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2024 MLA Spring Case Law Summary

CHOICE OF LAW

***Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65 (2024): Choice-of-law provisions in maritime contracts are presumptively enforceable under maritime law except under narrow exceptions.**

Raiders bought an insurance policy from Great Lakes to insure its boat. The policy contained a New York law choice-of-law provision. A year later, Raiders' vessel ran aground in Florida, and Raiders submitted a claim to Great Lakes. Great Lakes denied the claim, asserting that Raiders failed to maintain the vessel's fire suppression system and that the breach voided the entire contract.

Great Lakes filed a declaratory judgment action in Pennsylvania. Raiders, in turn, brought contract claims under Pennsylvania law, and Great Lakes took the position that New York law applied. The district court agreed, and the Third Circuit vacated that judgment, holding that maritime contract choice-of-law provisions must yield to strong public policies in the state in which suit is brought.

The Supreme Court granted cert and reversed. The Court began by discussing admiralty jurisdiction, established maritime principles, and the federal courts' authority to either create new principles or apply state law concepts to fill in gaps. The court thus looked to whether there was an established federal maritime rule regarding the enforceability of choice-of-law provisions and found that there was: choice-of-law clauses (along with forum-selection clauses) are presumptively enforceable. The court also noted that making such clauses presumptively enforceable supports important public policies relevant to maritime commerce.

Raiders asserted that *Wilburn Boat* precludes presumption of enforceability of choice-of-law clauses in maritime law contracts. Great Lakes responded that *Wilburn Boat* was in tension with the Court's modern maritime jurisprudence. The Court ducked that concern, determining that *Wilburn Boat* was inapposite because

it did not involve a choice-of-law provision, that it was limited only to its holding that state law applied as a gap-filler in the absence of a uniform federal maritime rule on a warranty issue, and that no such gap existed in the case before the Court. The Court also touched on policy concerns at issue in *Wilburn Boat*, finding them lacking in the present case and determining that there is nothing particularly unique about marine insurance contracts to nullify the presumption of enforceability.

The Court further identified the limited exceptions to applicability of choice-of-law clauses: contravention of a controlling federal statute, conflict with an established federal maritime policy (such as release from liability for negligence), or when the parties can furnish no reasonable basis for a chosen jurisdiction. The Court considered and rejected an exception based on a fundamental state policy of the state with the greatest interest in the dispute.

Notably, Justice Thomas filed a concurrence attacking *Wilburn Boat*, arguing that it has been limited to "local disputes," and calling its rationale "deeply flawed." The majority did not address this opinion, perhaps foreshadowing future attacks and limitations on *Wilburn Boat*.

***Aegean Mar. Petroleum S.A. v. KAVO PLATANOS M/V*, No. 2:15-CV-00172-JHC, 2023 WL 7280744 (W.D. Wash. Nov. 3, 2023): A court's evaluation of the merits under (arguably) the wrong country's law supported maintaining an arrest, at least in the absence of a sufficient showing of what the correct country's law required.**

Aegean Maritime is another case arising out of the O.W. Bunkers bankruptcy, where Aegean brought suit against the vessel *in rem* against the charterer and owner *in personam* for payment of the invoices. The court authorized arrest, attachment, and garnishment under Rules B, C, and D. The case was stayed pending resolution of similar cases in New York, and the court took the case back up after those rulings, recognizing that O.W. typically was not considered an agent of the vessel such that a maritime lien could attach.

After the court lifted the stay, motions practice was triggered regarding whether Aegean's claims were due to be dismissed, the net effect of which was that Aegean amended its complaint to assert five causes of action under Canadian law, including Canada's law on maritime liens. The court granted dismissal as to Aegean's Rule C *in rem* claims but denied the motion as to the plaintiff's other claims, holding that the plaintiff's breach of contract law should be analyzed under Greek law, that its unjust enrichment claim should be analyzed under Canadian

law, and that its other claims were simply types of relief sought instead of distinct claims.

The charterer then moved to vacate the arrest under Rule E(4)(f). The court first rejected Aegean's argument that charterer failed to file a timely statement of interest, determining that Rule C only applies to *in rem* actions and that the only remaining claims asserted were *in personam* claims. Additionally, the court noted that it would have and exercise discretion to allow the charterer to file such a statement out of time in any event.

Applying a "fair or reasonable probability" standard, the court then denied the motion to vacate. At issue first was a forum-selection clause in the contract which arguably required litigation in Greece. But the court interpreted the language of the clause to allow Aegean to file in any jurisdiction. The charterer further contended that the Greek courts have already found that Aegean did not have viable contractual claims. That litigation, however, was still ongoing, with the case pending in Greek appellate courts. Although the district court had previously applied Canadian law in determining whether a contract existed instead of Greek law and the Greek trial court had applied Greek law in finding no enforceable contractual relationship, the district court determined it was premature to dismiss the breach of contract claim, at least in the absence of certified translation of sufficient documentation of the Greek proceedings. The court also determined that Aegean had a valid claim for unjust enrichment under Canadian law. Accordingly, the court denied the motion to vacate the attachment.

