2008

Bareboat Charters: Can a Shipowner Limit Liability to Third Parties? Answers for Owners Attempting to Navigate the Unsettled Waters in the Eleventh Circuit

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BAREBOAT CHARTERS: CAN A SHIPOWNER LIMIT LIABILITY TO THIRD PARTIES? ANSWERS FOR OWNERS ATTEMPTING TO NAVIGATE THE UNSETTLED WATERS IN THE ELEVENTH CIRCUIT

INTRODUCTION

A bareboat charter is a contractual agreement akin to the lease of a vessel whereby most of the "customary liabilities" of the owner are shifted to the charterer.\(^1\) Some courts have raised concerns over bareboat charters—also referred to as a demise charter\(^2\)—regarding the ability of owners to use the bareboat device as a means to limit liability to injured third parties.\(^3\) In *Baker v. Raymond International, Inc.* the Fifth Circuit brought force to this concern; the court held a bareboat charter would no longer shield owners from personal liability for third party injuries caused by the unseaworthiness of a vessel, even though the owner had no control over the vessel, and regardless of whether it was the owner or charterer who created the

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1. The bareboat charter is best understood as the lease of a vehicle. The charterer is the lessee who, for most purposes of liability, is considered the vehicle's owner while in possession. See, e.g., *BLACK'S LAW DICTIONARY* 250 (8th ed. 2004); 70 AM. JUR. 2D *Shipping* § 202 (2005).

2. The terms "bareboat" and "demise" are often used interchangeably as though identical in regards to this type of charter. See 80 C.J.S. *Shipping* § 92 (2007) (stating "[a] 'demise charterer' or 'bareboat charterer' is one who contracts for the vessel itself and assumes exclusive possession, control, command, and navigation thereof for specified period, and the charterer furnishes the crew and maintenance for the vessel."). There is a technical difference between the two. See *THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW* 671 n.6, 675 n.1 (4th ed. 2007) (stating "[a] true 'bareboat' charter allows the charterer to select his own master and crew. If the owner provides the master and crew . . . the charter is a demise, although not technically a 'bareboat' charter."). When an owner's master and crew stay on the vessel subject to the charterer's control, the agreement is a demise charter. *Id.* In a bareboat charter, "the owner may also turn over the vessel to the charterer without a master and crew." *ROBERT FORCE, ADMIRALTY AND MARITIME LAW* 43 (2004). The agreement and obligations of the parties are unaffected by the term used, though courts will look harder at a demise charter to see if the owner retains any control—behavior inconsistent with an intent to create a bareboat charter by surrendering complete control and possession of the vessel. See, e.g., Sheldon A. Gebb, *Admiralty Law Institute: Symposium on Charter Parties: The Demise Charter: A Conceptual and Practical Analysis*, 49 Tul. L. Rev. 764, 768 (1975); 80 C.J.S. *Shipping* §§ 94–96 (2007). For purposes of this Note, the term 'bareboat' will be used unless the facts indicate the owner's master and crew remained onboard as part of the agreement.

unseaworthy condition.\textsuperscript{4} The \textit{Baker} decision created a split among federal circuits on the issue of liability to third parties.\textsuperscript{5} The Supreme Court declined to determine whether or not a bareboat charter would allow a shipowner to shield himself from third party liability for injuries resulting from an unseaworthy condition of his vessel.\textsuperscript{6} While the vast majority of circuits clearly support limited liability under a bareboat charter, the Eleventh Circuit has yet to indicate its position on this issue.\textsuperscript{7}

Part I of this Note provides background about bareboat charters, their uses, and how they are created.\textsuperscript{8} Part II addresses the duties owed to third parties by owners and charterers, the doctrine of seaworthiness, and the role of seaworthiness in a bareboat charter agreement.\textsuperscript{9} Part III outlines federal precedent prior to the Fifth Circuit's decision in \textit{Baker}.\textsuperscript{10} The position of the Supreme Court, and the Fifth Circuit's decision in \textit{Baker}, are addressed in Part IV.\textsuperscript{11} Part V evaluates the state of the law following the Supreme Court's reluctance to address the issue and the split created by the Fifth Circuit Court.\textsuperscript{12} Part VI reviews current Eleventh Circuit cases concerning bareboat charter agreements and its reasoning for not addressing the issue.\textsuperscript{13} Part VII offers solutions for owners and charterers seeking to clarify and protect their interests when entering a bareboat charter agreement, regardless of the jurisdiction; parties to a bareboat agreement should utilize comprehensive contractual provisions and indemnity clauses to protect themselves and ensure their expectations are met.\textsuperscript{14}

\begin{itemize}
  \item[4.] Id. at 184.
  \item[5.] See infra Parts III, IV.B, V.
  \item[6.] See infra Part IV.A.
  \item[7.] See infra Parts III, V–VI.
  \item[8.] See infra Part I.
  \item[9.] See infra Part II.
  \item[10.] See infra Part III.
  \item[11.] See infra Part IV.
  \item[12.] See infra Part V.
  \item[13.] See infra Part VI.
  \item[14.] See infra Part VII.
\end{itemize}
I. BAREBOAT CHARTERS: CREATION AND USES

Bareboat charters are a valuable device to “encourage enterprise,” allowing owners to lease the use and services of vessels which may otherwise lay dormant while charterers gain full use and control of a vessel without the expense of actually purchasing one.\(^\text{15}\) Charters are a contractual device giving parties great leeway to modify the agreements to fit their particular needs.\(^\text{16}\) More specifically, bareboat charters are useful in allowing involved parties to freely allocate the risks and costs of doing business.\(^\text{17}\)

A. Creation of a Bareboat Charter

Because a bareboat charter is not valid unless the owner transfers complete control of the vessel to the charterer, the contract should include specific language describing such a transfer as there is often a presumption against bareboat agreements.\(^\text{18}\) While courts often focus on the parties’ actions and do not require specific language to find a valid bareboat charter, language should be included in the contract to show the parties’ intent to transfer control.\(^\text{19}\) In transferring control, the owner has a duty to deliver a seaworthy vessel to the charterer.\(^\text{20}\) Although this duty is implied by law, the owner should still address seaworthiness by including a clause that the vessel is “tight, staunch, seaworthy.”


\(^{16}\) See supra note 2, at 42; see infra Part II.A; see, e.g., Gebb, supra note 2, at 774.

\(^{17}\) See infra Parts II.B, VII.

\(^{18}\) See Schoenbaum, supra note 2, at 671. The language should specify that the charterer “shall have the same authority as the owner of the vessel as to her management and the control of the officers” or that the charterer “shall have exclusive possession, control, and command of the vessel during the entire period of use... [and] shall man, victual and navigate such vessel at its own expense or by its own procurement.” 80 C.J.S. Shipping § 96 (2007); Gebb, supra note 2, at 767–68 (quoting Maritime Administration Bareboat Charter Party Agreement, 46 C.F.R. § 221.13 (1974)); Guzman v. Pichirilo, 369 U.S. 698, 700 (1962) (stating that courts are “reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship”); see infra Part I.B, note 126 and accompanying text.

