# RECENT DEVELOPMENTS IN SALVAGE LAW

Maritime Law Association, Salvage Committee, Spring 2010[1]

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**Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 2009 WL 4932724 (M.D. Fla., Dec. 22, 2009). Court lacks subject matter jurisdiction per FSIA over Spain's Nuestra Senora de las Mercedes.**

This action concerns competing claims over a shipwreck believed to be a Spanish frigate that exploded in an 1804 battle with the British, which Odyssey discovered in international waters off the Straits of Gibraltar. The Foreign Sovereign Immunities Act (28 USC 1602, et seq.) grants immunity to a foreign state's property from attachment, arrest and execution subject to limited exceptions. The Court adopted the Magistrate Judge's report and recommendation which concluded that the FSIA applied and the exceptions were not applicable. In short, the object believed to be the Spanish warship was not subject to an in rem action for salvage. The rationales were the implication of Spain's patrimonial interests and a desire for reciprocal treatment of United States warships.

Peru unsuccessfully asked the Court to measure its interest against Spain's based on claims of exploitation by Spain, Peru's former colonial ruler. In addition to the jurisdictional problems, the Court declined Peru's request under the "act of state

[1]Notes: on citations: citations to the cases which are the subject of this update are cited as follows: "At [A.M.C. or, if no A.M.C. cite, other reporter page number];" questions or comments should be directed to Mr. Jason R. Harris of Welch and Harris, L.L.P., 201 New Bridge Street (28540), Post Office Box 1398, Jacksonville, North Carolina 28540, Telephone: (910) 347-0161, Facsimile: (910) 347-0164, JRHarris@welchharris.com. Please note that this update is not exhaustive nor is it necessarily limited to the period since the last update authored in the Spring of 2009; this update was reviewed and edited with the assistance of Mr. Trevor Avery, of Swansboro, North Carolina, a 3L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina, enrolled in Mr. Harris' Ocean and Coastal Law Course.

doctrine" which precludes U.S. courts from inquiring into the validity of the public acts a recognized foreign sovereign power commits within its own territory.

Appellate court review is expected.

**Aqua Log, Inc. v. State of Georgia, 594 F.3d 1330 (11th Cir., Jan. 28, 2010). Georgia cannot assert sovereign immunity in an in rem claim absent actual possession of the res[2].**

In the nineteenth and twentieth centuries, logging operations used the rivers of Georgia to transport harvested logs to mills and market. On occasion, some of these logs would sink to the bottom of the river and many remain there to this day. These logs have features that are not present in modern lumber and, thus, have increased value. Georgia passed a statute in 1985 that gave it title to all "submerged cultural resources."

Aqua Log, Inc., a professional salvor, filed permits to raise and remove the logs pursuant to state law and then filed two in rem actions concerning logs in two sites. Georgia filed statements in both cases in which it made claim to the logs as submerged cultural resources and Georgia specifically stated that it did not waive sovereign immunity. Georgia filed a motion to dismiss the in rem actions for lack of subject matter jurisdiction pursuant to the Eleventh Amendment.

The 11th Circuit held that the Eleventh Amendment "does not defeat Federal Jurisdiction over all in rem admiralty claims." The state must have a "colorable claim to possession," and be in possession of the res, in addition to not waiving sovereign immunity. Because Georgia has not waived its sovereign immunity and it has asserted a

[2]This summary was prepared by Captain Michael G. Ankrum. Capt. Ankrum is actively serving in the United States Marine Corps and is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Following law school he will pursue a career in military justice with the USMC. Capt. Ankrum is enrolled in Mr. Harris' Ocean and Coastal Law course and has completed Mr. Harris' Admiralty Law course.

colorable claim to possession, the issue to be decided was whether Georgia had possession of the logs lying at the bottom of the rivers.

The Court held that to satisfy the possession requirement a state must exert physical control over the res. Mere constructive possession was insufficient to meet the possession requirement under the Supreme Court's in rem admiralty jurisdiction. Therefore, Georgia's motion to dismiss was denied.

