STEVEDORES, MARINE TERMINALS,
AND VESSEL SERVICES COMMITTEE

Thursday, October 31, 2019, 1:30 – 3:30 p.m.
Hyatt Regency Scottsdale Resort & Spa at Gainey Ranch
Scottsdale, Arizona

AGENDA

I. Welcome and Speaker Introductions
Deborah C. Waters, Waters Law Firm, Norfolk, Virginia (10 Minutes)
1:30-1:40

II. Legal Responsibilities Marine Terminals Owe to Visiting Vessels
David H. Sump, Willcox & Savage, Norfolk, Virginia **(1 Hour CLE)**
1:40 – 2:40

III. Longshoremen's and Harbor Workers' Compensation Act:
Update of Case Law, Regulation and Legislation
Discussion of Selected Cases
Kenneth G. Engerrand, Brown Sims, Houston, Texas **(.5 Hour CLE)**
2:40 – 3:10

IV. Old Business
A. FMC Interpretive Rule on Demurrage and Detention
B. U.S. State Department ACPIL Teleconference
C. Future CLE topics
D. Future Committee projects
3:10 – 3:30

V. New Business

VI. Adjournment

****New York CLE—**The Maritime Law Association of the United States ("MLAUS") is an accredited New York provider of continuing legal education ("CLE"). The program will be appropriate for experienced and newly admitted attorneys (Non-Transitional and Transitional). A total of 1.5 CLE credits in Areas of Professional Practice will be offered. Attorneys admitted in jurisdictions other than New York may be entitled to CLE credits for attending the program and should consult with their jurisdiction's CLE authorities.

TERMINAL RESPONSIBILITIES TO VISITING VESSELS

Presented by: David H. Sump, Esq. Norfolk, Virginia

At the Meeting Of:

THE MARITIME LAW ASSOCIATION COMMITTEE ON STEVEDORES AND TERMINAL OPERATIONS

Scottsdale, Arizona
October 31, 2019

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Terminal Responsibilities to Visiting Vessels

I. Introduction

Vessels berthed at a waterfront terminal are a common sight in and around port locations. The terminal may be performing vessel cargo loading or unloading operations. Or the terminal may be serving as a lay berth for the vessel. The cargo may be containerized, liquid, bulk or break bulk. The vessel may be loading or unloading passengers instead of cargo. Or the vessel may not be a cargo vessel at all; instead using the terminal as a supply depot for provisions, fuel, water or sewage discharge. In each and every one of these instances the terminal owes duties or responsibilities to the vessel. Those duties may be a product of common law such as the standard bailor/bailee relationship, or it may be a complicated contractual relationship the result of several layers of economic transactions. This paper and the presentation it supports will evaluate the numerous relationships that exist between a terminal and a vessel – studying primarily one half of the berthing equation – the obligations of the waterfront terminal to its visiting vessel.

A vessel loading or unloading at a waterfront terminal would seem to be a very straightforward transaction. One entity transferring cargo to another entity is the bedrock of maritime commerce. The duties and obligations of these two entities engaged in the cargo transaction are in no way simple and straightforward. Contracts, tariffs, common law and federal statutes and regulations all contribute to define the various duties and obligations owed by the terminal to a visiting vessel. This analysis, however, must begin by determining the role each party plays in the transaction.

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In most cases cargo is either being delivered to or received from a marine terminal, if not both. The marine terminal is generally more than just a physical location for the exchange of cargo. It is helpful to examine the various roles the terminal may occupy in the exchange of cargo.

II. Terminal as Wharfinger

In some instances a terminal merely accepts possession of the property of another entity for safekeeping; the typical bailor/bailee relationship. That relationship would certainly include the common law obligations to care for the property of another while it is in your possession. It may also include the obligation to load or discharge that property to or from a vessel, or it may include the obligation to facilitate the delivery or receipt of those goods from others at the beginning or end of the bailment relationship.

The bailment relationship is most commonly observed in a typical container port. Cargo is delivered by truck to the terminal, stored on behalf of the shipper until a vessel arrives, then loaded aboard the vessel for transport. The terminal rarely, if ever, owns the cargo held at the terminal. The terminal does not sell or buy the cargo. The terminal does not typically appear on the ocean bill of lading. Therefore, in this common bailment situation, where would you find the legal obligations that exist between the terminal and the vessel?

It is implied in general maritime law that a wharfinger must exercise reasonable diligence to provide a safe berth and to warn a person lawfully using its facilities of any unexpected hazard or deficiency, including underwater obstructions, at the berth or in its approaches of which it may have knowledge, or should have knowledge in the ordinary

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course of diligence. (*Smith v. Burnett,* 173 U.S. 430 (1899); *In re Frescati Shipping Company, Ltd.*, 886 F.3d 291, 306 (3d Cir. 2018). Wharfingers owe a duty to exercise reasonable diligence to provide a safe and secure mooring. *Vaccaro v. Waterfront Homes Marina*, 2012 AMC 1991 (S.D.N.Y. 2012); *Hardesty v. Larchmont Yacht Club*, 1983 AMC 1059 (S.D.N.Y. 1982). A wharfinger has a duty to provide mooring cleats and other fittings that will not fail, even in a storm. *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 354 F.2d 476 (4th Cir. 1966).

A pier owner has a duty to maintain its pier in a state of repair to resist effects of normal maritime activity near it. *Azcon Corp. v. North Dakota*, 1982 AMC 1448 (D.Minn. 1981). The duty to maintain a facility to resist damage or to warn a vessel operator using the berth of its inadequacies does not apply where the deficiency was apparent and known to those in charge of the vessel's operation. *Bunge Co. v. M/V FURNESS BRIDGE*, 588 F.2d 790 (5th Cir. 1977)(berth constructed for a 34,000 ton vessel visited a 112,000 ton vessel without proper tug assist).

A wharfinger's duty to vessel crewmembers is determined by state law – premises liability. *Landers v. Bollinger Amelia Repair, LLC* 403 Fed.Appx. 954 (5th Cir. 2010). Although the vessel is typically responsible for choosing and maintaining its lines, a wharfinger in some jurisdictions also has a duty to monitor mooring lines, especially if it is aware of a problem with weather, the berth or the mooring lines themselves. *Androutsakos v. M/V PSARA*, 2004 AMC 2113 (D.Or. 2004).

A wharfinger's obligation to inspect, warn and correct dangerous conditions extends only to common areas of the wharves and slips. This duty of care applies only to business invitees. Restatement (Second) of Torts Section 344.

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III. Terminal Federal Security Obligations

In addition to the general maritime law obligations cited above, terminals are regulated by the United States Coast Guard primarily regarding terminal security and security for the visiting vessel. These regulations are primarily found in 33 CFR Part 105 "Maritime Security: Facilities". These regulations require that a facility that services visiting foreign cargo vessels in excess of 100 gross register tons and those U.S.-flag cargo vessels (not fishing vessels) in excess of 100 gross register tons and bulk cargo barge fleeting facilities must have an approved Facility Security Plan. 33 CFR §105.105-120. The terminal must also comply with the applicable provisions of Part 105 Subparts B and C; most of which are too voluminous to discuss in this paper and are not specifically applicable to the visiting vessel.

Part 105 does contain security provisions intended to provide security for the visiting vessel and its crew.[1] Put simply, the terminal is responsible for the safety and security of the vessel berthed at its facility as well as for the safety of the crew. Generally, before a vessel arrives at a terminal, the Facility Safety Officer and the Master/Vessel Safety Officer communicate regarding activities and circumstances that affect the safety and security of the terminal and the vessel. These activities and circumstances are detailed in the Declaration of Security that is signed by both the Facility Safety Officer and the Master/Vessel Safety Officer upon arrival. Security planning is necessary for circumstances where crewmembers are departing the vessel, either for an appointment (medical appointment/dental appointment) or for permanent

[1] Additional requirements applicable to passenger vessel and cruise terminals will not be reviewed for this paper.

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departure from the vessel. Sometimes new crewmembers are joining the vessel at the terminal berth and accommodations must be made for these arrivals as well. Unaccompanied baggage may be delivered to or from the vessel. The vessel may be having supplies delivered such as fuel or provisions. Each of these events must be coordinated with the terminal and security must be provided for each transaction.

In addition to the events outlined in the Declaration of Security, the terminal has an obligation to designate a restricted area in areas immediately adjacent to the vessel as well as any location where dangerous or hazardous cargo is stored at the terminal. 33 CFR 105.260. Access to the restricted area must be controlled through Transportation Worker Identification Card security access or accompanied access for those non-TWIC visitors. Restricted areas not only ensure the safety of the vessel and crew from intruders, but also the safety and security of cargo and vessel stores that may be loaded aboard the vessel.

Further, terminal operators have specific obligations with regard to the care and movement of cargo at the facility. The terminal must ensure that cargo is delivered to the correct vessel/carrier, must deter tampering and must maintain inventory control over dangerous and hazardous cargo. 33 CFR 105.265. Of course, the intensity of the security measures depends largely on the Maritime Security Level set by the United States Coast Guard for the port or the facility. Failure to comply with the requirements of Part 105 may result in criminal penalties (Class D Felony) or civil penalties (up to $25,000 for each violation) as prescribed by 46 U.S. Code §70036 (33 CFR 101.415).

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IV. Terminal Contractual Obligations to Vessels

Terminals almost always have contractual obligations to vessels as well as regulatory and common law obligations. Contractual obligations are typically determined largely on the role the terminal and vessel occupy in the underlying business transaction. Certain questions must be answered before thoroughly understanding which contracts may apply to the relationship between the terminal and the vessel. For instance: Is the terminal receiving or supplying the cargo? Does the terminal own the cargo that is being handled at the terminal? Does the vessel have a direct contractual relationship with the terminal owner? The answers to these questions will help determine the contracts that govern the transaction and the terminal's role in the transaction.

A. Terminal Cargo Storage and Handling Model

Terminals may perform the role of cargo storage and handling with no direct contractual relationship with the vessel and no ownership interest in the cargo before, during or after transportation. This model is often observed at container terminals, break bulk terminals and liquid/bulk storage facilities that service multiple customers. Typically these terminals receive cargo from a shipper, receiving the cargo by rail, truck or pipeline and occasionally by waterborne transportation such as barge or vessel. The terminal receives the cargo and holds the inventory for the customer until such time as a third party or the customer takes the cargo away. The terminal is paid by one party to receive, hold and transport the cargo to a carrier selected by the customer.

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In the Cargo Storage and Handling Model the terminal never has a legal ownership interest in the cargo it possesses. As such, general maritime law bailment law applies except as modified by any contract between the customer and the terminal. In these models you will typically find that a Customer Service Agreement (CSA) exists between the customer and the terminal. The name of the contract varies, but the purpose is basic. The contract sets forth the terms under which the terminal will receive cargo from the customer, hold that cargo, and then deliver that cargo to a carrier for shipment elsewhere.

The contract sets forth the terms under which the cargo will be received and disbursed and the cost of storing and handling the cargo. The vessel either delivering the cargo or picking up the cargo is ancillary to the contract. However, many of these contracts do discuss what obligations the terminal will undertake regarding the vessels that discharge or receive cargo from the terminal. Customer Service Contracts may require the terminal to load cargo using its own equipment, or receive cargo using its own equipment. Customer Service Contracts also typically provide for a minimum estimated hourly or daily loading and discharge rate for vessels as well a specific storage requirements.

The terminal's ability to load and/or discharge cargo safely, reliably and at a predictable rate is important not only to the customer, but also the vessel. Time is money for vessels and therefore if a terminal cannot load at the minimum rate set forth in the Customer Service Agreement it is very possible the vessel will be late departing the port and consequentially late arriving at the discharge port. As stated previously, because the terminal has no contractual relationship with the vessel through a charter or other

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contractual relationship, it is very likely that the cost of delay will be visited on the voyage charterer that may or not be the customer. Ultimately, the customer will seek delay penalties on behalf of the vessel and its charterers/operators.

