to determine whether the defendant’s liability [and the remedy] shall be measured by common-law standards rather than those of the maritime law.”¹⁰⁷ Here, the plaintiff was injured aboard a merchant

100. The general maritime law is “[d]rawn from state and federal sources, the general maritime law an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.” *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 & n.2 (1986) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959); *Romero v. International Terminal Operating Co.*, 354 U.S. 354, 373-75 (1959), *superseded by statute as stated in Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)).
101. See 19 WRIGHT ET AL., *supra* note 27, § 4514, at 452. (“[A]lthough there is no ‘general’ federal common law, it is now recognized that in certain narrowly defined but extremely important circumstances the federal courts may fashion ‘specialized’ federal common law—substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress—that supplant state law.”).
102. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917), *superseded on other grounds by*, 33 U.S.C. §§ 901-44 (1994 & Supp. III 1997)); see also *supra* Parts III.B & C.
103. See SCHOENBAUM, *supra* note 37, § 3-1, at 97 n.9. (“Federal courts may, and often do, look to state statutory law and to precepts of the common law which they ‘borrow’ and apply as the federal admiralty rule.” (citing *Petition of Kinsman Transit Co.*, 338 F.2d 708, 719-21 (2d Cir. 1964))).
104. See *Orient Overseas Line v. Globemaster Baltimore, Inc.*, 33 Md. App. 372, 381, 365 A.2d 325, 334 (1976) (noting that state courts must apply substantive maritime law in admiralty actions). *But see Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 636 (La. 1992) (holding that predominately local interests mandated application of state law instead of substantive maritime law); see also Thomas A. Russell & Richard J. Nikas, *Recent Developments in Recreational Boating Law*, 9 U.S.F. MAR. L.J. 381, 384 (1997) (“It is increasingly common . . . for courts to apply state law to a situation that should be decided using general maritime law.”).
105. David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L.J. 81, 83 (1996).
106. 247 U.S. 372 (1918).
107. *Id.* at 384.

ship while at sea.¹⁰⁸ Instead of pursuing the traditional remedies in admiralty, the seafarer sued in state court and alleged negligence against the vessel's owner.¹⁰⁹ The *Chelentis* Court held that, regardless of whether a claim is heard in a state or federal court, the rights affected and the remedies applied are "those of the sea."¹¹⁰ The Court observed that had it permitted a recovery under the common law, "such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.'"¹¹¹

In 1995, the United States Court of Appeals for the Fourth Circuit confirmed the continuing vitality of the *Chelentis* holding in *Maryland Department of Natural Resources v. Kellum*.¹¹² In *Kellum*, a tug and barge flotilla exited Breton Bay and was heading down the Po-

108. *See id.* at 378.

109. *See id.* at 378-79.

110. *Id.* at 384. However, the United States Supreme Court again recently departed from the traditional view of admiralty uniformity by allowing litigants to pursue remedies under state law where federal law is silent. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 202-04 (1996) (addressing the punitive damage claims—traditionally not available in admiralty—of the parents of a young girl who had died while riding a jet ski); *see also* Thomas M. DiBiagio, *Fostering Uniform Substantive Law and Recovery—The Demise of Punitive Damages in Admiralty and Maritime Personal Injury and Death Claims*, 25 U. BALT. L. REV. 1, 14 n.77 (1995) (noting that the lower appellate court in *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 636 (3d Cir. 1994), openly suggested that the uniformity principle had less weight than previously thought). This trend continues; according to one noted academic scholar:

Since handing down *Jensen* and *Chelentis*, the [United States] Supreme Court [as of 1996] has issued fifty-three significant decisions in which state law and federal maritime law came into conflict. In twenty-nine of those, state law triumphed over the competing claims of federal maritime law. The other twenty-four held that federal maritime law displaced state law.

Robertson, *supra* note 105, at 89-90 & nn.50-53.

111. *Chelentis*, 247 U.S. at 382 (quoting *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (quoting *The Lottawanna*, 88 U.S. 21 (Wall.) 558, 575 (1874))). *See also supra* note 41 and accompanying text.

112. 51 F.3d 1220, 1226 (4th Cir. 1995). The Fourth Circuit commented that "we find ample authority that state law may not be applied if it conflicts with, or seeks to materially change, federal maritime law." *Id.* (citing *Chelentis v. Luckenbach S.S. Corp.*, 247 U.S. 372 (1918)); *see also* Samuel C. Steinbach, *Recent Decisions, The Maryland Survey: 1994-1995*, 55 MD. L. REV. 1033, 1043-44 (1996).

tomac River.¹¹³ The tow, which was owned and operated by C.G. Willis, Inc. and commanded by Captain Kellum, was loaded with pea gravel from the Maryland Rock Industrial Dock at Lovers Point, and had a maximum draft of nine and a half feet.¹¹⁴ The barge ran aground at Huggins Point onto an oyster bar owned by the State of Maryland.¹¹⁵ State authorities subsequently stopped the flotilla, complaining about property damage to the oyster bed.¹¹⁶

The *Kellum* court began its analysis by observing that navigational errors that result in property damage due to the grounding of a vessel have traditionally been considered maritime torts, subject to federal maritime law.¹¹⁷ Holding that the Maryland statute¹¹⁸ imparting strict liability for the damage offended the admiralty rule of liability, the *Kellum* court refused to apply state law.¹¹⁹ The *Kellum* court expressly affirmed the importance of the *Chelentis* uniformity principle¹²⁰ and concluded that federal positive law, whether taken from the general maritime law or statutory in origin,¹²¹ is clearly

113. See *Kellum*, 51 F.3d at 1221.

114. See *id.* at 1221-22.

115. See *id.* at 1222.

116. See *id.*

117. See *id.* at 1223 ("The alleged injury to Maryland's oyster bar resulted from an occurrence unique to maritime law, the stranding of a vessel. On review of the relevant law, we find . . . that damage to property caused by a stranding in navigable waters is uniformly treated as a maritime tort.").

118. See MD. CODE ANN., NAT. RES. I § 4-1118.1 (1995). The statute reads in pertinent part: "[A] person may not destroy, damage, or injure any oyster bar, reef, rock, or other area located on a natural oyster bar in the Chesapeake Bay" *Id.*

119. See *Kellum*, 51 F.3d at 1226 (citing *Chelentis*, 247 U.S. at 384); see also Steinbach, *supra* note 112, at 1037 ("While states retain legislative power over actions that arise within their borders, state legislation cannot significantly alter the general admiralty law.").

120. See *Kellum*, 51 F.3d at 1226 (citing *Chelentis*, 247 U.S. at 384).

121. There are three major sources of substantive admiralty law. One such source is the general maritime law—federal common law fashioned by judicial decisions in the federal courts sitting in admiralty in the absence of statutory guidance by Congress. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("Absent a relevant statute, the general maritime law, as developed by the judiciary, applies."); see also SCHOENBAUM, *supra* note 37, § 3-1. Another source of substantive admiralty law is the federal statutes enacted by "Congress, exercising its constitutional powers under the Admiralty Clause and the Commerce Clause," many of which are codified in Titles 33 and 46 of the United States Code. SCHOENBAUM, *supra* note 37, § 3-1. The third source of admiralty law stems from international sources; "[t]he smooth operation of the shipping industry has dictated that different nations should conform their

supreme.¹²²

C. Federal Preemption in Admiralty Products Liability Claims

Given that a federal statute will preempt a contradictory state law for an admiralty claim,¹²³ the potential for preemption is critical to adjudicating the marine products liability case.¹²⁴ For example, in the realm of products liability, federal and state courts have held that section 4306 of the Federal Safety Boating Act¹²⁵ preempts state

laws. This is usually accomplished by negotiating an international convention on a particular topic" that is then adopted into domestic law. *Id.*; cf. SIMON GAULT ET AL., *Marsden on Collisions at Sea* 1-3 (12th ed. 1998) ("An important feature in this area of the law is that much of the relevant English statute law is based on international conventions, which are intended to achieve a degree of uniformity between the laws of the States which are parties to those conventions.").

Congress has adopted many international standards and international conventions by treaty, some of which have been codified as or referenced in federal statutes. The most significant example of this type of incorporation is the collision regulations, more commonly known as the "nautical rules of the road," that are applicable to all vessels whether or not commercial in nature. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 868, 676 (1982); GAULT ET AL., *supra* note 121, at 1-21; see also SCHOENBAUM, *supra* note 37, § 3-1.

122. See generally, e.g., Charles L. Coleman, III, *Federal Preemption of State "BAP" Laws: Repelling State Boarders in the Interests of Uniformity*, 9 U.S.F. MAR. L.J. 305, 306 (1997) (observing that the supremacy of federal law flows from several Constitutional provisions, including the Supremacy Clause, Admiralty Clause, Commerce Clause, and Treaty Clause).

123. Under the Supremacy Clause of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State notwithstanding.

U.S. CONST. art. VI, § 2. See also *Levinson v. Deupree*, 345 U.S. 648, 615 (1953) (noting that *Erie* was "irrelevant" in a collision between two recreational vessels).

124. See 14A WRIGHT ET AL., *supra* note 27, § 3671, at 261 n.40 ("State law controls only in the absence of a federal statute, a judicially fashioned admiralty rule, and a need for uniformity in admiralty practice." (citing *Suma Fruit Int'l v. Albany Ins. Co.*, 122 F.3d 34 (9th Cir. 1997))).

125. See 46 U.S.C. §§ 4301-11 (1994). Section 4306 of the Federal Safety Boating Act ("FSBA") details the federal preemption of state law in certain circumstances, providing in pertinent part:

Unless permitted by the Secretary [of Transportation] under section 4305 . . . a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a

law in several claims¹²⁶ for personal injuries suffered because a recreational vehicle lacked propeller guards.¹²⁷ Moreover, a general

recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

Id. § 4306.

126. See *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993). Swimming in a Georgia lake, the plaintiff was struck by the unguarded propeller of a boat driven by her mother-in-law. See *id.* at 1576. Her action was dismissed on summary judgment because the FSBA preempted her state law design defect claim against the manufacturer for failure to provide a propeller guard. See *id.* at 1580-81. In *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991), the plaintiff was ejected from a recreational vessel because it struck a submerged object; she was injured by the boat's unguarded propeller. See *id.* at 1580. The plaintiff sought recovery under Florida state products liability law, but lost on summary judgment because of the FSBA's preemption clause. See *id.* at 1582. In *Mowery v. Mercury Marine, Div. of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991), an individual was seriously injured by a powerboat's propeller while rafting on Lake Erie. See *id.* at 1013. The plaintiff filed suit, alleging that the product was defective because it lacked a propeller guard. See *id.* The admiralty claim seeking common law remedies was dismissed as being explicitly preempted by FSBA. See *id.* at 1017. But see *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994). In *Moore*, a swimmer injured by a recreational motorboat's unguarded propeller sued under a theory of products liability but lost on summary judgment because the lower court held that the FSBA preempted state law. See *id.* at 247. The Texas Supreme Court reversed the lower court, concluding that there was no express preemption by the FSBA, even though recognizing that four federal courts had held that FSBA preempted state law claims. See *id.* at 252. This holding was expressly rejected by *Emily Moss v. Outboard Marine Corp., Harris-Kayot, Inc.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996). The federal preemption clause of the FSBA was recently before the Supreme Court; however, the Court dismissed the petition for certiorari prior to issuing a ruling. See *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir.), cert. granted, 522 U.S. 978, cert. dismissed, 523 U.S. 1113 (1998).

127. See *Davis*, 854 F. Supp. at 1576; *Shields*, 776 F. Supp. at 1580; *Mowery*, 773 F. Supp. at 1013. See also 2 ARTHUR C. DAMASK ET AL., INJURY CAUSATION ANALYSES: CASE STUDIES AND DATA SOURCES 225-26 (1993). Each year, people are seriously injured by recreational boat outboard motor propellers. See *id.* However, there is an overall lack of consumer product safety attention. See *id.* This is largely because:

the potentially lethal blade, turning through the water, is not visible; therefore there is not the usual outcry from the populace against the lack of safety of such a device, even though it is the cause of a large number of serious injuries. If it were visible . . . consumer product safety attention would be more insistent.

Id. The authors recommend a propeller guard to protect persons in the water

maritime law rule, created by federal judicial decisions, will control a state court's determination of an admiralty products liability claim.¹²⁸ Despite the apparently clear line that demarcates when the substantive maritime law applies and when state law applies, this concept has been extremely troubling for courts.¹²⁹ One court opined: "Discerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence."¹³⁰

What is clear, however, is the need for consistent results by the courts exercising their admiralty jurisdiction.¹³¹ Only when courts uniformly adjudicate maritime claims will uniform principles result. As acknowledged in *Chelentis v. Luckenbach Steamship Corp.*,¹³² the Supreme Court recognizes that the purpose of admiralty law is to foster "the maritime commerce lying at the heart of the admiralty court's basic work."¹³³ The Court has also recognized that the underlying federal policies in support of that purpose pertain equally to recreational vessels, if maritime commerce is materially impacted in some manner.¹³⁴

However, state courts are eroding the substantive maritime law by increasingly applying state law to marine products liability ac-

from a risk of serious injury. *See id.* at 226.

128. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *see also* 14A WRIGHT, ET AL., *supra* note 27, § 3671, at 261 n.39 ("Maritime torts apply principles of maritime negligence, not common law negligence." (citing *La Esperanza de P.R., Inc. v. Perez y Cia. De Puerto Rico, Inc.*, 124 F.3d 10 (1st Cir. 1997))).

129. *See Robertson*, *supra* note 105, at 81 & n.3 (noting that Justice Scalia has concluded: "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is entirely consistent within our admiralty jurisprudence." (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994))).

130. *In re Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (1st Cir. 1994).

131. *See Sisson v. Ruby*, 497 U.S. 358, 367 (1990) ("The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial."); *see also* Elizabeth L. Burrell, *Application of State Law to Maritime Claims: Is There a Better Guide than Southern Pacific v. Jensen?*, 21 TUL. MAR. L.J. 53, 54-56 (1996) (commenting that lack of uniformity would "greatly burden commerce if everyone involved in the maritime trades were subject to different rules in different ports . . .").

132. *See supra* notes 106-11 and accompanying text.

133. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533 (1995) (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982)).

134. *See Foremost Ins. Co.*, 457 U.S. at 677.

tions.¹³⁵ This inclination is apparently based on the theory that the law to apply to recreational vessels¹³⁶ is a distinct subset of admiralty law, which need not conform to admiralty's touchstone principle of uniformity and consistency.¹³⁷ The inconsistent results can subvert the traditional commercial maritime interests' need for decisional stability.¹³⁸ This trend undermines admiralty's goal of uniformity, as well as, the command of federal preemption—substantive federal law must control in state adjudication of issues when federal maritime interests are at stake,¹³⁹ even for recreational vessel cases.¹⁴⁰

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135. See Russell & Nikas, *supra* note 104, at 384 (noting that it has been "increasingly common . . . for [state] courts to apply [their state] law to a situation that should be decided using general maritime law."). An excellent illustration of this trend is *Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 636 (La. 1992), *cert. denied*, 506 U.S. 819 (1992). For a discussion of this case, see *infra* notes 417-27 and accompanying text. See also *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 252 (Tex. 1994) (noting "tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products" and holding that "state law tort claims are not preempted by the Federal Boat Safety Act"). *But see* *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 26 (Wash. 1993) ("Washington's interest in providing a [strict liability] remedy for these plaintiffs does not outweigh federal interests in maritime uniformity."); see also Russell & Nikas, *supra* note 104, at 384.
136. See Russell & Nikas, *supra* note 104, at 384; see also CALIFORNIA STATE BAR ASS'N *preface to CALIFORNIA BOATING LAW* (1963) (discussing the "evolution of pleasure boating law").
137. See Russell & Nikas, *supra* note 104, at 384. *But see id.* n.13 (citing *Lewis v. Timco*, 716 F.2d 1425, 1428 (5th Cir. 1983) (explaining that maritime law is a "conceptual body [of law] whose cardinal mark is uniformity").
138. See *Chelentis*, 247 U.S. at 382 ("[I]t would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states,' " (citing section 9 of the Judiciary Act of 1789)); see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917), *superseded on other grounds*, 33 U.S.C. § 901 (1994 & Supp. III 1997) (restricting the state's authority in maritime matters).
139. See SCHOENBAUM, *supra* note 37, § 3-1, at 95 n.4 (noting that the mandate of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) "established the principle that federal district courts exercising diversity jurisdiction must try state-created causes of action in accordance with state laws—not federal common law—[and] thus has no application in admiralty"). See *Levinson v. Dupree*, 345 U.S. 648, 651 (1953) (observing that *Erie* was "irrelevant" in a case involving two motorboats). See also *supra* note 126.
140. There is no distinction between a recreational vessel and a commercial vessel at least with respect to admiralty tort jurisdiction. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982). See also *supra* note 139.