\(^{19}\) See, e.g., 80 C.J.S. Shipping §§ 94–96 (2007); Guzman, 369 U.S. at 700–01 (1962); Backhus v. Transit Cas. Co., 532 So. 2d 447, 449 (La. App. 1 Cir. 1988). A contract should clearly indicate the owner, charterer, and the payment amount. FORCE, supra note 2, at 44; see infra notes 126, 139 and accompanying text.

\(^{20}\) See infra Part II.B.
strong, and in every way fitted for the service” of its intended use. 21
An owner must also protect the remaining interest in the vessel and
should insert a clause requiring the charterer to return the vessel “in
as good condition, ordinary wear and tear expected, as that in which
he received her.” 22

Moderating phrases such as “more or less” or “about” should be
included to indicate flexibility in the duration of bareboat charters,
distinguishing them from time charters. 23 An owner should also
address whether or not the charterer is allowed to sub-charter the
vessel. 24 Care is needed here so the owner does not appear to retain
any measure of control over the charterer or vessel, possibly
frustrating the creation of the bareboat agreement. 25 Arbitration
clauses are helpful to handle possible disputes. 26 The parties will also
want to include various provisions to allocate liability, insurance, and
provide for indemnity if damages are required. 27

B. Bareboat Charter Uses

Owners often use bareboat charters to lease their vessels while
limiting their liability to third parties. 28 Unlike other types of
charters, 29 a bareboat charter “substantially alters the rights and

21. FORCE, supra note 2, at 46; see SCHOENBAUM, supra note 2, at 690; Gebb, supra note 2, at 769.
22. GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY § 4-22 (2d ed. 1975). To
assure the vessel is in proper order when returned, a provision for a redelivery inspection should be
included. Id.
23. Gebb, supra note 2, at 774; see infra note 148 and accompanying text. A time charter is a charter
for a specific period where “the shipowner continues to manage and control the vessel, but the charterer
designates the ports of call and the cargo carried.” BLACK’S LAW DICTIONARY 250–51 (8th ed. 2004).
24. See FORCE, supra note 2, at 50.
25. See supra note 19; infra note 148 and accompanying text.
26. See FORCE, supra note 2, at 51.
27. See infra Part VII.
28. See supra note 15 and accompanying text.
29. The three basic categories of charters include (1) bareboat (or demise) charters, (2) time charters,
and (3) voyage charters. FORCE, supra note 2, at 42. A time charter is an agreement to lease the vessel’s
“carrying capacity” to the charterer for a specific period of time; a voyage charter is an agreement to
lease the ship for a specific voyage(s). Id. Owners in both time and voyage charters provide the crew and
are responsible for “navigation and management of the vessel . . . maintenance, repairs to the vessel,
and injuries to third parties arising from the crew’s operational negligence.” Id. at 42–43. The opposite
is true of a bareboat charter. Id.
obligations of both owner and charterer."\(^3^0\) A major reason courts allow this transfer of responsibility is a general misgiving about holding liable an owner not in control and far-removed from the operations of the vessel.\(^3^1\)

The charterer in a bareboat agreement becomes responsible for the operation of the vessel and is liable for damages to third parties or to the vessel.\(^3^2\) This alteration of rights has led many courts to carefully scrutinize bareboat charter agreements.\(^3^3\) They closely examine the parties' actions in combination with the contract terms to determine if a bareboat charter exists and was intended.\(^3^4\) Courts impose a heavy burden on owners attempting to limit liability as there is a presumption against bareboat charters.\(^3^5\) It must be clear the owner has "completely and exclusively relinquish[ed] 'possession, command, and navigation' of the vessel to the charterer" for a valid bareboat charter to exist.\(^3^6\)

Traditionally, an owner benefited from a bareboat charter agreement by using it "as a shield against in personam [sic] liability" for injuries to third parties caused by the vessel's operation.\(^3^7\) If the bareboat charter is properly executed, the charterer will be considered

\(^3^0\) Melanee A. Gaudin, Vessel Owner's Personal Liabilities for Injuries Sustained by Third Parties While Under Demise Charter: Strict Liability After Baker v. Raymond Int'l, Inc., 8 MAR. L. 121, 122–23 (1983); see also FORCE, supra note 2, at 43 (explaining that because a bareboat charter gives "possession and control of the vessel to the charterer," the charterer is then generally responsible for maintenance, repairs, and any damage the vessel causes due to negligent operation).

\(^3^1\) See SCHOENBAUM, supra note 2, at 710–11; see, e.g., Forrester v. Ocean Marine Indem. Co., 11 F.3d 1213, 1215 (5th Cir. 1993); see also Kerr-McGee Corp. v. Law, 479 F.2d 61, 63 (4th Cir. 1973) (noting because the owner in a bareboat agreement "no longer has the right to control the use of the vessel, he is no longer charged with the duties and liabilities that arise out of its ownership").

\(^3^2\) See SCHOENBAUM, supra note 2, at 676, 711.

\(^3^3\) See, e.g., Gebb, supra note 2, at 768; Guzman v. Pichirilo, 369 U.S. 698, 700 (1962); Backhus v. Transit Cas. Co., 532 So. 2d 447, 449 (La. App. 1 Cir. 1988).

\(^3^4\) See infra Part II.A.

\(^3^5\) See, e.g., Backhus, 532 So. 2d at 449; see also 80 C.J.S. Shipping § 93 (2007) (noting as courts are "reluctant" to find a bareboat agreement if a "lesser relationship" can be found, the owner "bears a heavy burden" of proof).

\(^3^6\) Backhus, 532 So. 2d at 449 (quoting Guzman, 369 U.S. at 699); see SCHOENBAUM, supra note 2, at 671; FORCE, supra note 2, at 43.

\(^3^7\) Backhus, 532 So. 2d at 449; Gebb, supra note 2, at 765.
the owner pro hac vice and thus responsible for providing a seaworthy vessel. 38

II. DUTIES TO THIRD PARTIES AND THE WARRANTY OF SEAWORTHINESS

Under maritime law, certain duties are required of vessel owners, especially regarding third parties, longshoremen, and seamen. 39 The bareboat device allows the owner to pass many of these duties along to the charterer. 40 A bareboat charterer becomes liable for the wages of the crew, "collision, personal injuries to the master, crew, and third parties, pollution damages, and for loss or damage to the chartered vessel." 41 General maritime law requires this "warranty of seaworthiness," 42 that is, a "shipowner [must] furnish a vessel that is reasonably fit for its intended purpose." 43

A. Duties: Generally

The shipowner or the bareboat charterer is "responsible for maintenance, repairs, or damages caused to third parties by the crew's negligent navigation of the vessel." 44 Thus, if harm—such as a collision—results from a negligent act, the party found to possess and

38. See, e.g., McAleer v. Smith, 57 F.3d 109, 112 (1st Cir. 1995); Gilmore & Black, supra note 22, § 4-23. An owner pro hac vice is one who "stands in the place of the owner for the voyage or service contemplated and bears the owner's responsibilities even though the latter remains the legal owner of the vessel." Matute v. Lloyd Berm. Lines, Ltd., 931 F.2d 231, 235 n.2 (3d Cir. 1991) (quoting Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 610 (3d Cir. 1948)).