REMOVAL

***In re N&W Marine Towing, L.L.C.*, 90 F.4th 724 (5th Cir. 2024): In a limitation action, a defendant sued in subsequent state court action is fraudulently joined for purposes of remand analysis if that defendant is sued in violation of the stay; the claimant should have had stay order lifted first.**

A deckhand on N/W's vessel was injured while repairing face wires between the vessel and barges in tow. N&W filed a limitation action in district court, triggering a stay of all claims and proceedings against N&W. The district court entered a stay order that explicitly stayed and restrained "[t]he commencement or further prosecution of any action or proceeding against N&W." Subsequent to the limitation action being filed, the deckhand filed a petition for damages in Louisiana state court against N&W, its vessel, Royal Caribbean and its vessel (which were

also involved in the incident), and several insurance companies under the savings to suitors clause and general maritime law. Royal Caribbean removed the state action to federal court asserting diversity jurisdiction and admiralty tort jurisdiction pursuant to 28 U.S.C. § 1333(1). The district court consolidated the two actions and denied the deckhand's motion to bifurcate. The deckhand then filed a motion to remand before seeking to have the limitation action stayed and the injunction lifted. The district court granted the motion to stay the limitation action, and the 5th Circuit affirmed on appeal.

The district court denied the motion to remand, determining that the deckhand had violated the stay order and that N&W was thus improperly joined in the state court matter. Accordingly, the district court dismissed N&W from the case and determined that complete diversity existed because the state court suit had no legal effect as to N&W. The court then severed the state court petition, dismissed it without prejudice, and retained jurisdiction over the limitation action but stayed it to allow the deckhand to pursue any viable claims he had against N&W in state court.

N&W and the deckhand both appealed, and the Fifth Circuit affirmed. It held that N&W was fraudulently joined given that the deckhand's case against it was barred by the limitation act and the district court's Rule F order. The circuit court also rejected several other creative attempts made by N&W to stay in federal court, finding no authority allowing a federal court to maintain a claim against an improperly joined party. Finally, the court rejected the deckhand's efforts to attack removal, again relying on the improper joinder.

RULE B

***Sikousis Legacy, Inc. v. B-Gas Ltd.*, No. 23-15245, 2024 WL 1245338 (9th Cir. Mar. 25, 2024): Probable cause to believe that Plaintiff will prevail on the merits of admiralty claim is the standard in the Ninth Circuit for whether pre-judgment Rule B attachment continues.**

This case involved an appeal from an order vacating a vessel attachment due to a contract dispute. The owner of the vessel was in the case on a veil piercing theory, which the plaintiffs sought to use to enforce an arbitration award (which had been obtained against another company) against the owner. The district court found

that the plaintiffs failed to show probable cause they would prevail on the theory and thus vacated the attachment.

The Ninth Circuit affirmed. Of particular interest here is the standard applied by the circuit court in assessing the motion to vacate. The circuit court noted that it was an unresolved issue in the circuit. The court ultimately adopted the standard applied below: whether there was probable cause to believe the plaintiff would prevail on the merits of its admiralty claim. A plaintiff meets the burden imposed by this test by "by establishing a reasonable probability of success as to each element of his claim. A reasonable probability requires less than a preponderance but requires more than a mere possibility of success." "Where the defendant who requested the Rule E(4)(f) hearing provides evidence that undermines an essential element of a plaintiff's claim, the plaintiff then has the burden to submit evidence to the contrary or explain why the defendant's evidence is not material to survive a motion to vacate the attachment."

The court noted that this appeared to be the prevailing test in the Ninth Circuit and noted that other circuits applied a similar standard. The court reasoned that this standard was appropriate under circuit precedent. A plaintiff need not prove its case at the Rule (E)(4)(f) stage, meaning that a standard higher than probable cause would be inappropriate.

Applying these standards, the circuit court found no error. It determined that under federal common law, plaintiffs had failed to show that the entity against which it had the award was dominated and controlled by the vessel owner.

***Trend Intermodal Chassis Leasing LLC v. Zariz Transp. Inc.*, No. 3:23-CV-1143-BN, 2024 WL 117155 (N.D. Tex. Jan. 10, 2024): a lease agreement for intermodal chassis to move containers from a port is not a maritime contract for purposes of admiralty jurisdiction and Rule B attachment, no stay pending appeal even where defendant admits lacking funds to pay a judgment where appeal only involves simple application of adverse precedent to facts of case**

The plaintiff filed suit in district court alleging breach of a maritime contract and maritime jurisdiction under Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1333. The plaintiff also sought Rule B attachment and garnishment of bank accounts, which the district court granted, and later over Kuehne+Nagel. The plaintiff subsequently filed a motion for summary judgment. After originally admitting that it owed plaintiff and lacked the funds to defend the case, the defendant filed an emergency

motion to vacate the attachment, alleging the court lacked subject matter jurisdiction.