The terminal also has an obligation to provide a berth that is appropriate for the vessel arriving to load or discharge the cargo. As such, most Customer Service Agreements include a provision that establishes the maximum dimensions of any vessel nominated to discharge or load cargo at the terminal; which usually includes the vessel's length, breadth, draft and air draft. If the nominated vessel meets the dimensions stated in the Customer Service Agreement, is expected that the vessel will fit safely and securely at the berth and cargo operations will be conducted without obstructions. Also, if there are service limits on the loading or unloading gear at the terminal those restrictions must also be included in the Customer Service Agreement. It is typical that the terminal will confirm acceptance of a particular vessel at the time of vessel nomination to avoid the arrival of a vessel that cannot safely make the berth or load/discharge cargo upon arrival.

So, at least indirectly, the terminal has a contractual obligation to safely handle a nominated vessel at its berth and promptly load and/or unload the cargo at the minimum rates set forth in the Customer Service Agreement. Failure to promptly load or unload a vessel will generally not result in a legal claim against the terminal because there is no privity of contract between the vessel and the terminal. As such, vessel demurrage claims must be made against the Customer and/or voyage charterer. In some cases the Customer is also the voyage charterer of the vessel. Whether or not the terminal is contractually

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liable for failing to meet its loading/unloading rates will be a function of the sanctions written into the Customer Service Agreement, if any.

Of course, the terminal will be liable in tort for any damage caused by its failure to maintain a safe berth or its failure to safely load or discharge the cargo. Damage to the vessel from grounding, striking a submerged object or contacting the berth will likely result in a maritime tort under the general maritime law in addition to a contractual breach of safe berth warranty if applicable. In the event the Customer makes contractual promises to the vessel by way of a voyage charter, or the consignee by way of a sale of goods contract, the Customer may attempt to seek redress from the terminal for breach of the safe berth clause or the duty to safely load or unload the vessel.

B. Tariffs

Terminal operators are often troubled by the lack of any formal legal relationship between the terminal and the vessel at its berth. Actions taken, or not taken, by the vessel at the berth may create problems for the terminal that are not readily resolvable by filing a suit for a general maritime law negligence cause of action. As such, terminal operators commonly create a tariff for the terminal – a legal contract of limited terms that the vessel owner/operator accepts merely by using the berth. The tariff primarily is intended to place contractual obligations on the vessel for failing to depart the berth when directed, failing to take the cargo at the rate and time agreed, etc. Occasionally the tariff may contain provisions that benefit the vessel – such as establishing rates for demurrage and dispatch between the parties.

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1. Container Terminals

Container terminals typically publish a tariff with the Federal Maritime Commission that sets forth the rates for cargo handling and storage at the facility. This contract, combined with the Carrier Service Agreement that container terminals typically negotiate with carriers that call at that terminal, form the various contractual obligations at the terminal. For instance, a typical Carrier Service Agreement will obligate the terminal to provide "marine terminal services" to vessels of that carrier, making reasonable accommodations to meet requests for scheduled berths. Pursuant to typical CSAs, the terminal has an obligation to provide a berth immediately upon the arrival of a carrier's vessel and a further obligation to promptly load and unload cargo, store the cargo and make it available for prompt and efficient pick-up by ground transportation.

Although Carrier Service Agreements are typically unique to each carrier and contain proprietary information regarding that relationship, the terminal's public tariff, sometimes known as a "Schedule of Rates," is available to the public and is generally applicable to all vessels that use the terminal berths. Most CSAs provide that tariff provisions are incorporated into the CSA except where there is a specific contradiction, wherein the CSA language will apply. As in all tariffs, the vessel, master and crew accept the terms of the tariff merely by using the berth. Some terminals have a "Berth Application" that the master or agent must submit at or around the Notice of Arrival. In some instances vessels or carriers have a standing contract for using the terminal as a layberth for vessels not requiring cargo handling and in such circumstances all or some of the tariff may not apply.

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Of course, since a tariff is a creation of the terminal, most provisions in the tariff will benefit the terminal with very few obligations of the terminal to the vessel. Typically a terminal will state that it will be responsible for its own negligence and nothing in the tariff is intended to exculpate it from its own negligence. However, tariffs also typically contain wide-sweeping language exonerating the terminal from any and all liability and consequential damages when applicable.

Tariffs often contain provisions that indicate how and when official notice will be provided to the vessel regarding when the vessel must vacate the berth without incurring penalties. Tariffs also obligate a period of free time during which charges will not accrue on cargo stored at the terminal before loading and after discharge. Terminals often are obligated to provide stevedoring services under the conditions set forth in the tariff.

In summary, although container terminals commonly use both Carrier Service Agreements and tariffs to outline the terms and conditions for transferring cargo at the terminal, those contracts place very few responsibilities on the terminal itself. Terminal responsibilities in this regard are primarily found in the general maritime common law and federal regulations.

C. Terminals as Suppliers/Receivers of Bulk Cargo

Terminals frequently receive or supply cargo in bulk to visiting vessels. As stated previously, the terminal may simply store the bulk cargo and provide the means to transfer the cargo from ship to shore to ground transportation as needed. Those transactions are typically governed by Customer Service Agreements that are sometimes augmented by terminal tariffs. Terminals in this scenario have no ownership interest in the cargo and no contractual relationship with the vessel other than the tariff.

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Some CSAs and tariffs contain exculpatory clauses for which enforceability is inconsistent among the circuits. See: *Wechsler Limitation Proceedings*, 121 F.Supp.2d 404 (D.De. 2000); *Broadley v. Mashpee Neck Marina*, 471 F.3d 272 (1st Cir. 2006); *In re Martin*, 2010 AMC 2398 (1st Cir. 2010). Indemnity provisions in these agreements are typically enforced. *In re Gingrich*, 2011 WL 6001347 (D.N.J. 2011).

The transaction becomes more complicated when the terminal owner also owns the cargo being loaded aboard/discharged from the vessel. Coal piers, agricultural products, and chemical cargos typically involve bulk cargo products that are owned by the terminal operator. In these bulk cargo transactions an underlying sales contract establishes the terms of the sale between the supplier (terminal operator) and the buyer or consignee. These contracts, in addition to the normal contract terms for the sale of goods, also includes a commercial term, known as an INCOTERM, which establishes whether the seller or the buyer is responsible for transporting and insuring the cargo.

Cargo buy/sell contracts may require the cargo seller to arrange to deliver the bulk cargo from the terminal to the consignee. In INCOTERMS this may be FOB(discharge port), CIF or CFR. In these circumstances the visiting vessel is very likely chartered by the seller to deliver the cargo to the consignee. The buy/sell agreement governs the rights and responsibilities of the buyer and the seller, which may include demurrage, dispatch and load rates as well as terminal availability for loading/discharge. The buy/sell agreement may also provide a safe berth provision for the loading port and discharge port, as well as draft and size restrictions at these terminals. If the terminal owner is also the seller, the terminal may have independent contractual duties to the buyer through the seller's contract of sale.

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Even more interestingly, pursuant to FOB/CIF/CFR sales, the seller who is also the terminal owner may also be the voyage charterer for the vessel. As in the *In re Frescati Shipping* case *infra*, the same party may have obligations to the vessel owner as the seller in a buy/sell agreement, the terminal operator in a berth tariff, and as a voyage charterer. Further excitement is realized when each relationship contains a different term for such critical elements as demurrage, delay and despatch. As a result, cargo sellers and buyers are often counseled to ensure their contract terms are "back-to-back"; meaning the demurrage, despatch and similar terms are the same for each contract. This guidance applies to the wording of the safe berth clauses as well.

Note that this same contractual dilemma can exist for buyers as well as sellers. In circumstances where the shipping term is FOB(discharge port), CIF or CFR, when the loaded vessel arrives at the buyer's terminal the buyer may also be the terminal owner. The same "share terms" may apply to the "buyer as terminal owner" scenario where delays in discharging the cargo may have separate financial consequences for the buyer under the buy/sell agreement and the terminal operator under the tariff.

In the case *In re Frescati Shipping,* terminal owner CITGO owed a general maritime law duty of due diligence to the vessel with regard to the providing a safe berth at which to call and discharge cargo. CITGO also had a duty as the charterer of M/T ATHOS I in which CITGO *warranted* that it would provide a safe berth for the M/T ATHOS I to discharge cargo.

According to the Third Circuit's reasoning in *In Re Frescati Shipping,* "a wharfinger's duty is to use reasonable diligence to ascertain whether the approach to is berth is safe for an invited vessel." *Id.* at 306. This standard of care is applied to the

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terminal operator without regard to whether the terminal operator is also the buyer/seller and without regard for whether the terminal operator is also the voyage charterer of the vessel. In the case of M/T ATHOS I, CITGO was obligated to use due diligence to locate any obstructions on the approach to its berth and presumably mark them or see to removal of the obstruction.

But ultimately, CITGO was not held liable to Frescati Shipping for failing to use due diligence to locate the obstructing anchor from the channel. CITGO was held liable for a breach of warranty to provide a safe berth – a warranty that had its origin not in the wharfinger/terminal relationship with M/T ATHOS I, but in CITGO's role as voyage charterer of M/T ATHOS I. *Id.* Because every voyage charter requires the designation of a discharge port, and the language of the voyage charter generally warrants a "safe berth," CITGO was promising that no hazards would pose a risk to the arriving vessel. So, despite CITGO's presumably reasonable efforts to determine whether obstructions existed in the approach channel, any failure identify and remove obstructions was a liability to be assumed by CITGO.

Circumstances where a single entity is the buyer/seller, terminal operator and voyage charterer may create a myriad of problems for a maritime attorney working through the various obligations and standards of care. The liabilities vary from general maritime law negligence standards of care to maritime contract charter party standards of care to quasi-maritime buy/sell contracts. Prosecuting and defending these claims require forethought and the marshaling of evidence unlike standard maritime claims.

V. CONCLUSION

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Terminal obligations to visiting vessels vary based on the contractual status of the parties and the nature of the claim. Terminal obligations often arise from the common law bailor/bailee relationships that have existed for centuries. Often terminal obligations arise from statutory requirements enacted by the port state (i.e. host nation). Terminal obligations are at times contractual, arising from Customer Service Agreements, tariffs and berth applications. These relationships are even more complicated by collateral contractual agreements such as buy/sell agreements and voyage charters that place additional responsibilities and obligations on the terminal operator.

Maritime attorneys considering claims against vessel related claims against terminal operators must not only consider the best means of collecting evidence to prosecute or defend the claim, but also the necessity for determining the source of the claim, whether in common law, statute or contract, and the appropriate burden of proof/standard of care applied to the source of that claim. Strategies for prosecuting and defending the claim can be best determined after establishing the source of claim and burden of proof/standard of care.

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October 2019 Update (No. 245)

Notes from your Updater:

The Department of Labor has announced the National Average Weekly Wage to be applicable for the 12-month period beginning October 1, 2019. The applicable NAWW for the period from October 1, 2019, to September 30, 2020, is $780.04. Consequently, the maximum compensation rate for total disability and death for that period is $1,560.08, and the minimum compensation rate (not always the minimum rate) payable for disability incurred after October 1, 2019, is $390.02 per week. Cost-of-living adjustments effective on October 1, 2019, are 2.36%.

On September 11, 2019, Judge Moreno adopted the recommendation of Magistrate Judge McAliley dismissing the Belize excursion, Exotic Shore Excursions, for lack of personal jurisdiction in *Bonck v. Carnival Corp.* (July Update) but held that Bonck had pled sufficient allegations of negligence against the cruise line, Carnival, to avoid dismissal of the passenger's case.

On September 20, 2019, the Maui County Council voted to enter into a settlement in No. 18-260, *County of Maui v. Hawai'i Wildlife Fund* (August Update). That case, involving the issue whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater, was set for oral argument in the Supreme Court on November 6, 2019.

On September 26, 2019, the Senate confirmed Eugene Scalia as Secretary of Labor by a vote of 53-44.

On the LHWCA Front . . .

