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AN EERIE *ERIE* QUESTION: DOES FLORIDA'S OFFER OF JUDGMENT STATUTE APPLY IN MARITIME CASES?

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I. INTRODUCTION

Most lawyers in Florida are probably familiar with the State's Offer of Judgment Statute because, according to the Florida Legislature, the Statute applies to "any civil action for damages" filed within the State.[1]

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1. FLA. STAT. § 768.79 (2009). The statute provides in relevant part that:

> *(1)* In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other

Briefly, for the unfamiliar, the Statute entitles a party that offers a settlement in a civil case to reasonable costs and attorney's fees if the offer is rejected and the eventual judgment in the case is at least twenty-five percent less favorable than the offer.[2] The Statute, by creating a disincentive for parties to reject good faith offers of settlement, hopes "to encourage parties to settle claims without going to trial."[3]

However, because of the peculiar nature of maritime law, it is unclear whether the Statute—and specifically its attorney's fees provision—applies in maritime cases.[4] In fact, the simple question posed by the title of this Essay has elicited two very different answers from state and federal courts in Florida. The federal courts say that the Offer of Judgment Statute does not apply in maritime cases because it substantively conflicts with the general federal rule prohibiting attorney's fees.[5] The state courts disagree.[6] This disagreement among the state and federal courts is disconcerting because it may encourage federal-state forum shopping in one of the country's leading maritime jurisdictions.[7] Avoiding the disagreement is seldom an option because

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> contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

Id. The phrase "courts of this state" includes both state and federal courts. *See* Menchise v. Akerman Senterfitt, 532 F.3d 1146, 1150 (11th Cir. 2008).

2. FLA. STAT. § 768.79(1) (2009).

3. Aspen v. Bayless, 564 So. 2d 1081, 1083 (Fla. 1990).

4. The Eleventh Judicial Circuit of Florida, for example, has yet to settle on a consistent answer to whether the Offer of Judgment Statute applies in maritime cases. *Compare* Sanchez v. Carnival Corp., Case No.: 98-4260 CA32 (Fla. Cir. Ct. Apr. 2, 2007) http://www.miami-dadeclerk.com/civil (holding that the Offer of Judgment Statute did not apply), *with* Escalona v. Carnival Corp., Case No.: 01-29813 CA15 (Fla. Cir. Ct. Apr. 25, 2003) (holding that the Offer of Judgment statute did apply).

5. Garan Inc. v. M/V Avik, 907 F. Supp. 397, 399-01 (S.D. Fla. 1995).

6. Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 520 (Fla. 3d DCA 1992).

7. Florida is a leading maritime jurisdiction because of the sheer volume of maritime commerce passing through its fourteen deep water ports. *See generally* FLORIDA PORTS COUNCIL, STATISTICS http://www.flaports.org/. This high amount of maritime trade naturally creates a greater demand for attorneys practicing maritime law. A Westlaw Profiler search for the profiles of "Attorneys and Judges" for attorneys practicing maritime law suggest that Florida

of the Statute's expansive scope, i.e., its applicability to "any civil action for damages."[8]

The purpose of this Essay is to answer the deceptively simple question posed by the title by making sense of the not so simple doctrines, and often contradictory rationales, upon which courts have relied to arrive at their inconsistent answers. The Essay begins with a brief discussion of the source of maritime law's peculiar nature: the U.S. Constitution. It goes on to explain the *Erie* and reverse-*Erie* principles that apply whenever answering questions like the one posed by the title before directly addressing the impasse between state and federal courts in Florida. The Essay concludes by offering a possible solution to the impasse.

