Bitter End Bulletin

Committee on Marine Torts and Casualties

November 1, 2021

Maritime Law Association of the United States
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INSIDE THIS ISSUE

The goal of this newsletter is to update members of the Committee on topics and trends within maritime tort law.

Getting Started

By Adam E. Deitz

Thank you for reading this first issue of *Bitter End Bulletin*, a quarterly periodical for members of the Maritime Law Association of the United States from the Committee on Marine Torts and Casualties.

The goal of this newsletter is to update Committee members on topics and trends within maritime tort law. Articles may include case law updates, legislative changes, regulatory developments, or anything else members might find interesting.

Bitter End Bulletin will strive for neutral content. Representing interests from both sides of the "v.," the bulletin is co-edited by a maritime personal injury plaintiff's attorney and a maritime defense attorney. We are hopeful this bipartisanship will continue into the future.

We need your help to make this periodical successful. Admiralty attorneys are well familiar with the concept of "uniformity in admiralty" throughout the United States, but the practice of maritime law still varies widely between the many States and Circuits. We want to hear from Committee members coast-to-coast. What is happening with the maritime practice in your area? How is case law developing? Is it consistent with other jurisdictions? What regulatory changes do you see? And what are the impacts of these developments?

If there is a topic that you would like to read, write, or share in *Bitter End Bulletin*, please contact Adam E. Deitz (adam@boatlaw.com) and Christine M. Walker (cwalker@fowler-white.com).

How Genuinely Salty is Salty Enough?

By Christine M. Walker and Adam B. Cooke

Whether the general maritime law or state law applies to a marine tort incident creates one of the first questions that a maritime practicioner must answer. Why? Well, although in some cases the facts create a very black and white to this question, in others, the answer may have shades of grey. While those shades may stay grey on the maritime practitioner's paper until the trier of fact makes a decision on the applicable law, to the marine insurer for the case, those variances in color are not grey, they are green. Very green as choice of law could impact not only the categories of potentially recoverable damages, but also the availability of attorney's fees.

Yet, on this very important issue that underlies all marine tort cases, more than sixty-five years has passed since the United States Supreme Court heard a marine insurance case. The last marine insurance case taken by the Supreme Court, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), held in the absence of any established federal maritime rule governing the issue at hand, state insurance law applies. Without any further guidance from the Supreme Court, this holding has set the stage for many outcome determinant choice of law battles, resulting in maritime practitioners duking out whether state or federal maritime law applies to their lawsuit based the more advantageous law for their position.

In *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters*, 996 F.3d 1161 (11th Cir. 2021), the Eleventh Circuit recently reviewed the *Wilburn Boat* rule. In an ever so cheeky fashion, the Eleventh Circuit created a new wrinkle to the well-entrenched and, at times, confounding choice of law question in *Ocean Reef*: does your lawsuit have a genuinely "salty" flavor? Well, there is no salt in the Great Lakes or up the Mississippi River, yet those comprise navigable waters of the United States for the purposes of admiralty jurisdiction and are in fact highways of interstate commerce where uniformity of the general maritime law has always created a paramount concern for courts.

Prior to its reluctant application of the *Wilburn Boat* rule, the Eleventh Circuit lamented that "the Supreme Court has left the lower federal courts at sea without a rudder or compass."

So, how genuinely salty is salty enough?

In 2017, Ocean Reef Charters, owned a 1988 92' Hatteras ("Vessel"). The Vessel's insurance policy required it to have a paid Captain and Crew Member. During Hurricane Irma, the Vessel did not moor at its normal berth and sank.

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Following the sinking, the Vessel's insurer denied coverage because the Vessel did not satisfy its Captain and Crew warranty. The insurer filed a declaratory judgment action in the Western District of New York, which was transferred to the Southern District of Florida based on the venue's significant contacts with the sinking.

