

# The Proposed Restatement of the Law of Marine Insurance

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## I. INTRODUCTION

When maritime lawyers in the United States consider the most pressing problems in the law of marine insurance today, it is not the substantive issues of governing law that come most readily to mind. Simply identifying the source of the governing law instead causes the greatest difficulties. Under the U.S. Supreme Court's *Wilburn Boat* decision, marine insurance questions in the United States may sometimes be resolved by reference to federal maritime law but often will be controlled by the law of one of the fifty states.

Unfortunately, the Court has provided virtually no guidance on how to decide whether federal or state law should apply in any given situation, or how to decide which state's law should apply when federal law does not. As a result, guidance on the resolution of these vertical and horizontal choice-of-law questions has come primarily from the lower federal courts—and the approaches accordingly differ depending on the region of the country in which the litigation arises. Among the uncertainties with which insurers and their assureds must deal, therefore, in addition to the central uncertainty as to whether a covered loss will occur, is the uncertainty as to what substantive rule will resolve any dispute that may arise between the contracting parties.

Although almost everyone agrees that *Wilburn Boat* has created problems, there is less agreement on the appropriate response. Suggestions have included calls for judicial reconsideration of the decision, a one-sentence federal statute simply overruling the case, and a comprehensive federal statute (following the British and Commonwealth models) to codify the substantive law of ocean marine insurance.

I fear that none of these solutions, despite their merit, is likely to succeed. I have therefore proposed that the American Law Institute (ALI), in cooperation with the Maritime Law Association of the United States (MLA), undertake a *Restatement of the Law of Marine Insurance*. Although such a project could not correct all the damage that *Wilburn Boat* has produced, it has the best chance of bringing order and predictability to a vitally important area of commercial law. The MLA is currently moving forward with this suggestion.

## II. GENERAL BACKGROUND

Understanding the *Wilburn Boat* problem (and the proposed *Restatement* solution) requires some basic background in U.S. constitutional law and the law of federal courts. In view of the large number of non-lawyers and overseas lawyers who attend the Houston Marine Insurance Seminar, it may well be helpful to provide a brief overview of the necessary background—even though

the discussion here should already be familiar to all of the U.S. lawyers in attendance.

The third clause of article III, section 2 of the Constitution extends the federal judicial power "to all cases of admiralty and maritime jurisdiction." This provision, as implemented by Congress, gives the federal courts the power to decide cases that fall within the "admiralty and maritime jurisdiction." It has also been construed to give the Supreme Court and the lower federal courts the "power and responsibility . . . for fashioning the controlling rules of admiralty law." In conjunction with the Constitution's "Necessary and Proper Clause," it has also been held to empower Congress to "alter, qualify, or supplement [admiralty and maritime law] as experience or changing conditions might require."

When the Constitution was adopted, it was not self-evident that marine insurance cases were within the federal "admiralty and maritime jurisdiction." In the early leading case of *De Lovio v. Boit*, however, Justice Story, sitting as a circuit justice, wrote a long and detailed opinion examining admiralty jurisdiction, and holding that actions on marine insurance contracts are indeed "admiralty and maritime" cases. Over half a century later, the full Court confirmed this conclusion, and it has not been seriously questioned since. As a result, it is generally accepted that the federal courts have the power to decide marine insurance cases, and that both Congress and the federal courts have the power to fashion governing rules of substantive marine insurance law.

Despite the undoubted power of the federal government in "admiralty and maritime" cases, the First Congress also reserved a role for the states. The First Judiciary Act, which created the federal district courts and conferred admiralty jurisdiction upon them, expressly recognized a plaintiff's right to bring most maritime causes of action in nonadmiralty courts—including state courts. In pertinent part, the 1789 formulation was as follows:

The district courts . . . shall . . . have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . .

The "saving to suitors" clause has been interpreted as a significant qualification on the "exclusiv[ity]" of the federal grant. If a state court has the power (under its own jurisdictional rules) to decide a marine insurance case—and it typically will—then Congress has preserved that power, notwithstanding the federal district court's otherwise "exclusive original cognizance" of the matter.