II. THE U.S. CONSTITUTION & MARITIME LAW

The U.S. Constitution, recognizing the importance of having a uniform national maritime law,[9] provides that federal judicial power "shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[10] Consistent with the constitutional grant of power, Congress has conferred on federal district courts original jurisdiction over maritime cases.[11] This conference includes jurisdiction over cases arising from torts on navigable waters[12] and those where interpretation of maritime contracts is at issue.[13] The federal judiciary's expansive jurisdiction,

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might be the country's leading maritime jurisdiction. (Search on Oct. 1, 2009, http://www.westlaw.com. According to the Westlaw search, Florida has 222 attorneys and judges who practice maritime law, compared to 101 for California, 114 for New York and 54 for Washington, D.C.).

8. FLA. STAT. § 768.79 (2009).

9. *See, e.g.*, Alexander Hamilton, THE FEDERALIST NO. 80, 502 (Benjamin Wright ed., Belknap Press 1961) (1787). Specifically, Alexander Hamilton writes that:

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.

Id.

10. U.S. CONST. art. III, § 2.

11. 28 U.S.C. § 1333 (2000).

12. *See, e.g.*, Norwegian Cruise Lines, Ltd. v. Zareno, 712 So. 2d 791, 793-94 (Fla. 3d DCA 1998).

13. Norfolk S. R.R. Co. v. Kirby, 543 U.S. 14, 23-28 (2004) (holding that federal maritime jurisdiction extends to contracts that concern a maritime transaction, unless the transaction is inherently local).

coupled with the need for uniformity, has empowered the federal judiciary to develop substantive maritime common law.[14]

However, federal judicial power over maritime law is not absolute. In the Judiciary Act of 1789, while conferring on the newly created federal district courts "original cognizance of all civil causes of admiralty and maritime jurisdiction," Congress also inserted a provision "*saving to suitors*, in all cases, the right of a common law remedy, where the common law is competent to give it."[15] According to the U.S. Supreme Court this "saving to suitors" provision found in the Judiciary Act, and its successor statutes, confers limited concurrent jurisdiction over maritime cases to state courts.[16] The limited concurrent jurisdiction allows state courts to preside over certain maritime cases.[17] It also allows state law to supplement federal maritime law so long as the state law does not interfere with the uniformity of substantive federal law.[18]

Deciding whether or not state law interferes with the uniformity of substantive federal maritime law requires the application of the reverse-*Erie* test.[19] A state law that passes the test does not interfere with the uniformity of federal maritime law, and thus, is a permissible supplement to federal law.[20] By contrast, a state law that fails the reverse-*Erie* test interferes with the uniformity of substantive federal law, and so is not a permissible supplement.[21]

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14. *See, e.g.*, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222-23 (1986); Romero v. Int'l Operating Co., 358 U.S. 354, 360-61 (1959), superseded by rule, U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 391 (3d Cir. 2002).

15. Judiciary Act of September 24, 1789, c. 20, § 9, 1 Stat. 77 (emphasis added). The current statute conferring original jurisdiction to federal district courts is similar to the Judiciary Act of 1789. According to the current statute, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors* in all cases other remedies to which they are otherwise entitled." 28 U.S.C.A. § 1333 (2009).

16. Madruga v. Super. Ct. of Cal. in & for San Diego County, 346 U.S. 556, 560-61 (1954).

17. State courts usually preside over cases brought under the Merchant Marine Act of 1920, 46 U.S.C.A. § 30104 (2009). The Act, commonly referred to as the Jones Act, allows a seaman to sue the owner or operator of a vessel for negligence in state court. Engel v. Davenport, 271 U.S. 33, 37 (1926) (stating that "[i]t is clear that the State courts have jurisdiction concurrently with the Federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law") (citations omitted).

18. *See, e.g.*, Southworth Mach. Co., Inc. v. F/V Corey Pride, 994 F.2d 37, 41 (1st Cir. 1993); Pacific Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1415 (9th Cir. 1990); Norwegian Cruise Lines, Ltd. v. Zareno, 712 So. 2d 791, 793 (Fla. 3d DCA 1998).

19. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222-23 (1986) (stating that "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine, which requires that the substantive remedies afforded by the States conform to governing federal maritime standards").