39. See, e.g., Gebb, supra note 2, at 772; Force, supra note 2, at 99, 102; see infra Part II.A; see also Black's Law Dictionary 961 (8th ed. 2004) (defining a longshoreman as a "maritime laborer who works on the wharves in a port; esp., a person who loads and unloads ships").

40. See supra Part I.B.

41. Schoenbaum, supra note 2, at 676; Gilmore & Black, supra note 22, § 4-23. A claim of unseaworthiness can only be brought by seamen. See, e.g., Force, supra note 2, at 99.

42. Baker v. Raymond Int'l, Inc., 656 F.2d 173, 181 (5th Cir. 1981); see also Force, supra note 2, at 99 (noting seaworthiness includes "all parts of the vessel and its operation, including the hull, machinery, appliances, gear and equipment, and other appurtenances").


44. Force, supra note 2, at 43.
control the vessel is liable for the damages. Similarly, the owner or bareboat charterer in possession and control is liable for the actions and torts of the crew under *respondeat superior* principles.

Bareboat agreements can also affect the parties' *in personam* and *in rem* liabilities. A seaman's remedy for unseaworthiness "is *in rem* against the vessel and *in personam* against either the title owner of the vessel . . . or the owner *pro hac vice* under a [bareboat] charter." If an injury results from an unseaworthy condition, a bareboat charterer may be found liable *in personam* for damages while the owner usually is not, though the ship—and thus the owner—may be liable *in rem*. In any other charter agreement—where possession and control are not transferred—the charterer is neither liable *in rem* nor *in personam* for injuries resulting from unseaworthiness. Though bareboat charter agreements generally allow owners to shield themselves from *in personam* liability to third parties, the vessel—and therefore the owner—can still be liable *in rem* for damages not exceeding the vessel’s value.

1. Duties to maritime workers

Maritime workers are a special class and include longshoremen and harbor workers. They are granted "special status" under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Under the LHWCA, maritime workers are entitled to

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45. *Id.; see, e.g., Emery W. Harper, Admiralty Law Institute: Symposium on Charter Parties: Demise Charters: Responsibilities of Owner or Charterer for Loss or Damage, 49 Tul. L. Rev. 785, 788–89 (1975).*

46. *See Gilmore & Black, supra note 22, § 4-23.*

47. *Id. §§ 4-23, 4-24, 9–18; Force, supra note 2, at 86. In rem liability is limited in that it cannot exceed the value of the vessel and its cargo whereas *in personam* liability has no prescribed ceiling and is unlimited. Gilmore & Black, supra note 22, at 621–22.*


49. *See, e.g., Schoenbaum, supra note 2, at 711.*


51. *See, e.g., Harper, supra note 45, at 789, Schoenbaum, supra note 2, at 711; see infra note 130 and accompanying text. But see infra Part IV.B.*

52. *Force, supra note 2, at 102. See supra note 39.*

benefits from their employers for injuries or illnesses related to maritime work.54 These benefits are akin to worker’s compensation as the worker “accepts less than full damages for work-related injuries. In exchange, he is guaranteed that these statutory benefits will be paid for every work-related injury without regard to fault.”55 The LHWCA allows these employees to file suit against a vessel whose negligence injured the worker and against their employer, if the employer is the vessel’s owner or owner pro hac vice.56

2. Duties to seamen

Seamen have traditionally been afforded extra protection from the legal system due to the “special hazards” they face at sea.57 The term ‘seaman’ has no statutory definition but generally requires a (1) “connection to a vessel [or vessels] in navigation . . . that is substantial in both duration and nature; and (2) must contribute to the function of the vessel or to the accomplishment of its mission.”58 The Jones Act allows seamen to seek relief via negligence claims against their employers.59 Liability for Jones Act claims are transferred to a charterer in a valid bareboat agreement.60 The owner or bareboat charterer is therefore responsible for providing a seaworthy vessel to seamen and will be liable for the injuries of a seaman resulting from failure to provide such a vessel.61

54. See, e.g., Force, supra note 2, at 102. See generally Longshoremen's Act, supra note 53.
55. Force, supra note 2, at 102 (quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 279 (1979)). The Longshoremen's Act has specific requirements to qualify and expressly exempts seamen from coverage. See, e.g., Force, supra note 2, at 102-04.
56. See generally Force, supra note 2, at 108, 110.
57. Chandris, Inc. v. Latsis, 515 U.S. 347, 354-55 (1995) (stating “seamen 'are emphatically the wards of the admiralty'” because they “are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour” (quoting Harden v. Gordon, 11 F. Cas. 480, 485, 483 (C.C.D. Me. 1823) (No. 6,047))).
58. Force, supra note 2, at 92. Under general maritime law and statute, seamen have three main remedies for recovery; they can pursue “actions for maintenance and cure, for negligence, and for unseaworthiness of a vessel.” See generally id. at 86-102 (discussing these remedies in greater depth).
60. See, e.g., Force, supra note 2, at 96.
B. Seaworthiness

A shipowner's duty to provide a seaworthy vessel is imposed by law and is non-delegable in regards to the protections required for third parties. The seaworthiness of a ship is circumstantial but generally requires a vessel to be reasonably fit for the intended purpose of the vessel as stipulated in the charter agreement. However, the owner and bareboat charcterer involved in the agreement have full discretion to apportion liabilities as they see fit. Thus, while a bareboat charter agreement cannot alter the scope of the duty owed to third parties, it allows the owner and charterer to transfer amongst themselves any liability resulting from the duty to provide a seaworthy vessel.

III. PRECEDENT IN THE FEDERAL CIRCUITS PRIOR TO THE FIFTH CIRCUIT'S DECISION IN BAKER V. RAYMOND INTERNATIONAL

Before the Fifth Circuit's decision in Baker, the federal circuits were unified in allowing a vessel owner to limit in personam liability for third party injuries through the bareboat charter device.