There is no distinction between consumer-recreational boating and commercial vessel claims—“[r]ecreational boating law does not exist as a separate legal discipline”¹⁴¹—even though admiralty law is historically protective of commercial maritime interests.¹⁴² While recreational vessels in their current form are a recent invention,¹⁴³ they are still governed by traditional admiralty principles.¹⁴⁴ Modern admiralty law evolved from ancient concepts that govern shipping and, for the sake of uniformity and consistency, should apply to all vessels, regardless of use. Therefore, there should be little, if any, distinction between recreational vessel and commercial vessel tort disputes in the substantive admiralty law,¹⁴⁵ including claims grounded in products liability.¹⁴⁶

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141. Russell & Nikas, *supra* note 104, at 384. *But see* CALIFORNIA PLEASURE BOATING LAW, *supra* 136, at 336 (discussing the “evolution of pleasure boating law”). However, “present indications are that courts will treat pleasure craft as they treat commercial vessels, [but] they yet may conclude, under pressure of compelling argument, that the use of pleasure craft differs so greatly from that of commercial vessels that different rules should govern in some areas.” Russell & Nikas, *supra* note 104, at 347-48. The Supreme Court has thus far rejected such a distinction. *See Foremost Ins. Co.*, 457 U.S. at 674-75.
 142. *See Foremost Ins. Co.*, 457 U.S. at 674-75. (“[T]he primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce. . . . [But] [t]he federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity.”).
 143. There are increasing numbers of recreational vessels on American waterways. *See* U.S. DEP’T OF TRANSP., *supra* note 1, at 3. Nationwide, in 1976, there were 7,671,213 boats registered by state authorities as compared to 11,877,938 boats numbered by 1996—an increase of 4,206,725 numbered boats over a 20-year period. *See id.* at 20.
 144. *See* 8 BENEDICT, *supra* note 23, § 1.01 at 1-4 (“It is now uniformly accepted that claims involving pleasure boats fall within admiralty jurisdiction so long as the established conditions for admiralty tort or contract jurisdiction are satisfied in a particular case.”); *see also* Russell & Nikas, *supra* note 104, at 384.
 145. *See supra* notes 199-204 and accompanying text.
 146. *See Karshan v. Mattituck Inlet Marina & Shipyard, Inc.*, 785 F. Supp. 363, 365-66 (E.D.N.Y. 1992) (applying the *East River* economic loss rule to a plaintiff’s products liability cause of action involving a non-commercial vessel). However, the willingness of courts to apply the substantive maritime law to products liability claims may be suspect. *Compare Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499, 501-02 (D. Md. 1990) (distinguishing *East River* on its facts and permitting recovery of economic losses because of the non-commercial nature of the vessel), *with Reliance Ins. Co. v. Carver Boat Corp.*, No. CIV.A.WMN-96-194, 1997 WL 714900, *3-4 (D. Md. May 29, 1997) (observing that there is no distinction between a commercial or non-commercial vessel upon which purchase permit a recovery).

The seminal case from the United States Supreme Court providing the determinative demarcation of when state law is applicable to an admiralty action is *Southern Pacific Co. v. Jensen*.¹⁴⁷ Pursuant to a state statute, the Workmen's Compensation Commission of New York awarded a decedent's spouse and surviving children a fixed weekly amount because his accidental death happened during the course of employment.¹⁴⁸ The Supreme Court held that the New York Workmen's Compensation Act attempted "to give [a remedy that] is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."¹⁴⁹

Observing that the saving to suitors clause allowed New York to only provide a " 'common law remedy where the common law [was] competent to give it,' "¹⁵⁰ the Court deduced that the statutorily mandated remedy was not available under the common law and was therefore constitutionally indefensible.¹⁵¹ The Supreme Court concluded that any state law that "works material prejudice to the characteristic features of the general maritime law" is invalid.¹⁵² Until *Jensen's* holding is completely repudiated by the Supreme Court, it remains the best chart available to safely navigate the course between the reefs of conflicting state law and federal interest in uniformity.¹⁵³

Notwithstanding the need for uniformity and consistency under admiralty law, there are three reasons to permit state law to apply to

147. 244 U.S. 205 (1917), *superseded on other grounds by* 33 U.S.C. §§ 901-44 (1994 & Supp. III 1997).

148. The widow's decedent—a stevedore—was offloading lumber from the S.S. *El Oriente* at the time of his demise. *See id.* at 207-08. While driving a small, electrically-powered freight truck loaded with lumber, the stevedore jammed the lumber on the guide pieces on a gangway. *See id.* at 208. Reversing the truck, he went "at third or full speed" backwards from the gangway into the stop's hold, stuck his head at the top of the hatch, and died. *See id.* The decedent's employer objected to the award on various grounds, including its constitutionality. *See id.* at 209-10.

149. *See id.* at 218.

150. *Id.*

151. *See id.*

152. *Id.* at 216.

153. Burrell, *supra* note 131, at 80 ("*Jensen* still appears to supply the only test for determining when the uniformity [principles in admiralty] can be sacrificed without producing a degree of unpredictability that damages all maritime interests."). *But see* Robertson, *supra* note 105, at 89 ("*Jensen* has never been a good guide, and today is completely discredited. Anyone who places serious reliance on any of its teachings is as likely to be fooled as enlightened.").

admiralty cases heard in state courts.¹⁵⁴ First, state law may fill a gap left by inadequate federal statutes or in the general maritime law.¹⁵⁵ Where clear federal guidance is absent, state courts are free to fashion their own rule.¹⁵⁶ Second, in certain actions, local interests may predominate.¹⁵⁷ Third, state law rights or remedies may be applied

154. See Burrell, *supra* note 131, at 63.

155. See *id.* ("No body of law provides a rule for every conceivable situation.").

156. See *id.* at 64 (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)). In *Wilburn Boat Co.*, a recreational vessel caught fire while it was used in violation of an insurance policy on an artificial lake, Lake Texahoma, situated between Texas and Oklahoma. See *Wilburn Boat Co.*, 348 U.S. at 311. The *Wilburn Boat Co.* Court decided to "leave the regulation of marine insurance where it has been—with the States" rather than to fashion a judicial rule as part of the general maritime law. *Id.* at 321. In dissent, Justice Reed wrote:

It is not only in markings, lights, signals, and navigation that States are barred from legislation interfering with maritime operation. The need for a uniform rule is just as great when dealing with the effect to be given to marine insurance on boats which plough our navigable waters. A vessel moves from State to State along our coasts or rivers. State lines may run with the channel or across it. Under maritime custom an insurance policy usually covers the vessel wherever it may go. If uniformity is needed anywhere, it is needed in marine insurance. It is like the question of seaworthiness which must be controlled by one law.

Id. at 333 (Reed, J., dissenting). Despite criticism from admiralty law scholars for offending admiralty uniformity principles, *Wilburn Boat Co.* has never been abrogated. See 1 PARKS, at *supra* note 7, at 13 ("*Wilburn* cast the law of marine insurance into a state of turmoil."); see also LESLIE J. BURGESS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 34-36 (3d ed. 1991) (observing that *Wilburn Boat Co.* is "widely criticized").

157. See Burrell, *supra* note 131, at 64; see also *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960) (observing that the city of Detroit could enforce a criminal ordinance prohibiting a steamship's smoke stacks from emitting black smoke on vessels that were approved and licensed by the federal government to operate in interstate commerce). In *Huron Portland Cement Co.*, the Supreme Court acknowledged that local interests of a port city could affect marine navigation and commerce, ordinarily federal interests. See *id.* ("The mere possession of a federal license, however, does not immunize a ship from the normal incidents of local police power, not constituting a direct regulation of commerce."). Furthermore, "the local regulation of wharves and docks" is a permissible local interest. *Id.* (citing *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). Yet, there is a fine line drawn here; for example, federally licensed vessels are exempt from local quarantine laws and local pilotage laws. See *id.* (citing *Morgan's Louisiana & T.R. & S.S. Co. v. Louisiana Board of Health*, 118 U.S. 455 (1886); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (How.) 299 (1851)). The dissenters in *Huron Portland Cement Co.* opined: "If local law required federally licensed vessels to observe local speed

in cases where there is a need to supplement existing maritime law.¹⁵⁸ However, as one commentator stated: "The 'supplemental' use of state law is most damaging to uniformity and its attendant value of predictability."¹⁵⁹ A court's use of state law to supply a remedy in a hard case, such as when a child is killed in a maritime accident¹⁶⁰ or when a swimmer is injured by a recreational vessel's propellers,¹⁶¹ and where the remedy in admiralty is not as attractive as that available under state law, could better be termed circumnavigation rather than supplementation.¹⁶²

Although the underlying policies of admiralty are clear, the unapplicable law may vary from case to case. With its emphasis on commercial trade and predictability, admiralty law shares very little with the policy underpinnings of state common or statutory law; therefore, the substantive remedies may vary drastically between admiralty and state law. Yet, before addressing the schism separating state law and admiralty law on the recovery of purely economic losses in a tort action, the practitioner must address the fundamental procedural issue of what court in which to file an admiralty claim. The answer to this question is not trivial—the questions of how "predominant" a state's interests are, how "clear" the general maritime law is, and how "necessary" state law supplementation of admiralty law is may hinge on who evaluates the competing federal and local interests.

IV. SUBJECT MATTER JURISDICTION OVER THE MARITIME PRODUCTS LIABILITY CLAIM

A. Admiralty Jurisdiction in General

With such a large number of recreational vessels registered in

laws, obey local traffic regulations, or dock at certain times or under prescribed conditions, we would have local laws not at war with the federal license, but complementary to it." *Id.* at 451 (Douglas, J., dissenting). The dissenting Justices further observed:

However the issue in the present case is stated it comes down to making criminal in the Port of Detroit the use of a certificate issued under paramount federal law Never before, I believe, have we recognized the right of local law to make the use of an unquestionably legal federal license a criminal offense.

Id. at 454 (Douglas, J., dissenting).

158. See Burrell, *supra* note 131, at 63, 78-80.

159. *Id.* at 79.

160. See, e.g., *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

161. See *supra* notes 126-27 and accompanying text.

162. See Burrell, *supra* note 131, at 80.

Maryland,¹⁶³ practitioners may face the task of bringing or defending against a potential maritime claim.¹⁶⁴ Admiralty actions have several markedly different features that set them apart from the typical state court action. Not only is there unique nautical language used by both commercial mariners and recreational sailors,¹⁶⁵ but the maritime claim will have different rules of decision and procedure.¹⁶⁶ There are also unique jurisdictional considerations that apply to a maritime dispute.¹⁶⁷ Moreover, federalism concerns may

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163. In 1996, there were 194,266 motorboats registered in Maryland. See U.S. DEP'T OF TRANSP., *supra* note 1, at 21; see also 46 U.S.C. §§ 12,301-09 (1987) (addressing the numbering of undocumented vessels). This number does not include "documented yachts," which are vessels not registered by Maryland authorities, but enrolled as vessels under federal statutes. See 46 U.S.C. § 12,102 (documenting vessels "of at least 5 net tons that is not registered under the laws of a foreign country is eligible for documentation" if the owner meets certain criteria).
164. See 8 BENEICT, *supra* note 23, at xiv ("With the general decline of commercial shipping throughout the world and the dramatic increase in recreational boating . . . admiralty law is no longer the exclusive domain of 'old salt sea lawyers' practicing in the august halls of various United States District Courts throughout the land."). For practical guidance on the most common situations involving recreational vessels, see WARREN J. MARWEDEL ET AL., RECREATIONAL CRAFT: JURISDICTION, CLAIMS & COVERAGE (1990).
165. For a useful primer of maritime subjects and nautical terms for an attorney facing a recreational vessel claim, see CHAPMAN, *supra* note 59, at 1-28; 8 BENEICT, *supra* note 23, at App. Naut-1.
166. For example, absent explicit federal statutory authority to the contrary, there is no constitutional right to a jury trial in an admiralty action tried in a federal court. See *T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Drydocks, Inc.*, 702 F.2d 585, 586-87 (5th Cir. 1983); 9 WRIGHT, ET AL., *supra* note 27, § 2315, at 116. This may not be the case if the maritime claim is brought in a state court. See Robertson, *supra* note 82, at 705 ("[T]he thought is that in the substantive realm there is some room for state law supplementation of the federal maritime law, whereas in the procedural realm, the state courts are free to go their own way."). Although the substantive law to determine parties' rights and liabilities is the same whether in the federal or state forum, a plaintiff who elects to proceed in state court may exercise a right to a jury trial. See *Midland Enter. v. Brasher*, 886 F.2d 812, 814 (6th Cir. 1989) ("One of the remedies saved to suitors was the right to trial by jury. . . ."). In the Fourth Circuit, juries may even hear claims against different parties on admiralty and non-admiralty grounds, each having a different subject-matter jurisdictional basis but brought together in one suit. See *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 151-54 & nn.5,6 (4th Cir. 1995) (addressing an action where several defendants were sued under negligence and products liability theories, but where the plaintiff relied upon diversity jurisdiction to reach one defendant and admiralty jurisdiction to reach the co-defendant).
167. See *infra* Part IV.B.

limit or even forestall a remedy in favor of admiralty uniformity principles.¹⁶⁸

B. Procedural Aspects of a Maritime Products Liability Claim

Regardless of whether a state or federal court hears a dispute arising out of a defective recreational vessel or its component parts, admiralty jurisdiction must be initially pleaded in accordance with the court's rules of procedure.¹⁶⁹ The particular pleading requirements of different jurisdictions are "neither numerous or difficult but do require attention" if practitioners intend to invoke admiralty jurisdiction.¹⁷⁰ Even if properly pleaded, not all of Maryland's state territorial waters¹⁷¹ will provide the necessary situs for admiralty tort

168. See *infra* notes 229-41 and accompanying text.

169. See *T.N.T. Marine Serv. Inc.*, 702 F.2d at 587-88 (discussing the pleading requirements of Rule 9(h) and the consequences of improperly pleading under the rule). Federal Rule of Civil Procedure 9(h) provides in relevant part:

A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

FED. R. CIV. P. 9(h). *But see* MD. RULE 2-303(b) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required.").

170. 8 BENEDICT, *supra* note 23, § 2.01[B], at 2-3.

171. State territorial waters exclusively navigable by recreational vessels may provide the necessary situs required for extending admiralty tort jurisdiction. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982); *Mullenix v. United States*, 984 F.2d 101, 104 (4th Cir. 1993). *But see* 33 U.S.C. § 59 (1986) (declaring that the northwest branch of the Patapsco River to be non-navigable); 33 U.S.C. § 59k (1986) (declaring that the south prong of the Wicomico River to be non-navigable). Whether a privately-owned lake such as Deep Creek Lake will provide the necessary situs element required for admiralty tort jurisdiction is an open question that has not been specifically adjudicated. However, at least one court has found that admiralty tort jurisdiction may not be proper where a man-made lake is without present navigability in fact. See *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, 1253 (3d Cir. 1994) (holding that a man-made, land-locked lake was non-navigable for federal jurisdiction purposes).

jurisdiction¹⁷² nor do all disputes involving boats and watercraft necessarily invoke admiralty jurisdiction.¹⁷³

However, in establishing admiralty jurisdiction, there is little discrimination between vessel types¹⁷⁴ or between commercial and non-commercial vessels.¹⁷⁵ Admiralty jurisdiction of the federal courts has been established for a jet ski¹⁷⁶ and other small craft,¹⁷⁷ as well as super tankers;¹⁷⁸ ultimately, the size or use of a vessel is not

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172. The United States Supreme Court has decided that an admiralty tort claim arising out of a collision between two recreational vessels on a state's territorial waters can properly be within federal admiralty jurisdiction so long as the tort claim bears a significant relationship to traditional maritime activity. *See Foremost Ins. Co.*, 457 U.S. at 674-77.
173. For the court to exercise admiralty jurisdiction over a tort claim, several prerequisites are necessary. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), the Supreme Court held that to properly obtain admiralty jurisdiction over a tort claim, the tort must have (1) occurred on navigable waters, and (2) the underlying facts of the incident must bear a substantial relationship to traditional maritime activity, and (3) have a potential impact on maritime commerce. *See id.* at 532-34.
174. A variety of floating objects with differing sizes, purposes, and styles are defined as vessels. *See* 1 U.S.C. § 3 (1994) ("The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the water."). Several other federal statutes define vessels somewhat differently for various purposes and produce varying results. *See* SCHOENBAUM, *supra* note 37, § 1-6 (explaining the difficulty of defining what is a "vessel"). A seaplane taxiing on the water is considered a vessel for the purposes of collision regulations, but is not a vessel while in the air. *Compare* 33 U.S.C. §§ 2003(e), 2018(d) (1994), *with* 14 C.F.R. §§ 91.113, 91.115 (1998).
175. *See Foremost Ins. Co.*, 457 U.S. at 675 (explaining that when determining the existence of admiralty jurisdiction, the courts should not distinguish between vessel types based solely on whether they are for commercial or pleasure use).
176. A jet ski is described as:
a small, low profile, motorized vessel—seven feet long, two feet high, and two feet wide—designed with a narrow beam to enhance its maneuverability. It is designed to be driven at speeds of up to 35 m.p.h. with the operator in a standing or kneeling position; balance is required to operate it.
Martell v. Boardwalk Enter., 748 F.2d 740, 744 (2d Cir. 1984) (addressing a boating accident on Lake George in northern New York where the operator of a recreational boat struck a rented jet ski driven by a teenager).
177. *See Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1229 (11th Cir. 1990) (applying admiralty law to a case involving a seven-foot jet ski); *Feige v. Hurley*, 89 F.2d 575, 576 (6th Cir. 1937) (applying admiralty law to a case involving a 15-foot Chris-Craft motorboat).
178. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 859-60 (1986).

relevant to establishing admiralty jurisdiction, so long as the claim involves a vessel.¹⁷⁹ The nature of the underlying claim dictates proper subject matter jurisdiction, as there are different jurisdictional requirements for admiralty tort claims and maritime contract actions.¹⁸⁰

1. Subject Matter Jurisdiction Over Admiralty Tort Claims

For the Maryland court to exercise admiralty jurisdiction over a tort claim, several prerequisites must be met.¹⁸¹ In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,¹⁸² the United States Supreme Court refined their holdings from an earlier trilogy of maritime cases to set forth specific requirements.¹⁸³ There, a contractor sought to limit liability for damages resulting from the flooding of a

179. See *Provost v. Huber*, 594 F.2d 717, 719 (8th Cir. 1979). The United States Court of Appeals for the Eight Circuit affirmed the lower court's denial of admiralty jurisdiction in a case where the plaintiff asserted "that the tractor-trailer being used to carry [a house over the frozen surface of a lake] was a vessel within the meaning of maritime law because it was transporting the structure over water." *Id.* Before completing the trek across the lake, the tractor trailer broke through the ice and the house eventually sunk to the bottom of Lake Superior. *See id.* The court concluded that "[b]y no stretch of the imagination can we equate a multi-wheeled device, designed and built for the purpose of transportation over a hard, defined surface—such as roads, highways, and even ice—with a vessel or ship as those terms are used in maritime law." *Id.*

180. See *Robertson*, *supra* note 82, at 690-93; *Marwedel*, *supra* note 44, at 426-47. *But see* SCHOENBAUM, *supra* note 37, §§ 1-10, & 57 n.13 (discussing the jurisdictional prerequisites for admiralty and observing that products liability cases in admiralty have eroded this doctrine).