20. *Id.*

21. *Id.*

III. *ERIE* AND REVERSE-*ERIE*: GENERAL PRINCIPLES

The reverse-*Erie* test, as the name implies, traces its origin to the *Erie* doctrine. Therefore, a discussion of *Erie*'s subtleties is warranted before delving into the reverse-*Erie* test.

Roughly stated, the *Erie* doctrine requires federal courts in diversity cases to apply substantive state law and procedural federal law.[22] According to *Erie*, there exists "no federal general common law" because there exists no general federal law-making power.[23] Therefore, unless a case is "governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state" in which the federal court sits.[24] In other words, the substantive state law of torts, contracts and property applies in federal courts because "there can be no other law" in these areas.[25]

The *Erie* doctrine was developed to prevent litigants, who could establish the diversity of citizenship needed to sue in federal court, from exploiting the differences between the substantive laws of the state and federal courts of a particular jurisdiction. As the U.S. Supreme Court put it, the doctrine developed as "a reaction to the practice of 'forum-shopping'" that allowed the "result of a litigation materially to differ because the suit had been brought in a federal court" instead of a state court.[26]

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.[27] highlights the type of intrastate gamesmanship that the *Erie* doctrine intended to prevent. In this case, Brown & Yellow, a cab company based in Kentucky, entered into a contract with a railroad for the exclusive right to solicit the railroad's passengers at a Kentucky station.[28] But, Black & White, a competing cab company, continued to solicit the railroad's passengers.[29] Brown & Yellow wished to have its exclusive dealing contract enforced.[30] However, the company knew that Kentucky state courts did not enforce contracts like the one between it and the railroad.[31] Desperate to enforce the contract, Brown & Yellow

22. Hanna v. Plumer, 380 U.S. 460, 471 (1965).
23. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
24. *Id.*
25. *Hanna*, 380 U.S. 460 at 472.
26. *Id.*
27. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 522-24 (1928); *see generally* Paul Ryerson, *Inconsistent Inconsistency: A Comment on Arrested Development of the Federal Common Law of Foreign Relations*, 16 FLA. J. INT'L L. 789 (2004).
28. *Id.* at 522-23.
29. *Id.* at 523.
30. *Id.* at 522.
31. *Id.* at 532 (Holmes, J., dissenting).

reincorporated in Tennessee and then sued in Kentucky federal court by invoking the court's diversity jurisdiction.[32] Federal common law in the jurisdiction, unlike Kentucky's common law, did enforce exclusive dealing contracts.[33] So, by choosing to bring a suit in Kentucky federal court instead of Kentucky state court, the plaintiff carried the day.[34] Had *Erie* been in place the Kentucky federal court, while hearing the case under its diversity jurisdiction, would have applied Kentucky's substantive common law of contracts. [35] Consequently, the outcome in both the federal and state forum would have been the same. Stated differently, had *Erie* been in place there would not have existed parallel and conflicting substantive laws in a single state that allowed a plaintiff to choose the forum that would allow it to prevail.

Because the reverse-*Erie* test draws its inspiration from the *Erie* doctrine, it too is concerned with preventing intrastate forum shopping made possible by having two parallel and conflicting substantive rules in one jurisdiction. According to the test, a state court may only apply state law to a maritime case before it when controlling federal maritime precedent is absent,[36] or when there is no substantive conflict between federal maritime law and state law.[37] This second requirement actually calls upon a court to first determine whether the state law in question is substantive or procedural and then to determine whether the state law conflicts with federal maritime precedent.[38]

If a state law is deemed to be procedural, then that state law may supplement federal maritime law regardless of whether or not it conflicts with federal law.[39] But, if the state law is substantive and conflicts with federal maritime law, then the state law may not permissibly supplement federal law because such supplementation would undermine the uniformity of federal maritime law.[40] To make the preceding paragraph easier to follow, we include the table below that summarizes the reverse-*Erie* test when federal maritime precedent on a particular issue is present:

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32. *Id.* at 523.