The existence of state court jurisdiction, however, does not necessarily mean that state substantive law applies. If a maritime case is brought in state court under the "saving to suitors clause," the state court is theoretically obligated to apply the same substantive law that the federal admiralty court would have applied. And the traditional presumption in U.S. maritime law is that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law." Prior to

*Wilburn Boat*, it was widely presumed that federal maritime law would apply in preference to inconsistent state law in an action involving marine insurance.

In the last half-century, the traditional presumption in favor of the application of substantive federal maritime law in all maritime cases, wherever they might be decided, has eroded considerably. Justice Frankfurter, writing for the Court in *Romero v. International Terminal Operating Co.*, raised a warning against the presumption in the following general terms:

"[T]o claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce."

More recently, the Court has upheld the application of state law in such diverse contexts as maritime pollution, transnational *forum non conveniens*, and the death of a recreational boater in territorial waters. But to this day, *Wilburn Boat* remains the most striking example of the Supreme Court's recognition of the applicability of state law in an admittedly maritime case.

### III. THE *WILBURN BOAT* CASE

The *Wilburn Boat* decision had its origin in some very mundane facts. In May 1947, the Fireman's Fund Insurance Company issued a marine hull policy on the *Wanderer*, a small houseboat. The policy was issued in Illinois through an Illinois broker to assureds who resided in Iowa and Illinois. It provided, among other things, that the vessel could neither be sold nor pledged without the insurer's consent. Furthermore, the vessel could be used "solely for private pleasure purposes," and could not be "hired or chartered" without the insurer's permission.

In June 1948, three brothers—Glenn, Frank, and Henry Wilburn—purchased the *Wanderer* for \$9,000. The insurer indorsed the policy in favor of the new owners doing business as a partnership known as "Wilburn's Boat Company." The purchasers, who were from Denison, Texas, proceeded to move the vessel to Lake Texoma, an artificial lake which lies (as its name suggests) on the border between Texas and Oklahoma. A policy indorsement authorized the trip and provided that after the move the *Wanderer* would be confined to Lake Texoma.

In September 1948, the three brothers sold the *Wanderer* to the "Wilburn Boat Company," an Oklahoma corporation that they owned. The insurer did not consent to this sale. On three occasions, the Wilburn brothers or their corporation pledged the vessel to secure promissory notes. The insurer did not consent to these transactions. Finally, the owners had leased the vessel on several occasions and had carried passengers for hire. Although a survey sent to the insurer in February 1949 partially disclosed the owner's planned commercial use of the vessel, the insurer did not give its required permission. It was undisputed that these actions breached the policy.

On February 25, 1949, a fire destroyed the *Wanderer* while it was moored approximately 300 feet (90 meters) off the Oklahoma shore of the lake. The

origin of the fire remains unknown, but it was undisputed that the policy breaches noted above did not cause the loss. The Wilburn brothers thus made a claim under the policy, which by its terms covered loss due to fire. Fireman's Fund, however, declined to pay the claim due to these breaches (and returned the premiums that had been paid). It argued that under the general maritime law of marine insurance, an assured's breach of a policy warranty permits the underwriter to avoid payment of a claim for a subsequent loss—even if the breach was unrelated to the loss. The Wilburns, on the other hand, argued that Texas law, rather than the general maritime law, governed the policy. Under Texas law, the policy breaches relating to the sale and use of the vessel would not defeat coverage unless they had contributed to the loss, and the anti-encumbrance provision in the policy would be ineffective.

In June 1949, the litigation odyssey began when the three brothers and their company sued the Fireman's Fund Insurance Company in a Texas state court, claiming over \$40,000 under the insurance contract. Fireman's Fund, asserting diversity jurisdiction, successfully removed the case to federal district court the following month. In December 1951, the district court ruled that federal maritime law governed and that—because of the "literal compliance" rule for warranties—the Wilburns were not entitled to any recovery. On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed. Because of the "[i]mportance of the questions involved," the Supreme Court "granted certiorari," meaning that it agreed to hear the case.

On February 28, 1955, just over six years after the fire, the Supreme Court reversed the Fifth Circuit's decision and remanded the case to the district court "for a trial under appropriate state law." Justice Black wrote the Court's opinion. Justice Frankfurter concurred in the Court's judgment, but rejected much of Justice Black's reasoning. Two justices dissented (in an opinion by Justice Reed).