The court first noted that it was rejecting any challenges to timeliness, because the court's subject matter jurisdiction was subject to challenge at any time.

Noting that a Rule E(4) hearing challenge to court's admiralty jurisdiction is not to be treated as a Rule 12(b)(1) motion to dismiss but that a plaintiff must have a valid prima facie claim against the defendant to attach maritime property, the court began the analysis of whether the contract at issue in the case was a maritime contract with the principal objective of maritime commerce. The court reviewed the tests typically used in the Fifth Circuit for non-oil-and-gas contracts: the contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract. The court reviewed the defendant's admissions, website information, and the contentions of the party, which established that the defendant transported ocean containers from ports on intermodal marine chassis. The court also looked to decisions from other circuits noting that lease agreements for equipment to transport containers or goods over land have been found to not be maritime contracts. The court accordingly determined that the contract at issue was not a maritime contract, relying on reasoning that focused on the points that the equipment at issue was used exclusively for land transportation and that the primary objective of the contract was not maritime.

The court also addressed a few miscellaneous arguments. For example, the court noted that a particular contract could make chassis and containers maritime property, but did not find that to be pertinent in this case. The court also found no basis in law or fact for the plaintiff's assertion that the parties had an expectation that ships would be involved in transporting cargo subject to the contract and that such an expectation should control. The court also rejected as important cases in which Rule B writs of attachment were granted in similar cases, noting that courts often use Rule E hearings to determine whether Rule B's requirements were in fact met despite granting attachments earlier on. Finally, the court noted that parties cannot admit or stipulate themselves into marine jurisdiction.

The court then denied the plaintiff's request for a stay pending appeal. Stays pending appeal are extraordinary relief. Applying the appropriate four part test, the court noted that plaintiff did not have a high likelihood of success on the merits or present a serious legal question, that there was no likelihood of irreparable injury given that the defendant had seemed to reverse itself on earlier claims of indigence,

that it was unwilling to hold the garnishee's money without sufficient reason, and that there appeared to be no overriding public interest concerns.

***Tonzip Mar. Ltd. v. Coral Energy Pte. Ltd.*, No. 2:23-CV-02283-DJC-AC, 2023 WL 7092880 (E.D. Cal. Oct. 26, 2023): no writ of attachment issued for bank account where only alleged connection between account and the district is the presence of an agent for the garnishee**

The plaintiff filed an ex parte application for Rule B attachment seeking to attach the defendant's bank accounts allegedly held by the garnishee in the Eastern District of California to secure claims for breach of a charter party. The court denied the application once because the plaintiff failed to satisfy the court that the accounts could be found in the district. The plaintiff filed a renewed application with additional evidence "in the form of (1) a letter from Garnishee to Plaintiff confirming that Defendant holds accounts with them, and (2) a current search of Garnishee on the Office of the California Secretary of State website confirming that Garnishee has an agent located within the District."

The court began its analysis by noting that courts have adopted different approaches in determining whether state or federal law applies to establish where a bank account is located for purposes of Rule B. The court noted that the Ninth Circuit looks to state law to assess the efficacy of serving one bank branch with attachment process to reach accounts at other branches. And in California, intangible property is considered located where the person or entity that currently has possession of the property is located. The court found the two pieces of evidence identified above to be insufficient in establishing that the bank account was located in the district.

***Xcoal Energy & Res. v. Acciaierie D'Italia S.P.A.*, No. 1:23-CV-00361-TFM-C, 2023 WL 7458845 (S.D. Ala. Oct. 10, 2023): title to coal had not passed to defendant such that Rule B attachment was proper, and contract for the sale of coal is not a maritime contract even though it required maritime transport**

This Rule B case involved the attachment of coal. The plaintiff sought security for claims it was in the process of filing and that arose out of the alleged breach of purchase agreements whereby the defendant agreed to purchase coal from the plaintiff. The coal subject to the attachment, however, was owned by a different entity, which was the seller under a different sale of goods contract with the defendant. Both the defendant and this other entity filed motions to vacate the arrest.

The magistrate judge thus found that the two essential elements necessary to support a Rule B attachment (that the defendant has a possessory interest or ownership in the property to be attached and that the contract at issue is a maritime contract) were not satisfied. As to the ownership of the coal, the court looked to the contract between the defendant and the other entity, which provided that title would pass once prepayment and provisional payment had been received in full. It was undisputed that the defendant had not made the provisional payment, meaning that the defendant did not have title in the coal. The cases relied on by the plaintiff were all distinguishable in that they did not involve a similar contract provision or right of possession/ownership.