33. *Id.* at 532 (Holmes, J., dissenting).

34. *Id.* at 531.

35. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).

36. *See* Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 914-17 (11th Cir. 2004); Greenly v. Mariner Mgmt. Group, 192 F.3d 22, 25-26 (1st Cir. 1999) (stating that a court "may-and should-resort to state law when no federal rule covers a particular situation").

37. *See, e.g.*, Southworth Mach. Co. v. F/V Corey Pride, 994 F.2d 37, 41 (1st Cir. 1993); Pacific Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1415 (9th Cir. 1990); Garan, Inc. v. M/V Aivik, 907 F. Supp. 397, 399-01 (S.D. Fla. 1995); Norwegian Cruise Lines, Ltd. v. Zareno, 712 So. 2d 791, 793 (Fla. 3d DCA 1998).

38. *Garan*, 907 F. Supp. at 399.

39. Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 518-19 (Fla. 3d DCA 1992).

40. *Id.*

Does State Law Conflict with Federal Law?	*Is State Law Procedural?*	*May State Law Apply?*
Yes	Yes	Yes
No	Yes	Yes
No	No	Yes
Yes	No	No

IV. APPLICABILITY OF FLORIDA'S OFFER OF JUDGMENT STATUTE & THE IMPASSE BETWEEN STATE AND FEDERAL COURTS

Since there is federal maritime precedent on attorney's fees, the Offer of Judgment Statute's applicability turns on whether the Statute is substantive or procedural and, if necessary, whether the Statute conflicts with federal maritime precedent. This section begins by discussing whether the Offer of Judgment Statute is substantive or procedural. It then discusses whether the Statute conflicts with the general federal bar on attorney's fees in maritime cases.

A. *Substantive or Procedural*

A law is substantive if it "creates, defines, and regulates the rights, duties, and powers of parties."[41] Consistent with this dictionary definition, the Florida Supreme Court has declared that "a statutory requirement for the non-prevailing party to pay attorney['s] fees constitutes 'a new obligation or duty,' and is therefore substantive in nature."[42] On another occasion, the Florida Supreme Court reaffirmed the substantive nature of statutes authorizing attorney's fees by stating that "[t]he ability to collect attorney's fees from an opposing party, as well as the obligation to pay such fees, is substantive in nature."[43] Since the Offer of Judgment Statute creates a statutory requirement to pay attorney's fees to an opposing party, logic suggests that the Offer of Judgment Statute, or at least its attorney's fees provision, is substantive law.

Logic notwithstanding, Florida's intermediate appellate courts have sought to distinguish the Florida Supreme Court's ostensibly broad and clear declaration that statutes authorizing attorney's fees are substantive. For example, the concurring opinion in *BDO Seidman, LLP v. British*

41. Black's Law Dictionary "substantive law" (8th ed. 2004).
42. Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985).
43. Bitterman v. Bitterman, 714 So. 2d 356, 363 (Fla. 1998).

Car Auctions, Inc.,[44] which the principal opinion for the Florida Fourth District Court of Appeals favorably cited,[45] concluded that the Offer of Judgment Statute, and specifically its attorney's fees provision, is procedural for choice of law purposes.[46]

The concurring opinion began by declaring that "what is substantive or procedural for [purposes other than choice of law] [] is not necessarily substantive or procedural for choice of law purposes."[47] This simple pronouncement allowed the concurring opinion to sidestep the Florida Supreme Court's seemingly clear declaration that statutes authorizing attorney's fees are substantive because this declaration was not made in a choice of law context. The opinion then went on to conclude that the Statute was procedural because it was "part of the machinery of Florida's judicial process that promotes judicial economy."[48] Implicit in this conclusion and its judicial economy rationale was the idea that any state law or court rule that furthers judicial economy is procedural. Were this true, then *all* statutes authorizing attorney's fees would *always* be procedural.

