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MLA Practice & Procedure Committee's 2023 Spring Case Summary

1. *Bunge, S.A. v. ADM International SARL*, No. 22-1276, 2023 WL 3773670 (3d Cir 2023): Rule B attachment, contingent or incomplete claims are not valid prima facie claims for purposes of a Rule B action.

Bunge involved the chartering of a cargo ship for the purpose of carrying fertilizer from Saudi Arabia to the Mississippi River. When the vessel arrived off of the Mississippi River, it lost two anchors, had issues offloading cargo, and spent time at the repair berth. No one paid for the costs associated with these events. The berth's owner thus arrested the vessel after it finished offloading. The owners posted a $10 million bond to free the vessel and ultimately settled the dispute with the berth's owner for $3.25 million. The owners filed an arbitration against Bunge as the first subcharterer, seeking indemnification under the time-charter. Bunge counterclaimed claiming money damages for lost hire under a safe-port warranty in the charter party. Bunge simultaneously filed an arbitration against the entity that chartered the vessel on a voyage charter from Bunge, ADM. Bunge also sought indemnification. The arbitrations progressed very slowly, so Bunge filed suit in the District of Delaware, alleging breach of contract and seeking to attach and garnish some of ADM's funds under Rule B as security for an eventual judgment. Importantly, Bunge asserted two claims: (1) a more than $7 million claim (after interest) for indemnification in the event it had to pay the vessel owners, and (2) a roughly $480,000 claim for breach of a safe-port warranty in the voyage charter party.

The district court originally issued a writ of attachment but subsequently vacated it, reasoning that Bunge presented two claims that were both contingent on the outcome of its arbitration with the vessel owners.

The Third Circuit reversed the district court. The task before the Third Circuit was determining whether Bunge had asserted a valid prima facie admiralty claim. The court agreed with the Second Circuit that federal maritime law governs whether the claim sounds in admiralty while the relevant substantive law governs whether a plaintiff has alleged a valid prima facie claim. The first prong was easily satisfied given that the case before the court presented a classic Rule B claim. Typically, courts addressing the second prong are confronted with the question of whether a party has adequately **factually** alleged a claim, but this case presented the court with the issue of whether the plaintiff had adequately **legally** alleged a claim. **The Circuit Court held that in such a case, for a valid prima facie admiralty claim, "(1) the claim must be**

ready to be adjudicated under the relevant law and (2) the claimholder must have asserted the claim."

The court applied English law on indemnification, as required by the charter party, in assessing whether Bunge had asserted a valid prima facie claim on either the $7 million claim or the $480,000 claim.

The court began with the $7 million claim. Under a theory of implied indemnity, Bunge had no valid claim because such a claim is not complete until there is payment to a third party. But under a breach of contract theory for breach of the safe-port warranty, Bunge had alleged a complete cause of action, because the cause of action dated from the breach, regardless of whether Bunge could show damages yet.

The court next determined that the $480,000 claim was not a valid prima facie claim. Even though this presented a straight breach of contract claim, the claim was "explicitly, deliberately contingent" on whether Bunge recovered this amount first from the vessel owners. The court found that permitting this claim to go forward would allow claimants to "tie up defendants' property for years without ever pressing their claims. Such a rule would invite abuse of the attachment remedy."

2. ***Crescent Towing & Salvage Co. v. M/V Jalma Topic*, No. 21-1331 c/w 21-1390, 2023 WL 405414 (E.D. La. Jan. 25, 2023): Rule C, Rule F limitation action, personal jurisdiction over a third-party brought in for indemnification purposes cannot be established simply through a failure to warn claim.**

The plaintiffs arrested the M/V Jalma Topic because of an allision that occurred when its rudder stuck to port in the Mississippi River near New Orleans, causing the vessel to allide with a barge and dock structure as well as several small boats on the west bank of the river. The owner of the vessel filed a limitation action and, after related cases were consolidated, filed a third-party complaint against the manufacturer of the vessel's autopilot system, alleging it was defective. The manufacturer moved to dismiss the claim against it for lack of personal jurisdiction. The vessel owner sought and received permission to amend its third-party complaint and seek discovery. It amended the third-party complaint to assert two claims: (1) a products liability theory grounded on strict liability dangerous condition and defective design and (2) failure to warn. Discovery was permitted only as to specific jurisdiction over the failure to warn claim, as the court concluded that it had no general jurisdiction over the manufacturer and no specific jurisdiction with respect to the products liability claim.