From the federal appellate courts:

Fifth Circuit affirmed the determination that the worker who injured the claimant was a third-party so claimant's settlement with that worker and his employer was subject to Sections 33(f) and 33(g) and affirmed the ALJ's decision not to modify the claimant's compensation so as to invoke Section 33(g) instead of Section 33(f). *Mays v. Director, OWCP*, No. 18-60004 (5th Cir. Sept. 11, 2019) (Higginbotham).

Opinion

The long history of this case began in 1991 when Avondale temporarily hired Tom Mays at its Louisiana shipyard under Avondale's contract with International Marine for cleaning and sandblasting a Navy vessel. After one of International Marine's employees (John Gliott) kicked Mays in the head, Avondale paid LHWCA disability and medical benefits until a dispute arose whether Mays could return to work. Ultimately, Mays was awarded medical benefits. Mays also filed suit against International Marine and its employee Gliott, and Mays settled that suit in 2000 for $60,000 without Avondale's approval. Avondale then contended that Mays' right to medical benefits was terminated under Section 33(g) because of the unauthorized settlement, and Mays sought to modify the award in his favor. The ALJ found that the settlement exceeded the value of Mays' benefits, so Section 33(g) was inapplicable, but that a credit was due under Section 33(f). The ALJ denied Mays' request for modification as untimely. The BRB affirmed the decision on credit, but held that Mays' modification request was not untimely; however, the BRB remanded with instructions to determine whether any additional compensation would cause Mays' claim to be subject to forfeiture under Section 33(g). Mays argued that Gliott was a borrowed servant of Avondale, not a third-party employee of International Marine, so neither Section 33(f) nor Section 33(g) was applicable to his settlement. The ALJ rejected Mays' argument and held that he was entitled to additional compensation of $335,012.08, but that increase would trigger Section 33(g). Therefore, the ALJ denied Mays' request for modification. The BRB affirmed, holding that the previous order remained in place with Avondale entitled to a Section 33(f) credit on medical benefits. The Fifth Circuit first affirmed that Gliott was not a borrowed servant of Avondale based on the substantial evidence standard. Judge Higginbotham reviewed the facts for each of the *Ruiz* factors and concluded that four of the nine factors, including the most important factor, who has control of the employee and the work, indicated that Gliott was not Avondale's borrowed servant; three factors weighed in favor of borrowed servant status; and two were neutral. Judge Higginbotham then addressed the effect of Sections 33(f) and 33(g). Avondale argued that Mays' benefits were barred by Section 33(g) because the ALJ had concluded that Mays was entitled to compensation in an amount far in excess of the unauthorized settlement. However, the ALJ did not grant modification as it would result in a Section 33(g) bar. Therefore, he left the former decision on Section 33(f) credit in place. There was, therefore, nothing that triggered Section 33(g), and the decision of the BRB was affirmed.

Sixth Circuit held that it is too late to raise a constitutional challenge to the ALJ on reconsideration with the BRB. *Island Creek Coal Co. v. Bryan*, Nos. 18-3680, 18-3909, 18-4022 (6th Cir. Sept. 11, 2019) (Murphy).

Opinion

These cases involve claims under the Black Lung Benefits Act, where the losing parties sought reconsideration in the Benefits Review Board, citing *Lucia v. SEC*, and requesting a new hearing before a properly appointed ALJ. The Director, OWCP, conceded that the ALJs were not constitutionally appointed, but argued that the appealing parties had forfeited their constitutional claims by not exhausting them with the Agency. The Sixth Circuit agreed, holding that the constitutional challenges to the ALJs were forfeited by failing to exhaust them with the BRB.

Shipyard's pre-welding testing held insufficient for fumes during welding and violates OSHA regulations. *Secretary of Labor v. Seward Ship's Drydock, Inc.*, No. 18-71216 (9th Cir. Sept. 11, 2019) (Fletcher).

Opinion

This case presents an important interpretation of OSHA regulations. Unfortunately, the Ninth Circuit decided the case without briefing or oral argument from the employer. Seward Ship's Drydock was a marine repair business in Alaska, performing both drydock and dockside repairs. In 2009, Seward was performing welding work in voids of the PAULA LEE. Before beginning repairs, Seward obtained a Marine Chemist Certificate from a certified marine chemist who tested the oxygen levels in each void and tested for combustible gases and toxic substances. The chemist did not test for fumes that would be produced by the welding that was to occur. Each day before welding began, the site's superintendent conducted atmospheric testing in the areas where work would take place, but that testing did not test for the metals in welding fumes. When welders complained of the poor air quality within the voids, the superintendent took a sample, and an alarm sounded. The welders called OSHA with a complaint, and the results of testing on a time-weighted average reflected that OSHA exposure standards were not exceeded. Nonetheless, OSHA issued a citation for failure to identify and evaluate the respiratory hazards in the workplace, to include a reasonable estimate of employee exposures to respiratory hazards and an identification of the contaminant's chemical state and physical form. The Commission ruled in favor of the shipyard, holding that an evaluation of respiratory hazards is only necessary when respirators are necessary to protect the health of employees, and no determination reflected that respirators were necessary. The Secretary disagreed, arguing that the regulations required the employer to evaluate respiratory hazards whenever there is a "potential" for overexposure to employees. Agreeing with the Secretary, Judge Fletcher declared that the requirement that employers both identify and evaluate respiratory hazards indicated that the employer has to evaluate the workplace for hazards even when the employer does not already know of the hazards. The exposures include not just those that exceed the permissible exposure limit. Judge

Fletcher considered the regulations to be unambiguous, and, therefore, no *Auer* deference was necessary.

From the federal district courts:

Harbor pilot recovered for unseaworthiness and section 905(b) negligence. *Rivera v. Kirby Corp.*, No. 3:17-cv-111, 2019 U.S. Dist. Lexis 147837 (S.D. Tex. Aug. 28, 2019) (Hanks).

Opinion

Jay Rivera was a harbor pilot in Corpus Christi when he suffered an injury to his left foot on the TARPON, a seagoing tugboat owned by Kirby Offshore Marine that Rivera piloted to its berth in Corpus Christi Harbor. Rivera was on his way to the wheelhouse of the tug when he stepped over a two-foot high bulkhead for a watertight door. On the other side of the bulkhead was a hatch cover that was not flush with the deck. Rivera's foot landed on the edge of the hatch cover, causing his ankle to roll and fracture the fifth metatarsal bone in his left foot. When the pain in his foot did not subside, even after a bone graft, a neurologist diagnosed Complex Regional Pain Syndrome. When another doctor opined that Rivera was medically unfit for his merchant mariner medical certification, his pilot's commission was revoked by the State of Texas. Crediting the testimony of his doctor in the seven-day bench trial, Judge Hanks believed that Rivera would suffer from CRPS for the rest of his life. Based on the decisions of the Fifth Circuit in *Bach v. Trident Steamship Co.*, 920 F.2d 322, 947 F.2d 1290 (5th Cir. 1991), holding that a pilot in similar circumstances was not a seaman, Judge Hanks addressed the argument that Rivera was covered by the LHWCA and could not bring an action for unseaworthiness as a *Sieracki* seaman. Although the Fifth Circuit in *Bach* did **not** have to decide whether Bach was covered under the LHWCA because the court held the ship was not unseaworthy, Judge Hanks proceeded to address the unseaworthiness question because the employment of Bach and Rivera was "materially indistinguishable." Judge Hanks then found the TARPON was unseaworthy because Kirby's failure to mark or repair the hatch cover that was not flush with the deck was unsafe and because Kirby violated industry customs and standards by failing to provide an escort for Rivera who was properly trained and familiar with the TARPON. However, even if Rivera were covered under the LHWCA, Judge Hanks held that he had established the negligence of Kirby under Section 905(b) of the LHWCA, as the area where Rivera was injured was under the active control of Kirby and the same reasons given for his unseaworthiness finding established a breach of duty. Judge Hanks found that Rivera lost $10,868,197 in future earnings (after discount to present value) and $157,810 in past wages as a pilot, but he reduced the future wage loss by $800,000 for residual wage-earning capacity as a consultant and expert witness. Rivera also lost the ability to accrue credit in the Corpus Christi Pilots' defined benefit plan, which Judge Hanks calculated at $1,469,129. Therefore, Judge Hanks rendered judgment in the amount of $11,695,136.

Court left open question whether DBA bars claims of translators and interpreters for violations of the Trafficking Victims Protection

Reauthorization Act and False Claims Act. *United States ex rel. Fadlalla v. Dyncorp International LLC*, No. 8:15-cv-01806 (D. Md. Sept. 4, 2019) (Xinis).

Opinion

This is a *qui tam* action brought by translators provided to assist our armed forces in the Middle East. Global Linguist Solutions provided the services of the plaintiffs in connection with a contract that required that it subcontract with various categories of small business, including veterans, women, and disadvantaged businesses. However, GLS engaged in a contracting scheme whereby it performed all of the contract work while giving the appearance that the required contractors were performing the work and also held the plaintiffs in inhumane conditions without travel documents at a risk of arrest. The defendants argued that the DBA preempted their claims under the Trafficking Victims Protection Reauthorization Act, but Judge Xinis noted that the DBA provides the exclusive remedy for injury or death arising out of the plaintiffs' employment. Although the employees did not anticipate that they would be involved in a "sinister scam" where their employer was "captor and abuser," Judge Xinis left open the possibility that the DBA applied to some of the claims after the record was further developed.

Contractual waiver of LHWCA subrogation in Agreement for Flight Services was not invalidated by the LOIA and was not applicable to injuries to passengers in helicopter crash. *Hammer v. PHI Inc.*, No. 6:16-cv-01048, 2019 U.S. Dist. Lexis 159466 (W.D. La. Sept. 17, 2019) (Hanna).

Opinion

Employees of Kinetica Partners, who were passengers on a PHI helicopter that crashed while bringing the employees to shore from a platform off the Louisiana coast on the outer Continental Shelf brought this suit against PHI and others. Zurich, the LHWCA carrier for Kinetica, intervened to recover its LHWCA payments, and the workers moved to dismiss the intervention on the ground that Kinetica (and thus Zurich by a blanket waiver of subrogatifon) had waived its right to subrogation in a Flight Services Agreement with PHI. In the FSA, PHI and Kinetica agreed to modified reciprocal defense, indemnity, and waivers of subrogation. Judge Hanna began by addressing the applicable law for the FSA. Applying the two-part test from the Fifth Circuit's en banc decision in *Doiron*, Judge Hanna concluded that the contract may have facilitated oil and gas operations on navigable waters by ferrying workers to and from the production platform, but the accident involved a helicopter and no vessel played a substantial role in the completion of the contract. Therefore, Louisiana law applied. Judge Hanna then addressed whether the Louisiana Oilfield Indemnity Act applied to the contract, and noted that the parties had not challenged that the AFS satisfied the requirements that the agreement related to exploration and development of oil and gas and pertain to a well. However, Judge Hanna did not have to reach a conclusion on this question as he found that the prohibitions of the LOIA were not implicated. He cited *Hudson v. Forest Oil Corp.* where the Fifth Circuit held that voiding a waiver of subrogation clause only achieved the purpose of the LOIA when the clause was sought to be enforced in conjunction with the enforcement of an indemnity clause. In this case, the parties had not sought to enforce any indemnity clause,

so the subrogation provision did not violate the LOIA. After holding that the plaintiffs were not barred from asserting waiver of subrogation despite having failed to raise it as an affirmative defense in answer to the intervention (Zurich was on notice of the defense from PHI's answer), Judge Hanna addressed whether the waiver of subrogation applied according to the terms of the AFS. The AFS required the waiver only to the extent of Kinetica's indemnity obligations, but the AFS did not require indemnity in this situation from Kinetica to PHI. Therefore, no waiver of Zurich's right to subrogation was triggered. Likewise, nothing in the AFS extended the waiver to the other defendants in the suit, so Zurich was entitled to pursue subrogation against them. Finally, Judge Hanna noted the difference between waiver of subrogation and waiver of credit and held that Zurich was entitled to an offset out of any net recovery by the plaintiffs for future benefits payable to or on behalf of the plaintiffs.