Attorney's fees provisions exist to deter unnecessary litigation or, in the case of the Offer of Judgment Statute, to deter the unnecessary continuation of litigation.[49] We as a society wish to deter unnecessary litigation so that scarce judicial resources may be spent on necessary litigation.[50] The efficient allocation of scare judicial resources is the very definition of judicial economy. Thus, if attorney's fees provisions exist to deter unnecessary litigation and we wish to deter unnecessary litigation to promote judicial economy, then attorney's fees provisions always exist to promote judicial economy. And, if promoting judicial

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44. BDO Seidman, LLP v. British Car Auctions, Inc., 802 So. 2d 366, 370-74 (Fla. 4th DCA 2001) (Gross, J., concurring).

45. *Id.* at 369.

46. *Id.* at 370. (Gross, J., concurring). The concurring opinion reads as follows:

> I write separately to note that even under a choice of law analysis, Seidman is entitled to recover fees under section 768.79, Florida Statutes (1991). This is so because the offer of judgment statute is "procedural" under Florida choice of law terminology; it is part of the machinery of Florida's judicial process that promotes judicial economy.

Id.

47. *Id.*

48. *Id.*

49. *See* Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1161-62 (1996).

50. *See* Michael Kinsley, *Quayle's Case*, NEW REPUBLIC, Sept. 9, 1991, at 4 (arguing that attorney's fees provisions would "curb lawsuits that are frivolous or extortionate" and "actually encourage lawsuits that are clearly meritorious," thus allowing a better allocation of scare judicial resources).

economy, as the concurring opinion in *BDO Seidman* reasons, makes an attorney's fees provision procedural, then *all* attorney's fees provisions must be procedural.

However, it is clear that not all attorney's fees provisions are procedural because the Florida Supreme Court has declared attorney's fees provisions to be substantive for, as the concurring opinion in *BDO Seidman* must admit, at least some purposes.[51] Accordingly, the judicial economy rationale in *BDO Seidman* must give way to Florida Supreme Court's insistence that "a statutory requirement for the non-prevailing party to pay attorney['s] fees constitutes 'a new obligation or duty,' and is therefore substantive in nature."[52]

In spite of a state court decision's logical flaws when construing state law, according to *Erie*'s progeny, a state court's decision binds both state courts and federal courts. [53] Therefore, the last word about whether the Offer of Judgment Statute is substantive or procedural is in the hands of the Florida state courts.[54] Fortunately, however, neither the principal opinion nor the concurring opinion in *BDO Seidman* can stop state or federal courts from declaring that the Offer of Judgment Statute is substantive for maritime law purposes. Oddly enough, this is made possible by the very gyrations the *BDO Seidman* court went through to declare the Statute procedural for choice of law purposes. Because, according to the court, what is procedural or substantive for one purpose cannot be procedural or substantive for all purposes, the court stopped short of holding the Offer of Judgment Statute to be procedural for purposes other than the one purpose before it.[55] Thus, *BDO Seidman*'s precedential value is limited to instances where a choice of law conflict arises between one state and another state.[56]

Once *BDO Seidman* confined to the choice of law context, it is clear that for all other contexts, under Florida law, statutes authorizing attorney's fees are substantive. The Florida Supreme Court has said so in unequivocal terms. (And as *Erie* makes clear, the Florida Supreme Court—as the highest state court—is in the best position to determine whether statutory provisions authorizing attorney's fees are substantive

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51. *BDO Seidman*, 802 So. 2d at 370 (conceding that attorney's fees provisions are substantive for Florida constitutional law purposes).

52. Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985).

53. *See, e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

54. *See* Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1144 (1999).

55. *BDO Seidman*, 802 So. 2d at 368-70.

