BOATING BRIEFS

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District Court rules that cruise lines violated law in docking and disembarking passengers in Cuba

***Havana Docks Corp. v. Carnival Corp.*, No. 19-CV-21724, 2022 WL 831160 (S.D. Fla. Mar. 21, 2022)**

Havana Docks Corporation ("Havana Docks") filed four separate suits in the Southern District of Florida to recover damages against Carnival, Norwegian, Royal Caribbean, and MSC arising from their use of certain port terminals and piers previously owned by Havana Docks prior to being confiscated by the Cuban Government in 1960. Specifically, Havana Docks alleged that each cruise line "unlawfully trafficked in property by the Cuban Government—the Terminal and its Piers—in violation of the Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. §§ 6021, *et seq.*, referred to as the LIBERTAD Act or Helms-Burton Act."

This newsletter summarizes the latest cases and other legal developments affecting the recreational-boating industry. Articles, case summaries, suggestions for topics, and requests to be added to the mailing list are welcome and should be addressed to the editor.

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Havana Docks acquired its "Concession" to operate the terminals in 1911 after purchasing it from the original owner that obtained it from the Cuban Government. After the property was "naturalized" by the Cuban Government in 1960, Havana Docks submitted a claim to the Foreign Claims Settlement Commission ("FCSC") established under the International Claims Settlement Act, 22 U.S.C. §§ 1621, *et seq.*, and tasked with determining "the amount and validity of claims by nationals of the United States against the Government of Cuba...for losses resulting from the nationalization...of property...owned wholly or partially...at the time by nationals of the United States." A claim certified by FCSC under the Settlement Act serves as both conclusive proof of ownership of a property interest and as the presumptive measure of damages. Havana Docks obtained its Certified Claim from the FCSC in 1971 noting in part a loss of $9,179,700.88 plus six percent interest from the date of loss.

The LIBERTAD Act states that any person who traffics in property confiscated by the Cuban Government after January 1, 1959 shall be liable to any United States National who owns the claim to such property. The trafficking must occur after November 1, 1996. The LIBERTAD Act defines trafficking as knowingly and intentionally selling, brokering, using, or engaging in commercial activity benefitting from confiscated property including profiting from the trafficking of another. While the spe-

cific factual allegations against each cruise line differed, all were alleged to have used and profited from the use the terminals originally owned by Havana Docks. The cruise lines argued, in part, that they did not do so knowingly or intentionally.

The court evaluated ten pending motions for summary and partial summary judgment submitted by Havana Docks and the Defendants. On March 21, 2022, United States District Judge Beth Bloom, in a 169-page order addressed multiple issues of first impression in interpreting the applicable federal statutes and regulations. This included an analysis of whether cruise ship tourism activities constituted lawful travel to Cuba consistent with the twelve categories of permitted travel defined by OFAC. Judge Bloom ultimately denied the defendants' motions and granted Havana Dock's motions for partial summary judgment as to all four cruise lines. The cases will move forward to trial as to Havana Docks' damages only. ▯

Punitive Damages

Punitive damages awarded against tour boat operator for "waking" private vessel resulting in injuries to passenger

***Meador v. Aramark Sports & Ent. Servs. LLC*, No. CV-19-08345-PCT-JJT, 2022 WL 476005 (D. Ariz. Feb. 16, 2022)**

The United States District Court for the District of Arizona recently awarded damages, including $100,000 in punitive damages, to a private vessel owner and passenger who suffered injuries after their boat encountered a large wake from a passing tour boat on Lake Powell.

In September 2019, Plaintiff Larry Meador was operating his 29-foot Hallett 290 powerboat near the Navajo Canyon area of Lake Powell with his wife Annette Meador and several other guests aboard. In the 600-foot wide canyon, Meador encountered the 76-foot M/V DESERT SHADOW owned and operated by Defendant Aramark traveling in the opposite direction through a blind turn. Meador's vessel encountered the wake of the DESERT SHADOW, which caused his bow to crash down on the water surface resulting in back injuries to his wife, Annette Meador.

The court first determined that it had admiralty jurisdiction over the case but that the substantive admiralty law could be supplemented by state law in the absence of an actual conflict or interference with the uniform application of admiralty law. The court determined that the Inland Rules of Navigation applied to the case, and, specifically, Rules 2, 5, 6, and 7. The parties disputed the application of Rule 9 and its definition of a "narrow channel." After analysis of both the geographic characteristics of Navajo Canyon and case law defining "narrow channel" for the purposes of Rule 9, the court ruled that Navajo Canyon was not a "narrow channel" as defined by Rule 9. The court also found that an Arizona state statute requiring watercraft to operate at a "reasonable and prudent" speed for the conditions so as to avoid "swamping other watercraft or otherwise endangering the lives or property of other persons" also applied to the facts of the case.