Thus, the issue before the court was whether it had specific jurisdiction over the manufacturer on the failure to warn claim. **The court noted that "[t]he narrow body of case law on the issue" convinced it that jurisdiction did not attach simply because of a failure to warn claim in and of itself since the mere failure to warn, without more, does not create the requisite contacts.**

Accordingly, the court went on to review whether minimum contacts were established as a matter of evidence. The petitioners claimed that the court had personal jurisdiction over the manufacturer because the vessel was serviced in Louisiana by an entity called RadioHolland, a service provider in the dealer network of a representative of the manufacturer. But the court rejected this argument because neither the manufacturer nor its representative were directly involved in the call for service on the vessel. Additionally, there was no evidence that the petitioners had contacted the manufacturer or its representative directly to arrange the service call. There was additionally no evidence that the technicians that serviced the vessel were certified by the manufacturer.

Finally, the court assessed whether maintenance calls made directly to the representative (without the manufacturer's involvement) could establish specific jurisdiction with respect to the manufacturer. The court found no evidence of an imputed agency relationship and thus determined that actions taken by the representative without the manufacturer's involvement could not be imputed to the manufacturer for purposes of the jurisdiction analysis. The court accordingly granted the manufacturer's motion to dismiss due to lack of personal jurisdiction.

3. *Gambol Industries, Inc. v. M/Y Heart's Desire*, 626 F.Supp.3d 1138 (C.D. Cal. 2022): Opening default for a *pro se* defendant

The District Court for the Central District of California held that good cause existed to set aside an entry of default judgment involving a *pro se* litigant. Here, Plaintiff (the operator of a boatyard in Long Beach, California) entered into a contract to provide services to a vessel owned by Defendant. After completing the work, Defendant refused to move her vessel, resulting in an outstanding balance of services plus fees of $82,689.90. Plaintiff filed an *in rem* action against the vessel, whereafter, the Magistrate Judge ordered that the vessel be arrested pursuant to Supplement Admiralty Rule C. Defendant failed to respond to the action, so Plaintiff requested an entry of a Clerk's default judgment. The clerk entered default judgment. Less than a month after the Clerk entered default judgment, the defendant appeared *pro se* and filed a Motion to Set Aside Default. Ultimately, the court found that good cause existed to justify setting aside the Default. The Court found that there was "little evidence that [Defendant] engaged in culpable conduct"— "conduct which hinders judicial proceedings as to which jurisdiction is unchallenged." Additionally, the court determined that "it is unclear whether [Defendant] is able to present a meritorious defense" and that "this factor does not weigh against denying the Motion" due to the "complexity of admiralty law and the fact that [Defendant] is appearing *pro se*." Finally, the court determined that setting aside the default would not prejudice Plaintiff and that a brief six-week delay would not result in tangible harm.

4. *Ganpat v. Eastern Pacific Shipping PTE, Ltd.*, 66 F.4th 578 (5th Cir. 2023): Fifth Circuit affirms anti-suit injunction pertaining to foreign litigation

The Fifth Circuit affirmed a district court's decision to grant an extraordinary remedy, an anti-suit injunction. An anti-suit injunction prevents a litigant from commencing or pursuing

claims in one jurisdiction while simultaneously litigating the same claims in another jurisdiction. Here, the district court enjoined a foreign lawsuit filed in India nearly a year and a half after litigation had commenced in the United States because the district court found that the Indian suit was vexatious and oppressive. The district court determined that all three factors enumerated under the Fifth Circuit's vexatious and oppressive standard were satisfied, warranting entry of the injunction – (1) the Indian litigation would result in inequitable hardship; (2) the Indian litigation sought to impede or frustrate the American litigation and thus threatened the court's jurisdiction, and (3) the Indian suit was duplicative of the American suit filed more than a year earlier. Notably, the court explained that the traditional four-part preliminary injunction test, requiring an irreparable injury, should not be employed when analyzing whether an international anti-suit injunction should be entered. The court explained that the traditional four-part test has neither been discussed in affirming anti-suit injunctions nor cited as the basis for reversing an anti-suit injunction in this Circuit. Additionally, the court explained that neither a party's nationality nor contacts with the United States are factors to be considered when weighing the vexatiousness of foreign litigation against considerations of comity. Overall, the vexatiousness of the Indian litigation outweighed the minimum comity concerns here, therefore, the anti-suit injunction was proper.