The plaintiff then shifted allegations and alleged that even if the defendant did not own the coal, it had conditional title to the coal. The magistrate judge rejected this argument on the grounds that it was not the premise upon which the plaintiff obtained the attachment and that the plaintiff could not establish any ownership on the defendant's part in any event.

Finally, the magistrate judge also determined that the contract between the plaintiff and defendant was not a maritime contract. Instead, it was a contract for the sale of goods (coal), the primary objective of which was the sale of the good itself. The mere fact that the contract provided for the coal to be shipped to Italy did not render the contract a maritime contract because (with reference to other cases) the transport of the coal was necessarily premised on the purchase of the coal itself and because neither the coal nor the sale thereof was directly or intimately related to the operation of a vessel or its navigation. Furthermore, the contract was not a "mixed" contract for the same reasons. This outcome was not impacted by the fact that demurrage costs would be included in the claimed damages. Accordingly, the magistrate judge recommended that the motion to vacate be granted.

RULE C

***Nautor Swan Glob. Serv., S.L. v. S/V RED SKY*, No. 22-CV-386-JJM-LDA, 2024 WL 81302 (D.R.I. Jan. 8, 2024): Law of the case doctrine does not prevent argument that failed in a motion to dismiss/vacate an arrest from being asserted as wrongful arrest counterclaim.**

The plaintiff sought to enforce a maritime lien for necessaries. The vessel was arrested and subsequently released on the posting of security. There were two motions to dismiss for lack of jurisdiction and to vacate the arrest, both of which

had been denied. The second motion in particular argued that Spanish law applied and did not allow for the in rem action. The court had determined that although Spanish law would likely apply to the substance of the contract dispute, Spanish law was immaterial to the validity of the arrest that occurred after the owner chose to bring the vessel into the district. The owner then filed a counterclaim asserting wrongful arrest (on the theory that Spanish law did not allow the lien underlying the arrest) and breach of contract.

The plaintiff filed a motion to dismiss. It sought dismissal of the wrongful arrest claim based on the law of the case doctrine, which provides that a legal ruling made at one stage of a case should control throughout the litigation unless altered by a higher court. Interlocutory orders, however, remain open to trial court consideration and are not law of the case. Accordingly, the magistrate judge recommended denial the plaintiff's motion to dismiss after finding a facially plausible wrongful arrest claim.

The judge also determined the breach of contract claim to be plausible, and recommended both the denial of the motion to dismiss as to that claim and that counter security in an amount significantly less than what was requested by the owner be posted.

***Naval Logistic, Inc. v. M/V Fam. Time*, No. CV 23-22379, 2023 WL 7109837 (S.D. Fla. Oct. 27, 2023): Mere procedural oversight in failing to file a verified statement of interest within requisite time may justify extension of time to file that statement, at least where the defendant had already appeared and expressed a clear interest in defending the claim.**

The defendant moved for reconsideration of a prior order appointing a substitute custodian, which the plaintiff (which was doing business as a marina and had been appointed as the custodian) opposed. In an effort to undercut one of the arguments being made by the plaintiff, the defendant also requested leave to file an untimely statement of interest.

The court first granted the motion for leave to file an untimely statement of interest. The court recognized its discretion to extend the deadline and exercised that discretion noting that the failure to file a statement of interest was a procedural oversight constituting excusable neglect that would not cause delay or prejudice. The court further noted that the defendant had already appeared and expressed an interest in defending the claim by filing an answer and affirmative defenses before the plaintiff moved to arrest the vessel.

The court, however, denied the motion for reconsideration, finding no manifest error of law or fact in its previous order. The court also found that justice did not require reconsideration. The plaintiff established itself as a marina with experience caring for vessels and acting as a substitute custodian. The defendant argued that the plaintiff was unfit to serve as the custodian because it had damaged the vessel as alleged in a third-party complaint in the case (the suit was over repairs that had been performed on the vessel at the plaintiff's marina). The court found that these concerns were not well founded, given that the plaintiff was required to maintain the vessel in good condition and had no incentive to reduce its own potential recovery. The court also noted that the defendant failed to identify a reasonable alternative.