After discussion of the evidence and expert testimony, the court found that the Meador's vessel was traveling between 25 and 30 miles per hour as it approached the Canyon and possibility slowed as it went to make the blind turn where it encountered the wake. The DESERT SHADOW was found to be on plane as it navigated the turn but was decelerating from 15 to 10 miles per hour. It was generating an approximate wake 3.3 feet at the time of the accident. The court found that the DESERT SHADOW did not violate Rules 5, 6, or 7 but that it did violate Rule 2 and the Arizona stat-

ute requiring the operation of vessels at a reasonable speed. The court also evaluated the facts in light of the *Pennsylvania* Rule, ultimately finding that the presumption was not overcome and ruling that both vessels contributed to Mrs. Meador's injuries equally, dividing fault 50/50.

After reducing the award by 50% for Meador's own comparative fault, the court awarded compensatory damages to the plaintiff of $135,373.50. The court refused to award damages for negligent infliction of emotional distress to Mr. Meador citing the lack of any physical injury.

The court held that punitive damages were recoverable under general maritime law where the injury was due to "wanton, willful, or outrageous conduct" citing to *Atlantic Sounding Co., Inc. v. Townsend*. The court also noted the 1:1 ratio set out in *Exxon Shipping Co. v. Baker*. The court discussed two prior reported incidents of injury arising from wake from Aramark's tour boats as well as internal company email traffic discussing tour boat wake complaints. The court found that the defendant was "on notice that its tour boats were generating potentially unsafe wakes" and that this notice justified an award of punitive damages in the amount of $100,000. ▯

Marine Insurance

District Court finds no coverage for live aboard vessel fire based on "primary residence" policy exclusion

***Progressive Garden State Ins. Co. v. Metius,* No. CV 18-2893 (WJM), 2022 WL 214546 (D.N.J. Jan. 25, 2022)**

This District of New Jersey decision by the Honorable William J. Martini evolved from a declaratory judgment action commenced by Progressive Garden State Insurance Company ("Progressive") seeking a declaration of non-coverage for fire damage to a boat owned by policy holder Erwin Metius ("Metius"). After a marital separation Metius, a New Jersey business executive, rented an apartment of his own in Jersey City and then began shopping for a boat with his girlfriend. Metius secured a slip in a local marina which accommodated his written requests for a docking agreement which allowed a liveaboard vessel. Shortly thereafter Metius purchased "Happy Hours," a 1988 Marine Trader motor yacht. After taking possession of the vessel Metius cancelled the lease for the Jersey City apartment. Although in the negotiations for the marina slip Metius disclosed the intention to "live on the board [sic] through the year," in his subsequent insurance application on Progressive's website Metius represented that the primary use of the vessel was "[p]leasure use exclusively." He also denied that the vessel would be used as a primary residence. Progressive issued a policy which provided up to $300,000 in liability coverage but did not provide hull coverage or physical damage coverage.

Five months later, with Metius aboard the vessel docked at her slip, a fire erupted which burned the vessel to the waterline and caused a boat in a neighboring slip to burn and sink. Metius presented an insurance claim to Progressive seeking coverage *inter alia* for damages to his vessel as well as to the neighboring boat. Progressive denied coverage and rescinded the policy based on the primary residence exclusion. In addition, Progressive relied on the policy's fraud and misrepresentation exclusion and the doctrine of *uberimmae fidei* alleging that Metius made false statements in the insurance application as to the intended primary use of the vessel.

Although the district court recognized that New Jersey courts had not previously interpreted "primary residence" within the context of a marine insurance policy applicable to a watercraft, the term

was considered to be unambiguous as a matter of law and refers to the place "where the insured mainly physically resides." Judge Martini analyzed the evidentiary record as to the time periods Metius spent aboard the vessel, as compared to his girlfriend's apartment and other locations, and made the following determination based on New Jersey non-maritime case law:

The Court finds the facts, viewed holistically and considering the totality of the circumstances, sufficiently establish that Metius was using the Vessel as his primary residence at the time of the fire. It was the main, principal place at which he physically lived; the place he returned to when he says he is going home. He owned and sometimes stayed at the Blairstown Address, but his physical contacts with this residence are those of a weekend visitor at a second home, Progressive therefore appropriately denied coverage of Metius's insurance claim under the Policy's primary residence exclusion. Progressive's motion for summary judgment was granted. ▯