A. First Circuit

In Ramos v. Beauregard, Inc., despite appellant's arguments, the First Circuit refused to hold the owner of a vessel liable for a condition of unseaworthiness that surfaced after the owner gave control of his vessel to the charterer. In Ramos, a longshoreman was injured while working on a vessel operating under a bareboat charter

62. Either the owner or charterer will be responsible for providing a seaworthy vessel to third parties; they cannot destroy that duty through contract or otherwise as it is implied by law. Gebb, supra note 2, at 772; see, e.g., FORCE, supra note 2, at 46, 99.

63. See supra note 21 and accompanying text.

64. See Kerr-McGee Corp. v. Law, 479 F.2d 61, 64 (4th Cir. 1973) (stating the parties to the charter agreement "were free to make whatever contractual allocation of risk they desired," thus they could decide the amount each would owe in the event of damages); see infra note 139 and accompanying text.

65. See Gebb, supra note 2, at 772–73.

66. See infra Parts III.A–E, IV.

agreement. The appellant filed a claim for damages against the shipowner alleging his injuries resulted from a condition of unseaworthiness and the owner was therefore liable. The appellant urged the First Circuit to overturn its precedent and allow recovery against the owner of the vessel, even though the vessel was leased under a valid bareboat charter at the time of the injury.

The First Circuit held the appellant offered no compelling reasons sufficient for the court to alter its position. The court reasoned the doctrine of seaworthiness would be greatly diminished if the owner of a vessel operating under a bareboat charter could be held liable for conditions of unseaworthiness as such accountability would impose a duty on the owner who had no control over the vessel. The court continued to allow the owner of a vessel operating under a bareboat charter to limit liability from injuries caused by unseaworthy conditions.

B. Third Circuit

The Third Circuit also held shipowners could use bareboat charter agreements as a shield against third party liability involving injuries from unseaworthy conditions. In *Haskins v. Point Towing Co.*, the Third Circuit affirmed the judgment for the defendant owner. *Haskins* involved a suit by an injured seaman against a barge owner

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68. Id. at 917; see also supra note 39.
70. Id.; see, e.g., *Vitozi v. Balboa Shipping Co.*, 163 F.2d 286, 289 (1st Cir. 1947); *Pichirilo v. Guzman*, 290 F.2d 812, 813–14 (1st Cir. 1961), rev'd on other grounds, 369 U.S. 698 (1962).
72. Id. at 918
73. *Id.*
74. *Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir. 1970); see also *Aird v. Weyerhaeuser S.S. Co.*, 169 F.2d 606, 609–10 (3d Cir. 1948) (stating though an owner is liable for a seaman's wages, when the owner uses a bareboat charter to give entire possession and control of the vessel to a charterer, the charterer becomes the owner *pro hac vice* and “assumes all the responsibilities of [an] owner with respect, inter alia, to the wages of the seamen and their wrongful discharge”); *Simko v. C & C Marine Maint. Co.*, 484 F. Supp. 401, 404 (W.D. Pa. 1980) (stating a bareboat charterer with full possession and control of a vessel is considered the owner *pro hac vice* and “stands in place of the owner for the voyage or service contemplated and bears the owner's responsibilities” (quoting *Blair v. U.S. Steel Corp.*, 444 F.2d 1390, 1391 (3d Cir. 1971))).
75. *Haskins*, 421 F.2d at 536.

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for injuries suffered from an alleged unseaworthy condition.\textsuperscript{76} As part of the holding, the court found no evidence of unseaworthiness.\textsuperscript{77} The court also stated that because the owner gave up full possession of the vessel under the bareboat agreement, the charterer "had the requisite control of the vessel . . . necessary to premise liability for unseaworthiness."\textsuperscript{78} Thus, Third Circuit precedent allowed owners to shield themselves from third party liability via the bareboat charter device.\textsuperscript{79}

C. Fourth Circuit

The Fourth Circuit held vessel owners could shield themselves from liability to third parties injured by unseaworthy conditions if the vessels were operating under bareboat charter agreements.\textsuperscript{80} In \textit{Kerr-McGee Corp. v. Law}, the Fourth Circuit stated that "[w]hen the owner of [a] vessel enters into a demise charter . . . he is no longer charged with the duties and liabilities that arise out of its ownership."\textsuperscript{81}

\textit{Kerr-McGee} involved a suit for damages from cargo that was lost when the barge transporting the cargo capsized in transit.\textsuperscript{82} The court found defective hatch covers caused the barge to sink and constituted an unseaworthy condition.\textsuperscript{83} Even though the owner was aware of the unseaworthy condition and the court explicitly recognized his failure to exercise due care, he was not held liable \textit{in personam} as the unseaworthy condition arose after the execution of the bareboat charter agreement and delivery of the barge.\textsuperscript{84}

The Fourth Circuit explained this result is required as owners no longer have the right to control the use of the vessel nor the duty to

\textsuperscript{76} Id. at 533–34.
\textsuperscript{77} Id. at 536.
\textsuperscript{78} Id.
\textsuperscript{79} See id.
\textsuperscript{80} Kerr-McGee Corp. v. Law, 479 F.2d 61, 63 (4th Cir. 1973).
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 62.
\textsuperscript{83} Id. at 62–63.
\textsuperscript{84} Id. at 63 (stating an owner whose vessel is operated under a demise charter can only be held liable for unseaworthy conditions that existed before the charter agreement was executed).
maintain it after giving total possession and control to a bareboat charterer. The normal duties and liabilities that arise out of ownership are transferred to the bareboat charterer; the court stipulated that once the bareboat charter is entered into, "the demise charterer 'becomes subject to the duties and responsibilities of ownership.'" Because the barge owner no longer had a duty of maintenance, even though the owner was aware of the unseaworthy condition, he could not be held liable for negligence as that duty and the resulting liability were transferred to the charterer.

D. Sixth Circuit

Prior to the Fifth Circuit's decision in Baker, established precedent in the Sixth Circuit held owners in a bareboat agreement were not liable to third parties for injuries resulting from a vessel's unseaworthiness. In W. G. Bush & Co. v. Sioux City & New Orleans Barge Lines, Inc., an owner and charterer entered into a bareboat agreement; part of that agreement required the owner to pay for repairs to cure an existing unseaworthy condition before delivery of the vessel. After possession was delivered to the charterer, the vessel sank while being loaded and damaged the third party's docking terminal. A finding of fact held an unseaworthy condition existed before the owner transferred possession of the vessel. The