5. *In the Matter of G&J Fisheries v. Costa*, 67 F.4th 20 (1st Cir. 2023): excusable neglect standard applied to untimely claims filed under Rule F

As a matter of first impression, the First Circuit affirmed the United States District court's decision to apply an "excusable neglect" standard for untimely claims filed under Supplemental Admiralty Rule F. The court reasoned that "[t]hough Supplemental Rule F(4) does not use the term excusable neglect, the standard for a district court to grant the filing of late claims upon a showing of the reasons therefor under the Rule is effectively one of excusable neglect." Therefore, the court explained that "Rule F(4) encompasses a showing of inadvertence, mistake, or carelessness, as well as intervening circumstances beyond the party's control." In this case, the court found that "[t]he district court did not abuse its discretion in finding that Costa's counsel failed to present a convincing excuse for their error, particularly because they were experienced practitioners in maritime litigation."

6. *Kanaway Seafoods, Inc. v. Pacific Predator*, No. 3:22-cv-00027, 2023 WL 3720975 (D. Alaska May 30, 2023): no admiralty jurisdiction in Rule D possessory action where Plaintiff asserted right to possess vessel without averring prior possession

Following a Magistrate Judge issuing his Report and Recommendation, the District Court adopted in part and denied in part the Magistrate Judge's Recommendation. Specifically, the court found that the Magistrate Judge erred in his finding that Supplemental Rule D jurisdiction was satisfied when one of the Plaintiffs asserted a right to possess the subject Vessel without first averring a prior possession. The Plaintiffs' Amended Complaint sought petitory relief under Supplemental Admiralty Rule D; yet the Plaintiffs argued that they brought "a possessory, rather than a petitory, action under Rule D." The court explained that "admiralty has jurisdiction in a

possessory suit by the legal owner of a vessel who has been wrongfully deprived of possession." The court further explained that "[a] possessory action is brought to *reinstate* an owner of a vessel who alleges wrongful deprivation of property" which "indicates that the action is one to recover possession rather than to obtain original possession." Because the Plaintiff's claim was one to obtain possession, rather than recover possession, the court found that the Plaintiff did not have a basis for a possessory action under Supplemental Rule D and therefore lacked jurisdiction to bring its claim.

7. ***Opaskar v. 33' 1987 Chris-Craft Amerosport Motor Vessel*, No. 1:21-CV-01710, 2023 WL 3978322 (N.D. Ohio June 13, 2023): Rule D, Effort to disclaim ownership of vessel to escape liability for incidents occurring on or because of the vessel does not invoke admiralty jurisdiction.**

On June 23, 2021, three individuals (including one owner of the vessel, Frank Opaskar, a sales representative, and the sales representative's son) were found deceased on board The Third Lady on Lake Eerie, ostensibly because of a carbon monoxide leak caused from a mechanical failure. The living owner (Gail Opaskar) of the vessel filed suit in federal court, claiming a right to try title in a petitory action governed by Rule D. Specifically, she claimed that a marine dealer was the proper owner of vessel because the Opaskars were in the process of trading the vessel in when the incident occurred. The dealer responded that the Opaskars were the true owners, and the estates of the two other decedents intervened arguing the same thing. The court ordered all parties to brief the issue of admiralty jurisdiction.