Federal court certified class for workers who received per diem payments and truck allowance pay that was not included in their regular rate of pay for the calculation of overtime. *Murillo v. Berry Brothers General Contractors Inc.*, No. 6:18-cv-1434, 2019 U.S. Dist. Lexis 162520 (W.D. La. Sept. 23, 2019) (Whitehurst).

Opinion

This case involves claims of maritime, oilfield, and other workers against Berry Brothers, a nationwide labor contractor with its headquarters in Berwick, Louisiana. The lead plaintiff alleged that Berry Brothers paid its workers a base hourly rate and 1.5 times that rate for work over 40 hours in a week. However, overtime was not calculated on additional amounts that were paid to employees in the form of per diem payments and truck allowance/reimbursement pay. The plaintiff contended that the failure to pay 1.5 times these payments violated the Fair Labor Standards Act. At this preliminary stage, Magistrate Judge Whitehurst certified a class action including non-exempt laborers who received additional pay in the form of per diem payments and truck allowance pay not included in the regular rate of pay.

From the state courts:

State can enjoin unauthorized practice of law after attorney's authorization to practice before federal agencies was withdrawn. *Ex parte Ninth Judicial Circuit*, No. 27919, 2019 S.C. Lexis 92 (S.C. Sept. 25, 2019) (per curiam).

Opinion

After Bradley Rowland Marshall was disbarred by the Washington Supreme Court on October 1, 2009, by the Ninth Circuit on May 25, 2010, and by the Supreme Court on December 13, 2010, he was no longer licensed to practice in any state. However, he remained the sole proprietor of Chartmans, Inc., whose website represented that Chartmans served as a legal consultant to federal workers and others in today's world where legal representation is essential in administrative hearings in the United States and in other proceedings and before other tribunals. Chartmans' letterhead reflected that the

company specialized in "Longshore and Federal Worker Claims." After his disbarment, the federal regulation in effect permitted any citizen who was not an attorney to appear in a representative capacity in an adjudicative proceeding before the Office of Administrative Law Judges, and Marshall continued to represent clients in LHWCA claims before the OALJ. On December 8, 2011, Judge Purcell issued an order granting reciprocal effect to Washington's disbarment and denied Marshall the authority to appear in a representative capacity before the OALJ. Noting that the issue whether Marshall's representation of clients in OALJ proceedings before Judge Purcell's order was unauthorized practice of law was a question for federal determination, the South Carolina Supreme Court declined to express an opinion as to the propriety of that representation. However, the court held that Marshall's representation of clients in OALJ proceedings after he was prohibited from appearing before the OALJ was unauthorized practice of law, and the court enjoined him from any further representation of clients before the OALJ.

And on the Maritime Front . . .

From the federal appellate courts:

Cruise line had sufficient notice of puddle on deck. *Plott v. NCL America, LLC*, No. 19-10109 (11th Cir. Sept. 9, 2019) (per curiam).

Opinion

Susan Plott finished soaking in the hot tub of the PRIDE OF AMERICA and was walking inside the Conservatory when she slipped in a puddle of clear liquid on the deck and fell down some stairs. About 20 to 25 minutes earlier it had rained and passengers had run to and through this area to escape the rain. The area was within sight of a bar where two crewmembers worked, and the area was continuously monitored during the time before Plott slipped. The district judge granted summary judgment to the cruise line that the cruise line did not have constructive notice of the wet floor, but the Eleventh Circuit reversed. A reasonable fact finder could conclude that the puddles came from passengers who fled the bar during the rain and that they had been present long enough to be discovered. Reaching an issue not addressed by the district court, the Eleventh Circuit then ruled that the colorless and odorless puddles were not open and obvious as a matter of law. As the case was remanded, the Eleventh Circuit addressed the exclusion of the testimony of Plott's expert, William Martin. The appellate court agreed that his opinions that it was unreasonable not to provide floor mats outside the Conservatory doors and not to provide warning signs were legal conclusions and not a proper topic of expert testimony. The Eleventh Circuit also agreed that his opinions that floor mats would have prevented the accident and that the floor was actually wet were based on speculation and were not admissible. Finally, the Eleventh Circuit agreed that his expert report did not demonstrate how his experience as an architect supported his opinions and conclusions.

Sufficient circumstantial evidence from CCTV footage of tripping hazard to defeat cruise line's summary judgment. *D'Antonio v. Royal Caribbean Cruise Line, Ltd.*, No. 18-15297 (11th Cir. Sept. 26, 2019) (per curiam).

Opinion

Sarah D'Antonio was walking through the crowded casino of the FREEDOM OF THE SEAS on the way to the theater. While walking on the edge of a six-foot wide tile walkway between the gaming tables she slipped and fell. She did not know what caused her to fall, but she fell as she walked by chairs at a gaming table. She originally believed that her shoe may have caught on the metal strip at the edge of the walkway, but she later abandoned that theory and argued that she must have tripped on the legs of a chair that was not pushed back under the gaming table and protruded into the walkway. Although she could not identify the chair as the cause of her fall, the Eleventh Circuit found sufficient evidence to defeat the cruise line's motion for summary judgment from the CCTV footage. The video depicted D'Antonio's fall as she walked past the chairs, and the chairs were close enough to the walkway that a jury could conclude that a chair leg extended into the path of the walkway. As the video demonstrated that the middle chair had been in that position for 18 minutes before the accident, the Eleventh Circuit held that a reasonable jury could conclude that the cruise line had constructive notice of a tripping hazard.

Basketball team owner's claim in the Deepwater Horizon economic loss settlement program remanded to reconsider causation. *BP Exploration & Production, Inc. v. Claimant ID 100296061*, No. 18-31048 (5th Cir. Sept. 26, 2019) (per curiam).

Opinion

After the owner of a professional basketball team was awarded damages based on the Deepwater Horizon Economic and Property Damages Settlement Agreement, BP appealed to the Fifth Circuit based on the characterization of specific expenses as fixed rather than variable and the sale of a draft pick being characterized as a negative salary expense rather than as a gain from the sale of an asset. As the district court's review was discretionary, BP argued that the case should be remanded in light of recent decisions of the Fifth Circuit that a claimant's losses must have been caused by the oil spill, and the basketball team's "losses" were not caused by the spill. Following those decisions, the Fifth Circuit remanded the case to the district judge to conduct a new discretionary review.

From the federal district courts:

Court enforced New York forum selection clause in contract of carriage. *Prospero Tire Export, Inc. v. Maersk Line A/S*, No. 18-1015, 2019 U.S. Dist. Lexis 151383 (D.P.R. Aug. 30, 2019) (Arias-Marxuach).

Opinion

The plaintiffs sought to export 150 containers of recycled tires from Puerto Rico and entered into brokerage agreements with companies that contract with Maersk Line to carry the goods to foreign ports. The plaintiffs alleged that Maersk Line took the containers but never delivered them. Maersk Line moved to transfer the case from federal

court in Puerto Rico to federal court in New York pursuant to the exclusive New York forum selection clause in Maersk Lines' standard Terms and Conditions of Carriage. Concluding that the forum selection clause encompassed all of the plaintiffs' claims, whether sounding in contract or tort, and that the public factors did not prevent enforcement of the clause, Judge Arias-Marxuach transferred the case to the Southern District of New York.

Insufficient notice of fruit on deck for cruise line to owe a duty to passenger who slipped on a piece of watermelon. *Francis v. MSC Cruises, S.A.*, No. 18-61463, 2019 U.S. Dist. Lexis 151255 (S.D. Fla. Sept. 5, 2019) (Seltzer).

Opinion

Janet Francis, a passenger on MSC's cruise ship DIVINA, slipped on a piece of watermelon in a passageway leading from the buffet. She had noticed that there was a lot of food on the deck of the passageway on her way to the buffet, putting her on heightened awareness. When she exited the buffet, ten to fifteen minutes later, she observed that the deck had been cleaned, but she was still cautious, looking for fruit on the floor. Nonetheless, she slipped on a piece of watermelon. The cruise line moved for summary judgment on the ground that it owed no duty to Francis because it had no actual knowledge of the piece of watermelon and it had not experienced evidence of substantially similar incidents to put it on notice of the dangerous condition and have a duty to warn its passengers. As the deck had been cleaned within the ten to fifteen minutes that Francis was at the buffet, there was insufficient evidence that the condition had been present to impute constructive notice to the cruise line. Although the cruise line was aware that food could be spilled on its decks and that food on the deck would be a slipping hazard, without a history of accidents of this sort, the cruise line was not on notice that the passageway was hazardous. Finally, Magistrate Judge Seltzer concluded that the condition of the fruit on the deck was open and obvious so that the cruise line would not have had a duty to warn Francis in any event. Therefore, he dismissed the case.

Climate-change suit cannot be removed based on the OCSLA. *Board of County Commissioners of Boulder County v. Suncor Energy Inc.*, No. 18-cv-01672, 2019 U.S. Dist. Lexis 151578 (D. Colo. Sept. 5, 2019) (Martinez).

Opinion

This is another suit against energy companies seeking damages allegedly caused by climate change. The defendants removed the case to federal court on a host of grounds, and Judge Martinez rejected all of the bases for removal, remanding the case to state court. One of the jurisdictional bases for removal was the Outer Continental Shelf Lands Act, but Judge Martinez held that the defendants' assertion that some fuels from the OCS may have contributed to the harm alleged by the plaintiffs was insufficient to support removal of the case based on the jurisdiction of the OCSLA. Judge Martinez did grant an emergency stay of his order of remand pending the filing of a motion for stay pending appeal and his ruling on that motion.

No admiralty jurisdiction (and no maritime attachment) over injury on

cruise excursion when the passenger crashed his ATV into a tree. *Doria v. Royal Caribbean Cruises, Ltd.*, No. 1:19-cv-20179, 2019 U.S. Dist. Lexis 154635 (S.D. Fla. Sept. 5, 2019) (Williams).

Opinion

After surviving Carnival's motion to dismiss for failure to state a claim (September Update), Enid Doria did not fare as well with the excursion company's motion to dismiss his Rule B (attachment) claim and vacate the Rule B process in connection with the injuries he suffered on a shore-based ATV excursion (Doria crashed the ATV into a tree in Cozumel). Concluding that the claim against the excursion company failed to satisfy the locality test for admiralty tort jurisdiction, Judge Williams dismissed the attachment claim against the excursion company for lack of subject matter jurisdiction.

Seaman's Jones Act and unseaworthiness claims for heart attack survived his employer's motion for summary judgment. *Guidry v. Epic Diving & Marine Services, LLC*, No. 17-01492, 2019 U.S. Dist. Lexis 152342 (W.D. La. Sept. 6, 2019) (Whitehurst).

Opinion

Frederick Guidry worked as a night Engineer on a dive support vessel, the M/V EPIC EXPLORER. While changing the oil in the engine room, he reached for a stack of oil absorbent pads that had been placed on top of a main electrical panel. They were weighted down with a stainless steel coupling to prevent the rags from blowing around from the ventilation. The coupling fell on the main electrical panel into a cut-out modification, causing contact with the bus bars and a catastrophic power failure that resulted in an extreme temperature spike in the engine room. After restoring power, Guidry was sweating profusely and struggling physically. He passed out and had to be revived by two hits from an AED. Guidry brought suit alleging that he suffered an acute plaque rupture and myocardial infarction that were precipitated by negligence and unseaworthiness in the modification of the main electrical panel that allowed foreign objects to enter the panel and by the placement of the metal union on the pads on top of the panel. Epic Diving's motion for summary judgment argued that the heart attack was caused by stress outside the zone of danger, but Magistrate Judge Whitehurst rejected that argument on the ground that a heart attack caused by physical perils, such as those described by Guidry, is compensable under the Jones Act and general maritime law. Judge Whitehurst also rejected Epic Diving's challenge to the medical testimony to support causation, as Dr. Courville stated that the events described by Guidry "were, more likely than not, contributing and precipitating factors to the acute plaque rupture and myocardial infarction.