Justice Black, having noted that there was no relevant federal legislation, began his analysis by posing two questions: "(1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?" In answering the first question, Justice Black distinguished or ignored several cases that appeared to establish the literal compliance rule. He thus concluded that the rule "has not been judicially established as part of the body of federal admiralty law in this country." He did not offer any guidance on what is required for a rule to become "judicially established," or any justification for why the question was worth asking in the first place.

Turning to the second question, Justice Black explained that the Court declined to fashion a "new" admiralty rule for two principal reasons. First, the regulation of insurance has historically been a matter for the states (even if the federal government does have the power to regulate insurance if it chooses to do so), and Congress has recognized and acted upon this division of responsibility. Second, even if the Court wished to fashion a new rule, doing so would be a complex and difficult task that courts are poorly equipped to undertake. In the

case before it, for example, Justice Black was clearly uncomfortable with the "harsh" literal compliance rule, but apparently felt uncomfortable in choosing a new rule to replace it. Deferring the problem to Congress or the states, with their greater expertise and experience, was much easier.

Justice Frankfurter wrote an opinion "concurring in the result," which meant that he accepted the Court's judgment (ordering a remand to decide the case under appropriate state law) but that he was unable to accept the reasoning in the majority opinion. In essence, he argued for a middle ground under which cases requiring a uniform rule throughout the country would be governed by federal maritime law, while cases of essentially local interest could be governed by state law. Because he thought this case, arising on an inland lake, was of merely local interest, he had no objection to the application of state law. But because he thought the reasoning in the majority opinion was unnecessarily broad, and could be "directed with equal force to oceangoing vessels in international maritime trade," he refused to join—and, indeed, harshly criticized—the majority opinion.

Justice Reed, joined by Justice Burton, dissented. He hinted that he would be prepared, as a matter of federal maritime law, to modify the literal compliance rule "insofar as the breached warranty does not contribute to the loss." Until Congress or the Court modified the rule, however, he argued that it should be applied in all maritime cases to preserve uniformity.

#### **IV. THE IMPACT OF *WILBURN BOAT***

*Wilburn Boat* creates problems on many levels, most of which go to the need for predictability and uniformity in the law governing marine insurance contracts. Since *Wilburn Boat*, in almost every case it has been an issue for debate whether state law or federal maritime law governs a particular question. With virtually no guidance from the Supreme Court, the lower courts are hopelessly divided in their attempts to answer this vertical choice of law question. Even when a court decides that state law should apply, it is often a complicated and difficult question to decide *which* state's law should apply. Finally, when a court has chosen a particular state's law, there is yet a further problem in applying that state's law in the marine insurance context. I will summarize each of these problems in the following subsections.

##### **A. THE VERTICAL CHOICE-OF-LAW PROBLEM**

In the years immediately after *Wilburn Boat* was decided, it was unclear what kind of impact the case would have. Soon after the decision was announced, Professors Gilmore and Black speculated in the first edition of their treatise as follows:

[*Wilburn Boat*] may mean merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean that there is no federal maritime law at all. It may very well turn out to mean anything between these extremes.

In practice, the subsequent cases occupy a broad range between these extremes.

*Kossick v. United Fruit Co.*, which was not a marine insurance action, clarified that *Wilburn Boat* did not require state law to govern in every admiralty case. Applying federal maritime law rather than a New York statute to a contract between a seaman and his employer, the Supreme Court distinguished its earlier decision with the observation, "needless to say, the situation presented here [in *Kossick*] has a more genuinely salty flavor than that [in *Wilburn Boat*]." Some lower courts have picked up on this cue and attempted to limit *Wilburn Boat* to the maritime-but-local context, as Justice Frankfurter had suggested in his concurring opinion. Others, however, have applied *Wilburn Boat* more broadly, at least in the marine insurance context.

Commentators and lower courts have suggested several other ways to limit *Wilburn Boat*. At one end of the spectrum, some have suggested that it requires the application of state law to the effect of warranties (which was the precise issue before the Court) but not to other aspects of marine insurance, although this is a difficult distinction to defend. One district court recently read *Wilburn Boat* to say "that federal admiralty law should apply to issues that are maritime in nature and that state law should apply to issues that are common to all sorts of insurance contracts."