RULE E

***Benicia Harbor Corp. v. M/V IDA LOUISE*, No. 223CV00205DJCCKD, 2023 WL 7092230 (E.D. Cal. Oct. 26, 2023), *modified*, No. 223CV00205DJCCKD, 2024 WL 281301 (E.D. Cal. Jan. 25, 2024): entitlement to a prompt hearing through Rule E(4)(f)'s may be forfeited by an owner's delay in seeking the hearing**

A marina owner filed suit against the vessel to enforce a lien for necessaries in February 2023. The marina filed an ex parte application for arrest, which the court granted. The vessel was arrested and placed in the marina's care and custody as the substitute custodian. The vessel owner was served with notice of the arrest and filed an answer and counterclaim in April 2023, but did not post or offer to post security to secure the release of the vessel. The plaintiff then moved for interlocutory sale of the vessel. The vessel owner opposed the sale on the grounds that the plaintiff has deteriorated the condition of the vessel, the plaintiff had not shown the costs of maintaining the vessel were excessive, and the owner's delay in securing release of the vessel was not unreasonable. The vessel owner also moved to vacate the arrest, arguing insufficient notice and asking for countersecurity.

The court dismissed the owner's notice argument, noting that a maritime lien is a "secret" lien that arises as a matter of law and may operate to the prejudice of a bona fide purchaser without notice. Thus, no notice was required.

The court also noted that the owner's motion to vacate the arrest came after several months of delay. Rule E(4)(f) entitles the owner to a "prompt hearing," and seven months after arrest is not prompt. The owner tried to argue that housing insecurity

led to the delay given that she lived on the vessel. The court, however, found the delay to be substantial. Accordingly, the court denied the motion to vacate.

Next, the court considered the motion for interlocutory sale. Finding that the deterioration of the vessel, the cost of maintenance, and the owner's delay in securing release all weighed in favor of a sale, the court ordered the motion granted.

SERVICE

***Falvey Cargo Underwriting Ltd. v. Zim Integrated Shipping Servs. Ltd.*, No. 119CV11495LTSSDA, 2023 WL 8716888 (S.D.N.Y. Nov. 30, 2023): settlement negotiations do not constitute good cause for extension of Rule 4(m) period for service, and waiting 4 years to effect service even though the parties are actively negotiating settlement will likely result in court refusing extension of time to serve**

Before the magistrate judge here was a request for an extension of time to complete service under Rule 4(f) or alternatively for an extension of the 90-day period specified in Rule 4(m). The plaintiff filed an admiralty action on December 16, 2019, against shipping lines, a freight forwarding company, and a vessel for breach of various duties as common carriers. The plaintiff sent the summons, complaint, and waiver of service forms to the email address of several employees of the entity designated as ZIM Integrated's agent for service of process. The plaintiff and ZIM Integrated then began an extensive settlement discussions, during which ZIM Integrated refused to accept service. The plaintiff continued to file purported joint letters seeking multiple extensions of court deadlines, which were generally granted. ZIM Integrated was not consulted about the letters and was not otherwise sent copies of resulting court orders.

Finally, on August 25, 2023, the plaintiff notified the court that ZIM Integrated had changed its position regarding settlement and that the plaintiff had now served ZIM Integrated. After another failed settlement conference, the plaintiff filed this motion.

The magistrate judge first looked to see whether there was good cause for the plaintiff's failure to effect service on ZIM Integrated, which the judge recognized as a heavy burden of proof. The judge further noted that attorney inadvertence, neglect, mistake, or misplaced reliance does not constitute good cause. Instead, the

court typically applies a four factor test: (1) whether the applicable statute of limitations would bar a refiled action; (2) whether the defendant had actual notice of the claims asserted in the complaint; (3) whether the defendant had attempted to conceal the defect in service; and (4) whether the defendant would be prejudiced by the granting of plaintiff's request for relief from the provision. The court further noted the Second Circuit rule that the exemption for foreign service set forth in Rule 4(m) does not apply if service was never attempted within the statutory period.

The judge first held that Rule 4(m) was applicable because service was made under Rule 4(h)(1), which is not exempted from the 90-day requirement of Rule 4(m). The judge, however, likewise considered an extension of time to complete service under Rule 4(f) out of an abundance of caution because the plaintiff had withdrawn service.

Applying Rule 4(m), the judge determined that the claims against the shipping company were due to be dismissed without prejudice. The judge found no valid effort to serve the shipping company within the 90-day period because at most the plaintiff had attempted to get ZIM Integrated to accept service, which ZIM Integrated had refused. Furthermore, the judge found that ongoing settlement discussions did not constitute good cause for extending the service deadline. Finally, the judge determined that an analysis of the four factors discussed above resulted in a mixed outcome, but the prejudice to ZIM Integrated served as the deciding point against an extension. It also influenced the judge that the plaintiff had repeatedly filed "joint" letters without consulting with the shipping company. The judge also recommended against an extension of time under Rule 4(f) for the same reasons.