85. Kerr-McGee, 479 F.2d at 63.
86. See, e.g., id.
87. Id. (quoting Leary v. United States, 81 U.S. 607, 610 (1872)).
88. See, e.g., Kerr-McGee, 479 F.2d at 63.
89. See, e.g., W. G. Bush & Co. v. Sioux City & New Orleans Barge Lines, Inc., 474 F. Supp. 537, 544 (M.D. Tenn. 1977); see also In re Cook Transp. Sys., Inc., 431 F. Supp. 437, 443 (W.D. Tenn. 1976) (stating a bareboat charter "in practical effect and in important legal consequence, shifts the possession and control of the vessel from one person to another" (quoting GILMORE & BLACK, supra note 22, at 673)). Because the owner in Cook Transp. Sys. retained partial control, the court found he failed to meet the burden of proving a bareboat agreement existed and thus had no "right to exoneration and/or limitation" that an owner is allowed under a bareboat charter. Cook, 431 F. Supp. at 443.
91. Id. at 539.
92. Id. at 538.
unseaworthiness of the vessel had not been cured as stipulated in the agreement and subsequently caused the vessel to sink.\footnote{Id. at 539. The vessel had been delivered to a repair facility with instruction to fix the defects and make the vessel seaworthy. Id. at 544. Both owner and charterer believed the vessel was seaworthy when the charterer took possession. Id. at 539. Still, the owner has a duty to provide a seaworthy vessel and cannot delegate that duty, even to a repair facility specifically instructed to cure the problem. Id.}

The court held the owner’s failure to deliver a seaworthy vessel made him liable for any losses sustained by the charterer that were caused by the unseaworthy condition.\footnote{Id. at 544.} However, the court also held the charterer—as a valid bareboat charter existed—was the owner pro hac vice and therefore responsible to third parties for providing a seaworthy vessel.\footnote{Id. at 544.} In upholding the ability of an owner to limit third party liability through a bareboat charter, the decision of the court resulted in the charterer paying the third party’s damages and the owner indemnifying the charterer for that same amount.\footnote{Id. at 140.}

\textbf{E. Ninth Circuit}

The Ninth Circuit has long held the charterer in a valid bareboat agreement will be liable to third parties.\footnote{See, e.g., W. G. Bush, 474 F. Supp. at 545.} In 	extit{The Beaver}, the Ninth Circuit affirmed a lower court decision barring one shipowner—the third party—from holding the charterer of a second vessel partially liable for damages after the two vessels collided where both were at fault for the collision.\footnote{See, e.g., The Beaver, 219 F. 139, 141 (9th Cir. 1915); see also Miculka v. Am. Mail Line, Ltd., 229 F. Supp. 665, 667 n.2 (D. Or. 1964) (stating a “bareboat charterer is personally liable for the unseaworthiness of a chartered vessel” (citing Reed v. S.S. Yaka, 373 U.S. 410, 412–13 (U.S. 1963))); Marr Enters., Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 958 (9th Cir. 1977) (dictum) (noting the owner’s “primary obligation” is to deliver a seaworthy vessel to the charterer; the bareboat device vests in the charterer “most of the incidents of ownership” (quoting GILMORE & BLACK, supra note 22, § 4-20)).} The owner of the first vessel claimed the charterer of the second was liable for the second vessel’s “improper navigation,” which was a contributing cause of the collision.\footnote{Beaver, 219 F. at 139–40.} The court specifically found the agreement was for a time charter and not a bareboat agreement, thus the charterer could not “be held in any
way responsible for the negligence of [the owner].” 100 While Beaver did not involve an owner claiming limited liability to a third party by means of a bareboat charter agreement, the Ninth Circuit specifically explained the requirements needed for an owner to do so. 101

IV. BAREBOAT CHARTERS NO LONGER A LIMIT ON OWNER LIABILITY: THE FIFTH CIRCUIT CREATES A SPLIT AFTER THE SUPREME COURT PASSES ON THE ISSUE

A. The Supreme Court’s Position on Bareboat Charters

The Supreme Court declined to answer the question of “whether a bareboat charter relieves the owner of liability for [the] unseaworthiness” of a vessel. 102 The Court first declined the question in the 1962 case Guzman v. Pichirilo and then again in Reed v. S.S. Yaka in 1963. 103

Guzman involved a seaman injured when a shackle broke and one of the ship’s booms fell upon him. 104 The seaman filed suit in rem against the ship and in personam against the owner to recover damages for his injuries. 105 The Supreme Court—agreeing with the trial court that no bareboat charter existed—reversed the finding of the Court of Appeals for the First Circuit. 106 The Court explained it was “reluctant to find a demise [charter] when the dealings between the parties are consistent with any lesser relationship” as such relationships would not allow an owner to “escape his normal liability” to provide a seaworthy

100. Id. at 140, 142; see supra note 29.
103. Guzman, 369 U.S. at 700; Reed, 373 U.S. at 411. Though the Court reserved this question in Reed and Guzman, prior statements of the Court indicated a bareboat agreement would limit the liability of owners to third parties. See Leary v. United States, 81 U.S. 607, 610 (U.S. 1871) (dictum) (noting “[t]here is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel . . . and consequently becomes subject to the duties and responsibilities of ownership.”); see also Gilmore & Black, supra note 22, § 9-18 (discussing in detail the decisions and reasoning in Guzman and Reed).
104. Guzman, 369 U.S. at 698.
105. Id.
106. Id. at 703.
vessel. The court stated, "[W]e need not decide here whether [a bareboat charter] relieves the owner of his traditional duty to maintain a seaworthy vessel." Reed involved a suit by a longshoreman to recover damages for injuries sustained when he stepped on a defective pallet while loading the vessel. The Supreme Court again declined to address whether or not a bareboat charter releases an owner from the duty to provide a seaworthy vessel. The Court instead found recovery was available as the Longshoremen's and Harbor Workers' Compensation Act "was not intended to take away from longshoremen the traditional remedies of the sea," thus a shipowner's duty to provide a seaworthy vessel extended to longshoremen under the circumstances of the case.

B. The Fifth Circuit Splits from Federal Circuit Precedent in Baker v. Raymond International

The Supreme Court offered little reason for declining to address whether vessel owners may limit their liability through a bareboat charter, and failed to indicate how lower courts should deal with the issue. Subsequently, the Fifth Circuit in Baker v. Raymond International, Inc. went against its own precedent and that of other federal circuits in holding an owner may not use such a charter to limit liability.