56. In *BDO Seidman* there was a choice between the laws of Tennessee and Florida. *Id.* at 367. A choice of law conflict between a validly enacted federal law and state law, however, would be resolved in favor of the federal law because of the U.S. Constitution's Supremacy Clause.

or procedural under Florida law.) Consequently, one must conclude that the Offer of Judgment Statute, and specifically its attorney's fees provision, is substantive law for *Erie* and reverse-*Erie* purposes.[57] This substantive Florida law may, however, still permissibly supplement federal maritime law so long as it does not conflict with federal law.

B. *Conflict Between Offer of Judgment Statute & Federal Common Law*

Neither federal maritime common law nor Florida common law award attorney's fees absent statutory authorization.[58] The Offer of Judgment Statute clearly authorizes attorney's fees if an offer of settlement is rejected and the eventual judgment in the case is at least twenty-five percent less favorable than the offer.[59] No analogous federal statutory authorization for attorney's fees exists in maritime cases.

If one were simply relying only on the existence of a Florida statute awarding attorney's fees and federal maritime common law precluding such fees, one would easily conclude that a conflict exists between the two. However, any determination about whether a conflict truly exists becomes more difficult because some federal jurisdictions allow the prevailing party in a maritime case to recover attorney's fees for a bad faith breach of the uniquely maritime duty to furnish maintenance and cure to seamen.[60]

In light of the federal bad faith exception, the Florida Third District Court of Appeal, in *Royal Caribbean Corp. v. Modesto*, held that no conflict exists between federal maritime common law and the Offer of Judgment Statute.[61] The Court cited the U.S. Supreme Court's decision as evidence of the absence of conflict.[62] In *Vaughan v. Atkinson*, the U.S. Supreme Court allowed a seaman to recover attorney's fees because the defendant shipowner willfully and persistently breached its duty to provide maintenance and cure to the plaintiff seaman.[63] According to *Modesto*, since *Vaughn* permitted a party to recover attorney's fees under some circumstances, the Florida Offer of

57. *See, e.g.*, Menchise v. Akerman Senterfitt, 532 F.3d 1146, 1150 (11th Cir. 2008) (concluding that the Florida Offer of Judgment Statute is substantive for *Erie*, and by extension reverse-*Erie*, purposes).

58. Noritake Co., Inc. v. M/V Hellenic Champion, 627 F.2d 724, 730 (5th Cir. 1980) (stating that "[a]bsent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to an award for attorneys' fees"); *see Young*, 472 So. 2d at 1154 (discussing "the American Rule adopted in Florida [that] requires each side to pay its own attorney's fee unless directed otherwise by a statute or an agreement between the parties").

59. FLA. STAT. § 768.79 (2009).

60. Garan, Inc. v. M/V Avik, 907 F. Supp. 397, 399-400 (S.D. Fla. 1995).

61. *See* Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 520 (Fla. 3d DCA 1992).

62. *Id.*

63. *See* Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962).

Judgment Statute did not conflict with federal law because it too awarded fees under certain circumstances, i.e., upon the unreasonable rejection of an offer of settlement.[64]

Unlike *Modesto*, a federal district court held that a conflict did exist between federal maritime common law and the Offer of Judgment Statute.[65] In *Garan v. M/V Aivik*, the federal court, relying on the Florida Supreme Court's interpretation of Florida law, began by reaffirming the substantive nature of the Offer of Judgment Statute's attorney's fees provision.[66] *Garan* went on to state that *Modesto* "misconstrue[][d] the holding in *Vaughan*."[67] According to the *Garan* court, "*Vaughan* discusses an exception for a discretionary award of attorneys' fees in the maritime context *but only* when the nonprevailing party has acted in bad faith during the course of the litigation."[68] Since the Offer of Judgment Statute does not require a finding of bad faith in the litigation process,[69] and instead merely requires a mathematical formulation, *Garan* concluded that the Statute conflicted with, and was preempted by, the general federal maritime bar on attorney's fees.[70]

The U.S. Third Circuit Court of Appeal in *Sosebee v. Rath*[71] reached a similar conclusion after considering whether a Virgin Island Statute[72]

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64. *See Modesto*, 614 So. 2d at 520.