**Solana v. GSF Development Driller, I, 2009 AMC 2884 (5th Cir., Oct. 30, 2009). Employees not salvors but contractual rate tbd.**

Louis Solana and Brendan Lally were employees of GlobalSantaFe (GSF) and worked on its Development Driller I (DDI), a semi-submersible drilling platform costing in excess of $350,000,000.00. Following Hurricane Katrina, GSF compiled a group of "volunteers," then ashore, including Solana and Lally, to save DDI which was listing and dragging anchors in the Gulf of Mexico. With additional assistance from a professional salvage firm, the effort was successful. Solana and Lally pursued salvage claims.

While their efforts were deemed voluntary, "both Solana and Lally expected to be compensated by GSF for their efforts to stabilize the DDI after she was damaged by Katrina, regardless of whether those efforts were successful. The Supreme Court has long recognized that a binding agreement to pay for salvage services irrespective of the success of the enterprise will defeat a claim for pure salvage." At 2890. The Court disagreed with the lower court's conclusion that the compensation for the voluntary services to rescue the DDI would be at the same rate of compensation as that prior to Katrina, thus opening the door for some form of increased compensation, though not a salvage award.

The Court further analyzed the claim under the International Convention on

Salvage of 1989. Without deciding if the Convention was enforceable, the Court concluded that the agreement precluded a pure salvage claim.

**Absolute Marine Towing & Salvage, Inc. v. S/V INIKI, 2010 WL 555333 (M.D. Fla., Feb. 10, 2010). Salvor's claim against insurer of salved vessel fails to state a claim.**

The S/V INIKI broke free from her anchor and ran aground near Sebastian Inlet State Park. The vessel's captain contracted with the plaintiff to salve the vessel, which was battered by the surf and had taken on about four feet of water and sand. The salvor asserted a claim against the vessel's insurer, Markel American Insurance Company, contending that Markel would have been liable for the cost of clean-up under its pollution liability coverage provision absent the salvor's assistance. The Court properly concluded that the salvor failed to state a claim upon which relief could be granted. Absolute Marine did not allege anything unjust or inequitable about Markel's conduct. The precedent relied on by the salvor (Cresci v. The Yacht BILLFISHER, 874 F.2d 1550 (11th Cir. 1989)) did not answer the question of whether an insurer owes a salvor compensation, but merely indicated that Florida's non-joinder statute did not bar a claim against an insurer. There was no case law raised in which a party was allowed to recover against an insurer for no other reason than because it did something that allowed the insurer to avoid having to pay out on its policy.

**Egan Marine Corp. v. Great American Ins. Co. of New York, 2010 WL 431661 (N.D. Ill., Feb. 1, 2010). Insurer required to indemnify for explosion on barge[3].**

[3] This summary was prepared by Ms. Mary Jennings, of northeastern North Carolina. Ms. Jennings is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Ms. Jennings is enrolled in Mr. Harris' Ocean and Coastal Law course and completed Mr. Harris' Admiralty Law course.

On January 19, 2005 Egan Marine Corp.'s (EMC) tug, the LISA E, was towing dump barge EMC 423 which contained clarified slurry oil. Both the LISA E. and EMC 423 were listed vessels under a Great American Insurance Company (GAIC) insurance policy which contained provisions requiring indemnity for costs and expenses associated with pollution, mitigation, and clean-up. An explosion occurred on EMC 423 causing one crewman to die and oil to be released into the Chicago Sanitary and Ship Canal. The LISA E. moved the barge to the side of the canal where it sank. EMC immediately notified GAIC of the incident. GAIC contacted Meredith Management Group, Inc. (MMG), its retained emergency response consultant, to support EMC in responding to the accident. MMG dispatched Thomas Neumann to the incident to act as "incident commander" on behalf of GAIC. Neumann agreed to have Dennis Egan (owner of EMC and its related entity, Service Welding and Shipbuilding (SWS)) act as the salvage master to attempt to raise EMC 423 from the canal. EMC engaged SWS to conduct the salvage operation.