Although *Wilburn Boat* has had little influence outside of the marine insurance context, how broadly it should apply within that field still remains unclear. Despite widespread criticism of the decision, the judiciary has not uniformly or predictably limited or distinguished it. For every case that cuts back on the broad application of Justice Black's dicta, there seems to be another new case that extends the reach of the holding. If anything, the sporadic efforts to distinguish or limit the case have probably made the situation worse, as each of the distinctions becomes just one more variable for the parties to consider when predicting how a marine insurance suit will be resolved.

Even on questions of methodology, the lower courts are spread out along a spectrum. Courts continue to apply federal law in marine insurance cases, either because they find that there is an established federal admiralty rule or they conclude that they should fashion one. But not all courts dutifully proceed through Justice Black's two-question analysis. Indeed, the second question—should the court fashion a federal admiralty rule—is regularly ignored. Some courts ignore even the first question, apparently applying state law simply because the case before it involves marine insurance.

Two recent cases—drawn from opposite ends of the spectrum—help to illustrate the range of views that exists in the federal courts. In *Aasma v. American Steamship Owners Mutual Protection & Indemnity Association*, personal injury plaintiffs with default judgments against a bankrupt shipowner brought direct actions against the owner's former P & I Clubs, which had provided coverage during the period that the injuries arose. The Clubs asserted defenses under their

"pay-to-be-paid" clauses. The Sixth Circuit concluded that no existing federal admiralty rule addressed the validity of such clauses, but that the need for a single, uniform rule in this "uniquely maritime" context justified the fashioning of a federal admiralty rule. The court thus recognized the validity of a "pay-to-be-paid" clause as a matter of federal maritime law.

In *Albany Insurance Co. v. Anh Thi Kieu*, the Fifth Circuit took a very different approach. The principal issue was whether the doctrine of utmost good faith was an established rule of federal admiralty law. Supreme Court decisions in the nineteenth century had recognized the doctrine. Fairly recent decisions in the Fifth Circuit—including the decision in *Wilburn Boat* on remand from the Supreme Court—had not only explicitly recognized the doctrine, but had declared that it was "solidly entrenched" or "established" in the federal law of marine insurance. The *Anh Thi Kieu* court distinguished all of these cases, however, and held that the "doctrine is entrenched no more."

## B. THE HORIZONTAL CHOICE-OF-LAW PROBLEM

The *Wilburn Boat* Court gave virtually no guidance on how to decide whether federal or state law should apply in any given situation, but it at least offered the illustration of its own analysis concerning the literal compliance rule. The Court gave absolutely no guidance on how to decide which state's law should apply when federal law does not. The Court simply noted that the horizontal choice-of-law problem was not before it, and remanded the case to permit the lower courts to resolve the issue.

The complications and difficulties are well illustrated by a quartet of marine insurance decisions within a single circuit over just six years. In 1985, the Fifth Circuit held that "the law of the state where the marine insurance contract was issued and delivered is the governing law." Two years later, the same court wrote, "the law of the state in which the [marine insurance] contract was formed" governs. Another two years later the court announced a different rule: "In identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues." Two years after that, the court reviewed the field and, in an attempt to reconcile the cases, declared that it would follow a two-step process. In step one, the court identifies the states in which the policy was formed, issued, and delivered. In step two, it decides which of these states has the greatest interest in the application of its law. But none of these fairly recent statements represents the Fifth Circuit's choice-of-law approach on remand in *Wilburn Boat* itself.

## C. APPLYING STATE LAW IN THE MARINE INSURANCE CONTEXT

When a court has chosen a particular state's law, there is rarely a relevant judicial decision or statute in the maritime context. Indeed, many states explicitly exclude marine insurance from significant portions of their insurance legislation. The court must therefore resolve a marine insurance dispute with reasoning designed for automobile or homeowners' insurance. In *5801 Associates, Ltd. v.*

*Continental Insurance Co.*, for example, a decision involving the sinking of a barge in the open seas off the coast of South Carolina, the federal court felt compelled to look to the law of Missouri. Finding no marine insurance decision on point, it followed an automobile insurance decision.