65. *Garan*, 907 F. Supp. at 399-01.

66. *Id.* at 399.

67. *Id.* at 400.

68. *Id.*

69. It should be noted that the Offer of Judgment Statute allows a trial court to deny attorney's fees if the court finds that the settlement offer was "not made in good faith." Fla. Stat. § 768.79(7)(a) (2009). Specifically, the Statute reads that "[i]f a party is entitled to costs and fees pursuant to the provisions of this section, the court *may* disallow an award of costs and attorney's fees." *Id.* (emphasis added). Relying on this provision, the defendants in *Garan* argued that the Offer of Judgment Statute contained a bad faith provision, and thus the Statute did not conflict with maritime law. *Garan*, 907 F. Supp. at 400. The *Garan* court disagreed. According to the *Garan* court, the Offer of Judgment Statute—unlike federal maritime law—does not *require* a trial court to make a bad faith finding before granting fees. *Id.* Instead, the Statute merely *allows* a court to deny fees if the Statute's mathematical standards are met but the party seeking fees made its settlement offer in bad faith. *Id.* The distinction is a fine but crucial one. According to the federal bad faith exception, a party seeking attorney's fees *must* seek fees based on the other party's bad faith. *See, e.g.*, Hines v. J.A. La Porte, Inc., 820 F.2d 1187, 1190 (11th Cir. 1987). By contrast, a party seeking fees under the Offer of Judgment Statute may collect fees without alleging or proving the other party's bad faith. The other party, i.e., the party from whom fees are being sought, may defend by arguing that the offeror made its offer in bad faith. Thus, it is possible for a party to seek attorney's fees under the Offer of Judgment without the other party's faith, whether good or bad, ever being at issue.

70. *Id.* at 400-01.

71. Sosebee v. Rath, 893 F.2d 54, 56 (3d Cir. 1990).

72. V.I. CODE ANN. tit. 5 § 541 (2009). The statute reads:

(a) Costs which may be allowed in a civil action include:

on attorney's fees conflicted with federal maritime law. Specifically, the *Sosebee* court held that "a general award of attorney['s] fees pursuant to a state statute which does not require a finding of bad faith directly conflicts with federal admiralty law."[73] Holding otherwise, according to the court, would encourage shopping for jurisdictions that have such statutes, thus undermining the uniformity of federal maritime law.[74]

Modesto, *Garan*, and *Sosebee* make clear that there is disagreement among the Florida state courts and federal courts over how to interpret *Vaughan*, and by extension whether or not the Offer of Judgment Statute conflicts with federal maritime law. But, whose interpretation of *Vaughan* should prevail? Recall that according to *Erie* and its progeny, federal courts must follow a state court's interpretation of state law because states are in a better position to interpret their own laws.[75] As a corollary, one would assume that because it is the province of federal courts to interpret and create federal law, including federal maritime law, a federal court's interpretation of federal law should bind state courts.[76] However, although state courts agree that they are bound by the decisions of the U.S. Supreme Court, the state courts vary in how much deference they give to lower federal court decisions interpreting

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(1) Fees of officers, witnesses, and jurors;
(2) Necessary expenses of taking depositions which were reasonably necessary in the action;
(3) Expenses of publication of the summons or notices, and the postage when they are served by mail;
(4) Compensation of a master as provided in *Rule 53 of the Federal Rules of Civil Procedure*;
(5) Necessary expense of copying any public record, book, or document used as evidence on the trial; and
(6) Attorney's fees as provided in subsection (b) of this section.
(b) The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto; provided, however, the award of attorney's fees in personal injury cases is prohibited unless the court finds that the complaint filed or the defense is frivolous.
(c) For the purposes of this section, "frivolous" means:
(i) without legal or factual merit; or
(ii) for the purpose of causing unnecessary delay; or
(iii) for the purpose of harassing an opposing party.