EMC/SWS successfully raised the barge. EMC/SWS were using all of their resources to salve EMC 423, so they had little other work of significance for at least three and a half months. The Illinois Environmental Protection Agency gave notice that oil residue must also be removed. GIAC stopped making payments to EMC/SWS under the insurance policy based on their contention that the LISA E did not cause the incident, and therefore did not have to pay any of her expenses to EMC/SWS, or any expenses over $5,000,000.00 because only one (not two) listed vessel was involved. Thereafter, because EMC/SWS could no longer afford to continue cleanup efforts on EMC 423, IEPA cited EMC/SWS for violating its notice and the government brought actions against EMC stemming from the incident.

EMC/SWS sued GAIC for breach of insurance contract arguing that GAIC failed to pay all of the amounts EMC/SWS claimed to have expended in responding to the barge explosion. The Court found GAIC breached the contract by refusing to apply coverage for the LISA E because, among other things, the LISA E was the sole source of movement for EMC 423 and her crew served as the crew for the barge. Since the court determined that the LISA E was involved in the incident, the insurance payout was not limited to $5,000,000.00, but doubled since two listed vessels were involved. GAIC was responsible for unpaid defense costs in the government's cases against EMC. The Court further held that even though the USCG issued a notice to EMC that there was no longer a substantial threat of discharge of oil or a hazardous substance, EMC was still exposed to liability under OPA90 and thus the policy continued to require indemnification.

**Blue Water Marine Service v. M/Y NATALITA III, 2009 WL 1911719 (S.D. Fla., July 1, 2009). Attorneys' fees award to vessel owners upon finding of bad faith by salvor[4].**

Plaintiff, Blue Water Marine Services ("Blue Water"), assisted the 100' M/Y NATALITA III, which was stuck on a reef off the coast of Florida. Blue Water failed to discuss or disclose the terms of salvage with the yacht owners before pulling the yacht from the reef. Instead, Blue Water presented a contract to the vessel owners after rendering assistance and required their immediate signature or Blue Water threatened to abandon the vessel in a perilous situation.

Prior to trial, the vessel owner presented Blue Water with two offers of judgment. However, Blue Water refused the first offer and failed to respond to the second asserting

[4]This summary was prepared by Mr. Clayton Byrd. Mr. Byrd is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Mr. Byrd is enrolled in Mr. Harris' Ocean and Coastal Law course.

the inapplicability of Florida's offer of judgment statute in admiralty actions.

Generally, attorneys' fees are not awarded in in rem actions; however, an exception to this rule exists upon a finding of bad faith by the losing party (here, Blue Water). The vessel owners sought an award of attorneys' fees because of Blue Water's misrepresentations at the time of the assist and because of exaggerations concerning the salvage award during litigation.

According to the Court, Blue Water's behavior constituted vexatious and unnecessary litigation entitling the vessel owner to attorney's fees ($18,162.25) and deposition costs ($13,105.09) after the first offer of judgment. The Court remanded the case back to the Magistrate Judge for another determination concerning the remaining attorneys' fees associated with pursuing the instant motion (i.e.: beyond victory of the merits of the salvage claim). On remand, the Magistrate Judge limited the vessel owners' recovery to the sum of the costs mentioned above ($31,267.34).

**BaywatchRI Marine Towing v. M/V DeVOCEAN, et al., 09-0116, Boat Owners Assoc. of the U.S. Salvage Arbitration Plan (Sept. 30, 2009)[5]. Close call on peril = low order salvage award.**

THE THREES B'S, a 56' Cruisers Yacht valued at approximately $750,000.00 was anchored in Great Salt Pond on Block Island, Rhode Island. Rafted to her starboard was DeVOCEAN, a 37' Sea Ray valued at approximately $100,000.00 and to her port was a vessel not involved in the instant litigation. The ground tackle of THE THREE B'S was not prudent to hold the raft. With winds gusting to 20 knots, the anchor dislodged while no one was aboard. The raft dragged into a prohibited anchorage. Competitors in