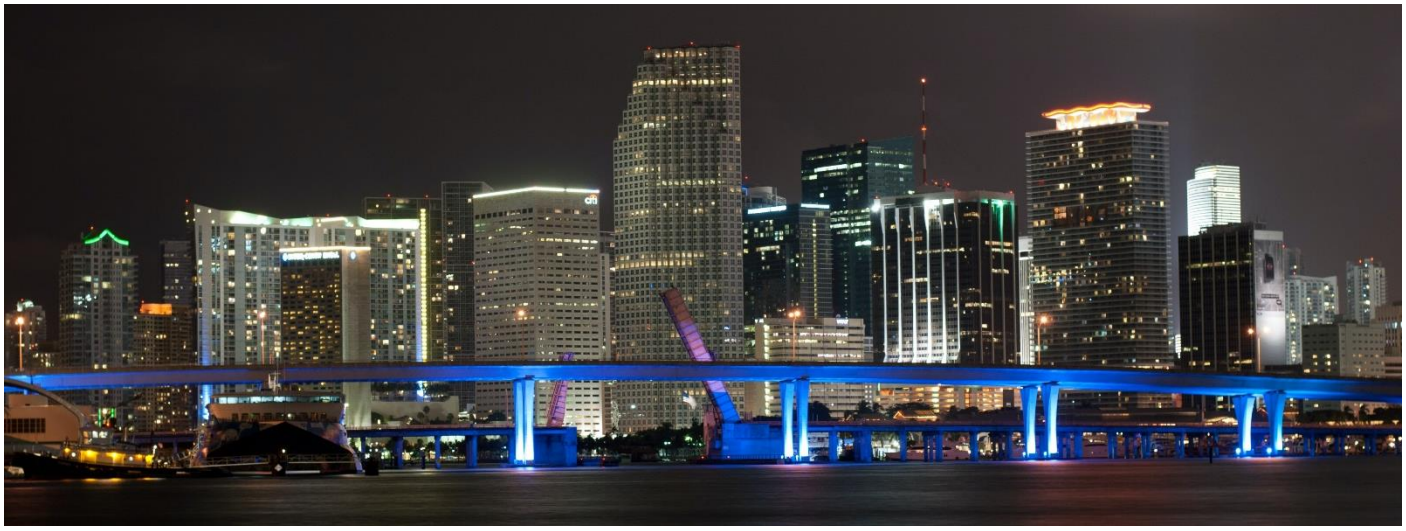
On summary judgment, the insurer argued that federal maritime law requires strict compliance with express warranties and that a breach bars coverage even if unrelated to the loss. Ocean Reef argued that Florida's anti-technical statute should instead apply and that, under said statute, the breach did not preclude coverage because the breach had no relation to the loss. At the trial level, the court noted that "the Eleventh Circuit has fashioned an entrenched rule of admiralty: express warranties in maritime insurance contracts must be strictly construed in the absence of some limiting provision in the contract." However, in May of 2021, the Eleventh Circuit found no entrenched maritime rule governing Captain and Crew warranties exists and, as a result, Florida law applies to determine the effect of Ocean Reef's breach.

Prior to its reluctant application of the *Wilburn Boat* rule, the Eleventh Circuit lamented that "the Supreme Court has left the lower federal courts at sea without a rudder or compass." The Eleventh Circuit articulated that, in a perfect world, a uniform rule would exist on "the effect of a breach of an express warranty in a marine insurance policy—and from there determine what that uniform rule should be." That perfect world, however, does not exist. The slate "is not blank. It is covered in graffiti, and we must somehow make sense of the layers of paint." Having held state law applicable, the Eleventh Circuit remanded the case to apply Florida's anti-technical statute.

Graffiti? Paint? Salt? Why not add caviar while we are at it?