181. *See infra* notes 185-87 and accompanying text.

182. 513 U.S. 527 (1995).

183. *See id.* at 532-33 (citing *Sisson v. Ruby*, 497 U.S. 358, 363, 365-67 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 260 (1972)). The *Grubart* Court observed that the traditional inquiry used by courts to examine whether a claim fell under admiralty law was simple: if the tort occurred on navigable waters, then admiralty jurisdiction was applied. *See id.* at 531. If the wrong did not happen while on navigable waters, then admiralty jurisdiction could not be applied. *See id.* at 531-32.

In 1948, the United States Congress enacted the Extension of Admiralty Jurisdiction Act, now codified at 46 U.S.C. § 740 (1994), to "end concern over the sometimes confusing line between land and water, by investing admiralty with jurisdiction over 'all cases' where the injury was caused by a ship or other vessel on navigable water, even if such injury occurred on land." *Jerome B. Grubart, Inc.*, 513 U.S. at 532 (citing *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209-10 (1963); *Executive Jet Aviation, Inc.*, 409 U.S. at 260.

freight tunnel that purportedly resulted from the contractor's negligent weakening of the tunnel structure while driving pilings into the riverbed.¹⁸⁴ The Supreme Court held that to properly obtain admiralty jurisdiction over a tort claim, the tort must (1) have occurred on navigable waters,¹⁸⁵ and (2) involve underlying facts that bear a substantial relationship to traditional maritime activity¹⁸⁶ that has the potential to materially impact maritime commerce.¹⁸⁷

The first prong of the *Grubart* jurisdictional test, the situs/location element,¹⁸⁸ requires that the tort occur on navigable waters un-

184. See *Jerome B. Grubart, Inc.*, 513 U.S. at 529-30.

185. "Navigable waters" are defined as "not only . . . the main sea, but . . . all the navigable waters of the United States . . . whether landlocked or open, salt or fresh, tide or no tide." *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 25 (1870). However, it should be noted that the definition of "navigability" in some federal contexts does not necessarily bind a determination of navigability under admiralty law. See 33 U.S.C.S. § 1362(7) (1986) (defining navigability for the Clean Water Act). There is an additional factor: the water must be presently navigable in fact. See *Mullenix v. United States*, 984 F.2d 101, 104-05 (4th Cir. 1993). In *Mullinex*, the United States Court of Appeals for the Fourth Circuit overruled the trial court's holding that the waters of the Potomac River above dam number five were beyond the reach of admiralty tort jurisdiction. See *id.* at 105. The court's rationale was based on the fact that the Potomac River had substantial commercial interstate ferry traffic, which made the river "navigable in fact" for the purposes of admiralty subject-matter jurisdiction. See *id.* at 104 & n.3. But see *LeBlanc v. City of Cleveland*, 979 F. Supp. 142, 145-46 (N.D.N.Y. 1997) (dismissing a claim for personal injuries sustained from a collision between a kayak and recreational vessel for lack of admiralty jurisdiction because the waterway was not navigable in fact). In *LeBlanc*, the court held that the Hudson River area where the accident occurred was not navigable in fact because of man-made dams and natural obstructions and therefore did not satisfy the situs element required to sustain admiralty tort jurisdiction. See *id.* at 146.

However, there is no requirement that the body of water be natural—a navigable waterway can be artificially created. In *Ex Parte Boyer*, 109 U.S. 629, 632 (1884), the Supreme Court held that admiralty jurisdiction extended to the Illinois and Michigan canal, which is an artificial but "navigable waterway connecting Lake Michigan and the Chicago River with the Illinois [R]iver and the Mississippi [R]iver." *Id.* at 631.

186. See *Jerome B. Grubart, Inc.*, 513 U.S. at 527 (citing *Sisson v. Ruby*, 497 U.S. 358, 363-64 n.2 (1990)).

187. See *id.* at 533 (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982)).

188. See *id.* at 533 (citing *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 268 (1972) (affixing a nexus test onto the requirement that the tort must have occurred on navigable waters for admiralty jurisdiction to attach)).

less extended by the authority of the Extension of Admiralty Act.¹⁸⁹ As a matter of law, the definition of navigable waters must be determined by the federal courts or Congress.¹⁹⁰ Therefore, state laws or state court holdings are not determinative of navigability for the purposes of admiralty jurisdiction.¹⁹¹ Waterways are considered navigable if “ ‘they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.’ ”¹⁹² Despite admiralty’s historical emphasis on maritime commerce, the Court specifically noted that “a purely recreational waterway can be navigable for admiralty purposes.”¹⁹³

The second prong of the *Grubart* test contains two elements for determining whether admiralty tort jurisdiction can be extended over an alleged maritime tort. The Supreme Court mandated that the facts presented have “ ‘a potentially disruptive impact on maritime commerce’ ”¹⁹⁴ and a substantial connection to traditional maritime activity.¹⁹⁵ The first element of the second prong is met when

189. 46 U.S.C. § 740 (1994).

190. See 14A WRIGHT, ET AL., *supra* note 27, § 3671 (discussing the source and scope of the jurisdiction of federal courts in admiralty matter). See also *supra* note 185.

191. See *Pugent Sound Power & Light Co. v. Federal Energy Regulatory Comm’n*, 644 F.2d 785, 788 (1981) (citing *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922); *Wisconsin v. Federal Power Comm’n*, 214 F.2d 334, 336-37 (7th Cir. 1954)).

192. *Mullenix v. United States*, 984 F.2d 101, 104 (4th Cir. 1993) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

193. *Id.*

194. *Jerome B. Grubart, Inc.*, 513 U.S. at 527 (quoting *Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990)).

195. *Id.* at 533. This element is a distillation of three separate admiralty holdings. See *Sisson*, 497 U.S. at 367 (holding that a fire on a yacht berthed at a marina generated a sufficient nexus to traditional maritime activity); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982) (holding that a collision of two recreational vessels on navigable waters was within admiralty jurisdiction); *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 268 (1972) (holding that an alleged wrong must bear a significant relationship to traditional maritime activity). *Executive Jet* involved tort claims stemming from an aborted take-off of an aircraft that crashed into the navigable waters of Lake Erie. See *id.* at 250. Based upon “judicial, legislative, and scholarly recognition” that “a purely mechanical application of the locality test” was problematic in determining whether admiralty jurisdiction was proper, the *Executive Jet* Court concluded that “maritime locality alone is not a sufficient predicate” *Id.* at 261. The Supreme Court then fashioned a nexus test, requiring that “the

the allegedly tortious incident, described "at an intermediate level of possible generality,"¹⁹⁶ can adversely affect maritime commerce, especially where vessel navigation or maritime operations could be impeded.¹⁹⁷ The latter element of the second prong of the *Grubart* inquiry turns on whether the conduct at issue, regardless of whether commercial or noncommercial in nature, "is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply. . . ."¹⁹⁸

The Supreme Court explicitly rejected the argument that torts on or involving recreational vessels should fall outside admiralty jurisdiction.¹⁹⁹ The Court concluded that such a distinction would be offensive to the principle of admiralty uniformity.²⁰⁰ Although the

wrong bear a significant relationship to traditional maritime activity." *Id.* at 268.

Foremost Insurance Co. was the second case in this trilogy. Focusing on the applicable law for a collision between an eighteen-foot pleasure craft and a sixteen-foot recreational fishing vessel on the Amite River in Louisiana, see *Foremost Ins. Co.*, 457 U.S. at 678, the Supreme Court held that "a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts." *Id.* at 677. In dissent, Justice Powell opined that "there is no substantial federal interest that justifies a rule extending admiralty jurisdiction to the edge of absurdity." *Id.* at 678 (Powell, J., dissenting). Noting that "[t]his case only involves pleasure craft," Justice Powell concluded that there was "no connection with any historic federal admiralty interest." *Id.* at 680 (Powell, J., dissenting).

In the third case of the trilogy, *Sisson v. Ruby*, the Court extended admiralty law to a dispute arising from a fire aboard a yacht and explained that the "relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Sisson*, 497 U.S. at 364. Maintaining that the *Foremost Insurance Co.* holding should not be restrictively read, the *Sisson* Court explained that navigation was merely one example of the types of traditional maritime activities that could satisfy the nexus element of the jurisdictional test elucidated in *Executive Jet*. See *id.* at 365. The Supreme Court observed that "navigation, storing and maintaining a vessel at a marina on a navigable waterway is substantially related to traditional maritime activity." *Id.* at 367. Although urged by Justice Scalia to abandon the potentiality requirement altogether, the *Sisson* Court declined. See *id.* at 364 n.2. The *Sisson* Court also explicitly declined to adopt any of the more formulaic approaches then used by the federal circuits. See *id.* at 367 n.4.

196. *Jerome B. Grubart, Inc.*, 513 U.S. at 538.

197. See *id.* at 539.

198. *Id.*

199. *Sisson*, 497 U.S. at 367.

200. See *id.* The *Sisson* Court further opined: "The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-

primary purpose of admiralty is to protect maritime commerce,²⁰¹ recreational vessels operate co-extensively with commercial vessels on navigable waters under uniform navigation rules.²⁰² Thus, pleasure craft torts have the capacity to endanger commercial shipping,²⁰³ which is within the federal interest.²⁰⁴

2. Subject Matter Jurisdiction Over Maritime Contract Claims

A maritime contract claim lies within admiralty jurisdiction if it meets judicially mandated subject-matter prerequisites. The Supreme Court held that determining whether admiralty jurisdiction should be extended over a contract dispute is based on the court's inquiry as to:

whether the contract was or was not a *maritime contract*
If it was, [admiralty] jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether [the contract] was maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime.²⁰⁵

Therefore, the applicability of admiralty principles to a contract depend on the court's characterization of the work to be performed pursuant to the agreement. Contracts that concern the charter of a ship,²⁰⁶ shipping cargo by a vessel,²⁰⁷ wharfage or dock rental for a

commercial." *Id.*

201. *See Foremost Ins. Co.*, 457 U.S. at 674 ("[T]he primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce").
202. *See id.* at 676. ("[T]he federal [collision regulations also known as the nautical] 'Rules of the Road,' [are] designed for preventing collisions on navigable waters . . . [and] apply to all vessels without regard to their commercial or noncommercial nature.").
203. *See Jerome B. Grubart, Inc.*, 513 U.S. at 538-39.
204. *See Foremost Ins. Co.*, 457 U.S. at 674-75 ("The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity.").
205. *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 29 (1870). *See generally* Marwedal, *supra* note 44, at 448 (indicating that admiralty contract jurisdiction applies to contracts relating "to the navigation, business, or commerce of the sea"); Robertson, *supra* note 82, at 694-98 (discussing the types of maritime contracts that fall within admiralty contract jurisdiction); SCHOENBAUM, *supra* note 37, § 1-10 (discussing admiralty contract jurisdiction); 14A WRIGHT, ET AL., *supra* note 27, § 3675.
206. *See supra* note 129 and accompanying text.

vessel,²⁰⁸ the towage of other vessels²⁰⁹ or a flotilla of barges,²¹⁰ the salvage of a sunken vessel,²¹¹ and the delivery of the ship's fuel²¹² have all been considered maritime contracts by the courts.²¹³ However, a contract for the sale of a vessel²¹⁴ or the building of a vessel²¹⁵ is not considered a maritime contract,²¹⁶ but a contract for re-

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207. See *Morewood v. Enequist*, 64 U.S. (23 How.) 491, 493-94 (1859). The Supreme Court "decided that charter-parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty. . . ." *Id.*
208. *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555, 560 (D. Md. 1966) ("Dock or wharf accommodations are a necessity of navigation, . . . and claims arising out of contracts with respect thereto have been held to be within the admiralty jurisdiction.") (citations omitted).
209. See *The Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638, 643 (1900) ("That a contract to tow another vessel is a maritime contract is too clear for argument, and there is no distinction in principle between a vessel and a [towed vessel].").
210. See generally, e.g., *Cross Contracting Co. v. Law*, 454 F.2d 408 (5th Cir. 1972).
211. See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 56 F.3d 556, 561 (4th Cir. 1995) (addressing the salvage of the S.S. *Central America* while returning from California with over a then-valued \$1,000,000 in gold cargo on board).
212. See *Exxon Corp. v. Central Gulf Lines, Inc.*, 707 F. Supp. 155, 161 (1989), *aff'd*, 904 F.2d 33, *rev'd on other grounds*, 500 U.S. 603 (1991) (addressing the dispute over an agency contract for fueling the M/V *Green Harbour*, a large cargo ship).
213. See SCHOENBAUM, *supra* note 37, § 1-10, at 59-63.
214. See *Flota Martima Browning de Cuba v. Snobel*, 363 F.2d 733, 735 (4th Cir. 1966). The court observed: "Although subjected to . . . criticism, the prevailing rule has been that a contract for the sale of a ship is not a maritime contract." *Id.* at 735 (citing the criticism by GILMORE & BLACK, *supra* note 24, § 1-4 and Note, *Admiralty Jurisdiction and Ship-Sale Contracts*, 6 STAN. L. REV. 540, 545-46 (1954)).
215. *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir. 1988) ("Until a vessel is completed and launched it does not become a ship in the legal sense, and therefore admiralty jurisdiction does not exist.") (citing *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 127 (1918)).
216. See *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 243 (1920) ("Under decisions of this court the settled rule is that a contract for the complete construction of a ship . . . is non-maritime, and not within the admiralty jurisdiction.") (citing *North Pac. S.S. Co.*, 249 U.S. at 125; *The Winnebago*, 205 U.S. 354, 363 (1907); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874); *Roach v. Chapman*, 63 U.S. (22 How.) 129 (1859); *People's Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1857)); see also *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 46 F. Supp. 242, 245 (D. Md. 1942) ("It is well settled in this country that the work of building a ship is not a maritime contract even though the ship

pairs²¹⁷ may be held to be one, depending on the facts of the case.²¹⁸ Moreover, a contract that is for the repair of a boat, but is so extensive as to be a total rebuilding of a vessel, arguably may not be a maritime contract.²¹⁹

3. The Similarity Between the Jurisdictional Requirements for Admiralty Tort and Contract Claims

There is some common ground between the jurisdictional requirements for tort claims and contract claims under admiralty law. Regardless of whether a maritime claim arises in tort or contract, a claim may fall under admiralty law without regard to jurisdictional amount²²⁰ or diversity of the parties.²²¹ However, if the parties are diverse and the jurisdictional amount is met,²²² a case involving maritime matters may be heard on the civil law side of the federal docket.²²³ Federal question jurisdiction can also be asserted in maritime matters²²⁴, but admiralty jurisdiction itself is not a federal question.²²⁵ Moreover, an action with non-admiralty claims,²²⁶ which belongs on the civil law side of the federal docket, may be properly

may have been launched.”).

217. See *Robert E. Blake, Inc. v. Excel Envtl.*, 104 F.3d 1158, 1160 (1997) (“[G]enerally . . . a contract to repair a ship is governed by admiralty law while a contract to build a ship is not.”).

218. See *id.* at 1160-62 (concluding that a ship repair contract fell outside the definition of a maritime contract because the ship had been indefinitely withdrawn from navigation).

219. *Id.* (applying the dead ship doctrine to an contract claim in admiralty).

220. See *Robert E. Blake, Inc.*, 104 F.3d at 1160-62.

221. See 14A WRIGHT, ET AL., *supra* note 27, § 3676, at 414 (“[I]n a suit brought under the admiralty jurisdiction of the federal district courts, neither complete diversity of citizenship nor a minimum jurisdictional amount in controversy is required.”).

222. See 28 U.S.C. § 1332(b) (1994). The amount in controversy must be at least \$75,000. See *id.*

223. See 5 WRIGHT, ET AL., *supra* note 27, § 1211.

224. See 28 U.S.C. § 1331 (1994); see also WRIGHT, ET AL., *supra* note 27, § 1014.

225. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959), *superseded by statute on other grounds as stated in Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990).

226. See *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 152 (4th Cir. 1995) (“Federal courts are authorized, in one civil action, to exercise several types of subject matter jurisdiction historically exercised by separate courts, including courts of law, equity, and admiralty.”). The *Vodusek* court further observed: “As a result, a single federal court has at least three separate departments—law, equity, and admiralty—each of which has its own traditional procedures.” *Id.*

heard with pendant federal claims cognizable only in admiralty.²²⁷ In addition, supplemental state law claims can be heard in an admiralty action as long as they stem from a "common nucleus of operative fact."²²⁸

4. Venue and Other Considerations

Once subject matter jurisdiction is established, the next logical question is in what court the action should be brought. The plaintiff in a marine products liability case has complete discretion to choose the forum in which the claim will be heard.²²⁹ Current rules of procedure essentially allow "forum shopping,"²³⁰ because the maritime plaintiff can choose to file a claim in the federal court sitting in admiralty, on the civil law side of federal court, or in a state court.²³¹ Another advantage that inures to the plaintiff filing a claim in admiralty, as opposed to a common law dispute filed in federal court, is that the normal federal venue rules²³² are inapplicable.²³³ It was decided more than a century ago that admiralty proceedings are not considered civil actions within the meaning of the federal statutes pertaining to venue.²³⁴ Moreover, in admiralty cases, Maryland's "state courts . . . are not bound by the venue requirements [and] they are not bound by the federal common law venue rule . . . of *forum non conveniens*."²³⁵ However, if the suit is filed in

227. See *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 560 (1866) ("[W]hen parties go into the Federal courts, they must show by the pleadings certain facts to give the court jurisdiction."); see also FED. R. CIV. P. 9(h) (requiring admiralty jurisdiction to be specifically pled).

228. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966); see *Motts v. M/V Green Wave*, 25 F. Supp. 2d 771, 776 (S.D. Tex. 1998). But see *Lewis v. United States*, 812 F. Supp. 620, 624 (E.D. Va. 1993).

229. See 15 WRIGHT, ET AL., *supra* note 27, at § 3848; see also CALIFORNIA PLEASURE BOATING LAW, *supra* note 136, at 226 ("The attorney dealing with small boat litigation has considerable discretion in choosing among a competent state court, the civil side of a federal district court, and the admiralty side of federal district court.").

230. The phrase "forum shopping" was coined by Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit. See Gita F. Rothschild, *Forum Shopping*, 24 LITIG., Spring 1998, at 40, 40-41.

231. See *supra* note 230.

232. See generally 28 U.S.C. §§ 1391-1413 (1994 & Supp. III 1997).

233. *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 516 (5th Cir. 1981) ("The regular venue provisions of 28 U.S.C. §§ 1391-93 are inapplicable in admiralty cases."); see also 15 WRIGHT, ET AL., *supra* note 27, § 3817.

234. See 15 WRIGHT, ET AL., *supra* note 27, § 3817; see also *infra* note 235 and accompanying text.

235. *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (holding that the

state court or is docketed on the civil law side of the federal court, then the venue rules ordinarily applicable to plaintiffs will govern.²³⁶ Even with this flexibility, many plaintiffs prefer to file in federal court for reasons such as judges with diverse experience,²³⁷ a larger and more diverse jury pool,²³⁸ and more efficient case handling with quicker results.²³⁹

Despite the advantages of federal court, there is a significant number of plaintiffs that choose to file in state court.²⁴⁰ Although many claims entailing the loss of a pleasure craft caused by a defective marine product are customarily brought in the federal district court rather than in a state court under the saving-to-suitors clause, the substantive application of the general maritime law should not differ.²⁴¹ While the underlying principles of consistency and uniformity that are essential to admiralty law are clear, these principals have increasingly faltered in the arena of marine products liability actions, especially as they result in recovery of economic losses.

V. PRODUCTS LIABILITY AND THE ECONOMIC LOSS RULE IN ADMIRALTY

The character of marine product liability claims has had the attention of the admiralty bar ever since Judge Benjamin Cardozo changed the face of tort law²⁴² with his seminal majority opinion in

doctrine of forum non conveniens is inapplicable in admiralty).

236. See *id.* at 454 (noting that state courts, even when hearing an admiralty case, are not bound by the federal venue statutes).

237. See Rothschild, *supra* note 229, at 44 ("Some lawyers believe that an Article III appointment, providing life tenure and a salary which can't be reduced, attracts higher-quality judges.") (citing Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 400 (1992)).

238. See *id.* ("The jury pool may differ between state and federal courts."). In Maryland, the circuit court jury pool is drawn from the county or city populace, whereas in federal court the jury pool is drawn from the whole state. Compare MD. CODE ANN., CTS. & JUD. PROC. §§ 8-102(a), 8-104 (1995), with 28 U.S.C. §§ 1861-78 (1994). See also RONALD M. CHERRY & FRANK F. DAILY, CIVIL TRIAL PROCEDURES IN MARYLAND 20 (MICPEL 1995) (discussing tactical considerations for selection of the Maryland federal or state forum).

239. See Rothschild, *supra* note 230, at 41.

240. See Robertson, *supra* note 82, at 686-87 (discussing the increasing numbers of admiralty cases heard in state courts).

241. See *id.*

242. See JOHN W. JOHNSON, HISTORIC U.S. COURT CASES 1690-1990: AN ENCYCLOPEDIA 297-300 (1992) (describing *MacPherson* as the origin of consumer rights in

MacPherson v. Buick Motor Co.,²⁴³ which abolished the contractual privity requirement in favor of strict liability for an unreasonably dangerous product.²⁴⁴ Other jurisdictions,²⁴⁵ including Maryland,²⁴⁶ followed the lead of the Court of Appeals of New York and recognized strict liability as a distinct cause of action.²⁴⁷ Marine products

tort law).

243. 111 N.E. 1050 (N.Y. 1916). See 2 PARKS, *supra* note 7, at 1064 & n.63 ("It appears that the first maritime case to follow *MacPherson* as to the liability of a remote shipbuilder was *Sieracki v. Seas Shipping Co.*" (citing *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *rev'd in part and aff'd in part on other grounds*, 328 U.S. 85 (1946), *superseded by statute as noted by Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 & n.11 (1979))). In *Sieracki*, the United States Court of Appeals for the Third Circuit explained that "if [a seaman] is injured on the ship in the course of unloading or loading [a] vessel he may have redress for a defect caused by its unseaworthiness." *Sieracki*, 149 F.2d at 102; see also Dennis W. Nixon, *Products Liability and Pleasure Boats*, 29 J. MAR. L. & COM. 243, 247 (1998) (As is well-known, *MacPherson* went to sea in 1945 in *Sieracki v. Seas Shipping Co.*).

244. See *MacPherson*, 111 N.E. at 1053. Speaking for the majority, Judge Cardozo explained:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

Id.

245. See generally William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1100-03 (1960) (chronicling the effect of *MacPherson*).

246. Even though Maryland appellate cases quoted *MacPherson* with approval or distinguished its tenets, Maryland's high court never expressly adopted the reasoning of *MacPherson* until 1951. In *Otis Elevator Co. v. Embert*, 198 Md. 585, 84 A.2d 876 (1951), the court of appeals recognized *MacPherson*: "[W]e shall assume that *MacPherson v. Buick Motor Company* and the cases which anticipated or followed it are law in Maryland." *Id.* at 599, 84 A.2d at 882. For a historical and legal analysis by the Maryland court of special appeals examining strict liability in tort for a defective product, see *Valk Mfg. Co. v. Rangasway*, 74 Md. App. 304, 310-23, 537 A.2d 622, 626-32 (1988), *rev'd sub nom. on other grounds Montgomery County v. Valk Mfg. Co.*, 317 Md. 185, 562 A.2d 1246 (1989).

247. See Robert A. Awsumb, Comment, *Recovery of Economic Loss Under Section 402A*, 9 J. PROD. LIAB. 1 (1986) (noting that there are essentially five different theories of recovery for a products liability claim). A litigant can press for recovery in an action sounding in negligence, breach of express warranty, breach of implied warranty of merchantability and/or fitness for its intended use, misrepresentation, or strict liability in tort. See *id.* (citing U.C.C. §§ 2-313 to 2-315 (providing express and implied warranties); RESTATEMENT (SECOND) OF TORTS § 402B (1965) (covering negligent misrepresentation); *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1962) (addressing strict liability in tort); *MacPherson*, 111 N.E. at 1050 (dealing with negligence)).

liability claims are tort claims,²⁴⁸ sounding in strict liability and negligence.²⁴⁹ The law of warranty may also play a significant role in the adjudication of disputes arising in maritime law. Where contractual privity is present, a breach of an express²⁵⁰ or implied²⁵¹ warranty in a shipbuilding or repair contract may or may not be actionable in tort,²⁵² but may instead give rise to an action in contract.²⁵³ This dis-

Under strict liability in tort, there are three theories under which a court may impose liability for an unreasonably dangerous product. As summarized by the court of special appeals in *Simpson v. Standard Container Co.*, 72 Md. App. 199, 527 A.2d 1337 (1987), they are defective manufacture, defective design, and failure to warn. *See id.* (citing *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 495 A.2d 348 (1985) (concerning a defective design theory to recover for injuries incurred when a pair of pajamas caught fire); *Eaton Corp. v. Wright*, 281 Md. 80, 375 A.2d 1122 (1977) (addressing a manufacturing defect in a portable propane bottle); *Troja v. Black & Decker Mfg. Co.*, 62 Md. App. 101, 488 A.2d 516 (1985) (grappling with insufficient warning of risk of injury); *Lahocki v. Contee Sand & Gravel Co.*, 41 Md. App. 579, 398 A.2d 490 (1979) (examining a manufacturing defect of van roof), *rev'd on other grounds*, 286 Md. 714, 410 A.2d 1039 (1980)).

248. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66 (1986) (adopting products liability as a maritime tort); *see also* John Minor Wisdom, *Admiralty Jurisdiction and Products Liability: Economic Loss*, 62 TUL. L. REV. 325, 325 (1988) ("Products liability is strict liability in tort unfettered by notions of contractual warranty."); SCHOENBAUM, *supra* note 37, § 3-11.

249. *See East River S.S. Corp.*, 476 U.S. at 865 ("We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law.") The Supreme Court also observed: "And to the extent that products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law." *Id.* at 866 (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959)).

250. *See* MD. CODE ANN., COMM. LAW I § 2-313 (1995). This section provides in pertinent part:

Express warranties by the seller are created as follows: [a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Id.

251. *See id.* §§ 2-314, 2-315 (pertaining to the implied warranty of merchantability and the implied warranty of fitness for particular use); *see also* *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 280, 329 A.2d 28, 31 (1974) ("Privity of contract remains an essential ingredient . . . in a breach of express warranty action not involving personal injury, because privity between the plaintiff and defendant is [a] requisite to maintain a contract action . . ." citing *Mackubin v. Curtiss-Wright Corp.*, 190 Md. 52, 56-57 A.2d 318, 321 (1948)).

252. *See* SCHOENBAUM, *supra* note 37, § 1-11.

253. *See id.*

tion is crucial in a maritime products liability action so as to establish admiralty subject-matter jurisdiction.²⁵⁴ If contractual privity can be established, warranty claims fall outside of admiralty jurisdiction.²⁵⁵ In addition, the " 'quasi-tort' theory of implied warranty is not well settled in maritime product liability law."²⁵⁶

The adoption of strict liability attracted many plaintiffs, including Maryland plaintiffs,²⁵⁷ to seek recovery under section 402A of the *Restatement (Second) of Torts*.²⁵⁸ In addition, many maritime plaintiffs sought to bring actions under this new theory.²⁵⁹ There were many advantages to pleading tort claims for those that essentially sound in warranty,²⁶⁰ devoid of personal injury or other property damage, as a mechanism to avoid both temporal²⁶¹ and contractual

254. See *supra* Part IV.B.2.

255. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 n.7 (1986).

256. 8 BENEDICT, *supra* note 23, § 4.03[A], at 4-15.

257. See *Phipps v. General Motors Corp.* 278 Md. 337, 340-48, 363 A.2d 955, 959-61 (1976) (adopting section 402A); see also generally Gerson B. Mehlman, Recent Decision, 6 U. BALT. L. REV. 295, 312 (1977) (recognizing that *Phipps* creates greater accountability for those who supply and sell goods).

258. See *Wisdom*, *supra* note 248, at 325 (discussing maritime products liability). See also *infra* note 277.

259. See 2 PARKS, *supra* note 7, at 1065 n.67. *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969) was "the first case in which an admiralty court squarely considered the question whether a products liability suit is cognizable in admiralty." 2 PARKS, *supra* note 7, at 1065 n.67. The court decided that an action for products liability would lie in admiralty. See *Schaeffer*, 416 F.2d at 221 (citing *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *rev'd in part and aff'd in part on other grounds*, 328 U.S. 85 (1946)); *Sanderlin v. Old Dominion Stevedoring Corp.*, 385 F.2d 79 (4th Cir. 1967); *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1965)). Observing that history indicates that admiralty law (albeit slowly) incorporates the law prevailing on land when there is no historic or statutory principle to the contrary, the court permitted the strict liability action to proceed. See *id.*

260. See *East River S.S. Corp.*, 476 U.S. at 868. The *East River* Court explained: "[T]he injury suffered—the failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *Id.* The Court also opined that: "Damage to a product itself is most naturally understood as a warranty claim." *Id.* at 872.

261. In Maryland, there is a three-year statute of limitations for most tort actions. See MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (1995). However, the limitations statute begins to run only when "the claimant in fact knew or reasonably should have known of the wrong." *Poffenberger v. Risser*, 290 Md. 631, 636, 431 A.2d 677, 680 (1981) (extending the "discovery rule" to all actions). There is, however, a four-year statute of limitations for actions filed under the

limitations.²⁶²

Similar to the way judicially carved doctrines such as the unforeseeable plaintiff²⁶³ were created to limit a tortfeasor's liability, courts also created doctrines to limit strict liability for a defective product causing only economic losses.²⁶⁴ Many jurisdictions do not allow recovery in tort for a reasonably foreseeable harm that results in purely economic losses, absent the nexus of privity of contract or some other legally imposed relationship,²⁶⁵ otherwise, "contract law

Maryland Uniform Commercial Code. See MD. CODE ANN., COMM. LAW I § 2-725 (1997); see also *Washington Freightliner, Inc. v. Shantytown Pier, Inc.*, 351 Md. 616, 618, 719 A.2d 541, 542 (1998).

262. See *Ainger v. Michigan Gen. Corp.*, 476 F. Supp. 1209, 1226 n.65 (S.D.N.Y. 1979). The court noted that a "seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." *Id.* (paraphrasing Prosser, *supra* note 245, at 1126). The court further stated: "Especially in the area of products liability, the tort theory of breach of warranty has been utilized to avoid the consequences of contract law with regard to privity, statute of limitations, survival of actions, and damages." *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 634-35 (4th ed. 1971)). Parties of relatively equal bargaining power may also seek to avoid the requirement of notice under the U.C.C. or avoid the effect of warranty disclaimers in shipbuilding or repair contracts, which are known as "Red Letter" clauses in admiralty parlance. See Howard M. McCormack, *Warranties and Disclaimers*, 62 TUL. L. REV. 549, 552 (1988).
263. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928). As noted by the *Palsgraf* court: The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. *Id.*; see also JOHNSON, *supra* note 242, at 300-05 (discussing the unforeseeable plaintiff and proximate cause).
264. See *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1195 (Del. 1992) ("The economic loss doctrine is a judicially created doctrine that prohibits recovery in tort where a product has damaged only itself . . ."); see also *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965). The *Seely* court noted:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business. . . .

Id. at 151.

265. See 1 ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS §§ 3.6-3.7, 3.9

would drown in a sea of tort.”²⁶⁶

This rule is the “economic loss rule,” which in essence bars recovery in tort for product-related economic losses²⁶⁷ unless accompanied by damage to property or physical injury to persons.²⁶⁸ Like the Court of Appeals of New York in *MacPherson*, the United States Supreme Court fostered product safety²⁶⁹ by refusing to impose the privity requirement in *Seas Shipping Co. v. Sieracki*.²⁷⁰ Instead, the Court explicitly relied on the fundamental maritime duty to provide a safe working environment and equipment on board ship so as not to cause personal injury.²⁷¹

Grounded in concerns over unseaworthy²⁷² vessels, the *Sieracki* Court considered the “shipowner’s liability for unseaworthiness as . . . essentially a species of liability without fault.”²⁷³ Thus, admiralty courts imposed strict liability for personal injuries resulting

(4th ed. 1992) (collecting cases and discussing the varying approaches of different jurisdictions allowing or denying a recovery for purely economic losses). In an admiralty context, the rule barring purely economic losses in tort flowed from the reasoning of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Even though the plaintiff alleged that the defendant had negligently treated a vessel’s propeller while in dry dock, the Court explained that the purely economic losses of the third party owner sustained were barred because “as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another, . . . [t]he law does not spread its protection so far.” *Id.* at 309.

266. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (citing GRANT GILMORE, *THE DEATH OF CONTRACT* 87-94 (1974)).

267. See *supra* note 19 and accompanying text.

268. See *infra* Part VI.

269. See also W. KIP VISCUSI & MICHAEL J. MOORE, *Rationalizing the Relationship Between Product Liability and Innovation in Tort Law and the Public Interest* 106 (Peter H. Schuck ed., 1991) (“Liability should also stimulate positive product modifications, such as improved product warnings and incorporation of safety design features.”)

270. 328 U.S. 85 (1946), *overruled by statute as noted by* *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 & n.11 (1979).

271. See *id.* at 95. The Court held that the shipowner’s duty of seaworthiness, traditionally owed to seamen, included protection for stevedores working aboard the ship to load cargo. See *id.*

272. A noteworthy definition of unseaworthiness includes a vessel, its crew, or any equipment on board that is unfit for its intended use. See *Waldron v. Moore-McCormick Lines, Inc.*, 386 U.S. 724, 726-27 (1967); see also PARKS, *supra* note 7, at 53-54.

273. *Sieracki*, 328 U.S. at 94. After the *Sieracki* decision, one commentator observed that unseaworthiness is a species of strict liability similar to products liability in the sense that it is liability without regard to negligence. See SCHOENBAUM, *supra* note 37, § 3-9, at 143 n.1.

from the unseaworthiness of a vessel's defective equipment thirty years prior to the adoption of section 402A of the *Restatement (Second) of Torts*²⁷⁴ by the federal courts sitting in admiralty.²⁷⁵ The Maryland Court of Appeals had adopted section 402A a year earlier in *Phipps v. General Motors Corp.*²⁷⁶ Only a minority of the federal circuit courts sitting in admiralty initially embraced section 402A of the *Restatement (Second) of Torts*.²⁷⁷ This was in contravention of the trend of the land courts, including Maryland, even though the underlying policy grounds for strict liability were equally applicable to defective marine products.²⁷⁸ Most of the federal circuits sitting in admiralty

274. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* Awsumb, *supra* note 247, at 3 ("The authors of Section 402A intended that it strike an equitable balance between the manufacturer's presumed expertise and control and the relatively unsophisticated and unprotected status of the ordinary purchaser or user") (citing RESTATEMENT (SECOND) OF TORTS § 402A, cmt. c); 2 PARKS, *supra* note 7, at 1064; SCHOENBAUM, *supra* note 37, § 3-6.