[5]This case was brought to the attention of the author by colleague Mr. Patrick McAleer, Esq. of Boston who well represented his client, THE THREE B'S, in this matter.

the area's "active marine rescue industry" arrived. The panel was troubled by the plaintiff salvor's exaggeration of the conditions as photographs refuted the alleged condition and assessment of danger. The owners of DeVOCEAN and THE THREE B'S signed a Standard Form Salvage Contract; however, the owner of THE THREE B'S handwrote and initialed above his signature "For Reasonable Towing Fee Only." Upon hauling anchor, the raft dragged again but ultimately the vessels separated from each other. The plaintiff then guided THE THREE B'S to a Coast Guard emergency mooring. The operation took 20-30 minutes. The Panel gave a quantum meruit award (denying a salvage award due to the owner's notation) of $1,000.00 for assistance to THE THREE B'S. Although a "close call" on whether there was a peril, the panel gave a $5,000.00 award for the salvage of DeVOCEAN.

**Lewis v. JPI Corp., 2009 WL 3761984 (S.D. Fla., Nov. 9, 2009). Sales price of vessel considered in low order award[6].**

Around 4:30 p.m. on August 8, 2005, Teresa Lewis was walking her dog around the Oceanic Island Condominium Complex[7], near the marina, and noticed the M/Y VERONA DE CARDIAN listing to port with the swim platform completely submerged, and the attached Wave Runner partially underwater. Mrs. Lewis called her husband, Clive Lewis, down to the marina. Mr. Lewis boarded the vessel and determined that the hose from the air conditioning seawater pump to the air conditioning compressor had detached and was pumping water into the vessel, at a rate similar to an open faucet. The

[6]This summary was prepared by Ms. Taylor Riley of Morehead City, North Carolina. Ms. Riley is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Ms. Riley expects to return to the coast after law school. Ms. Riley is enrolled in Mr. Harris' Ocean and Coastal Law course and completed Mr. Harris' Admiralty Law course.

[7]The Lewis' own a condominium at the Oceanic Island Condominium Complex. They also keep their boat docked at the marina, a few slips down from the M/Y VERONA DE CARDIA.

Lewis' arranged for the water to be pumped out the next morning. Mrs. Lewis attempted to contact the owner of the vessel by phone, but was unsuccessful. The Lewis' checked on the vessel twice that night. The next day, a crew arrived and pumped out the vessel. The pumping crew charged $100.00 for services rendered, which the Lewis' paid and the vessel interests, JPI Corp., reimbursed. A few months later, the Lewis' brought suit seeking a salvage award.

The Court determined the Lewis' had a valid claim for salvage.[8] The Court applied the six Blackwall factors to determine the size of the award. The Court determined that the Lewis' expended minimal labor; the salvage required minimal skill and energy; the Lewis' exposed little of their own property to danger in completing the salvage (just a screwdriver); the risk to the Lewis' should have been low[9]; the value of the property saved was equal to the sales price (the vessel was sold October 16, 2006); and the degree of danger from which the property was rescued was low. The Court determined the salvage award to be five percent (5%) of the $434,000.00 sales price of the vessel: $21,700.00.

**O'Hagan v. M&T Marine Group, LLC, 2010 WL 503118 (S.D. Fla., Feb 8, 2010). Local rule requiring specificity of amount claimed yields to The BLACKWALL factors.**

Plaintiffs contend they saved four vessels collectively valued at $2,204,000.00 tied to a floating dock that began to sink during Hurricane Wilma. Defendants sought to

[8]A marine survey showed bilge pumps were either inoperable or operating at a reduced capacity and had the water continued to be pumped into the vessel, she would have come to rest on the bottom causing the vessel to be submerged five feet above her normal draft, flooding most of the vessel.