Outside the specific application of the Crew and Captain warranty, the *Ocean Reef* decision has hardly left practitioners with any bright line rule on the application of *Wilburn Boat* moving forward. Notwithstanding, the *mea culpa* opinion does appear to present a call to the United States Supreme Court for further clarification on this ever present and continually important maritime law issue. Or, perhaps, in pointing to the United Kingdom Insurance Act of 2015's abandonment of the "harsh" literal compliance rule that required recission as the automatic remedy for breach of warranty, the Eleventh Circuit presented a call to Congress to address choice of law issues in marine insurance vis-a-vis legislation. Whether the Supreme Court or Congress will answer the call remains unknown. However, as Alexander Pope said and the Eleventh Circuit echoed in *Ocean Charters* . . . Hope springs eternal.

In the meantime, it appears that the quagmire pertaining to the appropriate level of salt in the United States has now extended from our plates to the court room.



Lawmakers Eye Changes for The Limitation of Liability Act and Small Passenger Vessels

By Adam E. Deitz

At almost 170 years old, The Limitation of Liability Act ("The Limitation Act"), 46 U.S.C. § 30501 *et seq.*, has a storied but sometimes contentious history. Congress passed The Limitation Act in 1851 to encourage ship-building and to induce capitalists to invest money in the maritime industry.[1] The Act protects vessel owners in the event of catastrophic loss by allowing the owner to seek to limit its liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel.[2] Simply stated, The Limitation Act guards a vessel owner's investment from what could otherwise be unlimited exposure to liability.[3]

However, application of the Act has been controversial. Famously, The Limitation Act was invoked in 1912 after sinking of R.M.S. TITANIC and the death of approximately 1,500 souls aboard. It was criticized when White Star Line ultimately paid about $430 for each life lost.[4] More recently, with marine casualties such as the Missouri Duck Boat Sinking (July 19, 2018—17 deaths) and the D/V CONCEPTION fire (Sept. 2, 2019—34 deaths), The Limitation Act has again come under scrutiny.

On September 22, 2021, Senator Dianne Feinstein (D-Calif) and Congressman Salud Carbajal (D-Calif.) introduced the "Small Passenger Vessel Liability Fairness Act" ('SPVLFA"), which they characterize as "a bill to reform maritime liability rules in response to the 2019 *Conception* boat fire that killed 34 people."[5]

The SPVLFA targets limitation of liability for "T-boats" (referencing passenger vessels under Title 46, Code of Federal Regulations (CFR), parts 175-185) as opposed to the Limitation Act of 1851 which applies to all sizes of the vessels. The proposed legislation would amend 46 U.S.C. § 30501, *inter alia*, by adding subsection (2) which defines a "small passenger vessel" as less than 100 gross tons, carries no more than 49 passengers for overnight domestic voyages or no more than 150 passengers for other voyages.

The SPVLFA would also add Subchapter III at 46 U.S.C. §30541. This section would require the Commandant of the Coast Guard to promulgate rules (within 180 days of the passage of the bill) to "provide just compensation in any claim" in which the owner of the covered small passenger vessel is found liable. The amendment calls for the Coast Guard's new rules to include a provision that:

"*In a claim for personal injury or death …, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner.*"

If passed, the SPVLFA rules would become effective immediately and retroactively to September 2, 2019 (the date of the D/V CONCEPTION fire). Stay tuned for future updates.

[1] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001)
[2] *Id.*
[3] *Id.*
[4] Riaz Zaman, Sailing on Troubled Waters - Antiquated U.S. Maritime Liability Limits for Death and Injuries of Ship Passengers: Options for Reform, 42 Denv. J. Int'l L. & Pol'y 41 (2013)
[5] FEINSTEIN, CARBAJAL INTRODUCE BILL TO REFORM LIABILITY RULES FOR MARITIME ACCIDENT COMPENSATION, https://www.feinstein.senate.gov/public/index.cfm/2021/9/feinstein-carbajal-introduce-bill-to-reform-liability-rules-for-maritime-accident-compensation (last visited Oct. 3, 2021).

Vaccine Mandates and Testing Requirements in Maritime Employment: All Aboard or Time to Jump Ship?