Seamen allowed to sue vessel operator's protection and indemnity insurer after obtaining judgment against vessel operator. *Bodden v. Travelers Property Casualty Co. of America*, No. 18-25095, 2019 U.S. Dist. Lexis 151733 (S.D. Fla. Sept. 6, 2019) (Scola).

Opinion

The captain and crew of a cargo tug and barge brought suit against the vessels' operator after the vessel ran out of fuel near Cuba and was towed to Cuba where the plaintiffs were stranded for nearly a year. During that time they ate rats and insects and suffered illnesses and injuries that were not treated. The workers brought suit against the operator under the Jones Act and general maritime law for unseaworthiness for failing to repatriate them and obtained judgment against the operator in state court. The settlement between the plaintiffs and the operator included an assignment to the plaintiffs of the operator's claims against its insurer Travelers. While the action against the operator was pending, the operator's protection and indemnity carrier, Travelers, brought a declaratory judgment action in federal court against the operator and obtained a default judgment that the policy was void ab initio. The seamen then sued Travelers directly under Florida law, which permits a party to sue a liability insurer after obtaining a judgment against the liability insurer's insured. Travelers moved to dismiss the direct action, arguing that the policy was a protection and indemnity policy, not a liability policy. Although the policy clearly provided that the insurer would pay the insured for losses that the insured "shall . . . have become liable to pay and shall pay on account of liabilities" as set forth in the policy, the court held that it was not sufficiently clear that the policy was an indemnity policy because it referred to liabilities throughout the policy. Travelers also argued that the plaintiffs were bound by the default judgment obtained by Travelers against the insured, noting that the plaintiffs were the assignees of the insured's rights. However, the plaintiffs were not suing in the capacity of assignees of the insured but as judgment creditors of the insured. Therefore, they were not prevented by the default judgment that voided the policy between Travelers and the operator from bringing the action against the insurer directly under Florida law.

Judge admonished attorneys for shotgun pleading in complaint. *Elliott-Savory v. Royal Caribbean Cruises, Ltd.*, No. 19-23662, 2019 U.S. Dist. Lexis 152673 (S.D. Fla. Sept. 9, 2019) (Scola).

Opinion

Judge Scola undertook an independent review of the record in this case in which a passenger brought suit for injuries sustained when the tender in which she was riding collided with the cruise ship. Noting that this was at least the fourth time that he had admonished one group of attorneys and at least the third time he had admonished another attorney, Judge Scola explained that multiple claims for relief cannot all be dumped into one nebulous count. Judge Scola struck the complaint and instructed the attorneys to replead, asserting each theory of liability as a separate cause of action.

Forum selection clause and lack of personal jurisdiction resulted in dismissal of vessel damage claim against insurers, broker, and vessel transporter. *White Knight Yacht LLC v. Certain Lloyds at Lloyd's London*, No. 18-cv-02616, 2019 U.S. Dist. Lexis 155269 (S.D. Cal. Sept. 10, 2019) (Bashant).

Opinion

California-based White Knight Yacht arranged for transportation of its yacht from Canada to Mexico with a Washington-based shipping company. The Washington company contracted with defendant United Yacht Transport to perform the transportation. When

plaintiff was advised that some of the provisions in the shipping contract would void its hull insurance, plaintiff contracted with the Washington shipping company to provide additional insurance, which was placed with Lloyd's by the Washington shipping company as a cargo policy through insurance broker H.W. Wood. When the yacht was damaged during transport, plaintiff brought this suit against United Yacht, Wood, and Lloyd's. United Yacht and Wood moved to dismiss based on the forum selection clause in the cargo policy (exclusive jurisdiction of the courts of England and Wales). As the clause encompassed the claims against both Lloyd's and Wood and bound the plaintiff even though the plaintiff was not a party to the cargo policy, Judge Bashant enforced the clause and dismissed the plaintiff's claims against United Yacht and Wood. Judge Bashant then addressed the motion to dismiss for lack of personal jurisdiction of United Yacht, which was based in Delaware and Florida. United Yacht was not subject to general jurisdiction in California, so the case turned on whether there was specific jurisdiction over United Yacht in this case. United Yacht did not contract with plaintiff in California. Instead, the Washington shipping company contracted with United Yacht to transport plaintiff's yacht from Canada to Mexico. As that did not contact did not establish that United Yacht purposely directed its conduct to California, Judge Bashant granted United Yacht's motion to dismiss.

Unwanted salvor granted salvage award and attorney's fees. *JSM Marine LLC v. Gaughf*, No. 4:18-cv-151, 2019 U.S. Lexis 155170 (S.D. Ga. Sept. 11, 2019) (Baker).

Opinion

Hurricane Matthew destroyed Defendant's dock and boatlift along the Wilmington River, near Savannah, Georgia, depositing her vessel, the MIST APPROACH, four houses downriver in a partially grounded state with its bow resting on a rocky area of the river bank surrounded by hurricane debris. Defendant had evacuated the area for the storm but notified her insurance company and had the vessel tied to the adjacent dock. The adjuster for the insurance company then inspected the vessel and did not observe any severe structural damage, noting that the vessel was immobilized due to the debris, was not leaking any fuel or lubricant, and had not taken on any water. The vessel had remained in this condition for more than a week without sustaining any damage. Before the adjuster could make arrangements to move the vessel, plaintiff JSM Marine undertook to salvage the MIST APPROACH, without the knowledge or consent of its owner. The operation was not easy, requiring a crew of four and a 130-foot barge, a 35-ton crane, a push boat, a work skiff, a truck with an attached trailer, and other equipment to cut away debris, lift the vessel from its position, transport the vessel to a ramp, and tow it to a storage facility. The operation was successful, but defendant's husband reported the vessel as stolen, and plaintiff's general manager was arrested (the charge was dismissed). The salvage company sent a bill to the plaintiff for $7,144 for salvage services, but the vessel owner declined to pay, and this suit ensued. The primary issue in the suit was whether the vessel was in a marine peril while tied to a dock in the same position for ten days without sustaining any additional discernible damage. Judge Baker noted that the great weight of authority established that grounding and stranding constitute per se marine perils, even when the vessel could have remained safely grounded for an indefinite period of time. As the vessel remained susceptible to the ever-changing coastal elements, placing it in a reasonable apprehension of further marine peril, Judge Baker held that the vessel was in

a marine peril as a matter of law. Turning to the amount of the salvage award, Judge Baker noted a range of salvage awards as a percentage of the salved property's value had varied from 4% to 25% (what happened to the moiety rule?). He considered the value of the vessel to be $32,000, and, considering the labor, expertise, condition, and danger faced by the vessel, he awarded the requested amount of $7,144--22% of the vessel's value. Both sides sought attorney's fees, and Judge Baker agreed that the plaintiff should recover attorney's fees. Although the prevailing party in a maritime action is not entitled to fees as a matter of course, Judge Baker found that the vessel owner had litigated in bad faith, advancing frivolous defenses, refusing to admit basic facts, and submitting sham evidence. Therefore, he granted the plaintiff's motion and requested evidence and briefing on the extent to which fees should be awarded and the amount.

Economic loss rule did not prevent wharf lessee from recovering against alliding vessel. *Mardi Gras World, LLC v. Marquette Transportation Co.*, No. 18-4745 c/w 18-5579, 2019 U.S. Dist. Lexis 154923 (E.D. La. Sept. 11, 2019) (Vance).

Opinion

This case involves the allision of defendant's towing vessel M/V STEVE RICHOUX with the Robin Street Wharf on the Mississippi River in New Orleans. The wharf is owned by the Board of Commissioners of New Orleans and leased to Mardi Gras World, covering the wharf and adjacent office and retail space for use as a Mardi Gras Museum. Pursuant to the lease, Mardi Gras World was required to provide property insurance on the premises, to repair or restore any premises that were damaged, to maintain the property, and to pay taxes on the property. When Mardi Gras World brought this action against the owner of the alliding vessel, the defendant moved to dismiss plaintiff's claims for economic damages under the *Robins Dry Dock* economic loss rule (there can be no recovery for economic losses for an unintentional maritime tort absent physical damage to property in which the plaintiff had a proprietary interest). The question presented was whether Mardi Gras World, which did not own the property, had a sufficient proprietary interest in the property to avoid the economic loss rule. Judge Vance noted that the Fifth Circuit has looked to three primary factors to determine the sufficiency of the proprietary interest, responsibility for repair, responsibility for maintenance, and actual possession or control. As all of these factors were satisfied in this case in accordance with the terms of the lease, Judge Vance concluded that Mardi Gras World had a sufficient proprietary interest to recover economic damages from the defendant. However, the defendant asserted that restrictions in Louisiana statutes governing riparian property rights prevented Mardi Gras World from having a sufficient interest to recover. The restrictions included the state's right to retake possession of the property, required written approval of maintenance, and provided that the wharves remained subject to the administration and control of the governing authorities with respect to maintenance. However, these provisions did not diminish the effect of the rights and obligations of Mardi Gras World in the lease insofar as they related to the factors considered under the economic loss rule. Thus, Judge Vance did not consider that Louisiana law prevented Mardi Gras World from having a sufficient proprietary interest in the wharf in order to recover.

Court did not exclude expert medical testimony in non-jury case for failure to comply with discovery obligations, granted summary judgment to medical

consultation company for actions of independent contractor physicians, declined to apply the collateral source rule to the maintenance and cure claim, and declined to decide whether the conduct of master would bind the owner for punitive damages in the maintenance and cure claim. *Adams v. Liberty Maritime Corp.,* No. 16-cv-5351, 2019 U.S. Dist. Lexis 156359 (E.D.N.Y. Sept. 12, 2019) (Brown).

Opinion

This case involves the allegation of failure to provide adequate medical treatment to a seaman on defendant's vessel, M/V LIBERTY EAGLE. When the plaintiff began suffering from swollen legs while the vessel neared the Port of Sudan, he requested that he be transported ashore for medical treatment. The seaman asserted that his symptoms and ailments were ignored by the vessel's captain and misrepresented to Future Care, a medical consultation company engaged by the ship. It was not until much later that the seaman was evacuated from the ship for treatment. The seaman brought this action against the vessel, its captain, and Future Care. The defendants moved to preclude certain expert testimony from the seaman's treating physicians for purported failure to comply with discovery obligations. Aside from the fact that treating physicians are excluded from the obligation to provide an expert report, Judge Brown noted that this was a non-jury case, which obviated the important concern that permitting treating physicians to offer causation testimony, without the benefit of expert witness discovery, risked misleading the jury. As Future Care engaged independent-contractor physicians (not employees) to dispense medical advice, Judge Brown granted Future Care's motion for summary judgment. Before the seaman reached maximum cure, he had incurred more than $300,000 in medical expenses that were paid by the seaman and his union medical insurance. Citing the rule from the Second Circuit (*Moran Towing & Transportation Co. v. Lombas*) that maintenance and cure is not subject to the collateral source rule, Judge Brown declined to allow the seaman to seek recovery for the expenses paid by the union insurer. However, Judge Brown did allow the seaman to seek recovery for the out-of-pocket expenses paid by the seaman. Finally, Judge Brown addressed the claim for punitive damages for the conduct of the master in willfully failing to provide medical treatment. The question was whether the captain was a managerial employee whose actions would bind the owner. As the issue was unanswered by the Supreme Court in *Exxon Shipping Co. v. Baker*, Judge Brown left the determination as to which approach to take to the shipowner's vicarious liability for punitive damages until a fuller record had been made with appropriate factual findings at trial.

Crane operator responsible for injury during basket transfer for failing to have a signalman on the platform who could see both the crane operator and the deck of the vessel. *Kinnerson v. Arena Offshore, LP*, No. 16-720, 2019 U.S. Dist. Lexis 157156 (W.D. La. Sept. 13, 2019) (Fallon).