107. Id. at 700.
108. Id. The Court also declined to decide "whether [a] vessel can be held liable in rem when neither the demisee nor the owner is personally liable." Id. at 700 n.3.
110. See, e.g., id. at 411 n.1.
111. Id. at 412-13. See generally Longshoremen's Act, supra note 53.
112. See supra Part IV.A.
113. Baker v. Raymond Int'l, Inc., 656 F.2d 173, 184 (5th Cir. 1981); see supra Part III.A-E. Earlier holdings of the Fifth Circuit were in accordance with the precedents of other federal circuits. Gaspard v. Diamond M. Drilling Co., 593 F.2d 605, 607 (5th Cir. 1979) (upholding a directed verdict for a charterer against a third party's claim for unseaworthiness as the court held the agreement was for a time charter). The court noted that whether the agreement was for a time or bareboat charter was "critical" to the third party's case. Id. at 606.
The Fifth Circuit created a split with its decision in Baker.\textsuperscript{114} Baker involved a seaman who was injured while making repairs to an unseaworthy barge.\textsuperscript{115} While the court held no valid bareboat charter could exist given the facts of the case, it stated even if such a charter had existed, the court would not allow the agreement to shield the owner from liability for the vessel's unseaworthiness.\textsuperscript{116} The court defended its decision by claiming that, with the development of strict liability for unseaworthiness, it was no longer useful to "restrict[] seamen to a remedy in rem [sic] as the sole means of holding the owner liable."\textsuperscript{117} The court stated an injured third party should not have to rely on an \textit{in rem} action and the "fiction of [a] ship's personality" as a means of recovery.\textsuperscript{118} The court further claimed this decision was in keeping with the general policy of courts to protect seamen and that an "injured seaman . . . should not have to speculate on when the unseaworthy condition of a vessel arose or whether a valid bareboat charter existed."\textsuperscript{119} However, the court noted the personal liability imposed on owners for vessels operating under bareboat charters was not an unlimited liability.\textsuperscript{120}

\begin{itemize}
    \item \textsuperscript{114} Baker, 656 F.2d at 184. The decision that a bareboat charter will not shield owners from third party liability has since been upheld in the Fifth Circuit. See, e.g., Wai v. Rainbow Holdings, 350 F. Supp. 2d 1019, 1029 (S.D. Fla. 2004); supra Part III.A–E.
    \item \textsuperscript{115} Baker, 656 F.2d at 176.
    \item \textsuperscript{116} Id. at 181–82 ( "A bareboat or demise charter . . . constitutes the only form of charter that purports to invest temporary powers of ownership in the charterer and, therefore, constitutes the only conceivable basis on which the vessel owner could seek to escape liability for the unseaworthiness of his vessel."). The court also noted "[a] seaman may have recourse \textit{in personam} against the owner of an unseaworthy vessel, without regard to whether owner or bareboat charterer is responsible for the vessel's [unseaworthy] condition." Id. at 184.
    \item \textsuperscript{117} Id. (stating the "restriction functions, instead, only as a pleading trap for the unwary and as a purely fortuitous means whereby an owner may escape liability if his vessel is beyond the court's jurisdiction").
    \item \textsuperscript{118} Id. (citing GILMORE & BLACK, supra note 22, § 9-18); see supra Part II.A.2.
    \item \textsuperscript{119} Baker, 656 F.2d at 184 (stating seamen are the "wards of admiralty" (quoting U.S. Bulk Carriers, Inc. v. Arquelles [sic], 400 U.S. 351, 355 (1971))); see supra Part II.
    \item \textsuperscript{120} Baker, 656 F.2d at 184 (stating under the Limitation Act, the owner in a bareboat charter agreement who was not at fault for the unseaworthy condition can only be liable up to the value of the vessel involved). \textit{See generally} Limitation Act 46 U.S.C.A § 183 (West 2006).
\end{itemize}
V. FEDERAL CIRCUITS CONTINUE TO ALLOW BAREBOAT CHARTERS TO LIMIT SHIPOWNER LIABILITY DESPITE THE FIFTH CIRCUIT’S HOLDING IN BAKER

In light of the Supreme Court’s decision not to address the issue of whether an owner’s liability may be limited through use of a bareboat charter agreement, and despite the split created by the Fifth Circuit’s decision in Baker, the majority of circuits continue to follow the precedent established in federal circuits prior to that decision.

A. Fifth Circuit

In Backhus v. Transit Casualty Co., the First Circuit Court of Appeal of Louisiana refused to reverse its precedent that the owner of a vessel will not be held liable for conditions of unseaworthiness that surface after the owner has given over control of his vessel to a charterer. Though in the Fifth Circuit, the court followed its established precedent by holding a “vessel owner is not liable in personam [sic] for a transitory unseaworthy condition arising during the existence of a bareboat charter.” The court reasoned that when the owner in a bareboat charter agreement gives up control and possession of the vessel, such an owner should not be liable for the injuries of a party to whom the owner owed no duty.

In Backhus, the Louisiana Court of Appeal found the owner of the vessel met the “heavy burden” of establishing the existence of a bareboat charter by proving “relinquish[ment of] possession and control of the vessel... both under terms of the agreement and in

121. See supra Part IV.A-B.
122. See supra Part III.A-E; infra Part V; see also Huss v. King Co., Inc., 338 F.3d 647, 652 (6th Cir. 2003) (holding an injured seaman could not recover from a shipowner when the evidence proved a bareboat charter existed and no evidence indicated the unseaworthy condition existed before the charter since the “owner of a vessel under a demise (or bareboat) charter is liable only for unseaworthiness that pre-existed the charter”); Rose v. Chaplin Marine Transp. Inc., 895 F. Supp. 856, 860 (S.D. W. Va. 1995); Matute v. Lloyd Berm. Lines, Ltd., 931 F.2d 231, 235 (3d Cir. 1991); Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 609–10 (3d Cir. 1948).
123. Backhus v. Transit Cas. Co., 532 So.2d 447, 450 (La. App. 1 Cir. 1988); see supra Part III.A.
124. Backhus, 532 So.2d at 450 (noting the Baker decision was “contrary to the great weight of federal authority”).
125. Id. at 449–50.
fact." The court further found the conduct of the owner and charterer consistent with the intent of the bareboat charter agreement. Stating the unseaworthy condition was "clearly a transitory condition which arose during the existence of a valid bareboat charter," the court held the owner was not liable for the plaintiff's injuries.

The court further stated an owner who leases a vessel under a bareboat agreement owes a duty to deliver a seaworthy vessel. The court explained that "federal courts have taken the position that the owner is liable only for unseaworthy conditions pre-existing the charter and bears no in personam liability for those conditions arising during the existence of the charter." In other words, owners without control and possession should not be liable for unseaworthy conditions they did not create. The court in Backhus recognized the Fifth Circuit's decision in Baker was a departure from general federal precedent and declined to join in that split.

126. Id. at 449. The court in Backhus quoted the language of the agreement used by the owner to transfer complete possession and control of the vessel to the charterer as follows:

POSSESSION, USE AND OPERATION.

(a) Charterer shall man, victual, fuel, maintain, navigate and supply the Vessel(s) at its sole cost and expense and shall pay all charges and expenses of every kind and penalties levied against the Vessel(s), it being understood that Owner retains no dominion, control, possession or command during the Term, all of the same being reserved to Charterer. Id.