[9]Mr. Lewis did not turn off shore power before reattaching the hose. He argued that his risk of electrocution was high. The court, however, determined that Mr. Lewis could have turned off shore power before attempting to reattach the hose, and as such, they did not increase the award for taking an unnecessary risk.

dismiss the claim as the Complaint did not specify the amount claimed for salvage, thus, allegedly was not in compliance with Local Admiralty and Maritime Rule E(3). The Court concluded that it was not necessary for the Plaintiffs to establish the value for the vessels in question or apparently specify the amount claimed for the salvage. The Local Rule only requires that the amount claimed be specified "to the extent known" in order to state a cause of action for salvage. The Court concluded that the value of the property salved is instead simply one of the six factors district courts consider when determining a salvage award.

**Nathan Smith v. The Abandoned Vessel, 610 F.Supp.2d 739, 2009 AMC 1413 (S.D. TX., Apr. 27, 2009). Artist's claimed discovery of a treasure ship not successful under laws of finds or salvage.**

"[A] self-described 'musician by birth' turned movie director, music producer, and treasure hunter from Los Angeles, California" whose other ventures include creating websites for pawnshops and legalized marijuana sites claims to have found a lost barkentine treasure ship from the 1820s near a small lake in Texas. At 1414. Evidence of the existence of an abandoned shipwreck included Smith's own testimony, a photocopy of a photograph of a small object Smith claimed was a piece of wood from the vessel (which he tested by placing in a microwave – it smoked so he concluded that the material was creosote, a wood used to build ships of the era) which he subsequently lost.

After concluding the water body under which the treasure was located was navigable and that the adjacent land owner had standing to intervene, the Court first analyzed Smith's claim under the law of finds. Although the property was abandoned and Smith had the intent to reduce the property to possession, he lacked actual or constructive possession of the property required for finds. Next applying salvage law,

the Court concluded that there was no "success" because it did not believe Smith recovered any artifacts. Thus, Smith was not entitled to a salvage award.

**Lay v. Hixon, etal., 2009 WL 1357384 (S.D. Ala., May 12, 2009). Stay of a civil action because of parallel criminal case[10].**

In August 2008, a 40' work barge belonging to Scott D. Hixon of Gulf Bay Marine Construction, LLC, disappeared from Long Bayou in Alabama and was reported stolen. It came to be in the possession of John Joshua Lay. Lay contacted Hixon on August 28, 2008 and indicated that he found the barge and sought a salvage award. Hixon called law enforcement to report Lay's request. The next day Lay was arrested and, along with Benjamin Hamilton and Carl Poole, subsequently indicted for theft of property. In February 2009, Lay filed a civil complaint, seeking a salvage award (perhaps under the theory that the best defense is a good offense). According to this complaint, Lay discovered the barge adrift in Long Bayou, secured it, and endeavored to locate the owner and pursue a claim for salvage. Hixon requested that the salvage action be stayed until the conclusion of the related criminal case.

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, counsel, and litigants. The court assesses and balances the nature and substantiality of the injustices claimed on either side, as well as the interests of the parties, the courts, and the public. When there are parallel criminal and civil cases there is no mandate that one enter a stay awaiting the result of the other; however, district courts are vested with substantial discretion to stay the civil proceedings in deference to

[10]This summary was prepared by Mr. Chris Craft. Mr. Craft is a 3L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Mr. Craft will be graduating this year and plans to practice in the area of Criminal Law. Mr. Craft is enrolled in Mr. Harris' Ocean and Coastal Law course.

the parallel criminal action where the interest of justice favor doing so.

In this case, the factual overlap between the two cases was considerable in that the question of whether the vessel was stolen or salved was at the crux of both cases. If Lay is found guilty of misconduct, he is not entitled to the benefits of a salvor and his civil case would be moot. Also, to require the vessel owner to defend against the civil suit while a criminal trial is pending may be frivolous. If Lay is convicted, for Hixon to spend money and time defending a frivolous suit would heap insult upon injury. The testimony of the two criminal co-defendants would come much easier in civil court if the criminal case were concluded - the risk of self-incrimination would be non-existent, thus, a more thorough gathering of testimony would be possible.

After a careful balancing of factors, the Court stayed the civil action until the conclusion of the related criminal case.