Opinion

Ryan Kinnerson was injured in a personnel basket transfer from a platform to a vessel. The platform operator decided to drill a new well and hired several contractors to perform construction and drilling work. As a result of the construction work, the operator hired

Sparrows to provide a Bullfrog crane and crane operator to raise and lower workers and equipment between the platform and a support vessel, the M/V MISS CLAIRE, located 100 feet below the deck of the platform. The crane had to be placed near the middle of the platform so that it could reach all sections of the platform, which meant that the crane operator could not see the deck of the vessel. Four workers, including Kinnerson, climbed into a personnel basket and were being lowered to the deck of the vessel by the crane operator. The deckhand on the vessel served as the sole signalman as well as serving as a rigger to grab the tagline to the basket and guide the basket to a proper location. When the basket was approximately 10 to 30 feet from the deck, the deckhand reached up to catch the tagline, but the tagline broke and he fell backward onto the deck, disabling the radio that the deckhand used to communicate with the crane operator. The basket continued to descend and struck the vessel's port railing, coming to rest about four feet above the deck. While it teetered on the rail, Kinnerson jumped to the deck, landing in a twisted position. Kinnerson brought suit under the general maritime law against several parties, including the platform operator, vessel owner, and supplier of the crane and crane operator. After trial to the bench, Judge Fallon concluded that the general maritime law applied and that the sole fault causing Kinnerson's injury was the negligence of the crane operator for failing to have a signalman positioned on the platform who could see both the crane operator and the basket as it was being lowered to the vessel. That signalman could have given the signal to stop as soon as the tagline parted and the crew member fell to the deck. Given Kinnerson's education, skill, and work history, Judge Fallon concluded that Kinnerson would have advanced in his career. Therefore, he found that Kinnerson would have transitioned from his job as a Level II Non-Destructive Tester (earning $95,689 per year) to a NDT III inspector with a base salary of $130,000 annually in a year. Considering the significant injury to his back that resulted in several surgeries to his back and a permanent stimulator to reduce the pain, Judge Fallon found that Kinnerson, who was 27 at the time of the accident, had a return to work capability of $7,852 annually and a past wage loss of $469,875.76 and a future loss of wage earning capacity of $2,760,014. He also awarded Kinnerson $1,300,000 ($400,000 past and $900,000 future) for physical pain and suffering, mental anguish, loss of enjoyment of life, and permanent disabilities, $171,188.57 in past medical expenses, and $1,109,039 in future medical expenses, together with prejudgment interest on past losses.

Plaintiff's knowledge of speaker above stinger rack and yellow-painted iron plate on the deck is not sufficient for an open and obvious defense. *Mayet v. Energy XXI Gigs Services, L.L.C.*, No. 17-9568, 2019 U.S. Dist. Lexis 157569 (E.D. La. Sept. 16, 2019) (Brown).

Opinion

Daniel Mayet was injured on Energy XXI's platform on the outer Continental Shelf, offshore Louisiana, while receiving cargo boxes from a vessel. He tripped on a plate on the deck of the platform while attempting to place a stinger on the platform's stinger rack and brought suit against Energy XXI under maritime law and Louisiana state law. Energy XXI asserted that it was entitled to summary judgment under Louisiana law as the condition of the stinger rack and the plate on the deck, painted yellow, were open and obvious. Even though both conditions were known to Mayet, Judge Brown ruled that there was a fact question whether the conditions were unreasonably dangerous. There

was a speaker located above the stinger rack that interfered with the use of the crane to place the stinger on the rack. While the stinger was plainly visible, Judge Brown believed that a reasonable jury could conclude that the location of the speaker would create a dangerous condition once the crane was operational. As to the iron plate that was painted yellow and known to Mayet, it was elevated above the level of the deck, so Judge Brown believed that a reasonable jury could conclude that it was not open and obvious to all who encountered it and that it was unreasonably dangerous.

Cruise line did not owe non-delegable duty to provide reasonable medical care to passengers. *McFee v. Carnival Corp.*, No. 19-22917, 2019 U.S. Dist. Lexis 159158 (S.D. Fla. Sept. 16, 2019) (Lenard).

Opinion

Robert McFee had suffered strokes in the past, so when his family was booking a cruise over the phone with Carnival, they asked if Carnival would fly McFee back to the United States if he suffered another stroke. Carnival's agent allegedly responded by offering a travel insurance policy that would ensure that McFee would be adequately treated and flown back to the United States if he suffered a stroke. The family booked the cruise and purchased the policy. McFee did suffer a stroke on an excursion in the Bahamas and was taken back to the ship. The ship's physician advised that he would have to disembark and seek medical attention at a medical facility in the Bahamas, requiring a CT scan and assessment by a neurologist. However, the medical facility did not have a neurologist, equipment for a CT scan, or medicine that plaintiff needed. McFee could not return to the ship as it was leaving, so his family had to book a commercial flight to the United States, allegedly resulting in aggravation of his condition. After dismissing some of the counts of the complaint as shotgun pleadings, Judge Lenard addressed the count alleging a non-delegable duty to provide reasonable care. McFee argued that in addition to Carnival's assuming the duty to provide reasonable care for ailing passengers, the duty was non-delegable. However, Judge Lenard considered that to be an overstatement of the duty owed under the general maritime law and dismissed that count for failure to state a claim. Finally, McFee pleaded a count of fraud by omission by failing to disclose that Carnival would not fly him back to the United States if he was unable to receive the treatment he needed for a stroke while on the cruise. Judge Lenard noted that this count actually involved an affirmative misrepresentation and was not a fraud by omission. Therefore, in addition to allowing McFee to replead the counts that were dismissed as shotgun pleadings, Judge Lenard allowed McFee to plead a fraudulent inducement claim.

No personal jurisdiction in New York in suit against trucking company for damage during shipment through New York from New Jersey to Connecticut. *Hartford Fire Insurance Co. v. Maersk Line*, No. 18-cv-121, 2019 U.S. Dist. Lexis 159765 (S.D.N.Y. Sept. 17, 2019) (Castel).

Opinion

This case involves damage to a shipment of windows between Cork, Ireland and Connecticut. Maersk transported the goods to Port Newark, New Jersey, and delivered the goods to New Jersey trucking company, Sapsan, which carried the windows from New Jersey, through New York, to Connecticut. The cargo insurer, Hartford, brought suit in

federal court in New York against Maersk, Sapsan, and the freight forwarder, and Sapsan moved to dismiss the claims against it for lack of personal jurisdiction. With respect to general jurisdiction, Judge Castel concluded that Sapsan's designation of an agent to accept service in New York pursuant to regulation under the Federal Motor Carrier Act was insufficient to consent to general personal jurisdiction in New York. As to specific jurisdiction, Sapsan had transacted business in New York, picking up and delivering shipments in New York and traveling a monthly average of 2,000 miles a month over New York roadways. However, Judge Castel concluded that Hartford had not made out a prima facie case that the damages arose out of an agreement between Sapsan and the New York freight forwarder to "supply goods or services" in New York. The claim was instead directed to the failure to properly deliver the shipment from New Jersey to Connecticut. As there was no substantial relationship to a New York transaction, Sapsan was not subject to personal jurisdiction in New York.

Another BELO suit was dismissed for lack of expert testimony. *Origene v. BP America Production Co.*, No. 18-25069, 2019 U.S. Dist. Lexis 159149 (S.D. Fla. Sept. 16, 2019) (Scola).

Opinion

One of the features of the settlement of the medical benefits class action from the Deepwater Horizon blowout was the back-end litigation option that is available for class members. However, a BELO plaintiff must litigate five issues, including causation, in order to collect compensation from the settlement agreement. Gernier Origene brought a BELO suit but failed to timely disclose his expert witnesses. Without expert witnesses, there was no evidence of medical causation, and Judge Scola dismissed his BELO suit.

Second shotgun complaint dismissed with prejudice. *Nichols v. Carnival Corp.*, No. 1:19-cv-20836, 2019 U.S. Dist. Lexis 160035 (S.D. Fla. Sept. 17, 2019) (Ungaro).

Opinion

We return (July Update) to the litigation over the death of Larry Nichols on an excursion in Roatan, Honduras, from the Carnival cruise ship Breeze. Judge Ungaro previously dismissed the complaint as a shotgun pleading and held that DOHSA provided the exclusive remedy for Nichols's spouse. Carnival moved to dismiss the amended complaint, and Judge Ungaro granted the motion, but this time with prejudice. The plaintiff simply removed 10 of the 55 preliminary allegations and plugged them into specific counts, re-alleging and incorporating the other paragraphs without explaining how they supported each cause of action. The causes of action concluded with assertions that had Carnival complied with the aforementioned duties, the decedent's death would have been prevented, which was too conclusory to establish causation. Judge Ungaro advised that the plaintiff must allege factual content to support how compliance with an alleged duty would have prevented the death. Additionally, the amended complaint still failed to allege sufficient facts to support the requirement of actual or constructive notice of the risk-creating condition. For example, plaintiff alleged that Carnival had notice of two individuals who had died on the excursion of heart attacks, but did not allege that the decedent in this case suffered a heart attack. Plaintiff had been warned of her original complaint's pleading deficiencies but filed an amended complaint that fell "woefully short

of curing these deficiencies." Judge Ungaro could only conclude that plaintiff could "not state a plausible claim and that a further opportunity to amend will produce only another prolix, but legally insufficient, complaint."

Cold prep cook at Maine Maritime Academy cafeteria achieved seaman status against food service contractor/employer while serving on training cruises on MMA's training ship. *Maine Maritime Academy v. Fitch*, No. 1:17-cv-195, 2019 U.S. Dist. Lexis 158779 (D. Maine Sept. 18, 2019) (Torresen).

Opinion

Janis Fitch was hired in 2008 as a cold prep cook by Sodexo to cook at Maine Maritime Academy's campus cafeteria. Sodexo had a contract with MMA to manage and provide food service for MMA on campus, on the training cruises for MMA's training vessel, and while the training vessel was under weigh to the shipyard. Fitch was told that she may be required to serve on the vessel during its summer cruises, and she did beginning in 2009 and on every training cruise thereafter until she was injured in the galley on the ship in 2016. Fitch had to sign articles with MMA in order to serve on the vessel. She asserted claims as a seaman against both MMA and Sodexo, requiring Judge Torresen to meticulously examine the hours she spent during her employment in service of the vessel in order to determine whether she satisfied the 30% rule-of-thumb for the duration test for seaman status enunciated by the Supreme Court in *Chandris*. Judge Torresen concluded that the 29.8 percent of her time spent in service of the vessel from the outset of her employment was "close enough" that she should be a seaman. Therefore, Judge Torresen turned to whether MMA, Sodexo, or both should be held liable under the Jones Act. Judge Torresen noted the dicta from the Supreme Court that only one person/firm can be sued as the Jones Act employer together with the dicta from the Fifth Circuit that a seaman may have more than one employer. However, Fitch did not develop this argument, and Judge Torresen proceeded to analyze whether Fitch was a borrowed employee of MMA. Judge Torresen noted the simpler test in the First Circuit compared to the more complex test adopted by the Fifth Circuit. Following the test from the First Circuit, Judge Torresen did not find an employment relationship between MMA and Fitch, even though she signed articles with MMA. The signing of the articles was to subject her to obedience to the orders of the ship's master, but the day-to-day operations of the Sodexo galley crew were under control of Sodexo. Thus, Judge Torreson concluded that Sodexo was Fitch's sole Jones Act employer.

Forum selection clause in post-accident document held inapplicable when no suit or claim had been made. *American Commercial Barge Line LLC v. Anthony*, No. 4:18-cv-69, 2019 U.S. Dist. Lexis 160596 (S.D. Ind. Sept. 20, 2019) (Pratt).