THIRD PARTY PRACTICE

***Gulf Island Shipyards, LLC v. Mediterranean Shipping Co. (USA), Inc.*, No. 1:22-CV-1018-MKV, 2023 WL 7735432 (S.D.N.Y. Nov. 15, 2023): Although Rule 14(c) may be used to establish a direct relationship between the plaintiff and a third-party defendant, it may not be utilized when the proposed third-party defendant is already a party to the case, subjecting such attempted claims to dismissal. The proper resort is a crossclaim.**

Two defendants moved to dismiss the plaintiff's Rule 14(c) tender in answer to a counterclaim filed against it. Those defendants were the entities the plaintiff

sought to name as third-party defendants pursuant to Rule 14(c). Rule 14(c) is unique in that it establishes a direct relationship between the plaintiff and third-party defendant upon the assertion of a third-party claim unlike in other contexts. Thus, it may only be asserted against a non-party in a lawsuit and is of no consequence when the proposed third-party defendant is already a defendant to the main action. Because the defendants were still parties to a crossclaim despite having plaintiff's direct claims against them dismissed, the court found the impleader inappropriate.

SPOLIATION

***Skanska USA Civ. Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023): "intent to deprive another party of the information's use in the litigation" for purposes of failing to preserve electronically stored information is the equivalent of bad faith in other spoliation contexts.**

Hurricane Sally caused 28 barges to slam around Pensacola Bay, leading to significant damage. Afterwards, the construction company that owned the barges filed limitation of liability actions for each of the barges, all of which were later consolidated. More than 1,000 parties ultimately filed claims, including (for example) a local bagel shop that claimed it suffered $90,000 in damages from a bridge outage because of the increase in travel time that cut the shop's sales by 35% The construction company moved to dismiss such claims (of which there were more than 900), arguing that it owed no duty to these parties that suffered mere economic damages.

The court ordered the claimants to join onto one of two amended master complaints: one for direct property damage and one for economic damage. The court also announced a bifurcated bench trial, with the first part dedicated to whether the company was entitled to limitation and the second (if necessary) to conduct damages discovery and any necessary further proceedings. The company then renewed its motion to dismiss the economic damages claim, on which the court deferred ruling.

The first phase of the trial lasted five days and focused on two issues: the company's negligence and its right to limit its liability. Applying the Louisiana rule, the district court determined that the company should not have been caught off guard by the storm and could have sought safer mooring for the barges. The district court likewise found that the company had privity and/or knowledge of the negligent acts because they were executive decisions. The district court thus

dismissed the limitation actions. Finally, the company was also sanctioned for spoliating electronic evidence in the form of data from five out of thirteen discovery custodians' cell phones, which was destroyed even with an active litigation hold and actual litigation. The company had not made any backups or suspended its normal data destruction policies. Two phones were deliberately reset due to employee departure, another was disabled under similar circumstances, another was lost overboard, and another had all text messages deleted under unusual circumstances. The district court found bad faith in that the company intended to deprive the claimants of the data because there was no cogent explanation, apart from bad faith, for the failure to preserve.

The construction company appealed to the Eleventh Circuit, first claiming that the district court should have decided the construction company's liability to each and every claimant before assessing its right to limit liability, which would have meant the dismissal of economic loss claims. Exploring the history and purpose of the statute at length, the circuit court rejected this argument, noting that the purpose of the limitation act is limitation, not exoneration. The circuit court noted that while usually district courts are required to determine what acts of negligence or conditions of unseaworthiness caused an accident before addressing the owner's knowledge or privity, courts are allowed to decide the knowledge/privity issue without addressing liability where it was impossible under any set of circumstances for the owner to demonstrate the absence of knowledge/privity. Furthermore, the district court did not clearly err in finding that the company failed to exercise reasonable care. Accordingly, the district court acted properly in dismissing the limitation.

The company also challenged its spoliation sanctions under Rule 37(e)(2). Particularly at issue was the district court's finding of bad faith, which was subject to review for clear error. The circuit court determined that the intent to deprive standard for electronic discovery spoliation was the same as the "bad faith" standard in other spoliation contexts, meaning the destruction of evidence for the purpose of hiding adverse evidence. The circuit determined that the litigation was clearly reasonably anticipated and that the evidence was actually lost. Some texts were lost beyond recovery, and the court found the ability to depose employees after the fact to be an insufficient substitute for reviewing their contemporaneous messages. Given that bad faith was being reviewed under a clear error standard, the circuit court found the bad faith finding easy to sustain. In any event, the circuit court noted that the complete failure to implement even the most basic data protection safeguards was egregious enough that an inference of bad faith was easy to make, even though there was no direct evidence of bad faith (such that the

district court would have been justified in finding the company to have been merely grossly negligent).