275. *See Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1134 (9th Cir. 1977) (adopting section 402A).

276. 278 Md. 337, 363 A.2d 955 (1976); *see also* A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 259, 634 A.2d 1330, 1337 (1994) (observing that "fairness requires recovery for injuries caused to person or property resulting from unreasonably dangerous products. . .").

277. *See supra* note 273; *see also Pan-Alaska Fisheries, Inc.*, 565 F.2d at 1134 (adopting section 402A); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 636 (8th Cir. 1972) (adopting section 402A as "the best expression of the doctrine as it is generally applied"); *McKee v. Brunswick Corp.*, 354 F.2d 577, 584 (7th Cir. 1965) (allowing recovery because personal injuries were caused by a defect in an unreasonably dangerous recreational vessel); *Wisdom*, *supra* note 247, at 331 (noting that a majority of courts of appeals sitting in admiralty follow the rule of *Santor v. A & M Karaghuesian, Inc.*, 207 A.2d 305 (N.J. 1965)).

278. *See Wisdom*, *supra* note 248, at 331 (citing *Emerson G.M. Diesel, Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1472 (9th Cir. 1984)). *See also Pan-Alaska Fisheries, Inc.*, 565 F.2d at 1134 n.2 (observing that a majority of land courts adopted section 402A). The Restatement (Third) of Torts: Products Liability is respon-

rejected the *Restatement* approach for marine products liability cases²⁷⁹ by adopting the minority approach of *Santor v. A & M Karaghuesian, Inc.*²⁸⁰

The *Santor* guideline was clear: a manufacturer had a duty to build and sell a product that was not defective, irrespective of whether the product's defect created an unreasonable risk of harm.²⁸¹ In following this approach, federal courts sitting in admiralty usually dealt with marine products that directly impacted the seafarer's livelihood or affected the mariner's safety at sea.²⁸² The

sive to this concern. See RESTATEMENT (THIRD) OF TORTS § 21 (1998).

279. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 869 & n.5 (1986). But see Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075, 1083 (1996) ("Labeling this a 'majority' approach overstates the state of the law at the time; actually, very few jurisdictions had addressed the question directly. The approach designed by the Court as a 'minority' had, in fact, been adopted by a majority of the courts of appeals at that time.").

280. 207 A.2d 305, 312-13 (N.J. 1965). The continuing validity of *Santor*, even under New Jersey state law, is questionable at best. See *Boyes v. Greenwich Boat Works, Inc.*, 27 F. Supp. 2d 543 (D.N.J. 1998) (discussing *Alloway v. General Marine Indus.*, 695 A.2d 264 (N.J. 1997). More recently, *Alloway* extended the economic loss rule doctrine to transactions which could be characterized as consumer sales, overruling an arguably conflicting decision in *Santor*. The *Santor* approach permits a consumer to maintain an action in strict liability for loss of value, whether or not the defect causes a risk of unreasonable harm. See *East River S.S. Corp.*, 476 U.S. at 868-69 & n.4.

281. See *Santor*, 207 A.2d at 312-13.

282. See *Emerson G.M. Diesel, Inc.*, 732 F.2d at 1472 (allowing recovery for economic losses accrued when a fishing vessel's port reduction gear failed while underway in the Bering Sea), overruled on different grounds by *East River S.S. Corp.*, 476 U.S. 858. The *Emerson* court observed that "[t]he rationale for the rule allowing recovery of lost profits in an admiralty negligence action is 'the familiar principle that seamen are favorites of admiralty and their economic interests entitled to the fullest possible legal protection.'" *Id.* (quoting *Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953) (allowing the crew members of a fishing vessel to recover lost profits from owners of another vessel that negligently fouled their nets)). Other courts have similarly allowed fishermen to recover for economic losses due to the special solicitude given to them. See *Yarmouth Sea Prods. Ltd. v. Scully*, 131 F.3d 389, 398-99 (4th Cir. 1997). In *Yarmouth Sea Products Ltd.*, the United States Court of Appeals for the Fourth Circuit held that "the special rule applicable to [commercial] fishermen" permitted the recovery for proven lost profits from the catch ordinarily earned, but lost, because of a collision caused by the inattentive lookout. See *id.* The court exhibited this special solicitude despite an explicit notation that "the *Robins Dry Dock* principle [of no recovery for economic losses in tort] is alive and well in the Fourth Circuit." *Id.* But see *McConnell v. Caterpillar Tractor*

courts adopting the *Santor* approach allowed the recovery of economic losses in tort by rationalizing that there was no reason to arbitrarily preclude tort recovery where the product fortuitously injured itself without personal injury or damage to other property.²⁸³ Because of the contradictory philosophical approaches utilized by the other federal circuits sitting in admiralty, the United States Supreme Court clearly needed to harmonize these differences. However, not until 1986 did the Court formally acknowledge products liability as an admiralty cause of action,²⁸⁴ after granting certiorari in a case from the Third Circuit that had taken a unique approach by disallowing recovery for economic losses utilizing a risk-of-harm balancing test.²⁸⁵

VI. THE EAST RIVER DOCTRINE

A. Factual Background

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*,²⁸⁶ the bareboat charterers²⁸⁷ of four American built²⁸⁸ and flagged super-tankers²⁸⁹ sought to recoup more than \$8 million in costs for repair-

Co., 646 F. Supp. 1520 (D. N.J. 1986) (refusing to award lost profits to commercial fisherman for products liability claim stemming from engine failure caused by defective crankshaft), *rejected by Sea-Land Serv., Inc. v. General Elec. Co.*, 134 F.3d 149, 155-56 (3d Cir. 1998).

283. See *Emerson G.M. Diesel, Inc.*, 732 F.2d at 1474.

284. See *East River S.S. Corp.*, 476 U.S. at 865. When the Supreme Court finally addressed the issue of whether to adopt products liability tenets into the substantive maritime law, there was nearly universal acceptance of this doctrine by the federal courts sitting in admiralty. See *Ocean Barge Transp. Co. v. Hess Oil Virgin Islands Corp.*, 726 F.2d 121, 123 (3d Cir. 1984).

285. See *East River S.S. Corp.*, 752 F.2d 903, *aff'd sub nom.*, *East River S.S. Corp.*, 476 U.S. 858 (1986).

286. 476 U.S. 858 (1986).

287. A bareboat charter is, in essence, a maritime long-term rental contract. See GILMORE & BLACK, *supra* note 24, § 4-1, at 134 (“[T]he charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner *pro hac vice*. . . .”); see also *East River S.S. Corp.*, 476 U.S. at 860 (“Each petitioner operated under a bareboat charter, by which it took full control of the ship for 20 or 22 years as though it owned it, with the obligation afterwards to return the ship[s] to the real owner.” (citing GILMORE AND BLACK, *supra* note 24, §§ 4-1, 4-22)).

288. See *East River S.S. Corp.*, 752 F.2d at 903-04.

289. See GREG S. MARSTON, *TANKER OPERATIONS: A HANDBOOK FOR THE SHIP'S OFFICER* 6-11 (1981). Supertankers are very-large crude carriers (VLCCs), “roughly [defined] as tankers of 160,000 [deadweight tonnage] and over” which usually carry crude oil, but also can carry bulk refined petrochemical products as cargo. *Id.* at 7. They are usually equipped with a “single steam turbine con-

ing their steam-turbine propulsion units and for lost revenue incurred during voyage deviations and unscheduled shipyard periods.²⁹⁰ The claims arose from the purportedly negligent design and manufacture of the units as well as the negligent supervision of the installation of the steam-turbines that powered the vessels.²⁹¹ Three of the four vessels suffered major engineering plant failures while at sea.²⁹² The fourth ship's engineering plant experienced problems during its maiden voyage;²⁹³ its astern guardian valve had been installed backwards and damaged the ship's main engine when high-pressure steam entered the low-pressure turbine stage.²⁹⁴

B. The Holding and Rationale of the East River Court

As a threshold matter, Justice Blackmun, writing for a unanimous Court, recognized that the federal circuits sitting in admiralty had overwhelmingly adopted products liability concepts.²⁹⁵ Without much discussion,²⁹⁶ the *East River* Court felt compelled to "join the Courts of Appeal in recognizing products liability in negligence, including strict liability, as part of the general maritime law"²⁹⁷ espe-

nected to the propeller shaft" for propulsion as was the case with these four vessels. *Id.* VLCCs are the largest moving objects ever built. *See id.* at 10. These supertankers were built by Seatrain Shipbuilding Corporation in Brooklyn, New York, and were christened as the *Stuyvesant*, the *Williamsburg*, the *Brooklyn*, and the *Bay Ridge*. *See East River S.S. Corp.*, 752 F.2d at 905. They were an exception to the rule that "VLCCs are built in foreign yards and rarely fly the American flag." Marston, *supra*, at 11 (citing Fig. 10, at page 14, a photograph of the *Brooklyn*, at 225,000 tons deadweight).

290. *See East River S.S. Corp.*, 476 U.S. at 861.

291. *See id.*

292. *See id.*

293. *See id.*

294. *See id.*

295. *See id.* at 865 (citing *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (3d Cir. 1945) (adopting liability without fault for unseaworthiness), *rev'd in part and aff'd in part on other grounds*, 328 U.S. 85 (1946), *overruled by statute as noted by Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 & n.11 (1979); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1135 (9th Cir. 1977)).

296. *See Davis, supra* note 279 at 1082 (chronicling the "culture of irresponsibility" whereby institutional defendants are freed from tort liability and discussing the Court's trend toward immunity from products liability). The author opines that: "One would have thought that the [*East River*] Court would take more time to explore fully the policies behind an area of law that had caused turmoil in state courts for the previous twenty years." *Id.*

297. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66 (1986).

cially in view of the Court's own precedents.²⁹⁸ The Court also found it desirable to harmonize the differing approaches taken by the federal appellate courts to answer the question of whether a marine products liability claim existed for injury to a product itself.

The *East River* Court examined the spectrum of answers spawned by courts, Congress, and commentators.²⁹⁹ Looking specifically at the approaches adopted by the land-based courts and federal courts sitting in admiralty, the Court observed that several distinct judicial philosophies had evolved to address the special concerns created in the area of products liability³⁰⁰ to resolve disputes, the resolution of which lie at the concursus³⁰¹ of tort and contract.³⁰² As they had manifested themselves in the federal circuits, these differences precluded uniformity and decisional predictability—the touchstones of admiralty law.³⁰³

Wanting to “keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages,”³⁰⁴ the *East River* Court rejected the balancing-of-harm³⁰⁵ and minority loss

298. *See Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 318 & n.3 (1964) (addressing a stevedore's claim for a breach of implied warranty of workmanlike service even though the company acted without negligence in furnishing the allegedly defective equipment that injured the employee); *Sieracki*, 328 U.S. at 97 (extending strict liability for the unseaworthiness of a vessel's cargo gear to stevedores).

299. *See East River S.S. Corp.*, 476 U.S. at 868 & n.3.

300. *See id.* at 868-70 & nn.4-5.

301. *See* BLACK'S LAW DICTIONARY 292 (6th ed. 1990). Concursus is where “[i]n the civil law, a running together . . . or meeting . . . of actions” occurs. *Id.* Concursus is also a legal term of art for an admiralty proceeding. *See* Complaint of Dredging Equip., Inc., 851 F. Supp. 172, 175 (E.D. Pa. 1994) (explaining that a concursus is a limitation of liability proceeding). A shipowner can limit liability arising from a maritime tort without privity or knowledge of the occurrence to the value of the vessel and its pending earnings under 46 U.S.C. App. § 183(a). *See id.* However, when the claimed amount is greater than the value of the vessel and its pending freights its accounts receivables “the court engages in a *concursum*, a proceeding where it determines ‘whether there was negligence, whether it was without the privity and knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed’” *Id.* (quoting *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979)).

302. *See* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 667 (1989) (“The problem of product-related economic loss . . . could be treated under either a tort or a contract rubric.”).

303. *See East River S.S. Corp.*, 476 U.S. at 863 & n.1.

304. *Id.* at 871.

305. *See id.* at 870. The *East River* Court characterized this approach as “attempting

of value³⁰⁶ positions, reasoning that warranty was the proper remedy for a defective product causing only economic losses.³⁰⁷ The Court held that “a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.”³⁰⁸ In denying the tort claims, the Court explained that “[w]hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the parties to its contractual remedies are strong.”³⁰⁹

The Supreme Court relied heavily on the inconsistency between the underlying purpose of products liability and the recovery of purely economic losses. It indicated that the underlying policy reasons for a tort cause of action sounding in products liability allows “more protection from dangerous products than is afforded by the law of warranty.”³¹⁰ Specifically with regard to the safety concerns underlying tort law, the Court observed: “[T]he tort concern with safety is reduced when an injury is only to the product itself.”³¹¹ In contrast with personal injuries, which could create overwhelming misfortunes, the Court characterized the recovery of

to differentiate between ‘the disappointed users . . . and the endangered ones.’ ” *Id.* at 869-70 (quoting *Russell v. Ford Motor Co.*, 575 P.2d 1383, 1387 (1978)). The Court rejected the balancing-of-harm approach because it “essentially turn[ed] on the degree of risk, [which is] too indeterminate to enable manufacturers [to] easily . . . structure their business behavior.” *Id.* The Court further reasoned that even if the injury to a product occurred in an “abrupt, accident-like event,” any recovery is geared to correcting “the failure of the purchaser to receive the benefit of the bargain—traditionally the core concern of contract law.” *Id.* (citing E. ALLAN FARNSWORTH, *CONTRACTS* § 12.8, at 839-40 (1982)). Maryland applies this type of balancing to determine whether a tort plaintiff may receive recovery for purely economic losses. *See infra* notes 373, 439.

306. *See East River S.S. Corp.*, 476 U.S. at 870-71. The Court recognized the many arguments for not differentiating between economic losses and those that result in personal injury or property damage to other property. *See id.* at 868-69 (noting that multiple courts have concluded that treating purely economic losses differently would generate arbitrary results that are not necessarily consistent with the principles underlying products liability law). Nonetheless, the Court found the arguments in favor of a distinction to be “more powerful.” *Id.* at 870.

307. *See id.* at 872.

308. *Id.* at 871 & n.6. The *East River* Court noted that it did not reach the issue of whether an action in tort could ever be asserted in admiralty if the damages are purely economic. *See id.*

309. *Id.* at 871.

310. *Id.* at 866 (citing *Seely v. White Motor Co.*, 403 P.2d 145, 149 (Cal. 1965)).

311. *Id.*

purely economic losses in tort as insurable events for which no special protection was required.³¹²

The Court likewise noted the economic impact of permitting parties to recover for damages solely to the product itself,³¹³ observing: "The increased cost to the public that would result from holding a manufacturer liable in tort for injury to a product itself is not justified."³¹⁴ The *East River* Court averted any recovery in the ship charterer's tort action and concluded that the cause of action more properly belonged under a warranty claim,³¹⁵ absent any personal injury or damage to "other property."³¹⁶ Observing that "the contractual responsibilities were thus clearly laid out," the *East River* Court refused to "extricate the parties from their bargain"³¹⁷ as the "maintenance of product value and quality is precisely the purpose of express and implied warranties."³¹⁸

Even though the petitioners attempted to recover for damages to other parts of the supertankers caused by the defective steam plants, the Court precluded recovery.³¹⁹ The Supreme Court explained that the component failures of the supertankers' steam plants, which damaged only the engines themselves and only caused economic losses, did not rise to the level or type of danger for which products liability was meant to compensate.³²⁰ The Court reasoned that as " 'all but the very simplest of machines have compo-

312. *See id.* at 871-72.

313. *See id.* at 874. "In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums." *Id.* (citations omitted).

314. *Id.* at 872 (citation omitted).

315. If the claims had been contractually based upon warranty, the *East River* Court noted that admiralty jurisdiction would not be applicable and state law would supply the rule of decision. *See id.* at 872 & n.7. *See also supra* notes 252-59 and accompanying text.

316. The *East River* Court considered "other property" to mean property damaged by the product other than damage to the product itself. *See East River S.S. Corp.*, 476 U.S. at 867. In *East River*, the turbines only damaged themselves. *See id.* at 875. On the count alleging the "reverse installation of the astern guardian valve," the Supreme Court observed similarly that "the only harm was to the propulsion system itself rather than to persons or other property." *Id.* at 875-76. Thus, these economic losses fell outside the zone of recovery under the economic loss rule. *See id.* at 876.

317. *Id.* at 875.

318. *Id.* at 872.

319. *See id.* at 867-68.