District Court rules no insurance coverage for owner of recreational vessel damaged during sea trial for testing repairs

***Cherewick v. State Farm Fire & Cas.*, No. 320CV00693BENMSB, 2022 WL 80429 (S.D. Cal. Jan. 7, 2022).**

The District Court for the Southern District of California recently granted summary judgment in favor of an insurer in an issue of first impression. The question before the court was whether a boatowners insurance policy provided coverage for damage sustained to the vessel during a sea trial conducted to verify repairs to the vessel or if such damages fell under the repair exclusion to the policy. The subject vessel was as 2008 27-foot Boston Whaler, which was brought in for repairs to its engines. As the vessel was being docked after a sea trial subsequent to the repairs, the electronic controls malfunctioned causing the vessel to allide with a concrete piling and causing damage to the port bow. The dealership hired to repair the engines also repaired the paint and gelcoat damage to the bow of the vessel although later it was determined that the provided repairs were "poor" in terms of matching the color of the vessel and the pre-existing non-skid patterns.

The subject policy excluded, in part, damage caused by "repairing, renovating, servicing, or maintenance" to the vessel as well as damage arising from poor workmanship or materials used in the repair of the vessel that contribute to or aggravate the loss. After evaluating several notice and timing issues also associated with the claim, the district court held that the insurance policy excluded the damages caused by the repairers during their sea trial and that the other policy exclusions also applied to the repairs themselves. The court held that the "**sea trial is, in fact, part of the repair process.**" As such, the plaintiff's damages fell within the repair exclusion to the policy and summary judgment was granted for the defendant insurer. ▯

Maritime Liens

Fifth Circuit declines to expand the definition of "necessary" under the Commercial Instruments and Maritime Liens Act to multi-ship operations working on a common project

***Central Boat Rentals, Incorporated et al., v. M/V NOR GOLIATH, in rem; Goliath Offshore Holdings, Private Limited, in personam*, No. 21-60501, 2022 WL 1090798, (5th Cir. April 12, 2022)**

This case concerned the fallout from the bankruptcy of Epic Companies, LLC ("Epic"). Epic was involved in a platform decommissioning project in the Gulf of Mexico as a general contractor. To complete the project, Epic subcontracted with

a multitude of vessel owners, including a heavy lift vessel, material barges, and tugboats. The M/V NOR GOLIATH was a large heavy lift vessel hired to lift the decommissioned platform components and place them onto "dumb" material barges. The tugboats were utilized to move the loaded material barges to the scrapyard inshore, before pushing the empty barges back out to the NOR GOLIATH to be reloaded. The tugboats were owned by a variety of Towing Companies who made up the Appellants in the Fifth Circuit Appeal. The Southern District of Mississippi granted summary judgment in favor of the NOR GOLIATH, holding that the services provided by the tugboats did not constitute a valid maritime lien. *See Arc Controls, Inc. v. M/V NOR GOLIATH*, No. 1:19-cv-391, 2021 WL 1971485 (S.D. Miss. May 17, 2021). The Towing Companies appealed the decision to the Fifth Circuit.

On appeal, the Towing Companies argued that they had provided a "necessary" under the Commercial Instruments and Maritime Liens Act ("CIMLA") by towing the barges and thus held a maritime lien against the NOR GOLIATH as a result of their unpaid invoices. The Towing Companies put forward three arguments in support of their position: (1) the NOR GOLIATH's function was the entirety of the decommissioning process, thus every good or service used in decommissioning an oil platform was a necessary for purposes of establishing a maritime lien; (2) the barges were equipment necessary for the NOR GOLIATH's function and the tugboats "delivered" the barges to the NOR GOLIATH; (3) the decommissioning project and the Nor Goliath could not have completed its mission without the towing companies as the project would have effectively "ground to a halt without the tugboats moving the barges."

The Fifth Circuit first distinguished between Epic's goal as the general contractor and the distinct role of the NOR GOLIATH, who was hired to lift platform components and place them on barges. The Court clarified that "necessaries" under CIMLA should be restricted to those goods of services used for the "particular function" of the vessel. Secondly, the Court rejected the argument that the material barges were equipment necessary for the NOR GOLIATH's function as they "did not help the NOR GOLIATH's crane raise and lower the platform components, and so the NOR GOLIATH did not 'use' the barges." In doing so, the Court cited to its recent decision in *Martin Energy Servs., LLC v. Bourbon Petrel M/V,* 962 F.3d 827, 831 (5th Cir. 2020) (wherein the court held that gasoline was not a necessary for a vessel tasked with carrying gasoline as cargo to another vessels for consumption – only the consuming vessel received a necessary) where it found that maritime liens only arise when "the good or service was provided for use by the vessel itself."