Opinion

This case arises from an injury sustained by a deckhand for American Commercial Barge Line. The seaman lives in Louisiana and was injured in Louisiana. The seaman was eligible for salary continuation while on medical leave, and ACBL sent him an Attending Physician's Statement of Functionality to complete to receive the salary continuation. That form required that he authorize his treating physician to provide medical information on his diagnosis, treatment, and working restrictions, and it also contained

a forum selection clause that provided that in the event the seaman filed a claim or lawsuit against ACBL related to the salary continuation or the incident giving rise to the injury, that the suit would only be filed in the federal court for the Southern District of Indiana. After the seaman's attorney and ACBL began to argue over the applicability of the forum selection clause and the seaman's attorney stated that the seaman "would need to file a lawsuit soon," ACBL filed this action in the designated federal forum in Indiana, seeking a declaratory judgment with respect to the rights and obligations of the parties under the agreement. The seaman moved to dismiss the action for lack of personal jurisdiction, as he had never been to Indiana, and ACBL responded that the seaman's consent to the forum selection clause waived any challenge to personal jurisdiction in the federal court in Indiana. Judge Pratt analyzed the specific wording of the clause and noted that it applies when the injured worker files a claim or lawsuit against ACBL. At the time the lawsuit was filed, the seaman had not filed a claim or lawsuit against ACBL. Therefore, Judge Pratt held that the forum selection clause was not applicable and dismissed the declaratory judgment action for lack of personal jurisdiction. Judge Pratt did noted that a suit had been filed by the seaman in Louisiana state court, after the motion to dismiss had been briefed, and the validity and enforceability of the forum selection clause would have to be litigated in that proceeding.

Insured was not entitled to amend to add bad faith claims or to have a jury trial on its counterclaim in the insurer's federal declaratory judgment action filed in admiralty. *Great Lakes Reinsurance (UK) SE v. Herzig*, No. 18 Civ. 9848, 2019 U.S. Dist. Lexis 162257 (S.D.N.Y. Sept. 23, 2019) (Gardephe).

Opinion

This case arises from hurricane damage to the insured's yacht CRESCENDO. A dispute arose over the amount for necessary repairs, and the insurer of the yacht brought this action in federal court in admiralty seeking a declaratory judgment as to the amount it owed for repairs. After a settlement agreement did not actually resolve the disputes, the insurer filed a second amended complaint that added counts that the insured was bound by its settlement agreement and that the policy was void ab initio, and the insured filed a counterclaim that included claims for fraudulent inducement, rescission of the settlement, and breach of contract. The insured then filed a motion to amend his counterclaim to assert a claim for breach of the duty of good faith and fair dealing and for his counterclaims to be heard by a jury. Judge Gardephe denied the motion to amend, first concluding that the amendment to add the extra-contractual claim would be futile. Under New York law, applicable to the yacht policy under *Wilburn Boat*, a claim for breach of the implied covenant of good faith and fair dealing can only survive a motion to dismiss if it is based on allegations different from those in the breach of contract claim. As the bad faith allegations related to the insurer's failure to pay the alleged cost of repairs and in its unilateral decision to reduce the Policy's value (before it declared the policy void ab initio), which were the basis for the breach of contract claims, the court held that the proposed amendment would not survive a motion to dismiss and should therefore be denied. Turning to the request for a jury trial on the counterclaims, Judge Gardephe found the prevailing law in the Second Circuit to be that the plaintiff can elect to proceed with the case in admiralty and preclude the defendant from invoking the right to a jury trial. This rule applies to counterclaims that arise out of the same contract and operative

facts as are involved in the plaintiff's case. As the insurer brought this action in admiralty, the insured had no right to a jury trial on its counterclaim arising from the same operative facts.

Judge held that giving notice, not receiving notice, triggered the six-month period to file a petition for limitation of liability. *In re Bullet Services, Inc.*, No. 18-cv-2727, 2019 U.S. Dist. Lexis 163490 (E.D.N.Y. Sept. 24, 2019) (Donnelly).

Opinion

Ira Brown was injured when he fell down the stairs on the passenger vessel CAPTAIN MIDNIGHT on May 8, 2018. He brought suit against the owner of the vessel in state court in New York on April 27, 2017, and served the summons and complaint on an employee at the owner's place of business and by mailing the summons and complaint to the owner at the same address in May 2017 and by later mailing copies to the owner's home and business addresses. A notice of motion for default judgment was mailed to the owner's home address on August 29, 2017. The owner contended that he did not receive the complaint until he received a second notice of motion for default judgment on November 8, 2017, and that he filed this limitation action in federal court within six months thereafter on May 8, 2018. The owner argued that the statutory directive that the petition be filed within six months after a claimant "gives" the owner written notice of a claim was triggered by the owner's actual receipt of written notice. However, Judge Donnelly did not believe the owner's "bald assertion" that he did not receive notice in the face of the evidence that he had been repeatedly served in accordance with state law notice procedures and by mail at the same address where the owner acknowledged receiving the complaint in November 2017. Therefore, Judge Donnelly dismissed the limitation action as untimely.

Prior litigation for possession of chartered vessel was not res judicata to subsequent litigation for unpaid hire and repair expenses. *Tug Construction, LLC v. Harley Marine Financing, LLC*, No. 2:19-civ-632, 2019 U.S. Dist. Lexis 163517 (W.D. Wash. Sept. 24, 2019) (Tsuchida).

Opinion

This litigation involves five bareboat charters of towing vessels owned by Tug Construction. Disputes between Tug Construction and the charterer, Harley Marine, led Tug Construction to terminate the charters, and Harley Marine returned all but one of the tugs, the LELA FRANCO. The charters contained a forum selection clause for Seattle, but the LELA FRANCO was operating near Los Angeles, so Tug Construction brought an action to repossess the vessel in the Central District of California. That action sought termination of Harley Marine's possession of the vessel, turnover of possession of the vessel, and fees, costs, and expenses incurred as a result of the matters in the complaint. That case was eventually settled with return of the vessel to Tug Construction and dismissal without prejudice of any other claims of the parties relating to the bareboat charter for the vessel. After the return of the vessel, Tug Construction brought this action for unpaid hire and repair expenses for the five tugs, and Harley Marine asserted res judicata as a defense. Judge Tsuchida rejected the claim for res judicata, as there was a lack of identity in the claims in the two lawsuits. The first suit was an in rem action for

possession of the LELA FRANCO and an in personam action against Harley Marine for repossession expenses, and the second suit was an in personam action against Harley Marine for recovery of hire and repair expenses for breach of the charter partiers. That left the question whether the claims in the second suit had to be brought in the first action, and Judge Tsuchida held that they did not. First, the charters contained a Seattle forum selection clause, and the possession action had to be brought at the location of the vessel. Second, at the time the suit was brought for possession of the LELA FRANCO, the vessel had not been returned and a determination whether it had to be repaired was premature. Finally, Judge Tsuchida did not consider there to be res judicata to the claims in the second suit when the first action specifically provided that the dismissal was without prejudice to other claims.

Judge declined to set aside default after claimant filed answer but not claim in limitation action without sufficient excuse. *In re Pav*, No. 17-cv-1113, 2019 U.S Dist. Lexis 163297 (E.D.N.Y. Sept. 24, 2019) (Feuerstein).

Opinion

This litigation arises from the collision in Great South Bay between Mark Pav's 24-foot Chaparral and a Yamaha personal watercraft operated by Roldando Moreno. On September 23, 2016, Moreno brought an action for damages for Pav's negligence in state court, which Pav removed to federal court based on original admiralty jurisdiction. On February 27, 2017, Pav brought this limitation action with respect to the collision. The court issued an order in the limitation action directing claims to be served by April 17, 2017, and at an initial pretrial conference, Moreno's counsel asked for an extension to serve a claim and answer until July 2, 2017. Moreno filed an answer but not a claim, and during the status conference on July 12, 2017, the issue of a default was raised for failure to file a claim. The court set a briefing schedule, but Moreno did not file any opposition to the motion for default. Therefore, the court entered the default judgment on January 29, 2018. On April 12, 2018, the court held a status conference and dismissed the underlying action (that had been removed to federal court) based on the default in the limitation action., Although Moreno appealed that dismissal to the Second Circuit, the appeal was dismissed when Moreno failed to timely file the forms required by the Second Circuit. On January 28, 2019, almost one year after the default in the limitation action, Moreno filed a motion pursuant to Fed. R. Civ. P. 60 (b) to vacate the default in the limitation action. Judge Feuerstein analyzed the requisites for relief under Rule 60(b) and denied relief. She termed the excuses proffered to be "flimsy," particularly the attempts to blame a former associate when a principal of the firm had attended the status conference on July 12, 2017, at which the court set the briefing schedule for entry of a default judgment (for which no response was filed). Based on the "egregiousness" of the neglect of counsel, the lack of a satisfactory explanation, and the absence of any indication of diligent efforts by Moreno to monitor his counsel's handling of the case, Judge Feuerstein held that the willfulness standard applicable in the Second Circuit had been satisfied. Additionally, she held that Moreno had submitted no evidence of a meritorious defense, nor had he shown a lack of prejudice to the limitation petitioner now that more than five years had elapsed since the collision.

Waiver signed by passengers on offshore fishing trip held insufficient to

release negligence of the vessel and owner. *In re New Pelican Charters, LLC*, No. 2:18-cv-86, 2019 U.S. Dist. Lexis 164094 (S.D. Tex. Sept. 25, 2019) (Tagle).

Opinion

Two passengers on an offshore fishing trip were injured when the vessel allided with a shrimp boat. The owner of the vessel filed this limitation action, and the passengers brought claims against the owner and operator, which sought summary judgment based on the terms of the waivers signed by the passengers before they boarded the vessel. The waivers provided that the passengers would not hold the vessel and its enumerated owner and operator responsible if the passengers were "injured as a result of any problem (medical, accidental, or otherwise) which occur while on the boat or otherwise participating in the trip. In applying the maritime clear and unequivocal rule to determine if the language was sufficient to encompass the negligence of the owner/operator, Judge Tagle noted that the Fifth Circuit had held that the phrases "all claims demands and causes of action" and "without regard to cause" were sufficient. However, she did not believe that the words "any problem" were not the same as "any cause" and were not clear and unequivocal, stating that a release of an accidental problem or an otherwise problem was "ambiguous language that invites multiple interpretations." Consequently, she denied the operator's motion for summary judgment seeking to enforce the waiver.

Seaman's failure to ask for assistance in lifting held insufficient for employer's motion for summary judgment. *Mingo v. Great Lakes Dredge & Dock Co.*, No. 18-3056, 2019 U.S. Dist. Lexis 165285 (E.D. La. Sept. 26, 2019) (Barbier).

Opinion

Gerald Mingo was employed as a deckhand by Great Lakes on the DERRICK 69 after disclosing a history of back and hip pain that he controlled with Percocet as needed. In his job training, Mingo was provided instructional materials about safe lifting practices and his "stop work authority." About a week after his hire, Mingo lifted a D-ring to place it on the crane's hook. This is typically a one-person job, and a senior rigger was standing a few feet away at the time. Mingo did not ask for assistance. When lifting the ring, which weighed 49.2 pounds (.8 pounds less than the recommended solo lift maximum), he felt a pop in his back that eventually required a fusion. Mingo brought suit against Great Lakes for negligence under the Jones Act and unseaworthiness, and Great Lakes filed a motion for summary judgment based on the fact that Mingo had been properly trained regarding lifting procedure, that he could have asked for help, and that his work experience and knowledge of his back condition made him capable of knowing whether he needed assistance. Judge Barbier denied the motion. First, he cited Mingo's two expert reports that the lifting procedure was unsafe and below the required standard of care for a Jones Act employer. He also noted that just because Mingo could ask for assistance did not absolve his employer of a duty to prevent unsafe situations. As the Jones Act case would go to trial, Judge Barbier reserved ruling on the unseaworthiness claim.

No standing to bring breach of contract action in vessel sale without being party to the contract. *Dubois v. Maritimo Offshore Pty Ltd.*, No. 3:15-cv-1114, 2019 U.S. Dist. Lexis 165734 (D. Conn. Sept. 26, 2019) (Meyer).