320. *See id.* at 867.

ment parts, [a contrary] holding would require a finding of "property damage" in virtually every case where a product damages itself.'"³²¹

C. *East River Doctrine Modified by the Supreme Court in Saratoga Fishing Co. v. J.M. Martinac & Co.*

In *Saratoga Fishing Co. v. J.M. Martinac & Co.*,³²² the Supreme Court modified *East River's* preclusion of recovery for economic losses by holding that the doctrine does not extend to physical damage to other property on a vessel added after its initial sale.³²³ Here, the M/V *Saratoga* sank as a result of an engine room fire and subsequent flooding.³²⁴ This fishing vessel was built by J.M. Martinac and Company fifteen years earlier and was originally equipped with a hydraulic system placed in the engine room that was designed by Marco Seattle but installed by the shipbuilder.³²⁵ After the launching and sale to Joseph Madruga, the M/V *Saratoga* was outfitted with additional equipment used for the tuna fishing industry.³²⁶ Three years later, the vessel was sold to the Saratoga Fishing Company, which continued to use it in the tuna industry until it sank in 1987.³²⁷ At trial, the Saratoga Fishing Company received damages for the additional equipment added by the original purchaser.³²⁸

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the trial court, refusing to uphold the award of purely economic damages.³²⁹ According to the intermediate court,

321. *Id.* (quoting *Northern Power & Eng. Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 330 (Alaska 1981)). Whether other property was meant to apply to the whole vessel or a component not manufactured by the defendant was not clearly delineated. The United States Court of Appeals for the Fifth Circuit faced this issue in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987). Here, buyers of defective vessels sought to recover economic damages from the designer of the steering mechanism for damages to components parts unrelated to the steering mechanism. *See id.* at 929. The court concluded that allowing buyers to recover under the "other property" exception under these circumstances would undermine *East River* and specifically defined "product" as the entire vessel. *See id.* at 929-30.

322. 520 U.S. 875 (1997).

323. *See id.* at 884.

324. *Id.* at 877.

325. *See id.*

326. *See id.*

327. *See id.*

328. *See id.* at 877-78.

329. *Saratoga Fishing Co. v. Marco Seattle Inc.*, 69 F.3d 1432, 1145 (9th Cir. 1995), *rev'd*, 520 U.S. 875.

added equipment "was part of the ship when [the original purchaser] sold the ship to Saratoga Fishing, and, for that reason, . . . the added equipment was part of the defective product that itself caused the harm."³³⁰ The court's holding was over the objections of a lone dissenter who argued that the additional equipment constituted "other property" under *East River*.³³¹

Subsequently agreeing with the dissenting judge, the Supreme Court explained that *East River* doctrine was inapplicable in cases where damage was to the property added after a subsequent sale that was not a causal factor in the injury.³³² The Court was troubled by the Ninth Circuit's holding³³³ that "create[d] a tort damage immunity beyond that set by any relevant tort precedent . . . found."³³⁴ The Supreme Court agreed with the dissenting judge of the Ninth Circuit that this was an unwarranted extension of *East River* that created more confusion regarding the economic loss doctrine's limits, particularly where the equipment added to the ship was not part of the benefit of the bargain in the original sale.³³⁵

The underlying facts of *Saratoga* may have suggested to the Supreme Court that a more liberal and equitable view of the *East River* doctrine was required.³³⁶ The *Saratoga* Court recognized that new owners of a vessel would in all probability alter it with new property, which should not be construed as the product itself if it were not part of the reason for the loss.³³⁷

330. *Saratoga Fishing Co.*, 520 U.S. at 878.

331. See *Saratoga Fishing Co.*, 69 F.3d at 1447 (Noonan, J., dissenting).

332. See *Saratoga Fishing Co.*, 520 U.S. at 884-85. According to the *Saratoga* Court:

We conclude that equipment added to a product after the Manufacturer (or distributor selling in the initial distribution chain) has sold the product to an initial User is not part of the product that itself caused physical harm. Rather, in *East River's* language, it is "other property." (We are speaking, of course, of added equipment that itself played no causal role in the accident that caused the physical harm.)

Id.

333. See *Saratoga Fishing Co.*, 69 F.3d at 1445 (holding that "the skiff, net, fuel, spare parts, and miscellaneous equipment, those items are part of the product and are not recoverable in a tort action as 'other property'"), *rev'd*, 520 U.S. 875 (1997).

334. *Saratoga Fishing Co.*, 520 U.S. at 880.

335. See *id.* at 879; *Saratoga Fishing Co.*, 69 F.3d at 1447 (Noonan, J., dissenting).

336. See *Saratoga Fishing Co.*, 520 U.S. at 884-85.

337. See *id.*

VII. *EAST RIVER* DOCTRINE APPLIED WITH CONTRARY RESULTS IN MARYLAND'S FEDERAL COURT

The United States District Court for the District of Maryland has experienced some difficulty applying the harsh mandate of *East River*.³³⁸ The following two cases, decided in Maryland's federal court, exemplify the confusion over the *East River* economic loss rule as their legal conclusions directly controvert each other.³³⁹

A. *Sherman v. Johnson & Towers Baltimore, Inc.*

In *Sherman v. Johnson & Towers Baltimore, Inc.*,³⁴⁰ David and Theresa Sherman sought recovery under various tort and contract causes of action against a yacht seller, Ocean Yachts, and other defendants.³⁴¹ One of the boat's main engines caught fire while offshore of Ocean City, Maryland.³⁴² Unable to extinguish the fire, Mr. Sherman abandoned the burning vessel, which ultimately sank, and was rescued.³⁴³ Fortunately, he was uninjured.³⁴⁴ In response to the plaintiffs' tort-based claims, the seller of the yacht raised the *East River* doctrine.³⁴⁵

The plaintiffs attempted to avoid the preclusive economic loss rule with two arguments, both of which the court accepted. The Shermans distinguished their relationship with the yacht seller from the commercial relationship in *East River*.³⁴⁶ Unlike the parties in *East River*, who had a ship-builder/ship-owner relationship, the plaintiffs argued that they had a consumer-producer connection with Ocean Yachts and therefore, were not precluded from recovery

338. See *Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499, 501-02 (D. Md. 1990) (awarding economic loss damages for a recreational vessel lost as a result of fire in a products liability action). *But see* *Reliance Ins. Co. v. Carver Boat Corp.*, No. 96-194, 1997 WL 714900, *2-4 (D. Md. May 29, 1997) (denying a marine products liability claim for economic losses occasioned by fire to a recreational vessel).

339. See *infra* Part VI.

340. 760 F. Supp. 499 (D. Md. 1990).

341. See *id.* at 501-02. The count for breach of warranty claims survived motion to dismiss. See *id.* at 501.

342. See *id.* at 500.

343. See *id.*

344. See *id.* Had Mr. Sherman been injured, he may have recovered his purely economic losses sustained from the sinking of the yacht. See 1 DUNN, *supra* note 265, § 3.7, at 204 (observing that the existence of even slight physical injury may permit recovery and discussing several cases with "extreme" results).

345. See *id.* at 501.

346. See *id.* at 501-02.

of economic losses by the *East River* doctrine.³⁴⁷ The federal district court found *East River* inapplicable to the facts in *Sherman* on this basis.³⁴⁸

The *Sherman* court noted that because the *East River* Court found no need to intrude into the commercial parties' choice to risk shift, it drew a distinction between the consumer (non-commercial) purchasers and a commercial seller.³⁴⁹ The *Sherman* court relied on the repeated references by the *East River* Court to the commercial context to conclude that its rule of preclusion applied solely to commercial transactions.³⁵⁰ Although noting that the Supreme Court "did not define 'commercial relationship' ", the *Sherman* court nonetheless concluded that the *East River* Court had "set out some characteristics of such a relationship."³⁵¹ Considering the nature of the transaction, the court refused to define the Shermans' transaction with Ocean Yachts as commercial.³⁵²

347. *See id.* at 502.

348. *See id.*

349. *See id.* at 502.

350. *See id.* at 501. As noted by the *Sherman* court, the *East River* Court addressed the issue of "whether a *commercial* product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation." *Id.* at 501 (quoting *East River S.S. Corp.*, 476 U.S. at 866) (emphasis added). Also noted by the *Sherman* court was the *East River* Court's holding that, "a manufacturer in a *commercial* relationship has no duty" under negligence or strict liability to "prevent a product from injuring itself." *Id.* (quoting *East River S.S. Corp.*, 476 U.S. at 871) (emphasis added). In support of its holding, the *Sherman* court also referenced a footnote in which the *East River* Court refused to "eliminate all tort causes of action when the only damages sought are economic." *Id.* (citing *East River S.S. Corp.*, 476 U.S. at 871 n.6). This was certainly a reasonable interpretation of *East River* given the Court's clear analysis of a problematic commercial transaction and the Court's express language in its holding. *See also East River S.S. Corp.*, 476 U.S. at 871-76.

351. *Sherman*, 760 F. Supp. at 501. For example, while discussing tort safety concerns and product injury, the *East River* Court stated:

[When] a product injures itself, the *commercial user* stands to lose the value of the product, risks the displeasure of its *customers* who find that the product does not meet their needs, or as in [*East River Steamship's* case, experiences increased costs in performing a service . . . [l]osses like these can be insured.

Id. at 501-02 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871-72 (1986)).

352. *See id.* at 502. The *Sherman* court also relied on the conclusion of some courts and commentators that the *East River* doctrine does not apply in the non-commercial context and the failure of the defendant to produce a case in

The second argument turned on the definition of other property loss—the *East River* doctrine only precludes recovery for economic losses to the product itself, that is the vessel, in tort.³⁵³ The Shermans argued that the “other property” that they had added to their vessel and lost as a result of the fire and sinking should be recoverable in tort.³⁵⁴ The court agreed with the Shermans’ view, concluding “that the economic damage went beyond the product itself and included ‘other property,’ specifically, various items of personal property . . . [that were] not components of the yacht” and denied the defendant’s motion to dismiss.³⁵⁵ Thus, the Shermans were able to avoid the *East River* economic loss rule on that ground as well.³⁵⁶

B. *Reliance Insurance Co. v. Carver Boat Corp.*

In *Reliance Insurance Co. v. Carver Boat Corp.*,³⁵⁷ an unreported opinion, the United States District Court for the District of Maryland sitting in admiralty came to a very different conclusion in its second opportunity to apply the *East River* economic loss rule.³⁵⁸ The plaintiff insurance company sought subrogation after paying an insurance claim stemming from the loss of a recreational vessel.³⁵⁹ The yacht burned because of an electrical failure while the vessel was berthed at a marina.³⁶⁰ In the defendant’s motion for summary judgment, the issue was again whether the *East River* doctrine applied in a non-commercial context.³⁶¹ Relying on *Sherman*, the plain-

which the doctrine was applied to a claim for economic damages arising from a non-commercial relationship. *See id.* (citations omitted).

353. *See id.* at 501-02. If *Saratoga Fishing Co. v. J.M. Martinac & Co.* had been decided before the Shermans sued, it would have not compelled a different result; the *Sherman* court’s decision presaged *Saratoga*’s subsequent holding that allowed recovery of other property losses. *See Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997). For a discussion of *Saratoga Fishing Co.*, see *supra* Part VI.C.

354. *See Sherman*, 760 F. Supp. at 501.

355. *See id.*

356. *Id.* at 502.

357. No. 96-194, 1997 WL 714900 (D. Md. May 29, 1997).

358. *See id.* at *1.

359. *See id.*

360. *See id.* at *1, *3.

361. *See id.* at *1 & n.1. The *Reliance Insurance Co.* court noted that the *Sherman* commercial/noncommercial vessel distinction was predicated on cases that “were all decided in the context of commercial transactions.” *Id.* (citing *Employers Ins. of Wausau v. Suwanee River Spa Lines*, 866 F.2d 752 (5th Cir. 1989) (barring recovery under the economic loss rule for a suit by the owner of a sunken tugboat against the vessel’s builder and supervisor of construction

tiffs argued that the court should again limit the *East River* doctrine to commercial users.³⁶² Writing for the federal district court in *Reliance Insurance Co.*, Judge Nickerson candidly observed that since his decision in *Sherman*, "the law has obviously evolved in a manner not anticipated by this [Court] at the time it rendered its decision."³⁶³ Therefore, the *Reliance Insurance Co.* court refused to regenerate the *Sherman* holding to distinguish between non-commercial and commercial buyers of marine products.³⁶⁴ Nevertheless, as *Reliance Insurance Co.* is an unreported decision, it binds only the parties to the action, and has no precedential value for other cases.³⁶⁵

The court's decision to forgo the distinction between commercial and non-commercial users of a maritime product was founded upon two disarmingly simple precepts. First, according to the court, the ability of consumers to purchase insurance to protect against the risk of vessel loss mitigates the need for a distinction.³⁶⁶ Second, the court saw little difference between commercial users of a marine product and sophisticated recreational vessel owners.³⁶⁷ Although sellers and consumers are not ordinarily considered to be bargaining equals, unlike the parties in a commercial transaction,

of the integrated tug and barge unit); *Richard O'Brien Cos. v. Challenge Cook Bros.*, 672 F. Supp. 466 (D. Colo. 1987) (addressing a non-maritime case in which the owner of cement pumps sought recovery for economic loss); *Consumers Power Co. v. Mississippi Valley Structural Steel Co.*, 636 F. Supp. 1100 (E. Mich. 1986) (considering the claims of an owner and builder of nuclear power plant for economic losses incurred because of a reactor's defective anchor bolts)).

362. See *Reliance Ins. Co.*, 1997 WL 714900 at *1.

363. *Id.* at *2; see also *Karshan v. Mattituck Inlet Marina & Shipyard, Inc.*, 785 F. Supp. 363, 366 (E.D. N.Y. 1992).

364. See *Reliance Ins. Co.*, 1997 WL 714900, at *1, *3.

365. See FED. R. APP. P. 36(c) ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, *estoppel*, or the law of the case."). In Maryland state courts, an unreported opinion is neither binding precedent nor persuasive authority. See MD. RULE 8-114(a).

366. See *Reliance Ins. Co.*, 1997 WL 714900, at *2 (noting that the *East River* Court "focused on the availability of insurance—and non-commercial vessels are also usually insured") (citing *Karshan*, 785 F. Supp. at 366; *Sisson v. Hatteras Yachts, Inc.*, No. 87-C0652, 1991 WL 47543, *2 (N.D. Ill. Apr. 2, 1991)); see also 1 PARKS, *supra* note 7, at 3 ("[The] importance [of] insurance in maritime affairs cannot be overemphasized. Without exception, it pervades every single sphere of maritime activities and, absent marine insurance protection, maritime commerce could come to a standstill.").

367. See *Reliance Ins. Co.*, 1997 WL 714900, at *2.

the *Reliance Insurance Co.* court concluded that most federal courts that had considered the issue “discard[ed] the commercial/non-commercial distinction as useless and likely to lead to confusion.”³⁶⁸

The *Reliance Insurance Co.* court also considered and explicitly rejected the plaintiff’s argument that even if the *East River* rule applied, the exception to the economic loss rule fashioned by the Maryland Court of Appeals should be applied.³⁶⁹ Maryland’s economic loss rule exception³⁷⁰ distinctly differs from the *East River* doctrine.³⁷¹

368. *Id.* (quoting *Somerset Marine Inc. v. Forespar Prods. Corp.*, 876 F. Supp. 1114, 1115 (C.D. Cal. 1994) (citing *Sisson*, 1991 WL 47543, at *2 (addressing an admiralty claim for a vessel that sank in Indiana waters due to a defective onboard washer/dryer unit)); *Karshan*, 785 F. Supp. at 365-66; *Lewinter v. Genmar Indus.*, 32 Cal. Rptr. 2d 305, 308-09 (Cal. Ct. App. 1994) (considering a catastrophic hull failure from defective fiberglass hull delamination)). The court also relied on the decision of the Washington Supreme Court in *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15 (Wash. 1993). Judge Nickerson observed that the *Stanton* court echoed the admiralty principle of uniformity—traditional maritime law does not differentiate based on the commercial or non-commercial nature of an activity. See *Reliance Ins. Co.*, 1997 WL 714900, at *2 (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675-76 (1982)).

369. See *Reliance Ins. Co.*, 1997 WL 714900, *3.

370. See *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 121 Md. App. 100, 708 A.2d 1047 (1998), *aff’d*, 354 Md. 264, 729 A.2d 981 (1999). Although recognizing that plaintiffs ordinarily do not recover for purely economic losses in tort, the court of special appeals recently recounted:

The Court of Appeals has held, however, that a plaintiff may recover in tort for purely economic loss where the defect creates a substantial and unreasonable risk of death or personal injury. . . . Moreover, when parties to a negligence action share an “intimate nexus,” satisfied by “privity of contract or its equivalent,” recovery in negligence may be had for “economic loss,” despite the absence of any risk that personal injury will result: “Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus satisfied by contractual privity or its equivalent. By contrast, where the risk created is one of personal injury, no such direct relationship need be shown, and the principal determinate of duty becomes foreseeability.”

Id. at 115-16, 708 A.2d at 1054 (quoting *Jacques v. First National Bank*, 307 Md. 527, 534-35, 515 A.2d 756 (1986)). For a thorough treatment of Maryland’s stance on tort recovery of economic loss, see generally Michael R. McCann, Comment, *Atlantis Revisited: Recovery Under Maryland Law for Purely Economic Loss Against Negligent Builders and Manufacturers*, 23 U. BALT. L. REV. 521 (1994). Obviously, this approach is in sharp contrast to that of the *East River* Court. See *supra* notes 285-320 and accompanying text.

371. Under the *East River* doctrine, the federal courts may not award recovery for purely economic losses absent personal injury or damage to other property

However, the court, in deference to the *East River* rule and the requirement for consistency observed³⁷² that "the need for uniformity in maritime products liability law prohibits this Court from applying Maryland's 'risk of harm' rule in this admiralty action."³⁷³

The *Reliance Insurance Co.* court's treatment of the *East River* doctrine is arguably an ambivalent result. The court correctly declined to apply Maryland law to fashion a remedy; such a displacement would have been an affront to federal interests by violating admiralty law's guiding principles of decisional uniformity and consistency.³⁷⁴ Nevertheless, this unpublished decision did not expressly overrule the result in *Sherman*, although it certainly cast considerable doubt as to its continued vitality.³⁷⁵

VIII. DISCUSSION AND ANALYSIS

A. *Recovery in Other Jurisdictions*

Two jurisdictions other than Maryland have also considered the issue of whether to provide remedies under state law or under the

other than the product itself, whereas in Maryland, a potentiality of an unreasonable risk of harm is sufficient to allow recovery. Compare *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986), with *A.J. DeCoster Co. v. Westinghouse Elec. Corp.*, 33 Md. 245, 251, 634 A.2d 1330 1333 (1994).