AI ASSISTANCE

***Mata v. Avianca, Inc.*, No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023): Attorneys sanctioned for submitting briefing containing AI generated cites, taking insufficient steps to correct their submissions, and making false and misleading statements to the court**

The plaintiff brought a personal injury claim related to an injury he sustained when hit by a metal serving cart in an airport. The defendant removed to federal court alleging federal question jurisdiction. The defendant then filed a motion to dismiss alleging that the plaintiff's claims were time-barred. The plaintiff's response to the motion "cited and quoted from purported judicial decisions that were said to be published in the Federal Reporter, the Federal Supplement and Westlaw" and contained a declaration that the contents of response were true and correct under penalty of perjury. The response was drafted by a different lawyer (who was not admitted to practice in the district) than the one who signed it. The signing lawyer simply reviewed the response for style and grammar, failed to check any of the authorities cited in the response, and may have failed to review the brief with the drafting attorney despite the probability that drafting attorney was unfamiliar or inexperienced with significant legal principles involved in the case.

The defendant filed a reply indicating that it was unable to locate the majority of cases cited by plaintiff, and the ones it did locate did not stand for the propositions for which they were cited. The defendant's reply further delineated between the cited cases and cases defendant was able to find. The plaintiff's attorneys failed to withdraw the affirmation or provide any explanation in response to the reply. The court investigated, and likewise failed to locate multiple authorities cited in the response. At the sanctions hearing, the signing attorney indicated that he did not read the reply and simply forwarded it to the drafting attorney, who did not alert the signing attorney about what the reply contained.

The plaintiff's attorneys had submitted non-existent judicial opinions with fake quotes and citations created by ChatGPT, then did little to no work verifying the cases. The court then ordered the signing attorney to file an affidavit annexing entire copies of the cases cited in the response. The signing attorney requested an extension of time by letter that stated as a reason for the extension that he was out of the office on vacation. At the subsequent sanctions hearing, the signing attorney

would admit that he was not out of the office on vacation but had submitted the letter to give the drafting attorney more time to respond to the court's orders.

Eventually, the signing attorney executed and filed an affidavit containing what purported to be copies or excerpts of all but one of the cases, which the signing attorney stated he was unable to find. Again, the signing attorney had not drafted this affidavit, had no role in creating it, and had no knowledge about whether the statements made therein were true. The drafting attorney had prepared the affidavit and walked to the signing attorney's office twenty feet away, where the drafting attorney looked it over and signed it.

The court reviewed the affidavit and again found the decisions to be fake with some particularly notable issues. For example, the clerk of the Eleventh Circuit confirmed one case to have been fake, involving a party that had never been a party to a case before the circuit since the institution of the electronic case filing system. The opinion also contained gibberish. There are several other examples this summary does not touch on here.

Eventually, the plaintiff's attorneys acknowledged that the decisions were generated by ChatGPT and were fake. The attorneys tried to explain that they used ChatGPT because they were primarily state court practitioners with little access to appropriate legal authorities for the case before them. The drafting attorney also explained how he queried ChatGPT for search results and authorities. Despite claiming at one point that he merely used ChatGPT as a supplement, the drafting attorney was later found to have not done any other research than what he had done on ChatGPT, except to try and verify some of the cases retrieved by ChatGPT results. There were other notable aspects of the attorneys' justifications, but they are omitted for the sake of brevity.

The court analyzed the attorneys' conduct under Rule 11. The court began its opinion by noting, at length, that while there was nothing improper about using a reliable artificial intelligence tool for assistance, attorneys are still required to serve a gatekeeping role in ensuring the accuracy of their filings. The court ultimately found bad faith on the part of the lawyers "based upon acts of conscious avoidance and false and misleading statements to the court" and imposed sanctions jointly on the law firm as well. The court found the attorneys' conduct to be in violation of Rule 11(b)(2) because they made frivolous arguments that constituted an abuse of the legal system. The court also found the conduct violative of Rule 3.3(a)(1) of the New York Rules of Professional Conduct and compared the knowing creation of false legal opinions to be forgery of the signature of a judicial officer, although

the court found the behavior to stop short of forgery because of the lack of judicial signatures or seals. It also found sanctions appropriate under the court's inherent power.

Ultimately, the court imposed a joint and several penalty of $5,000, required the attorneys to notify the plaintiff and send him certain materials, notify all of the judges falsely attributed as authors of the fake decisions, and file letters of compliance with the court.

***Kruse v. Karlen*, No. ED 111172, 2024 WL 559497 (Mo. Ct. App. Feb. 13, 2024): Pro se appellant's appeal dismissed in part because of issues apparently related to AI generation.**

The court in *Kruse* confronted a litany of violations of Missouri's appellate rules committed by a pro se appellant pertaining to the form of appellate briefs, but of particular interest here is the appellant's submission of an appellate brief in which the overwhelming majority of the citations were "not only inaccurate but entirely fictitious." The court also noted that the appellant in some cases cited real cases that were entirely unrelated and chalked it up as "presumably the product of algorithmic serendipity." There were also suspiciously inaccurate and inapposite rules citations. The appellant apologized for his briefing and explained that he had hired an online consultant purporting to be an attorney in a different jurisdiction to prepare the appellate brief at "less than one percent of the cost of retaining an attorney." The appellant claimed he did not know that the consultant would use "artificial intelligence hallucinations."