127. Id.

128. Backhus, 532 So.2d at 450.

129. Id. at 449–50.

130. Id. at 450 (La. App. 1 Cir. 1988); see also Matute v. Lloyd Berm. Lines, Ltd., 931 F.2d 231, 235 (3d Cir. 1991) (stating a charterer will only become an owner pro hac vice and be "treated as the owner for many purposes and ... subject to an owner's liabilities" under a valid bareboat charter, even though the court there did not find a bareboat charter existed); Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 609–10 (3d Cir. 1948) (holding that under a bareboat charter agreement, the owner may shield himself from liability for third party injuries caused by an unseaworthy condition arising after vessel delivery). But see supra Part IV.B. See generally Brophy v. Lavigne, 801 F.2d 521 (1st Cir. 1986); Kerr-McGee Corp. v. Law, 479 F.2d 61 (4th Cir. 1973); In re Marine Sulphur Queen, 460 F.2d 89, 100 (2d Cir. 1972) (dictum); Haskins v. Point Towing Co., 421 F.2d 532 (3d Cir. 1970). But see supra Part IV.B.

131. See Backhus, 532 So.2d at 450; supra Part I.B.

132. Backhus, 532 So.2d at 450; see also Rose v. Chaplin Marine Transp. Inc., 895 F. Supp. 856, 861–62 (S.D.W. Va. 1995) (finding the bareboat charterer an owner pro hac vice and "legally responsible for the unseaworthiness of the vessel after the date of transfer" even though the vessel was subsequently time charted by the owner from the bareboat charterer, as no proof existed indicating the owner had regained complete control required to transfer liability); Kerr-McGee Corp., 479 F.2d at 63.
B. Ninth Circuit

In upholding its precedent, the Ninth Circuit has explicitly declined to follow the Fifth Circuit's decision not to allow a vessel's owner to limit liability to third parties via a bareboat charter agreement. In Goodwin v. Guy F. Atkinson Construction Co., Judge Owen M. Panner asserted that "[a]lthough Baker's reasoning is interesting, I conclude that the Ninth Circuit would not follow the Fifth Circuit's lead" and held owners could continue to limit their liability through use of bareboat charter agreements.

The Ninth Circuit maintained that position in the more recent case In re Tidewater Barge Lines, Inc. Again, the court recognized the Supreme Court has not resolved the issue and stated "the Ninth Circuit has held that under a bareboat or demise charter, an owner [] has no liability for unseaworthiness to a third party." The pertinent claim in Tidewater involved a fourth party complaint for contribution against the owner of a barge for damages caused when the barge capsized and its cargo was lost. The claim was based on the theory that the owner was liable because the sinking of the barge and loss of cargo resulted from unseaworthy conditions. However, the court found the barge was operating under a valid bareboat charter and stated:

Unseaworthiness is the duty of the owner, but the owner can transfer that duty to a charterer through a bareboat charter. Once transferred, the owner no longer has control over the vessel, and the charterer becomes

133. See supra Parts III.E, IV.B; see, e.g., Goodwin v. Guy F. Atkinson Const. Co., No. CV 89-1401-PA, 1991 WL 187462, at *2-3 (D. Or. Feb. 11, 1991); see also Griffith v. Martech Int'l, Inc., 754 F. Supp. 166, 171 (C.D. Cal. 1989) (declining to adopt the Fifth Circuit's "divergent views" that allow in personam claims against owners whose vessels are operating under bareboat charters); Dant & Russell, Inc. v. Dillingham Tug & Barge Corp., 895 F.2d 507, 509-10 (9th Cir. 1989) (finding an owner not liable in personam for an injury to a third party caused by an unseaworthy condition of his vessel that pre-existed the bareboat charter agreement because the charterer was aware of the unseaworthy condition but waived the owner's liability by postponing the needed repairs).


136. Id. at *7 (citing Dant & Russell, 895 F.2d at 510).


138. Id. at *1, *4. Numerous unseaworthy conditions were cited, including (1) the barge "was not fit for use as a carrier of cargo containers; (2) did not have proper watertight integrity; (3) had perforations in the bin walls; (4) had water in the bottom of the cargo bin, the double bottom, or both; and (5) was unstable." Id. at *4.
the equivalent of the owner. The duty of providing a seaworthy vessel continues to exist, but is owed by the party that actually possesses and controls the vessel.139

Thus, the Ninth Circuit affirmed its prior position allowing owners to use a bareboat charter to protect themselves from liability to charterers or third parties for injuries resulting from unseaworthy conditions, rather than enforcing such a duty on an owner that has neither control nor possession of the vessel.140

VI. THE ELEVENTH CIRCUIT DECLINES TO ADDRESS THE ISSUE

In Lovette v. Happy Hooker II, the Middle District of Florida recognized the federal circuit split as to whether or not a bareboat charter relieves the shipowner from liability for unseaworthiness.141 The court acknowledged that the Eleventh Circuit had not yet resolved the issue, and declined to do so in Lovette.142

In Lovette, the plaintiff seaman was injured while trying to operate the vessel’s anchor.143 The seaman filed suit alleging his injury resulted from an unseaworthy condition and the owner was liable in failing to maintain a seaworthy vessel.144 The owner filed for summary judgment claiming no liability to the seaman as the vessel was operating under a bareboat charter agreement when the seaman was injured.145

Instead of resolving the Eleventh Circuit’s position in the split, the court acted in similar fashion to the Supreme Court and held the owner failed to meet the heavy burden of proving a bareboat charter

139. Id. at *8. The court found the terms of the lease agreement for the barge consistent with a bareboat charter, specifically that the owner had relinquished and the charterer assumed "responsibility, liability and benefit of and for the use, control and operation of the [barge]," including "responsibility for all costs, expenses . . . damages, claims or other charges of any kind . . . attributable to the use, operation, maintenance or condition of the [barge]." Id. at *10.
142. Id.
143. Id. at *2.
144. Id.
145. Id. at *3.
The court dismissed the owner’s claim for summary judgment and held neither the language of the agreement nor the actions of the parties were consistent with a valid bareboat charter. In *Gatewood v. Atlantic Sounding Co.*, the Middle District Court of Florida once more declined to address the issue of an owner’s ability to use a bareboat charter as a shield against liability to third parties. The court again acknowledged the split as unresolved in the Eleventh Circuit but remanded the case for factual findings as to the existence of a bareboat charter and whether an unseaworthy condition pre­existed the charter agreement. In issuing the order, the court gave no indication on the direction the Eleventh Circuit would take on the issue.