The Opaskars owned the vessel The Third Lady for over 30 years. In 2021, they decided to trade it in for a new vessel. The Opsakars decided on a new vessel, and a sales representative came to look at The Third Lady. Afterwards, the Opaskars put a deposit down on a new boat, and the dealer issued a Buyer's Quote form with information regarding the new vessel and terms under which it was being purchased. On June 17, 2021, the Opaskars tried to give the dealer the title to The Third Lady, but the dealer refused to accept it, saying that a mechanical inspection was required first and that Frank Opaskar needed to sign the title in front of a notary. The inspection was the voyage on which Frank, the salesperson, and the salesperson's minor son were tragically killed.

The court ultimately found it had no jurisdiction. The court assessed whether it had maritime jurisdiction under two theories: (1) was the purported trade in contract for The Third Lady a maritime contract, and (2) was the case a proper petitory action under Rule D. The court rejected the first basis, reasoning that a trade in contract was most analogous to a contract for sale. As to the second basis, the court and the parties failed to identify any case law where a party that held a certificate of title for a vessel sought to use Rule D for the purpose of being declared not the owner. The court reasoned that a plaintiff bringing a Rule D action must claim, not disclaim legal title.

The court then went on to assess whether the case presented a proper use of Rule D simply because Opaskar was the legal owner of the vessel on the date of the incident. Opaskar argued that title passed equitably to the dealer by virtue of its "exhibition of the indicia of ownership." The court disagreed, viewing Opsakar's argument as an attempt to side-step the fact that the real dispute between the parties was an argument over the terms of the purported trade-in agreement. Relying on other cases rejecting such attempts, the court thus found jurisdiction lacking under the second prong as well. The court accordingly dismissed the Rule D petition and the dealer's counterclaim.

8. *Seville v. Maersk Line, Limited*, 53 F.4th 890 (5th Cir. 2022): Jurisdiction, Venue, and Rule 11- Allegations of personal jurisdiction designed to elicit waiver of personal jurisdiction or transfer (1) subject the complaint to automatic dismissal instead of transfer and (2) violate Rule 11.

In *Seville*, Plaintiff filed suit in a district that concededly had no personal jurisdiction "and no colorable basis for venue." The plaintiff was the personal representative of a seaman who suffered a back injury while working abroad on a vessel in Bahrain. The plaintiff filed a Jones Act negligence claim in the Eastern District of Louisiana. The defendant moved to dismiss for lack of personal jurisdiction, arguing that venue was improper because it was not subject to personal jurisdiction in the district. The plaintiff opposed but requested transfer instead of contesting any of the defendant's jurisdictional arguments. The district court granted the motion to dismiss and denied the request to transfer.

The Fifth Circuit affirmed. Starting with the premise that the parties agreed that venue was improper, the court went on to explain applicable venue and venue transfer rules. The Fifth Circuit recognized that district courts retain discretion to transfer cases to proper venues if such transfer would serve the interest of justice. Among the appropriate considerations is why the suit was filed and whether the plaintiff held a reasonable good faith belief that venue was proper in the original forum. And where a plaintiff's attorney reasonably could have foreseen that the case was filed in an improper forum, courts often dismiss instead of transferring. This is because transfer in such cases is not in the interest of justice and such conduct should be deterred, even where the statute of limitations might bar re-filing.

The Circuit Court found neither specific nor general jurisdiction over the defendant. The court further found that the jurisdiction and venue problem was evident from the face of the complaint.

Notably, Plaintiff's counsel attempted to justify being in the wrong district on the ground that personal jurisdiction is waivable. The Circuit Court was unconvinced, noting that Rule 11 requires a good-faith and colorable basis for every representation made to a federal court. Counsel's argument was thus "equal parts disturbing and surprising." The court held not only that this argument forecloses transfer, but it also gives rise to Rule 11 violations. Thus, the district court's decision was affirmed.

9. ***Sikousis Legacy Inc. v. B-Gas Limited*, No. 22-cv-03273-CRB, 2023 WL 322900 (N.D. Cal. Jan. 19, 2023): Rules B and E, another court applies probable cause to the plaintiff's burden of establishing a prima facie case.**

This case concerned the attachment of the vessel M/T Berica and a motion to vacate the attest. The question was whether attachment was appropriate in light of the alter ego relationship between the named owner of the vessel and a family of related corporate entities in Cyprus and Norway. The defendants were various related corporate entities in these countries as well as an individual who was the chairman of the board of all of the named corporate defendants. The plaintiffs were arbitration creditors that obtained a $7.5 million award stemming from one of the defendant's repudiation of a bareboat charter party. That defendant changed names and, subsequent to the award, declared insolvency.