Relying on *Mata* and ABA Rule of Professional Conduct 3.3, the court held that appellant's conduct constituted an abuse of the judicial system, explicitly determining that "[f]iling an appellate brief with bogus citations in this Court for any reason cannot be countenanced and represents a flagrant violation of the duties of candor Appellant owes to this Court." The court further found that the appellant's missteps justified dismissal of the appeal and sanctions, particularly due to appellant's failure to rectify these and other issues when brought to his attention.

PUNITIVE DAMAGES

Kenai Ironclad Corp. v. CP Marine Servs., LLC, 84 F.4th 600, 610 (5th Cir. 2023): 1:1 punitive to compensatory damage ratio is not a mandatory limit in admiralty cases, punitive damages may be required to support compensatory

damages, attorney's fees awards incurred in litigating case are not compensatory damages sufficient to support a punitive damages award, and prejudgment interest is not applicable to punitive damages

The plaintiff alleged that one of the defendants breached a contract to repair and convert a supply vessel. The plaintiff further alleged that the pre-suit relationship between the parties had deteriorated such that after the plaintiff tried to remove its vessel from the co-defendant's shipyard, both defendants "rammed, wrongfully seized, detained, and converted [the] vessel for five days before releasing it." The district court after a bench trial found liability for wrongful arrest and awarded punitive damages and attorney's fees.

Pertinently, the district court found that the defendants acted in bad faith and detained the vessel pursuant to an invalid maritime lien. The district court awarded punitive damages measured by the value of the vessel's missed contract time for the days that the defendants wrongfully detained the vessel along with attorney's fees.

The defendants appealed the wrongful arrest determination as well as the awards of punitive damages and prejudgment interest on the punitive damages award. The Fifth Circuit first found that the district court did not clearly err in finding that there was no valid lien at the time the vessel was seized. The alleged debt had been paid prior to seizure of the vessel, meaning the lien had ceased to exist. The defendants contested various aspects of the alleged arrest. First, they tried to justify the arrest by claiming that they had concerns about plaintiff's check clearing, but the circuit court found record evidence sufficient to permit the district court to reject these arguments. The defendants also argued that the vessel was never actually arrested because it was not rammed, but was instead merely "bump[ed]" in a "controlled, safe, and appropriate" manner "for a proper purpose . . . to create a pause in the unfolding events so they could be rationally discussed." The defendants also asserted that when the return of the vessel was finally and actually requested, it was returned the day after. The circuit court again found sufficient record evidence to support the findings of wrongful arrest and bad faith.

The circuit court next addressed punitive damages. The circuit court began by quickly concluding that the evidence supported a determination that the defendants' "conduct was in bad faith, in callous disregard for the safety of the people aboard the vessels, and in reckless disregard of [the plaintiff's] rights" and thus supported a punitive damages award.

Pivotally, the circuit then turned to the question of whether the 1:1 ratio of compensatory to punitive damages ratio established in *Exxon v. Baker* was "absolute." The court framed the issue as whether the ratio applied in all cases or "only in cases 'like' *Exxon*, involving 'reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury,' and where the conduct was 'worse than negligent but less than malicious.'" The court determined that the majority of cases to have reviewed the issue had concluded that the ratio was not a hard rule. After reviewing treatise discussion of the issue as well, the court determined the majority rule to be correct for three primary reasons that were applicable to the defendants' conduct. The first was that *Exxon* explicitly stated that its holding applied in cases like the one before it. The second was that nothing about the Supreme Court's subsequent precedent suggested that ratio established an inflexible rule. The third was that where the conduct was intentional and malicious but compensatory damages were small, the 1:1 ratio would do little to deter the appropriate conduct.

The court also raised but declined to address the question of whether punitive damages required underlying compensatory questions. The court declined to address this question because of the instructions on remand ordered in the remainder of the opinion.

The court then considered whether the attorney's fee award could constitute compensatory damages sufficient to support a punitive damages award but concluded they could not qualify unless they were "collateral legal expenses," *i.e.* fee outlays incurred in some way other than the proceeding in which the attorney's fees are sought. But the district court's opinion (mainly, its calculation of the punitive damages award) suggested to the circuit court that its award of punitive damages itself was, at least in part, compensatory. Accordingly, the circuit court remanded to the district court for clarification as to what part of the award was compensatory and what part was punitive.

Finally, the circuit court also issued the same instructions with respect to the prejudgment interest, because prejudgment interest is only applicable to compensatory damages, not punitive damages.