An even more striking example of this problem can be found in the litigation between Exxon and its underwriters to determine coverage under a global corporate excess policy for hundreds of millions of dollars of the clean-up expenses following the *Exxon Valdez* oil spill. One issue in the coverage dispute was whether the loss was fortuitous. The underwriters argued that the loss was not fortuitous because it was caused by Exxon's reckless conduct in permitting its vessel-owning subsidiary to employ a known alcoholic as the captain of the *Exxon Valdez*. Exxon not only denied that it had been reckless, it also argued that the loss in question would have been fortuitous even if it had been reckless. Exxon contended that the fortuity rule was the same under any law (state or federal) that might be relevant, but it had filed suit in a Texas state court and taken the position that Texas law generally applied to the case as a whole. Thus Exxon needed authority in support of its contention that Texas law permits insurance coverage for the unforeseen consequences of reckless or even intentional acts. In the absence of any statute or decisions in the marine insurance context, its principal authority on this central issue was a decision of the Texas Supreme Court addressing whether a homeowners' policy covered liability for transmitting genital herpes to a sexual partner.

#### **V. PREVIOUSLY SUGGESTED SOLUTIONS TO THE *WILBURN BOAT* PROBLEM**

##### **A. SUPREME COURT RECONSIDERATION OF *WILBURN BOAT***

Inasmuch as the *Wilburn Boat* problem is a creation of the Supreme Court, the Court might seem to be a logical candidate to solve the problem—most obviously by overruling the decision. The MLA and commentators in the field have suggested this solution, and several petitions for certiorari have presented the opportunity in recent years. While the Court has indeed overruled problematic maritime law decisions in the past, several factors make this an unlikely solution in the *Wilburn Boat* context.

Perhaps the best indication that the Court has no plans to fix its own mistake is its utter lack of interest in any aspect of marine insurance. Although in some areas of maritime law the Court seems to have adopted an attitude of "if at first you don't succeed, try, try again," the Court has not heard a marine insurance case since *Wilburn Boat* itself (forty-four years ago).

Even if the Court were to revisit the *Wilburn Boat* issue, the result might well be the same. The recent trend in the Court's general maritime federalism jurisprudence, illustrated in such cases as *Yamaha* and *American Dredging*, has been to give even greater scope to state law in maritime cases. And the Court has shown no desire to reduce the states' role in insurance.

Finally, even if the Court were to overrule *Wilburn Boat*, this might not fully solve the problem. For the last forty-four years, the general maritime law of marine insurance (the federal law) has failed to develop because in most cases federal courts have either applied principles that were already settled in 1955 or looked to state law (without the authority to change it or make it a part of the general maritime law). As George Waddell has explained, in a paper delivered to the Houston Marine Insurance Seminar in 1993, "to a great extent the federal law of marine insurance is permanently frozen where it was in 1955." If the Supreme Court were to announce that the lower courts should start applying federal law again, they would have to make up for over forty years of inaction and develop the modern rules that are needed today. Although the task could be accomplished, it would take time, and meanwhile there would still be a lack of predictability and uniformity—particularly if the Supreme Court left the task entirely to the lower federal courts.

## B. DISTINGUISHING OR LIMITING *WILBURN BOAT* IN THE COURTS

In a common law system, distinguishing or limiting awkward precedents is a familiar method for indirectly accomplishing what cannot (or will not) be done directly. *Wilburn Boat* is a prime candidate for such treatment. Indeed, Justice Frankfurter's separate opinion encouraged subsequent courts to limit *Wilburn Boat* to the "maritime but local" context, on the basis that the casualty at issue took place while the vessel was confined to an artificial inland lake. In *Kossick*, the full Court seemed to endorse a maritime-but-local limitation on *Wilburn Boat*, while commentators and lower courts have suggested other means of limiting *Wilburn Boat*. As discussed above, however, efforts to solve the *Wilburn Boat* problem in this fashion have failed—or even made the situation worse.

Even if the lower courts intelligently limited *Wilburn Boat*, problems would continue. The most plausible narrowing approach—adopting the "maritime but local" distinction suggested by Justice Frankfurter and endorsed in *Kossick*—would often be difficult to apply in practice. In *Wilburn Boat* itself, after all, the *Wanderer* was operating in interstate commerce (between Texas and Oklahoma) and passed through five states while covered by the insurance policy in question. Was that scenario truly "local"? Although limiting *Wilburn Boat* would probably be preferable to current law in most respects, in many ways a "maritime but local" doctrine here would probably be as unsatisfactory as it has been in other contexts.