Finally and most notably, the Court addressed the argument that maritime liens could arise from an "indirect benefit" finding that it misapprehended the concept of liens for necessaries. The entire explanation from the Fifth Circuit bears repeating in full: "Mutually beneficial conduct is expected when each vessel was hired by the same general contractor. Indeed, every ship in Epic's fleet indirectly benefitted from the barges being towed just as every ship indirectly benefitted from the Nor Goliath's lifting and loading. **But mutually beneficial conduct alone cannot give rise to a maritime lien under CIMLA, otherwise multi-ship operations would give rise to an untenable situation where all ships in a fleet would have liens on the other. In short, maritime liens for necessaries run against the vessel that received the necessary and no further."** On this basis, the Fifth Circuit declined the invitation of the Towing Companies to expand CILMA's reach and upheld the decision

of the District Court dismissing the Towing Companies claims. ▯

Oil Pollution Act

In an issue of first impression, the Eleventh Circuit holds that OPA does not create a cause of action against the US and displaces the SAA

***Savage Servs. Corp. v. United States*, 25 F. 4th 925 (11th Cir. 2022).**

This case arises from an oil spill in the Tennessee-Tombigbee Waterway and addresses the interplay of the Suits in Admiralty Act ("SAA") and the Oil Pollution Act of 1990 ("OPA"). The subject oil spill occurred when a push boat with two tank barges in tow entered a lock operated by U.S. Army Corps of Engineers. The raked bow of one of the tank barges became caught on the upper wall of the lock. As the water was removed from the lock, the raked bow hung up until it bent resulting in a puncture in the oil tank, spilling crude oil into the lock.

The court addressed the intersection of two legal cannons. First, the principle that the government is immune from suit absent unequivocal consent. Second, that statues should be construed harmoniously if possible and "if not, that more recent or specific statues should prevail over older or more general ones." As noted above, the two laws at issue are the SAA and the OPA. The SAA, enacted in 1920, waived sovereign immunity for the government for most admiralty claims. The OPA, enacted in 1990, governs and apportions liability for oil-removal costs. It holds spillers strictly liable for upfront removal expenses and incentivizes "good behavior" by allowing the spiller to avail themselves of certain enumerated liability defenses, including if established "by a preponderance of the evidence, that the discharge...of oil and the resulting damages or removal costs were caused solely by...(1) an act of God; (2) an act of war; (3) an act or omission of a third party...; or (4) any combination of paragraphs (1), (2), and (3)." 33 U.S.C. § 2703(a). The OPA also establishes a limitation on liability for the owner based on the size of the vessel. However, these liability defenses and the limitation on damages are only available if the responsible vessel owner reports the incident and provides all reasonable cooperation in the removal activities. Additionally, the OPA permits the spiller/responsible owner to file suit for contribution against other liable parties.

Following the subject oil spill, the plaintiff vessel owner filed suit against the government pursuant to the SAA seeking property damages and oil-removal costs. The government moved to dismiss the suit in part, based on sovereign immunity for the oil- removal costs. The plaintiff also moved for summary judgment seeking an affirmative ruling that the government has waived its sovereign immunity as to oil-removal claims. In granting the government's motion to dismiss and denying the plaintiff's summary judgment, the district court held that: 1) the OPA authorizes no claim against the Government; and 2) the OPA's comprehensive remedial scheme displaces the SAA's more general sovereign-immunity waiver. The Eleventh Circuit affirmed.

In reaching its decision on this issue of first impression, the Eleventh Circuit first evaluated whether or not OPA provided a cause of action for contribution against the government. The United States is not within the statute's definition of the entities that can be sued. The legislative history of the OPA and its predecessor statute, the Federal Water Pollution Control Act ("FWPCA") indicated that Congress intended to remove the cause of action against the U.S. government previously provided for in the FWPCA from the amended text of the OPA. The court held that the "OPA does not create a cause of action by which oil spillers

can seek contribution from the United States for oil-removal costs."