Id.

73. *Sosebee*, 893 F.2d at 56.
74. *Id.*
75. *See, e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).
76. Zeigler, *supra* note 54, at 1151 n.37 (discussing cases where state courts consider themselves bound by the decisions of both the U.S. Supreme Court and lower federal courts).

federal law.[77] The Florida Supreme Court in particular does not consider itself, and thus other Florida courts, bound by decisions of the lower federal courts.[78] So, state courts in Florida are not bound by *Garan* or *Sosebee*.[79] Yet the federal courts, for the sake of consistency, will likely follow *Garan*.

Further, because one of Florida's intermediate appellate courts found no conflict between the Offer of Judgment Statute and the federal maritime common law of attorney's fees, the Statute applies in maritime cases filed before state courts.[80] However, as noted above, because a federal court found a conflict between the Offer of Judgment Statute and federal common law, the Statute does not apply in maritime cases filed before federal courts. Therefore, there are now two parallel substantive rules for attorney's fees in Florida, much like there were two parallel substantive rules for exclusive dealings contracts in *Black & White Taxicab Co.*

The availability of two substantive rules for attorney's fees promotes federal-state forum shopping, just as it did in *Black & White Taxicab Co.* Parties to litigation may, for example, decide to bring an action to a particular forum or remove an action from a particular forum because of the applicable law on attorney's fees. The party with the weaker hand, of course, would prefer federal court where the penalties for bluffing during settlement negotiations do not include attorney's fees. The party with the stronger hand, by contrast, would prefer state court where the Offer of Judgment Statute would impose the attorney's fees penalty. So, both parties would focus their energies on assuring that they are before the right forum. The right forum for a particular party, just as in *Black & White Taxicab Co.*, is the forum that provides the best outcome or greatest payoff from the suit. The fact that the outcomes are different is disconcerting. Different outcomes, i.e., grossly different recovery amounts because of the inclusion or exclusion of attorney's fees, in the same jurisdiction are what *Erie* was intended to prevent.[81] Thus, the inconsistent decisions about the applicability of the Offer of Judgment Statute in maritime cases strike at the very essence of the *Erie* doctrine and the reverse-*Erie* test.

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77. *Id.* at 1144-45.

78. Carnival Corp. v. Carlisle, 953 So. 2d 461, 465 (Fla. 2007).

79. *See id.*

80. According to the Florida Supreme Court, "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (citing Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985)); *see also* Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980). Here the Florida Third District Court of Appeal's decision is the only relevant decision by a Florida district court. Thus, the decision, and by extension the Statute, applies in all maritime cases filed before state courts.

81. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

V. CONCLUSION

Considering the state and federal disagreement about whether the Offer of Judgment Statute conflicts with federal maritime common law, the answer to the question posed by the title of this Essay is "yes" in state court, but "no" in federal court. Were the answer "yes" for both state and federal courts, or in others words, if the Statute applied in every maritime action filed within the state, one wonders whether this would promote interstate forum shopping as *Sosebee* feared. Presumably, if Florida was the only (or one of the few) jurisdiction to allow attorney's fees in maritime cases for rejecting an offer settlement, then parties with a stronger hand would want to see their cases make their way to Florida, and parties with a weaker hand would want to see their cases make their way out of Florida. Simply put, *Sosebee*'s fear of interstate forum shopping would then be realized.

Therefore, if one were searching for the "right" answer to the question posed by the title of this Essay, we humbly suggest that the answer would be "no" for both state and federal courts. However, this right answer requires that *Modesto*'s reading of *Vaughan* be recalibrated. This right answer requires that one of Florida's intermediate appellate courts or the Florida Supreme Court reconsider *Modesto*. Until then, the Offer of Judgment Statute and the federal-state forum shopping and interstate forum shopping it makes possible will remain a thorn in *Erie*'s side.