## C. THE PROPOSED ONE-SENTENCE STATUTE OVERRULING *WILBURN BOAT*

In 1991, the MLA adopted a resolution calling for the enactment of a single-sentence federal statute to overrule *Wilburn Boat*. The proposed statute simply provided, "The interpretation and effect of policies of marine insurance and other insurances of marine risks shall be governed by the general maritime law and statutes of the United States." Congress clearly has the power to federalize marine insurance, as *Wilburn Boat* itself

reaffirmed. This approach also has the virtue of simplicity; it overrules *Wilburn Boat* and does nothing more. And the provision is short enough that its supporters could plausibly hope to have it tacked onto a more substantial bill and passed without extensive discussion.

Whatever its virtues, in 1992 the proposal was described as "dead in the water" because no Congressman or Senator could be found to sponsor it. In 1994, the chair of the sponsoring committee reported that the proposal, "while moribund for quite some time, isn't dead yet." Whether the proposal is dead now or just grievously ill, it has not been seriously discussed in several years.

Even if Congress were willing to enact the proposed statute, it is not clear that this would solve the problem—for the same reason that a simple judicial overruling of *Wilburn Boat* might not solve the problem. The general maritime law of marine insurance has, for the most part, failed to develop during the last forty years. It would take some time to answer the unresolved questions that have been deferred to state law in the intervening years, particularly if the Supreme Court continued to ignore the subject.

#### D. THE PROPOSED U.S. MARINE INSURANCE ACT

In 1993, the MLA created an Ad Hoc Committee on the Marine Insurance Act of 1906 to study the British Act and consider how it might serve as a model for comparable U.S. legislation. The "goal [was] a federal act which will return marine insurance to maritime law." The group has approached its task with vigor. In 1995, it published a detailed study examining the extent to which U.S. marine insurance cases are generally consistent with the British Act, and has prepared a second study focusing on the more controversial cases.

In many ways, a comprehensive statute would be an ideal solution. The Supreme Court invited such a result in *Wilburn Boat* when it declared, "Congress could replace the presently functioning state regulations of marine insurance with one comprehensive Act." This solution would avoid one of the worst problems associated with a simple overruling of *Wilburn Boat*, for there would be uniform, substantive law to fill the gap created by over forty years of relative inactivity in the field in many federal courts. And lower courts would be obligated to follow a governing federal statute.

The major concern with this proposal is the utter lack of evidence that Congress would enact such a statute in the foreseeable future. Some observers believe Congress affirmatively prefers to leave marine insurance to the states. Given the limited extent to which the states actually regulate marine insurance, let alone provide rules of substantive law (or even have an interest in providing rules of substantive law), it seems implausible that Congress has such an affirmative preference. It is easier to believe that Congress may want to preserve the authority of state insurance commissions in consumer contexts, and that educating Congress on how marine insurance differs would be an expensive and time-consuming process. Even in the absence of any opposition, inertia is a

powerful force. If there is any significant opposition, which seems likely, the prospects for Congressional action would be very slim indeed.

## VI. THE *RESTATEMENT* PROPOSAL

### A. THE AMERICAN LAW INSTITUTE AND THE RESTATEMENTS

The ALI is a non-profit organization of approximately 3,500 lawyers, law professors, and judges dedicated to the reform and improvement of the law. Founded in 1923, the Institute has been highly influential in the development of United States law, primarily through its drafting of model legislation and its promulgation of "Restatements" in a broad range of subjects. To give one indication of the ALI's influence, the Supreme Court has cited the Restatements in over eight hundred cases.

A Restatement goes through several distinct stages before final approval. First, the prospective reporter prepares a prospectus to outline the project and establish its scope. The Program Committee reviews the prospectus, and the Council (the ALI's 60-member governing body) approves it. The Director (the officer responsible for managing the ALI) then appoints a reporter (or co-reporters) and an advisory committee of practitioners, legal scholars, and judges with expertise in the subject. (These experts are not necessarily ALI members.) ALI members who wish to do so may join a "members consultative group."