The plaintiffs claimed they could recover against the owner of the Berica as a different, related entity under an alter ego theory. The corporate defendants were allegedly involved in a series of transactions for nominal or fractional value, such that the entity that was subject to the award no longer had the same parent company as the owner of the Berica and no longer owned certain charters or any other valuable assets. Plaintiffs alleged that these transfers were intended to strip the debtor corporation of its assets, that the corporate defendants had substantial overlapping ownership, and that the defendant chairman and his corporate surrogates caused the transfer of the debtor's assets to hinder the plaintiffs' efforts to collect.

In assessing the vessel owner's motion to vacate the attachment, the court first discussed the alter ego doctrine. The court noted that federal common law applied as to the alter ego doctrine, and that a plaintiff seeking to apply that rule in a maritime case must make out a prima facie case "(1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice." The court's focus was the corporation's practical operation, not "superficial indicia of interrelatedness." The Ninth Circuit has articulated the test somewhat differently, determining that a plaintiff must show that "(1) the controlling corporate entity exercise[s] total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own ... (2) injustice will result from recognizing the subservient entity as a separate entity ... and (3) the controlling entity had a fraudulent intent or an intent to circumvent statutory or contractual obligations."

Of particular note to this committee was the question of the appropriate burden. The court recognized that the burden of showing why the attachment should not be vacated belonged to the plaintiffs. The court noted that the Ninth Circuit has not articulated the appropriate standard, but found some support for application of a "probable cause" standard. Hearing no objection from the parties, the court again applied the probable cause standard.

The court then went through an extensive analysis of the facts pertaining to the alter ego analysis. Ultimately, the court found the plaintiffs' evidence to be insufficient in two places: in

the link between the debtor and the parent company, and in the link between the owner of the Berica and any other at-fault entity. The court also rejected an effort to apply California's single business enterprise doctrine, finding that it conflicted with admiralty law on the subject. Thus the court granted the motion to vacate but stayed its orders to allow the plaintiffs to seek a further stay in the Ninth Circuit.

10. *Sing Fuels Pte Ltd. V. M/V Lila Shanghai*, 39 F.4th 263 (4th Cir. 2022): no maritime lien for provision of necessaries under apparent agency theory, actual agency necessary

The Fourth Circuit affirmed the District Court's decision denying a maritime lien under the Commercial Instrument and Maritime Lien Act ("CIMLA"), 46 U.S.C. §§ 31301-43. Under CIMLA, "a party must show the following: (1) a person providing necessaries; (2) to a vessel; and (3) on the order of the owner or a person authorized by the owner." Notably, CIMLA creates a rebuttable presumption that certain persons, including charterers, are presumed to possess the authority to obtain a vessel's necessaries. Here, it is undisputed that necessaries (bunkers) were provided to a vessel. Therefore, prongs one and two are satisfied, leaving only the question of authority for the court to review. In affirming the district court's decision, the Fourth Circuit found that the bunker trader failed to adequately prove that it was entitled to a maritime lien or otherwise show that the district court's conclusions were clearly erroneous. First, "there is no argument or record evidence that [the bunker trader] acted on the order of the owner"; therefore, the bunker trader is not entitled to a maritime lien under the first scenario of authority. Second, the bunker trader failed to demonstrate that its point of contact or the sub-charterer of the Vessel were persons authorized by the owner; thus, again, the bunker trader is not entitled to a maritime lien under CIMLA. The main thrust of the bunker trader's argument rested on a theory of apparent agency. However, "under CIMLA's terms, the rebuttable presumption of authority to bind a vessel is only applicable if an agency relationship indeed exists." Ultimately, the bunker trader failed to establish the existence of any agency relationship between its point of contact and the charterer, therefore, closing the door on the third and final purported basis of authority. Despite over $530,000.00 in fuel being provided to and consumed by the vessel, the bunker trader was not entitled to a maritime lien in the vessel because the bunker trader failed to prove its case.