VII. SOLUTIONS FOR OWNERS AND CHARTERERS TO CLARIFY AND LIMIT LIABILITY IN BAREBOAT CHARTER AGREEMENTS

The Fifth Circuit in *Baker* stated “[t]he allocation of ultimate liability should be the responsibility of the owner and charterer, who ‘can sort out which between them will bear the final cost of recovery.’” Thus, in its break from established precedent, the Fifth Circuit gave owners and charterers a hint at how best to protect themselves from the risks of uncertain liability; this instruction holds true for those in the unsettled Eleventh Circuit and elsewhere. Through “the wise use of indemnity clauses and comprehensive insurance coverage,” parties can mitigate most uncertainties over

146. *Id.* at *3–4; see supra Part IV.A.
147. *Lovette*, 2006 WL 66722, at *3–4 (stating there is a “heavy burden on the party who attempts to show that the owner of the vessel has been relieved of his legal obligations as owner” (citing Guzman v. Pichirilo, 369 U.S. 698, 700 (1962))).
148. *Id.* (finding the specification of dates for the term of the charter more consistent with a time charter and a contract clause allowing the owner access to the vessel at any time being “contrary to the demise charter’s requirement that the [charterer] has exclusive possession over the vessel”).
150. *Id.* at *5–6.
151. *See, e.g., id.*
liability.154 Though this can be a difficult task considering the numerous circumstances and uses of contracts between shipowners and charterers, the “owner and demise charterer are free to contract as they please and have unrestrained discretion to modify, expand, or abrogate their obligations inter se.”155 The following terms and clauses provide an outline for owners and charterers to accomplish that task.156

A. Insurance and Indemnity

To protect their interest in the vessel, owners should carry a hull policy covering “damage to or loss of a vessel.”157 Charterer parties will usually—and should be required to by owners—carry protection and indemnity (P&I) insurance.158 P&I coverage insures against damages to third parties, is used to indemnify the owner against such damages, and is the “primary means whereby shipowners and operators protect themselves against third-party liability claims.”159 The owner must assure indemnity from the charterer for all in personam liability and for any in rem actions against the owner’s vessel by including such a clause in the contract.160 P&I coverage should include:

- Personal injury and death claims (including maintenance and repatriation); passenger liability (including luggage); liability for cargo loss and damage (including extra handling costs); collision, wreck removal (where necessitated by law); pollution;

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155. Gebb, supra note 2, at 772; see, e.g., Harper, supra note 45, at 787.
156. See infra Part VII.
157. FORCE, supra note 2, at 184–85. Charterers may also carry a hull policy to cover their own possible liability for not returning the ship in the same condition it was received or for damages resulting from not being able to use the vessel. GILMORE & BLACK, supra note 22, § 4-22. Hull policies should include a “run down” clause to indemnify owners for third party liability in cases of collision. FORCE, supra note 2, at 184–85; see supra note 22.
158. FORCE, supra note 2, at 184–85; GILMORE & BLACK, supra note 22, § 4-22.
159. FORCE, supra note 2, at 185, 187. A policy covering liability for pollution by oil discharge into navigable waterways used to be included in P&I coverage but is now separate and should not be overlooked. Id.
loss of property on the insured vessel; damage to fixed and floating objects; towage; and general average.\textsuperscript{161}

Owners should include a clause barring the charterer from creating liens against the vessel and "requir[ing] the charterer to satisfy liens" if any are attached when the vessel is returned.\textsuperscript{162} Parties to the charter agreement should also be aware that insurance policies "written 'free of particular average' (F.P.A.) mean that the underwriters are liable only for a total loss" and should be sure the policy is "written 'with average' (W.A.) to provide coverage for partial losses."\textsuperscript{163} Depending on the particular use of the vessel, a policy for cargo loss may also be advisable.\textsuperscript{164}

\textbf{B. Coverage for Defects}

As the owner's duty in a bareboat agreement is to deliver a seaworthy vessel at the outset of the charter, a provision should require inspection of the vessel at delivery to determine the vessel's seaworthiness.\textsuperscript{165} The provision should state that "delivery to, and acceptance of the vessel by, the charterer constitutes full performance of the owner's obligation to provide a seaworthy vessel."\textsuperscript{166} This will protect the owner from liability for patent defects, as the charterer's opportunity to inspect the ship constitutes disclosure of any defects which, if not addressed, are affectively waived.\textsuperscript{167} A clause or policy insuring for liability resulting from latent defects that are not or could not be detected by reasonable, diligent inspection should also be included.\textsuperscript{168}

\textsuperscript{161} FORCE, supra note 2, at 187 (quoting Raymond P. Hayden & Sanford E. Balick, Marine Insurance: Varieties, Combinations, and Coverages, 66 TUL. L. REV. 311, 327 (1991)).

\textsuperscript{162} Gebb, supra note 2, at 783; see, e.g., GILMORE & BLACK, supra note 22, § 4-24.

\textsuperscript{163} FORCE, supra note 2, at 188.

\textsuperscript{164} Id.

\textsuperscript{165} Gebb, supra note 2, at 769–70, 777–79.

\textsuperscript{166} Id. at 769–70, 778.

\textsuperscript{167} Id. at 770. The owner may be liable for undiscoverable latent defects that create an unseaworthy condition and cause injury after the bareboat charter commences. Id.; see, e.g., 80 C.J.S. Shipping § 102 (2007); see supra note 133.

\textsuperscript{168} Gebb, supra note 2, at 778.
By incorporating a number of provisions and clauses in the bareboat charter agreement, owners and charterers can be assured their interests are protected. Given the charterer's complete possession and control of the vessel, insurance and indemnity clauses covering any *in personam* liability and physical damage to or loss of the vessel are extremely important for owners. Finally, an owner should include a clause requiring indemnity from the charterer for any damage or loss resulting from the charterer's failure to honor the contract provisions that required the charterer to carry comprehensive insurance.

**CONCLUSION**

The bareboat charter is a useful device allowing owners to transfer possession and control of their vessels and, at the same time, pass along some of the expenses and liabilities that ownership entails, while allowing charterers the freedom of an owner without the full expense of purchasing a vessel. Fortunately, because the Fifth Circuit's departure from precedent can be countered with appropriate risk allocation in the contract agreement, bareboat charters remain a useful tool in the maritime industry. Through use of comprehensive indemnity clauses and insurance coverage, a vessel owner and charterer can fully protect themselves from *in personam* and *in rem* liability, even in the Fifth and Eleventh Circuits. While precedent strongly favors limiting owner liability to third parties via the bareboat charter, the ability of owners to alternatively protect themselves is one explanation for the Fifth Circuit's departure from precedent and also explains why the Eleventh Circuit has declined to settle the matter in its jurisdiction.

172. Gebb, *supra* note 2, at 784; *see supra* Part I.A–B.
174. *See supra* Part VII.
175. *See supra* Parts IV.A–B, V, VII.
Being the chief architect of the bareboat charter agreement, owners can easily insert the necessary provisions to mitigate liability exposure while distributing those costs to the charterer. Whether located in the Fifth, Eleventh, or any other circuit, prudent owners should take necessary steps to ensure they appropriately quantify and limit their liability through indemnity clauses and comprehensive insurance coverage.

John W. 'Chris' Chitty

176. See, e.g., Gaudin, supra note 30, at 144–45; see supra Part VII.
177. See supra Part VII.