Opinion

This case involves "a boat deal gone bad." Richard Dubois, Sheila Dubois, and Michael Flors wanted to buy a yacht built by Australian entity Maritimo Offshore, but they wanted the sale to be through an American entity that could install equipment, do finishing work, and take responsibility for repairing and servicing the vessel, Fairbanks Yacht Group. The transaction occurred through two contracts, a Dealer Sales Agreement that listed the buyer as Capital Cable Construction (owned by Richard Dubois and his adult son Michael Flors), and a Sales Contract for New Boat listing the buyers as Richard and Sheila Dubois. Title to the yacht was transferred to Richard and Sheila Dubois. Numerous problems arose with respect to failure to install the requested equipment and the vessel's taking on water. Richard and Sheila Dubois and Michael Flors eventually sued Maritimo and Fairbanks, and Maritimo undertook bankruptcy proceedings in Australia and the United States. Richard and Sheila Dubois were later dismissed from the suit for failure to prosecute the action, but Flors continued to press the suit. Judge Meyer raised the issue whether Flors had standing to bring the action as he was not a named party in either of the contracts, and Flors responded that he suffered injury because he owned 50% of Capital Cable Construction, because he owned 100% of a company which paid for the boat after it was purchased, and because Richard and Sheila Dubois had a verbal agreement that Flors now owned 100% of the yacht. Judge Meyer was satisfied that Flors had standing by acquiring an ownership interest in the yacht subsequent to the initial purchase. This did not extend to the claims of breach of contract or breach of common-law warranty claims under Connecticut law (a contract for sale of a vessel is not a maritime contract), but it did give Flors standing to maintain actions for misrepresentation, negligent misrepresentation, breach of express warranties as a consumer, negligence, and unfair trade practices. In light of the bankruptcies, Judge Meyer dismissed the claims against Maritimo.

Agreeing that you would buy cargo that shows up at your doorstep does not make you a consignee. *Seaboard Ltd. v. Trinpak Packaging Co.*, No. 18-cv-22797, 2019 U.S. Dist. Lexis 165754 (S.D. Fla. Sept. 26, 2019) (Smith).

Opinion

Trinpak is a foreign corporation that exports petrochemical products, including used motor oil. Trinpak sent Bodin Oil a proposal to sell used oil to Bodin, memorializing a prior phone call. Bodin did not respond to the proposal. Nonetheless, Trinpak booked transportation with Seaboard to ship two containers of used oil from Trinidad to Louisiana, listing Bodin as the consignee. When the vessel arrived at the transshipment port of Kingston, Jamaica, the containers were discharged and motor oil was discovered in the vessel that came from some source (no source of the leakage could be found in the containers). Seaboard initially made a demand against Trinpak for $156,842.65 in cleanup and other expenses, and later made demand on both Trinpak and Bodin, with no response. Seaboard then brought this action against Trinpak and Bodin. Trinpak defaulted, and Bodin moved for summary judgment. Although the bill of lading identified Bodin as the consignee, Judge Smith could not find any support for finding that Bodin was a party to the contract of carriage. Bodin took no steps to accept the bill of lading, and there was no evidence that Trinpak acted as Bodin's agent in booking the shipment. The

admission of Bodin's president that he would have purchased the oil had it arrived at his yard was not an authorization for Trinpak to ship goods to Bodin as consignee. Finally, even if Bodin were the consignee, the evidence did not establish that Bodin had anything to do with the oil spillage on the vessel.

Thanks to Monica Markovich for her help in preparing this Update.

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Quotes:

"Diderot may very well have had the previous Supreme Court cases in mind when he wrote, 'We have made a labyrinth and got lost in it. We must find our way out.'"

Justice Sandra Day O'Connor, *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (quoting *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

The intoxication defense to maintenance and cure claims has become "watered down" and appears to be "on the rocks."

Anne S. Walts, Maritime Personal Injury class, South Texas College of Law (1982).

Please note that these opinions and statements are my own analysis of the cases that are discussed. They do not represent the position of Brown Sims, P.C. or any organization to which I belong or that I represent. Under no circumstances should these opinions and statements be considered legal advice. If you want legal advice, please consult an attorney.

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David represents clients on a wide variety of maritime interests, including admiralty and maritime law and maritime pollution law. Prior to entering private practice, David served for fourteen years as a commissioned officer and law specialist in the United States Coast Guard, eventually reaching the rank of Lieutenant Commander.

David served as the Coast Guard and Department of Transportation liaison to Capitol Hill for the Oil Pollution Act of 1990 and related bills, providing technical input regarding the legal and practical implications of various proposed legislation dealing with vessel construction, operations and environmental response. Before serving as a law specialist, David served as Operations Officer on a medium endurance Coast Guard cutter, commercial vessel marine inspector, Coast Guard investigating officer and pollution response officer.

David has represented marine terminals in all aspects of marine operations as well as cargo disputes and riparian rights issues for over twenty years. David has extensive experience in charter party drafting, charter party interpretation and conflict resolution. He is experienced in drafting and revising Contracts of Affreightment as well as providing training sessions for clients describing and interpreting the Contracts of Affreightment and charter parties he drafts. David is also experienced in defending marine pollution claims, including defending suits by the United States pursuant to the Oil Pollution Act of 1990 and suits by third parties. David also represents parties with marine interests before the United States Coast Guard, U.S. Maritime Administration, United States Customs Service and the Federal Maritime Commission.

David is experienced in vessel purchases, vessel sales, vessel financing and vessel foreclosures. David has represented national and local banking institutions in preparing and reviewing loan documents, security agreements, preferred ship mortgages, buy/sell agreements, etc. associated with vessel transactions.

David has represented a variety of maritime clients in civilian practice for the past 20 years, concentrating in the area of prosecution and defense of various property damage claims, vessel collision and grounding claims, marine personal injury and wrongful death claims, as well as addressing issues involving maritime construction and marine contracts. He is acknowledged as one of the leading attorneys in marine pollution and riparian rights and is experienced in state and

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Professional Recognition

Best Lawyers in America, Lawyer of the Year - Admiralty and Maritime Law (2005-2020)

Virginia's Business "Legal Elite," Maritime and Environmental Law (2005-2018)

Virginia *Super Lawyers*, Transportation and Maritime Law (2006-2019)

Leadership

Chair, Maritime Law Association Committee on Regulation of Vessel Operations, Safety, Security and Navigation (2016-Present)

federal procurement/contract claims and protests.

Practice Areas

MARITIME

Published Work

- Author, The Oil Pollution Act of 1990: A Glance in the Rearview Mirror" Tulane Law Journal Volume 85, Page 1101 (2011)
- Author, "No Frills" Primer on Iran Sanctions Benedict's Maritime Bulletin August 10, 2013
- Author, "OPA 90: Twenty Five Years of Judicial Interpretation" Tulane Maritime Law Journal Volume 39, Page 439-469 (2015)

CASE RESULTS DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH CASE AND DO NOT GUARANTEE OR PREDICT A SIMILAR RESULT IN ANY FUTURE CASE.

Vice-Chair, Maritime Law Association Committee on Regulation of Vessel Operations, Safety, Security and Navigation (2014-2016)

Secretary, Maritime Law Association Committee on Regulation of Vessel Operations, Safety, Security and Navigation (2010-2013)

Adjunct Professor, Maritime Law, College of William and Mary School of Law (2010-2017)

Chair, Law Practice Management Division, Virginia Bar Association (2006-2008)

Board of Governors, Virginia Bar Association (2006-2008)

Memberships

Maritime Law Association of the United States

Southeastern Admiralty Law Institute

Virginia Bar Association

Norfolk Portsmouth Bar Association

Kenneth G. Engerrand practices law as President of Brown Sims, P.C. in its Houston, Texas office and teaches as an Adjunct Professor of Law at the University of Houston Law Center. For more than 40 years he has lectured on legal subjects in courses and seminars presented by The University of Texas, Tulane University, The University of Houston, Louisiana State University, Loyola University, South Texas College of Law, and The University of St. Thomas, as well as to meetings and seminars presented for The United States Department of Labor, The State Bar of Texas, The State Bar of Louisiana, The International Association of Drilling Contractors, The Workers' Compensation Educational Conference, The National Association of Marine Surveyors, The International Transportation Management Association, the Houston Claims Association, and a host of other groups.

Mr. Engerrand earned his B.A., *magna cum laude*, from Florida State University and his J.D., *with honors,* from the University of Texas School of Law, and he is a member of many professional organizations, including the Maritime Law Association, American and Houston Bar Associations, Defense Research Institute, Texas Association of Defense Counsel, Order of the Coif, Phi Beta Kappa, Phi Kappa Phi, Phi Delta Phi, Mariners Club, Propeller Club, State Bar of Texas and the Texas Bar Foundation. He supports a number of civic, industry, and charitable groups and serves as a trustee of the Judge John R. Brown Scholarship Foundation.

Mr. Engerrand has written extensively, and his publications include: *Maritime Oilfield Contracts Reconsidered*, 41 Hous. J. Int'l Law 241 (2019); *Escape from the Labyrinth: Call for the Admiralty Judges of the Supreme Court to Reconsider Seaman* Status, 40 Hous. J. Int'l Law 741 (2018); *Collateral Source Issues in Maintenance and Cure Cases*, 42 Tul. Mar. L.J. 1 (2017); *Removal of Admiralty Suits,* 41 Tul. Mar. L. J. 1 (2016); *Admiralty Jury Trials Reconsidered*, 12 Loy. Mar. L.J. 73 (2013); *The Relationship Among General Maritime Law, OPA, and OCSLA*, 25 U. San. Fran. Mar. L.J. 253 (2013); *Vessel Status Reconsidered*, 11 Loy. Mar. L.J. 213 (2013); *Forum Selection and Arbitration Clauses in Seamen's Injury Claims,* 11 Loy. Mar. L.J. 109 (2012); *Indemnity for Gross Negligence in Maritime Oilfield Contracts,* 10 Loy. Mar. L.J. 319 (2012); *A Tedious Balance: Third-Party Claims under the Longshore and Harbor Workers' Compensation Act*, 10 Loy. Mar. L.J. 1 (2011); *Jones Act Issues after Norfolk Southern Railway v. Sorrell,* 6 Loy. Mar. L. J. 1 (2008); *Primer on Maintenance and Cure*, 18 U. San. Fran. Mar. L.J. 41 (2005-06); *Primer of Remedies on the Outer Continental Shelf*, 4 Loy. Mar. L. J. 19 (2005); *Medicare Set-Asides and Protecting the Parties' Interests in Longshore Claims,* 3 Loy. Mar. L.J. 11 (2004); *The Fleet Rule for Seaman Status: The Peril of Perils*, 2 Loy. Mar. L.J. 92 (2003); *DOHSA's Reach: What Are The High Seas Beyond A Marine League From Shore?* 1 Loy. Mar. L.J. 1 (2002); *Changes in Pursuing and Defending Attorney's Fees Claims in The Fifth and Ninth Circuits*, 14 U. San Fran. Mar. L.J. 155 (2001-02); *Recent Developments in Admiralty Law in the United States Supreme Court, The Fifth Circuit, and the Eleventh Circuit*, 24 Tul. Mar. L. J. 741 (2000); *Recent Developments in Admiralty Law in the United States Supreme Court, The Fifth Circuit, and the Eleventh Circuit*, 20 Hous. J. Int'l L. 265 (1998); *Removal and Remand of Admiralty Suits*, 21 Tulane Mar. L. J. 383 (1997); *Recent Developments*

in Admiralty Law in the United States Supreme Court, The Fifth Circuit, and the Eleventh Circuit, 18 Hous. J. Int'l L. 709 (1996); *Seaman Status Reconstructed*, 32 S. Tex. L. Rev. 169 (1991); *Admiralty Law*, 23 Tort & Ins. L.J. 251 (1988); *Seaman Status Reconsidered*, 24 S. Tex. L.J. 431 (1983); *The Continuing Conflict Between Congress & The Supreme Court Over The Standard of Care in Longshore Third Party Actions,* 22 S. Tex. L.J. 423 (1981); *Troubled Waters for Seaman's Wrongful Death Actions,* 12 J. Mar. Law & Com. 327 (1980), reprinted in 21 S. Tex. L.J. 191 (1980).

Mr. Engerrand is author of the casebook, *Admiralty Environmental and Insurance Issues* © 2018, and the chapter "Concurrent Jurisdiction" in *The Longshore Textbook*, Seventh Edition.

Mr. Engerrand's publications have been cited and quoted by the United States Supreme Court as well as appellate and district courts from California to New York.