With the personnel in place, the central work proceeds in a series of annual cycles. The reporter prepares a "preliminary draft" covering some of the topics that will be included in the final Restatement. The ALI distributes this preliminary draft to the advisory committee and the members consultative group, which thereafter meet with the reporter for detailed discussions. The reporter revises the preliminary draft, based on this critical review, to prepare a "council draft." The reporter then meets with the Council for further review and discussion. Finally, with the Council's approval, the reporter prepares a "tentative draft" for distribution to the full ALI membership and discussion at the annual meeting. At the end of this discussion, the membership votes on the draft. In the meantime, the reporter is already working on another preliminary draft covering another set of topics, and the annual cycle is repeated.

When all of the topics have been addressed, and the full ALI membership has approved each of the tentative drafts, the reporter integrates all of the work into a final draft, which incorporates revisions adopted at annual meetings, reconciles inconsistencies, and updates references. The finished product is published as a printed volume and distributed widely.

### B. THE IMPACT OF A RESTATEMENT ON THE *WILBURN BOAT* PROBLEM

A *Restatement of the Law of Marine Insurance* could accomplish indirectly the goals that a comprehensive federal statute might achieve more directly. Although Restatements are not formally binding in most jurisdictions, they have great persuasive authority. Thus a *Restatement of the Law of Marine Insurance* could

bring some measure of uniformity and predictability to a field that desperately needs it.

The principal problem under *Wilburn Boat* is the lack of predictable choice-of-law rules. The "vertical" choice between federal and state law is unclear. Moreover, if a court determines that state law should govern, *Wilburn Boat* relegates the parties to complex rules for the "horizontal" choice among the relevant states, and these rules are particularly difficult to apply in the marine insurance context. A second major problem with *Wilburn Boat* is the impact that it has had on the development of marine insurance law. A *Restatement of the Law of Marine Insurance* could solve both problems, the first indirectly and the second directly.

Choice-of-law issues would become essentially irrelevant if the *Restatement* were always the substantive law chosen. Under *Wilburn Boat*, a court's first task is to look for relevant federal maritime law. If a court were to accept the *Restatement* as a sufficiently authoritative source (which would not be unlikely), then the *Restatement's* principles would govern and there would be no need to look to state law. Alternatively, if a court did not accept the *Restatement* as a source of federal law on a particular issue (perhaps because the principle was not sufficiently "established" or "entrenched" under the relevant circuit's precedents), then the court would either formulate a federal maritime rule to govern the case or look to state law. If the court were to formulate a new federal maritime rule, the *Restatement* would be highly persuasive as to what that rule should be. Thus there is a strong possibility that the *Restatement* principle would become established as federal law. If the court were to look to state law, it is likely that nothing specifically applicable to marine insurance would be found. Whereas federal courts today will turn to non-marine cases of questionable relevance to predict how a state's courts would decide a marine insurance issue, a *Restatement of the Law of Marine Insurance* would be a far better guide to the decision that could be expected from a state court. In other words, all of these different routes lead to the same substantive result: application of the *Restatement* principle, in one guise or another, to the case at hand.

A *Restatement of the Law of Marine Insurance* could solve the second problem—the lack of new development in marine insurance law since 1955—more directly. A *Restatement* would not be limited to describing the law as it existed in 1955, or translating the British Act to correspond to the constitutional position in the United States. Rather, the ALI would take the opportunity to update the law to govern modern circumstances, looking to state, federal, and international sources to determine the best rules available.

Some might worry that this proposal will be ineffective because Restatements have no binding authority. A judge who is unpersuaded by the *Restatement* would have no obligation to follow its principles. In my view, this is unlikely to be a significant problem. Restatements may not bind a court, but they have long had tremendous persuasive authority. In the absence of binding authority to the contrary that is directly on point (and such authority would be unusual in this field), most judges will find a Restatement to be persuasive. This is particularly

likely to be true in marine insurance, a field where most judges have no expertise and would welcome the assistance that a Restatement can provide. In other words, a *Restatement of the Law of Marine Insurance* is likely to be as effective as a federal statute in most situations, even if it does not have the same legal authority.