By Christine M. Walker

On September 9, 2021, President Biden announced a proposed rule for any business employing over one hundred people to mandate vaccination or weekly testing. On October 12, 2021, OSHA submitted the rule to the Office of Management and Budget as the next step in the required review process prior to publication in the Federal Register. Like nearly every other business, COVID-19 created a new issue for marine operators: how to keep the workplace safe while respecting the medical rights and freedoms of employees. However, some unique aspects of the maritime industry also create unique legal questions.

Let's consider the following fact pattern: an unvaccinated mariner tests negative for COVID-19 before a voyage, was in service of the ship 100% of the time during the voyage and tests positive before disembarking in the ship's home port. What is the employer's legal responsibility to the mariner? More likely than not, maintenance and cure.

But, what if the employer did not have testing procedures in place before the mariner leaves the ship to see his or her family and the family subsequently contracts COVID-19? Did the employer provide a "safe" work environment if the mariner could leave the ship before testing for COVID-19? Does the employer have any financial responsibility towards the medical treatment of mariner's family because it did not require testing prior to leaving the ship? If the employer does elect to aid in the family's medical recovery, should the family have to submit to questioning under oath about other potential ways they were exposed to the virus?

Alternatively, if an employer tests the mariner upon reentry into the vessel's homeport and the mariner tests positive, is the employer required to pay housing expenses to quarantine the mariner so as not to expose the mariner's family? What level of care is considered palliative versus curative while the mariner is attempting to fight the virus? Last but not least, how do the legal rights of the mariner, if at all, change based on his country of citizenship? The foregoing illustrations are just the tip of the proverbial iceberg for COVID-19 employment questions in the maritime industry.

Through vaccine mandates made by certain airlines for crew, one thing has already been made abundantly clear - sick crew is bad for transportation business. Crew sickness creates shortages, delays and can risk spreading an illnesses to personnel and passengers in contained indoor areas used during and in order to facilitate transportation operations. Additionally, ports may require ships to quarantine if a single crew member tests positive with COVID-19, potentially impacting the ship's entire voyage schedule. All of these problems come at a cost.

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As the cruise lines get back to business following COVID-19 related shutdowns and the shipping industry grapples with an uncertain supply chain, also stemming (in part) from COVID-19 problems, maritime employers must tread carefully to avoid any further losses. Moreover, in the current environment of labor shortages, employees have more bargaining power than recent years. If mariners, or port workers that support the marine industry, do not agree with an employer's vaccine or testing mandates because the restrictiveness of the mandates, they may quit. Equally plausible, if they do not feel safe in the work environment because monitoring and reporting procedures are too laxed, they may quit.

Consequently, what is a good solution for a maritime employer in a situation where, no matter what, it risks losing employees? As courts of law continue to catch up with the numerous legal issues arising from COVID-19 employment and workplace policies, the prudent course of action requires employers to proceed carefully. At a minimum, putting in place any necessary internal controls to show not only the contemplation of a safe work environment for employees, but also a continually updated strategy as new scientific information about the virus, its variants and how to prevent it from spreading emerges.

Thus far, COVID-19 has been anything except predictable. That said, one thing has remained predictably the same during the pandemic. Mariners are entitled to a work environment that guarantees their safety. Despite mariners potentially having more bargaining power than in years past, if ever a modern time existed to expect a trier of fact to treat a mariner like a very sympathetic "ward of the court," now is that time. Why? For the first time in a very long time, the general public is acutely aware of how the maritime industry impacts their daily lives. From necessities like toilet paper to the luxury of seagoing vactions and the unmet expection of Johnny getting his holiday presents on time, the general public now has a tangible frame of reference for how "essential" maritime workers are to supporting their daily needs as well as the lifestyle they want to lead.

Therefore, forewarned is forearmed and, with no clear answers in sight on various unique issues arising from the rights and legal status of mariners, caution remains the eldest child of wisdom.

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