372. See *East River S.S. Corp.*, 476 U.S. at 870.

373. See *Reliance Ins. Co.*, 1997 WL 714900, at *3.

374. Unfortunately, the *Yamaha* Court has apparently signaled a departure from the once fairly stringent uniformity and consistency principles of admiralty law that ordinarily preclude recovery under state law. See Burrell, *supra* note 131, at 74. *Yamaha* "provides an excellent example of the characterization problems that arise in recreational boating cases and of the temptation to bend the law to the circumstances of the case." *Id.* at 75. Whether the Supreme Court's decision will affect other substantive areas of admiralty law is an open question; the *Yamaha* Court did not address "whether federal maritime or state law should form the substantive law . . . providing the rule of law for remedies [for wrongful death claims and] . . . and those remedies may change when the vessel crosses the mystical three mile limit and unseen state boundaries." Russell & Nikas, *supra* note 104, at 387.

375. See *Karshan v. Mattituck Inlet Marina & Shipyard*, 785 F. Supp. 363, 365 & n.2 (E.D.N.Y. 1992) (disagreeing with *Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499 (D. Md. 1990)); *v. Lewinter v. Genmar Indus.*, 32 Cal. Rptr. 2d 305, 309 n.3 (Cal. Ct. App. 1994) (noting that *Sherman* was the only published case that drew a distinction between commercial and consumer vessel transactions); *Alloway v. General Marine Indus.*, 695 A.2d 264, 270 (N.J. 1997) (characterizing *Sherman* as against the weight of authority); *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 21-23 (Wash. 1993) (suggesting that the continued vitality of *Sherman* was doubtful and observing that the *Sherman* decision stood alone against the weight of authority).

general maritime law.³⁷⁶ Likewise, these cases also reveal the difficulty that a court encounters in harmonizing the harsh federal rule with a consumer-boater's need for protection from defective marine products.³⁷⁷ In *Stanton v. Bayliner Marine Corp.*,³⁷⁸ a consolidated action brought in Washington state court, the plaintiffs claimed that their forty-five foot boats were lost because the design of the recreational vessels' keels created an unreasonable risk of mass flooding should an accidental grounding, stranding, or a submerged object puncture the hull.³⁷⁹

The parties in *Stanton* vigorously disputed whether *East River's* doctrinal mandate extended to consumers or whether it was factually limited to commercial transactions.³⁸⁰ Relying on *Sherman*,³⁸¹ the plaintiffs contended that the economic loss rule barring recovery in tort as applied to consumers was still undeveloped and thus, state law could provide the appropriate remedy.³⁸² However, after looking to other jurisdictions' treatment of cases where yacht-owners suffered only economic losses, the court concluded that the mandate of *East River* was equally suitable to both commercial and consumer vessel transactions.³⁸³ The *Stanton* court decided that the lower court erred by displacing the *East River* doctrine with a remedy under Washington state law.³⁸⁴ Premised on the erroneous notion that the

376. See *Stanton*, 866 P.2d at 22 (declining to depart from admiralty's uniformity principle and barring recovery for the losses of two yachts); *Goldson v. Carver Boat Corp.*, 707 A.2d 193, 198 (N.J. App. Ct. 1998) (barring a claim for recovery of a destroyed yacht and noting that the "substantive maritime law relating to tort recovery is abundantly clear").

377. See, e.g., *Stanton v. Bayliner Marine Corp.*, 844 P.2d 1019, 1023 (Wash. App. Ct. 1992) (observing that the *East River* Court "unjustifiably dismisses the safety concerns attendant to product injuries caused by hazardous defects."), *rev'd*, 866 P.2d 15 (Wash. 1993). *But see* Burrell, *supra* note 131, at 79 ("[C]are must be taken that the balancing of national and state interests is not result-oriented. . .").

378. 866 P.2d 15 (Wash. 1993).

379. See *id.* at 17. The plaintiffs asserted that their boat sank in 12 minutes after striking a submerged rock in Puget Sound. See *id.* Bayliner maintained that the sinking actually took 27 minutes. See *id.*

380. See *id.* at 21.

381. *Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499 (D. Md. 1990).

382. See *Stanton*, 866 P.2d at 17.

383. See *id.* at 23. In addition, the *Stanton* court relied on *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982).

384. See *Stanton*, 866 P.2d at 20.

consumer concerns were local, not maritime,³⁸⁵ the lower court superseded the federal interest in admiralty uniformity.³⁸⁶ Recognizing that there is no distinction between pleasure boats and commercial vessels in marine products liability cases,³⁸⁷ the Supreme Court of Washington reasoned that "Washington's interest in providing a remedy . . . does not outweigh federal interests in uniformity"³⁸⁸ and reversed the lower court.³⁸⁹

Having decided that the *East River* economic loss rule would be applicable to the plaintiffs' yacht losses, the court next examined the issue of whether the substantive maritime law preempted Washington's risk-of-harm balancing test.³⁹⁰ Reviewing the Washington Products Liability Act³⁹¹ and the legislative intent underlying its promulgation,³⁹² the *Stanton* court held that tort recovery for economic losses was specifically excluded under the Act because such claims were warranty actions under the Uniform Commercial Code.³⁹³ The court's characterization of this action did not conflict with the *East River* rule.³⁹⁴ However, there was an inherent conflict as to the manner that economic loss was defined because Washington state law permitted recovery utilizing a risk-of-harm balancing test³⁹⁵ for pure economic losses, rather than the restrictive contract approach formulated by the *East River* Court.³⁹⁶ The *Stanton* court held that there was no recovery in tort for the plaintiffs because "federal maritime law preempts application of a conflicting state law where there is a judicially fashioned admiralty rule on point [and] *East River* is the

385. *See id.* (citing *Stanton*, 844 P.2d at 1019). After analyzing the harm suffered by the plaintiffs, the lower court explained: "Whatever federal interest in uniformity exists, it is outweighed by Washington's concern to ensure the personal safety of its citizens, to deter the manufacture and dissemination of dangerous products, and to exercise its authority over tortfeasors acting within its jurisdiction." *Stanton*, 844 P.2d at 1023.

386. *See Stanton*, 866 P.2d at 20.

387. *See id.* at 21-23.

388. *See id.* at 26.

389. *See id.* at 17.

390. *See id.* at 24 (citing *Stanton*, 844 P.2d at 1019).

391. *See id.* at 18 n.2 (citing WASH. REV. CODE. §§ 7.72.010-060 (1992) (Washington's Products Liability Act)).

392. *See id.* at 26.

393. *See id.* (citing WASH. REV. CODE. §§ 7.72.010(6), 7.72.020(2) (1992)).

394. *See id.* at 25. The *Stanton* court observed that "[t]he [Washington Products Liability Act] does not conflict with the holding in *East River*." *Id.*

395. *See id.* at 27 (citing *Washington Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199, 1210 (Wash. 1989)).

396. *See id.* at 25.

maritime rule on economic loss."³⁹⁷

In a New Jersey case, the intermediate appellate court in *Goldson v. Carver Boat Corp.*³⁹⁸ also decided that the substantive remedies provided by state law must give way to the governing general maritime law.³⁹⁹ At a public sale, Goldson bought a powerboat valued at \$175,000 for \$125,000 in "as is" condition.⁴⁰⁰ Two months later, the boat caught fire while docked at a marina.⁴⁰¹ After determining the cause of the fire,⁴⁰² the plaintiff filed suit and advanced theories of negligence, strict liability, and warranty against the boat builder and engine installer.⁴⁰³ The court held that tort recovery was barred because the suit was for purely economic losses to the vessel itself,⁴⁰⁴ observing that "[t]he substantive maritime law relating to tort recovery of economic loss is abundantly clear"⁴⁰⁵ and affirming the trial court's grant of summary judgment in favor of the defendant.⁴⁰⁶

These decisions illustrate how a state court should apply the distinctive remedies afforded under the general maritime law as uniformity principles promote decisional consistency.⁴⁰⁷ There are only a few reasons why a state court should apply its own remedy rather than the governing substantive rule of admiralty:⁴⁰⁸ (1) the absence of any guiding admiralty principle,⁴⁰⁹ (2) the use of state law would merely impact a predominately local concern,⁴¹⁰ or (3) the use of state law to supplement an inadequate rule provided by

397. *Id.* at 28.

398. 707 A.2d 193 (N.J. Super. Ct. App. Div. 1998).

399. *See id.* at 198, 201.

400. *See id.* at 194.

401. *See id.* at 194-95. After completing a "long hard run," the plaintiff docked the boat. *Id.* While the vessel had performed well during transit, the boat owner observed that a spark emanated from the engine compartment shortly after docking. *See id.* After opening the hatch, the boat caught on fire and was severely damaged. *See id.* at 195.

402. *See id.* at 195. The plaintiff's expert determined the cause of the fire and loss of the boat was "the improper installation of the [boat's] engine and its proximity to the decking." *Id.*

403. *See id.*

404. *See id.* at 198.

405. *Id.*

406. *See id.*

407. *See Maryland Dep't of Nat. Resources v. Kellum*, 51 F.3d 1220, 1226 (4th Cir. 1995).

408. *See Burrell, supra* note 131, at 65.

409. *See id.*

410. *See id.*

the substantive admiralty law.⁴¹¹ Although few state courts have faced this issue, they would likely follow the *Stanton* and *Goldson* decisions by adhering to federal admiralty precedents.⁴¹² However, one state supreme court has been "relatively bold in asserting the applicability of state law in maritime cases."⁴¹³

In *Green v. Industrial Helicopters, Inc.*,⁴¹⁴ the Supreme Court of Louisiana extended the "maritime but local concern" doctrine, which had been historically grounded in workers compensation cases,⁴¹⁵ to strict liability.⁴¹⁶ "As a matter of logic and legally permissible principle[.]" the state's highest court asserted that it could "afford a remedy not traditionally found in the maritime law, provided that the remedy neither conflicts with substantive maritime law nor impermissibly interferes with the requirement of uniformity."⁴¹⁷ Because *Green* dealt with personal injuries sustained during the crash landing of a helicopter into the Gulf of Mexico approximately 150 miles offshore of the Louisiana coast,⁴¹⁸ the facts fell into an interstitial space between substantive maritime law and applicable state law.⁴¹⁹ Therefore, the supreme court permitted the plaintiff to recover under the state strict liability statute⁴²⁰ as a supplement to the general maritime law, which provided no clear remedy.⁴²¹

Relying on *Green*, Louisiana's lower courts have extended *Green*

411. *See id.*

412. *See Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 25 (Wash. 1993). *But see Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 638-39 (La. 1992) (holding that predominately local interests mandated application of state law instead of substantive maritime law). *See also Burrell*, *supra* note 131, at 69 (noting that even where "local elements predominate," the use of this principle to apply a state law remedy "may be extremely disruptive to uniformity because they can be used as authority in subsequent cases to work harm to established maritime rules.").

413. Robertson, *supra* note 82, at 703 (citing *Green*, 593 So. 2d at 638-39).

414. 593 So. 2d 634, 636 (La. 1992), *cert. denied*, 506 U.S. 819 (1992).

415. *See CALIFORNIA PLEASURE BOATING LAW*, *supra* note 136, at 336 ("Most of the case law on the 'maritime but local' doctrine arose out of attempts to apply workmen's compensation statutes to maritime employment."). According to one writer, even though "[t]hese cases are instructive[.]" they are of limited direct application to pleasure boating enthusiasts." *Id.*

416. *See Green*, 593 So. 2d at 643-44.

417. *Id.* at 639.

418. *See id.* at 635-36.

419. *See id.* at 641-42.

420. *See id.* at 636 (citing LA. CIV. CODE ANN. art. 2317).

421. *See id.*

to encompass marine products liability claims,⁴²² although none have yet reached a case with only economic losses. By permitting recovery under its state strict liability statute, Louisiana and its state courts are disregarding the *East River* mandate. While distinguishable on its facts from *Sherman* and *Reliance Insurance Co.*, these Louisiana cases could form the basis for an unwarranted and potentially harmful variance in admiralty law's uniformity principle.⁴²³

B. Recovery in Maryland's Courts

The contradictory signals sent by the Maryland federal courts are not surprising. The *Sherman* court's result conforms with the plain language in *East River*, which clearly referred to the arms-length transaction of sophisticated shipbuilders, shipowners, and charter parties.⁴²⁴ Whether the *East River* Court envisioned that its mandate would preclude recreational vessel consumers from recovering purely economic losses is debatable.⁴²⁵ This is particularly true in light of the Court's subsequent modification of *East River* in *Saratoga*—yet another case involving a sophisticated shipbuilder and experienced fishing vessel owners.⁴²⁶ Therefore, the *Saratoga* Court's reasoning arguably did not reach consumer recreational vessel transactions either.⁴²⁷

On the other hand, there is ample authority to refrain from making a distinction between commercial and noncommercial ves-

422. See *Brodtmann v. Duke*, 708 So. 2d 447, 452 (La. Ct. App. 1998) (considering the death of three passengers on a 37 foot cabin cruiser stemming from carbon monoxide emitted from a corroded marine generator exhaust); *Zeller v. Olympic Marine Co.*, 692 So. 2d 1172, 1175 (La. App. Ct. 1997) (addressing an injury caused by a defective barge loading system where wire line caught cleat on barge and snapped, but providing no recovery under either state or admiralty law); *Mayo v. Nissan Motor Corp.*, 639 So. 2d 773, 784-85 (La. App. Ct. 1994) (involving a failure to warn and holding that state law could supplement *East River*).

423. See *supra* note 152 and accompanying text.

424. See *supra* notes 351-57 and accompanying text. Judge Nickerson's analysis was not followed by any other court, despite the readily distinguishable difference between the vessel's charterers in *East River* and the yacht owners in *Sherman*. See *Karshan v. Mattituck Inlet Marina & Shipyard*, 785 F. Supp. 363, 365 (E.D. N.Y. 1992).

425. The express language of the *East River* Court's holding referred to commercial users and did not mention recreational vessels at all. See *supra* text accompanying note 307.

426. See *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 877 (1997).

427. See *id.* at 883.

sels.⁴²⁸ Even in the determination of subject matter jurisdiction, one of the most fundamental determinations in the evaluation of a maritime claim, all courts in admiralty must disregard distinctions based on the vessel's use.⁴²⁹ Moreover, the *East River* Court's rationale that dissatisfaction with a commercial vessel and the corresponding reduction of any benefit of the bargain is best understood as a warranty claim⁴³⁰ applies with equal force to consumers of recreational vessels.⁴³¹ Therefore, the *Reliance Insurance Co.* court properly refused to excuse the parties from their bargain because "little distinguishes a commercial purchaser of a maritime vessel from a consumer, [as] pleasure boat purchasers [generally] are sophisticated and perfectly capable of negotiating the terms of the[ir] vessel purchase."⁴³²

The consequences of applying the *East River* doctrine can be harsh, considering the protections afforded under state law. Section 402A of the *Restatement (Second) of Torts* was adopted by the Maryland Court of Appeals to protect consumers from the unreasonable risk

428. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982) ("The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity.").

429. See *supra* notes 141-46 and accompanying text.

430. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872-74 (1986).

431. See *Karshan v. Mattituck Inlet Marina & Shipyard*, 785 F. Supp. 363, 365-66 (E.D.N.Y. 1992). The *Karshan* court reasoned that the *East River* Court did not limit its rationale to purely commercial transactions. See *id.* The court also quoted *East River* for the proposition that claims of this type should fall under warranty rather than tort. See *id.* at 366 (quoting *East River S.S. Corp.*, 476 U.S. at 866-68); see also *Lewinter v. Genmar Indus.*, 32 Cal. Rptr. 2d 305, 309 n.3 (Cal. Ct. App. 1994) (tracing the rationale of *East River* and observing with approval that a warranty remedy is appropriate). But see *Alloway v. General Marine Indus.*, 695 A.2d 264, 272-73 (N.J. 1997). The *Alloway* court put an interesting limitation on its preclusion of economic recovery for tort and strict liability claims under state law: "[W]e do not reach the issue of the preclusion of a strict-liability claim when the parties are of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages." *Alloway*, 695 A.2d at 273. (emphasis added). Although the *Alloway* court precluded recovery of purely economic losses on the specific facts in dispute, it did leave the door open to considering whether purely economic damages to other types of vessels, such as work boats or commercial fishing vessels, could be recovered.

432. *Reliance Ins. Co. v. Carver Boat Corp.*, No. 96-194, 1997 WL 714900, at *2 (D. Md. May 29, 1997).

of harm caused by defective products.⁴³³ Maryland courts also permit plaintiffs to recover for economic losses where the mere potential of serious personal injury exists.⁴³⁴ However, if a purely economic loss claim is heard in a Maryland court applying admiralty law, *East River's* economic loss rule and admiralty's principles may inflict severe penalties against a Maryland boater who purchases an expensive, but defective, yacht that causes no harm other than to the vessel itself.⁴³⁵

Admittedly, the principles of uniformity and consistency in admiralty adversely affect the rights of consumers who have far less experience in owning and operating their vessel than commercial vessel owners. Laypersons may lack the ability to knowingly risk shift

433. See *Phipps v. General Motors Corp.* 278 Md. 337, 352-53, 363 A.2d 955, 963 (1976) (adopting section 402A); see also *Awsumb*, *supra* note 247, at 3.