In some ways, a *Restatement of the Law of Marine Insurance* would even be better than a federal statute at solving the *Wilburn Boat* problems. Restatements go beyond the "black letter," which is analogous in some ways to the statutory text that would be enacted in a federal statute, to include comments that explain how the black letter should be applied, illustrations to give examples of the black letter's application, and reporter's notes to explain the process by which the black letter, comments, and illustrations were developed. Although federal statutes may have legislative history offering similar assistance to the interpretation of the statute, it is less clear what counts as legislative history, legislative history is more likely to be ambiguous, and some judges are unwilling to follow legislative history. A Restatement is also easier to update if the need arises, while amending a statute requires completion of the full legislative process.

A *Restatement of the Law of Marine Insurance* would be an ideal project for the ALI. This is a topic where the need is great, and the ALI is particularly well-suited to solve the problem. Although the law of marine insurance might be viewed as a narrow topic of interest only to specialists, it is nevertheless a sub-set of the law of contracts—a field in which the ALI has long been prominent. In any event, marine insurance is no more "narrow" or "specialized" than some of the other commercial topics that the ALI has addressed, such as suretyship or transnational insolvency. Although the ALI does not have a large body of marine insurance specialists within its membership, this should not be a barrier. The ALI membership has great expertise in related fields, and the MLA (with its expertise in this particular field) would be a willing collaborator in a *Restatement of the Law of Marine Insurance*.

## VII. CONCLUSION

Many people have worked long and hard to solve the problems created by *Wilburn Boat*, and I do not criticize their efforts. My principal criticism is that neither Congress nor the courts have taken the final step necessary to solve the *Wilburn Boat* problem. Furthermore, my proposal is entirely consistent with the earlier work that has been done in this area. If Congress or the Supreme Court simply overruled *Wilburn Boat*, for example, a *Restatement of the Law of Marine Insurance* could provide the substantive rules that the federal courts have not developed during the last forty years.

Following the publication of my earlier article proposing a *Restatement of the Law of Marine Insurance*, the MLA's Ad Hoc Committee on the subject decided that a federal Marine Insurance Act was no longer worth pursuing, and that efforts should instead focus on the *Restatement* alternative. MLA President Howard M. McCormack appointed a new Study Group, which prepared a Design Proposal for submission to the ALI earlier this year. After consideration by the

Program Committee, the ALI decided that this project is not a current priority for the Institute. But the Director encouraged the MLA to continue its efforts in this field, and to return to the ALI with a more developed proposal in a year or two. The MLA is currently considering how it will respond to this news.

If the ALI ultimately were to decide not to pursue a *Restatement of the Law of Marine Insurance*, the goals outlined here could still be achieved if the MLA (in cooperation with other interested organizations) undertook a comparable project. The disadvantage of proceeding without the ALI, of course, is that the Restatements are known and trusted by the judiciary. Even if the MLA approached a project in exactly the same way—indeed even if the MLA produced exactly the same product as the ALI would have produced (except for the title)—the MLA would not fully succeed unless the final product were generally accepted by those making the decisions. Although the MLA may be as well-known and respected as the ALI in the maritime community, very few judges have sufficient maritime experience to appreciate the position of the MLA. Thus an MLA *Digest of Marine Insurance* (or whatever title were chosen) could be a valuable project, but it would be a second-best solution compared to an ALI Restatement.

Even a second-best solution, however, is far better than the current situation under *Wilburn Boat*. In the absence of predictability and uniformity, both insurers and the parties who depend on marine insurance are unable to order their affairs with confidence as to what risks they are bearing. The costs of insurance increase, as underwriters must charge a higher premium in light of the uncertainty, but the value of the insurance is diminished, as assureds are less confident they will recover in the event of a loss. Litigation is more often necessary to resolve disputes, once again increasing the costs. Ultimately, all of these costs are borne by the consumers who purchase goods that are transported by sea—goods that are insured under marine policies, carried on insured vessels, and handled by workers whose health and safety are covered by marine insurance.

The *Wilburn Boat* problem accordingly affects everyone with a connection to the U.S. economy. Solving the problem should therefore be a priority for those who are in a position to have an impact on the question, particularly maritime lawyers and those who work in the marine insurance industry.