Next, the court evaluated whether OPA provided a complete defense to liability for damages arising from governmental negligence and held it did not provide such a defense. Congress specifically removed "negligence on the part of the United States government" as a defense to liability in amending the FWPCA and enacting the OPA. The court next addressed the more complex issue of whether the OPA was exclusive in its application or if the SAA still permitted a common law admiralty suit against the government. The government argued and the court accepted that the OPA provides a comprehensive and exclusive remedy for oil spill removal claims and displaces any common law causes of action permitted by the SAA. The court reasoned that a detailed statute, such as the OPA, preempts a more general statute, like the SAA. OPA also included a "Notwithstanding any other provision or rule of law" clause meaning that its remedial scheme was exclusive.

While the specific issue before the court was one of first impression, other circuits have also addressed the scope of OPA and held that it is the exclusive remedy for oil-removal claims that fall within its application. The court also evaluated the policy impact of precluding suit against government and determined that congress intended to "force the oil industry to internalize the negative externalities of its business..."

Lastly, the court rejected an argument that OPA had repealed the SAA by implication. The OPA as a specific statute displaced a cause of action under the common law or SAA and lacks any waiver of sovereign immunity. The government's partial motion to dismiss the plaintiff's oil-removal claim was affirmed. ▯

U.S. Coast Guard Updates

USCG issues ANPRM regarding Electronic Chart and Navigational Equipment Carriage Requirements for commercial vessels

On March 28, 2022, the USCG issued an advance notice of proposed rulemaking (ANPRM) regarding a proposed strategy to revise the "chart and navigational equipment carriage requirements to implement statutory electronic-chart-use provisions for commercial U.S.-flagged vessels and certain foreign-flagged vessels operating in the waters of the United States." The ANPRM seeks public input regarding proposed changes to the chart and navigational equipment carriage requirements, which the USCG states are not currently suited for an electronic chart only environment. Specifically, the USCG is "seeking information on how widely electronic charts are used, which types of vessels are using them, and where the vessels operate as well as views on the appropriate equipment requirements for different vessel classes. The information...will assist in drafting a proposed rule that tailors electronic charts requirements to vessel class and location." The ANPRM arrives in conjunction with NOAA undertaking a 5 year "sunsetting" program to phase out production of its raster navigational charts and paper nautical charts by January 2025. The ANPRM contains 17 specific questions posed to industry covering everything from how electronic charts are used in practice, what systems should be required, backup power supply, redundancy, and costs considerations for compliance with an electronic only regulatory framework. Public comments for the ANPRM close on June 27, 2022. ▯

USCG issues Marine Safety Information Bulletin 02-22, Cybersecurity Awareness & Action

On April 11, 2022, the United States Coast Guard issued Marine Safety Information Bulletin Number 02-22 regarding Cybersecurity Awareness &

Action. The bulletin directs stakeholders of the marine transportation system to monitor the Cybersecurity & Infrastructure Security Agency's website for information and recommendations for adapting a heightened cybersecurity posture. Per the CISA's guidance every organization should have documented thresholds for reporting potential cyber incidents to senior management and the U.S. government. Marine transportation system ("MTS") stakeholders should be closely monitoring their computer systems and networks for suspicious activity and potential security breaches. The bulletin reminds stakeholders that Marine Transportation Security Act regulated vessels and facilities are required, and other MTS stakeholders are encouraged, to report breaches of security to the National Response Center. The Coast Guard continues to review its own policies and guidance to address cyber risks and has previously issued some guidelines to assist industry. The Coast Guard's Cyber Command is also an available resource for MTS to use to prepare for or respond to a cyber-incident. □

Updated Fire Protection Regulations For Recreational Vessels, 33 C.F.R. §§ 175.301, *et seq.*

As of April 20, 2022 the U.S. Coast Guard has adjusted and revised the fire extinguisher regulations applicable to recreational vessels. The purpose of these amendments is to further clarify the recreational standards by separating them from the commercial standards and removing NFPA 10's inspection, maintenance, and recordkeeping requirements for recreational vessels. This is accomplished, in part, by moving the rules for these requirement to part 175 of subchapter S (Boating Safety) of title 33 where other recreational vessel rules already exist.

The new regulations limit the age of any extinguisher aboard to twelve (12) years and adopt standards tracking the newer labeling/classification system consistent with industry changes in labeling practices (i.e., 5-B, 10-B, 20-B). There are no specific new changes to fixed mount/engine room regulations equipment regulations. While there is no requirement to retrofit boats manufactured prior to 2017, the extinguishers aboard such vessels need to be maintained and in a good serviceable condition subject to the twelve year age limitation noted above. All extinguishers installed after August 22, 2016 must meet the new requirements. *See* 33 C.F.R. §§ 175.301*, et seq.* □

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