434. See *Council of Co-Owners Atl. Condominium v. Whiting-Turner Contracting Co.*, 308 Md. 18, 35, 517 A.2d 336, 345 (1986).

435. See *Reliance Ins. Co.*, 1997 WL 714900, at *3; see also *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 22 (Wash. 1993) (declining to depart from admiralty's uniformity principle and disallowing any tort recovery for economic losses that might have been available under state law). *But see* *Boatel Indus., Inc. v. Hester*, 77 Md. App. 284, 550 A.2d 389 (1988). In *Boatel*, a non-admiralty action for breach of warranty and the tort of negligent misrepresentation was brought in Maryland state court to recover for a yacht's hull failure during rough weather on the Chesapeake Bay. See *id.* at 289, 550 A.2d at 392. The *Boatel* court reversed the trial court's award of economic loss damages. See *id.* Deciding that the plaintiffs were not consumers, the court limited the remedy to repair costs. See *id.* at 296, 550 A.2d at 395. As reasoned by the *Boatel* court: "Because the Hesters suffered no physical injuries, their alleged damages being entirely economic losses, it would appear that they are likewise precluded from recovery for common law negligent misrepresentation." *Id.* at 307, 550 A.2d at 401 (citing *Flow Indus. v. Fields Const. Co.*, 683 F. Supp. 527, 530 (D. Md. 1988); *Wood Prods., Inc. v. CMI Corp.*, 651 F. Supp. 641 (D. Md. 1986); *Copiers Typewriters Calculators v. Toshiba Corp.*, 576 F. Supp. 312 (D. Md. 1983)). At least to the extent of the tort claim for negligent misrepresentation, it appears that "the determination of whether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage." *Id.* at 308, 550 A.2d at 401 (citing *Council of Co-Owners v. Whiting-Turner*, 308 Md. 18, 35, 517 A.2d 336, 345 (1986)). Once the duty of the defendant is established, "[w]here the risk is of death or personal injury the action will lie for recovery of the reasonable cost of correcting the dangerous condition." *Id.* The *Boatel* court did not need to decide this case on the basis of the *East River* doctrine because recovery for economic losses was precluded by strict application of state limited warranty law. See *id.* Had this dispute been litigated under a maritime products liability theory, the *East River* doctrine should have also barred a tort recovery.

liabilities⁴³⁶ or appreciate the complexity of the forces at work dur-

436. Of course, insurance is available to recreational vessel owners to protect themselves from potential liabilities. See *Karshan v. Mattituck Inlet Marina & Shipyard, Inc.*, 785 F. Supp. 363, 366 (E.D. N.Y. 1992) (“[V]essel owners can, and generally do, insure against losses to the value of the vessel. . . .” (citing *East River S.S. Corp., v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986))). The discrepancy lies where a knowledgeable vessel owner, such as a shipping company, has the power to negotiate equally with the vessel’s builder and component suppliers to favorably warranty their products, whereas a recreational vessel owner may not have the bargaining power. See *infra* note 443.

These differences also extend to the construction of the vessel and its subsequent use. Commercial vessels are usually built under the practiced eye of a classification society, such as the American Bureau of Shipping, and assembled with component parts inspected and certified by the Bureau. See *Matter of Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1286 (7th Cir. 1992); see also Machael A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 TUL. MAR. L.J. 75, 82-88 (1997); ELIJAH BAKER, INTRODUCTION TO STEEL SHIPBUILDING 10-11 (2d ed. 1953).

Also, commercial vessels are generally operated by a licensed master who is assisted by a crew and officers that are explicitly required to obey the master’s lawful commands. See 46 U.S.C. § 11,501(4) (1996) (enumerating penalties to be imposed on seamen for the willful disobedience of a lawful command at sea); *Maes v. Los Angeles Tanker Operators, Inc.*, 75 F. Supp. 7, 8-10 (S.D. Tex. 1948) (rejecting a claim against a shipowner and vessel for false imprisonment after the master confined the chief mate to his quarters and indicating that the chief mate’s employment contract required him to obey all lawful commands of the officer in charge of the ship). In addition, the vessel operation, manning requirements, safety inspections, and repair schedules of commercial vessels are heavily regulated. See also *Western Pioneer, Inc. v. United States*, 709 F.2d 1331, 1335-36 (9th Cir. 1983).

Conversely, recreational craft are often built in mass production facilities and sold to dealers for resale to consumers, much like the automobile industry. See *Complaint of Dillahey*, 733 F. Supp. 874, 879 (D.N.J. 1990); see also CHAPMAN, *supra* note 59, at 551. Frustrated at the ability of yacht owners to petition for exoneration from liability in what they plainly viewed as an action limited to commercial vessels, the *Dillahey* court observed: “Pleasure boating is . . . the product of a technology that can produce small boats at modest cost and of an economy that puts such craft within the means of almost everyone.” *Dillahey*, 733 F. Supp. at 879 (quoting Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 661 (1963)). Indeed, “[i]n 1995 alone, recreational vessel sales reached more than 326,600 new units.” Russell & Nikas, *supra* note 104, at 382 & n.1 (citing Marine Industry Recovery to Continue, CIT MARINE INDUSTRY OUTLOOK, June 25, 1996, at 1). Often times, the recreational vessel purchaser may be totally unfamiliar with maritime affairs and rely on the dealer to provide information, warranty service, operating expertise, and perhaps even their first boat rides. See, e.g., *Karshan*, 785 F. Supp. at 365-66.

ing a sojourn at sea, both natural⁴³⁷ and man-made.⁴³⁸ Furthermore, recreational vessel retailers and buyers may not have equal bargaining power in their transactions.⁴³⁹ Nonetheless, even if pleaded, the Maryland courts should not distinguish between consumers who purchase recreational boats and owners of commercial vessels.⁴⁴⁰ Any consumer/commercial or similar bargaining power-based distinction for maritime products liability claims entailing only economic losses should come from Congress,⁴⁴¹ either by explicit pre-

437. See DONALD A. WHELPLEY, *WEATHER, WATER AND BOATING* at vii (1961). According to one commentator:

The sailor cannot escape from the elements, neither can he ignore weather, be it good, bad, or indifferent, because it surrounds him from the time he casts off until he bends on the last line at the dock and secures. Skippers of rowboats and . . . ships share many of the same weather problems, even if on a different scale.

Id.

438. See UNITED STATES POWER SQUADRONS, *MARINE ENGINES AND EQUIPMENT* at iii (1972) ("An engine failure at the wrong time could well mean the 'death' of your boat and, more important, [the boat operator's] life may end up as a statistic in the ever-increasing list of small boat casualties.").

439. See *Reliance Ins. Co.*, 1997 WL 714900 at *2. But see *Karshan*, 785 F. Supp. at 365 (observing that the purchase of a \$480,000 yacht by a sophisticated buyer does not transform the relationship from consumer to commercial); *Alloway v. General Maritime Indus.*, 695 A.2d 264, 276 (N.J. 1997) (Handler, J., concurring) ("The consumer here is a purchaser of an expensive luxury whose bargaining power is substantially equivalent to that of the seller.").

440. Cf. *Alloway*, 695 A.2d at 272-75 (explaining that the remedy for economic loss should lie in warranty because a "tort cause of action for economic loss duplicating the one provided by the U.C.C. is superfluous and counterproductive").

441. See Gary T. Schwartz, *Considering the Proper Federal Role of American Tort Law*, 38 ARIZ. L. REV. 917, 942 (1996) ("While at the state level products liability law—at least until recently—has primarily been judicial law, at the federal level products liability law would presumably be law adopted by Congress."); see also Stephen J. Werber, *The Constitutional Dimension of a National Products Liability of Repose*, 40 VILL. L. REV. 985, 1003 (1995) ("Congress can act in the area of products liability and can preempt state law."); see also U.S. CONST. art. VI, § 2; *id.* art. I, § 8, cl. 3. Congress has considered and passed legislation dealing with a number of federal products liability issues. See Werber, *supra*, at 1003. Additionally, federal regulatory agencies have promulgated many product safety standards. See Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1214-17 (1996) (observing that "[p]roducts liability is a mixture of state tort law and federal regulation") (citing Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 177 (1989)).

emption⁴⁴² or by enabling legislation for federal regulatory action,⁴⁴³ not the courts.

This may be especially necessary in light of the recent calls for recreational-vessel propeller guards⁴⁴⁴ and the ever-increasing importance of marine design defect and failure to warn cases to admiralty law.⁴⁴⁵ Considering the strength of consumer pressure and the power of recreational boating's user associations,⁴⁴⁶ the time may be

442. See Ausness, *supra* note 441, at 1266 (suggesting that one solution is for "Congress or federal administrative agencies [to] preempt state products liability law explicitly").

443. See *id.*

444. See Propeller Accidents Involving Houseboats and Other Displacement Type Recreational Vessels, 60 Fed. Reg. 25,191 (May 11, 1995) (to be codified at 33 C.F.R. § 183) (seeking comments to determine what action may be necessary to address propeller accidents involving houseboats and other displacement-type recreational vessels). In a study to develop the background to support a federal regulation that would require propeller guards on houseboats, it was found that:

Over 31,000 boating accidents were reported to the Coast Guard for the years 1989 to 1993. The BAR [Boating Accident Report] data base indicates that 17 'Struck By Boat or Propeller' accidents involving houseboats were reported, with 16 injuries and one fatality. Three accidents resulting in three injuries were of the category, 'Struck by Boat,' and 14 were of the category, 'Struck by Propeller,' and resulted in 13 injuries and one fatality.

Id. The United States Coast Guard maintains that "[c]urrently available data does not support a need for Federal regulations to require propeller guards on houseboats." *Id.* After extending the comment period, the Coast Guard received 1,994 responses to this notice seeking comments. See Propeller Injury Prevention Aboard Rental Boats, 61 Fed. Reg. 13,123 (1996) (to be codified at 33 C.F.R. § 183). More than 1,800 of the comments received "were form letters from individuals who support the development of regulations to require the use of propeller guard technology or pump jet propulsion on vessels used in the rental houseboat industry." *Id.* at 13,124. The Coast Guard further noted that

[a]n additional 69 comments supporting the development of regulations to prevent the incidence of propeller-strike accidents were received from accident victims and their relatives, attorneys, physicians, State law enforcement agencies, manufacturers of devices designed to prevent propeller-strike accidents, and other individuals. Comments opposing regulations were received from 57 boaters, nine houseboat livery operators and marinas, members of 10 associations, committees, or councils, 13 boat and engine manufacturers, and [6] naval architects or marine consultants.

Id.

445. See Nixon, *supra* note 243, at 244-56.

446. Among the associations that advocate recreational boating safety are the Na-

ripe for a federal, statutorily-created cause of action for marine products liability to preempt state law and foster uniformity.⁴⁴⁷ As demonstrated by the contradictory results is *Sherman and Reliance Insurance Co.*, there is a potential for decisional inconsistency. Between the interests of commercial shipping (the traditional heart of admiralty law) and consumer advocates, whose interests will prevail? The inconsistency extends even further than the issue of the availability of economic damages in tort. Presently, comprehensive consumer warranty protections for recreational vessel defects causing only economic losses are already inherent in both federal⁴⁴⁸ and state statutes.⁴⁴⁹ Yet, along with commercial vessel owners, recreational buyers can avail themselves of other unique admiralty protections, such as limitation of liability actions to avoid or limit negligence.⁴⁵⁰ By with-

tional Safe Boating Council, United States Coast Guard Auxiliary, and United States Power Squadrons, Inc. See Russell & Nikas, *supra* note 104, at 383 ("In response to growing concern regarding the safety of recreational vessels, representatives of insurance trade organizations and companies, including the National Association of State Boating Law Administrators, the National Safety Council, and the National Transportation Safety Board formed the National Recreational Boating Safety Coalition.") (citing *New Coalition Seeks to Reduce Recreational Boating Casualties*, MARINE SAFETY REP., Oct. 2, 1995, at 2). The purpose of the Recreational Boating Safety Coalition is to "increase public awareness of boating safety problems and refine data collection of boating accidents, to better identify trends and possible areas for improvement." *Id.*

447. See Jeffrey White, *Does Products Bill Collide with the Tenth Amendment?*, TRIAL, Nov. 1997, at 30 & n.8 (explaining that Congress did not create a federal cause of action for products liability in the Product Liability Reform Act of 1997, but noting that it has previously introduced such a federal cause of action in other proposed and unenacted federal legislation). *But see* Stolz, *supra* note 436, at 719 (arguing that "the law of pleasure boating will develop faster and more rationally if the creative capacities of the state courts and legislatures are freed of an imaginary federal concern with anything that floats on navigable waters").
448. See *Boatel Indus. v. Hester*, 77 Md. App. 284, 305, 550 A.2d 389, 400 (1988); see also 15 U.S.C. §§ 2301-12 (1988) (Magnuson-Moss Warranty Act). As explained by 16 C.F.R. § 700.1 (1988), the Court of Special Appeals of Maryland concluded that the appellee's boat fell under the broad reach of the Magnuson-Moss Act. See *Boatel*, 77 Md. App. at 305, 550 A.2d at 400.
449. See *Boatel*, 77 Md. App. at 299-305, 550 A.2d at 397-99 (discussing MD. CODE ANN., COMM. LAW I § 9-109(1) (1995); MD. CODE ANN., COMM. LAW II § 13-101 (1990 & Supp. 1998); MD. CODE ANN., COMM. LAW II § 14-101(d) (1990 & Supp. 1998)). Under the specific facts of this case, the court held that these sections were not applicable. See *id.* at 302-05, 550 A.2d at 398-99.
450. See Complaint of Dillahey, 733 F. Supp. 874, 879 (D. N.J. 1990) (discussing the application of 46 U.S.C. App. § 183 to recreational vessels). Limitation is an admiralty device that allows judicial proceedings to limit liability to the after-

holding one type of protection while extending another based on consumer pressures, the courts could generate decisions that are counterintuitive to admiralty's consistency and uniformity principles.⁴⁵¹

Until the enactment of a federal statute or a complete change in the course charted by the Supreme Court, the state courts, including those of Maryland, must adhere to the principles and tenets of the substantive general maritime law. If a Maryland court could not provide an admiralty based remedy for economic losses, but the state law would, the Maryland courts should not be tempted to do so. With its long and distinguished history of admiralty practice in its courts,⁴⁵² Maryland should not depart from the traditional notions of uniformity and consistency in admiralty in favor of a consumerist's view.

Imagine if you will, a hypothetical case that stems from the total loss of a yacht, similar to the circumstances in *Sherman*.⁴⁵³ Assume these facts: (1) there was no personal injury and minimal "other property" losses sustained in the boat's sinking, (2) the recreational vessel was valued at less than the federal jurisdictional amount, and (3) it was manufactured by a Maryland corporation and sold by a Maryland dealer. Assume further that the suit, in which the plaintiffs allege that the boat was defective, was filed in one of Maryland's circuit courts, and the lack of any reason to extend federal jurisdiction precluded removal. Which economic loss principle, the harsher federal rule barring recovery absent personal injury or other property losses or Maryland's balancing-of-harm rule, should govern?

Observing the erosion of uniformity signaled by some Supreme Court's⁴⁵⁴ precedent,⁴⁵⁵ as well as the *Green* and *Sherman* court's decisions,⁴⁵⁶ the Maryland court could arguably allow a recovery under the economic loss rule fashioned by its own appellate courts.⁴⁵⁷ In

accident value of the vessel or even exonerate the boat owner from any liability under certain conditions. See SCHOENBAUM, *supra* note 37, §§ 13-1 to 13-2 & 761 n.8.

451. *But see* *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 22 (Wash. 1993) (declining to depart from admiralty's uniformity principles).

452. *See generally* OWEN & TOLLEY, *supra* note 45, at 7-11.

453. *See supra* Part VII.A.

454. *See* *Thompson*, *supra* note 17, at 224.

455. *See supra* notes 337-356, 414-23 and accompanying text.

456. *See supra* notes 374.

457. *See supra* Part III.C.

contrast, the federal scheme, whether by preemption or uniformity, barring a tort recovery seemingly propagates an unnecessarily severe result, especially in view of safety at sea concerns. Nevertheless, should this situation ever present itself in a Maryland state court, that court must look beyond the borders of its own state and the boundaries of its own jurisprudence to guide its result.⁴⁵⁸

IX. CONCLUSION

Maryland is abundantly blessed with the Chesapeake Bay and its seacoast. The recreational boating population attracted to its beauty, however, can significantly pressure Maryland's legal community to find solutions that are seemingly more equitable to a recreational vessel consumer's economic losses when measured against the harsher remedies available in admiralty.⁴⁵⁹ While the commercial maritime vessel operator and the recreational boater-consumer are factually distinguishable in many aspects,⁴⁶⁰ uniformity should preclude any legal distinction in a marine products liability action even if state law grounds are advanced.⁴⁶¹

The owner whose pleasure boat was lost due to failure of a defective marine product may not care about uniformity principles of admiralty in favor of finding a remedy for the purely economic loss suffered.⁴⁶² However, those very same admiralty principles gave rise to the insurance that may well have afforded protection for that loss.⁴⁶³ The legal concern lies, nonetheless, not with the choice of law available in a federal forum or a state court,⁴⁶⁴ but with the patchwork of differing law and available remedies in different jurisdictions.⁴⁶⁵ Clearly, this offends the long tradition of uniformity in admiralty jurisprudence.⁴⁶⁶

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458. *See Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 26 (Wash. 1993).

459. *See supra* notes 311-13, 373-78 and accompanying text.

460. *See supra* notes 345-52 and accompanying text.

461. *See Stanton*, 866 P.2d at 26.

462. *See supra* Parts VII.A & B.

463. *See supra* Part VII.B.

464. *See supra* Part IV.

465. *See supra* Part III.C.

466. *See supra* notes 151-52 and accompanying text.