FISHERIES COMMITTEE REPORT
THURSDAY – NOVEMBER 5, 2020
4:00 am – 5:00 pm EST

1. 34 Attendees

2. COVID-19 UPDATE - **Christopher Harrell, General Counsel, Ocean Fleet Services**

Summary: Corvid 19 ("Covid") has created significant chaos of the international seafood supply chain.

When China closed its economy to manage the outbreak it erased a substantial seafood market. China is the world's largest seafood processing national and much of its supply closed with it. China purchases a lot of United States domestically harvested raw material for reprocessing—this crash forced unsold inventories to risk and prices to diminish. China's seafood demand is beginning to recover but it is a slow process.

Europe's shut down thereafter created another significant issue in the seafood trade since the European Union is a sizeable consumption market. This is especially true for salmon and other fresh commodity trades. Demand in Europe (and the United States) pivoted primarily to retail sources forcing suppliers, both foreign and domestic to alter their operations overnight and adjust to new retain driven sales plans.

Following Europe's shutdowns came the United States and Canada and later parts of South America. The result was the immediate loss of food service markets. Some products demand dropped by over 80% in the early days of the domestic shutdown. The big question now is what will happen with a possible second wave resurgence and whether restaurants will close again.

The world has seen huge price impacts of various international seafood commodities as these trade impacts occurred. As example, for fresh landed commodities on the east coast we have experience a very soft demand while other items saw spikes in demand (e.g. such as the price of scallops as the switch to retain occurred). The United States government has stepped into assign with major inventory build purchases of certain commodities to assist certain segments impacts, Alaskan pollock as example.

In addition to market irregularities vessel owners and processors have experienced tremendous negative impact on the availability of labor. The various stimulus packages with unemployment benefits "topped-up" has provided strong incentives for workers to stay at home until this situation is resolved. Fear of contracting the virus also keeps people at home as does the lack of affordable childcare for children now learning from home. Most employers facing the same labor shortages have also seen rapid wage escalation to entice people to come back to work further exacerbating an already tough economic climate.

The labor shortages have created supply chain disruption for most suppliers, including those for input bills of materials like packaging, ingredients, machinery parts, cleaning chemicals, etc. Further, Covid related travel restrictions have prevented normal travel to support domestic and international business, delayed M&A activity and prevented equipment suppliers to support industry in normal preventative maintenance.

3. *ALL ELEPHANT, NO MOUSEHOLE* (Or Nothing Still Does Not Equal Something) Gulf Fishermens Association v. National Marine Fisheries Service August 4, 2020 United States Court of Appeals Fifth Circuit No. 19-30006 – **Sandy Welte, Welte & Welte, Camden, Maine**

As we know, the Magnuson-Stevens Act seeks to "conserve and manage the fishery resources found off the coasts of the United States" and provides for the establishment of area councils. and tasks them with drafting Fishery Management Plans to facilitate that goal."

The Act defines "fishery" as follows:
(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
(B) any fishing for such stocks.

Id. § 1802(13). "Fishing," in turn, is defined as:
(A) the catching, taking, or harvesting of fish;
(B) the attempted catching, taking, or harvesting of fish;
(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish;

-The Gulf of Mexico Fishery Management Council comprises Texas, Louisiana, Mississippi, Alabama, and Florida. Id. § 1852(a)(1)(E). So, that Council has "authority over the fisheries in the Gulf of Mexico seaward of" those five states.

-In 2009, it became the first regional council to put forward a plan to regulate and permit aquaculture when it developed a "Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico".

-Under the Plan, the Council would approve five to twenty permits for aquaculture operations over a ten-year period.

This was:

THE FIRST SUCH PLAN in the Act's forty-plus year history to propose an aquaculture permitting scheme or for that matter the first attempt by NMFS or any council to regulate aquaculture under the Act.

In its own words, the Rule "establishes a comprehensive regulatory program for

managing the development of an environmentally sound and economically sustainable aquaculture fishery in Federal waters of the Gulf" and its purpose is "to increase the yield of Federal fisheries in the Gulf by supplementing the harvest of wild caught species with cultured product."

-As the 5th Cir observed, **that is no small attempt**. The Rule allows for a maximum annual production of 64 million pounds of seafood in the Gulf. That figure would equal the previous average annual yield "of all marine species in the Gulf except menhaden and shrimp."

-Plaintiff's, a coalition of fishing and conservation organizations concerned about the commercial and environmental impacts of the Rule's proposed regime, challenged the Rule in district court.

-They claimed the Rule was invalid because it fell outside the Council's authority to regulate "fisheries" under the Act. The district court agreed and refused to defer to NMFS's construction of the Act under Chevron.

-Specifically, they asserted that the Rule's expansion of seafood production will harm traditional fishing grounds, reduce prices of wild fish, subject wild fish to disease, and pollute open waters with chemicals and artificial nutrients.

--Issue was joined by way of Cross- motions for summary judgment

--the district court held the Act unambiguously forecloses NMFS's authority to regulate aquaculture and granted summary judgment for the Associations

The agency appealed.

it argued the Act is ambiguous as to whether it encompasses aquaculture. Because the Rule reasonably resolves this putative ambiguity, the agency claims it earns Chevron deference. (when statute is ambiguous, "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency").

Put differently, Chevron had held that when a "statute is silent or ambiguous with respect to the specific issue," courts must defer to an agency's interpretation as long as it is permissible.

A Textual Dead Zone

5th Cir.'s response: We usually start with the text, but more telling here is the Act's lack of text. As far as aquaculture, the Magnuson-Stevens Act is **a textual dead zone**: the original Act does not mention aquaculture or fish farming at all. More to the point, the Act's provisions defining the agency's regulatory power say nothing about creating or

administering an aquaculture or fish farming regime.. The agency concedes this but asks us to treat the chasm as a mere “gap” for it to fill. That is, the agency argues it has power to regulate aquaculture because the Act.

Judge Duncan described that position as a "nothing-equals-something argument ... barred by [Fifth Circuit] precedent."

Fond of animal metaphors, courts like to say, “Congress does not ‘hide elephants in mouseholes.’” Chamber of Commerce v. U.S. Dep’t of Labor, 885 F.3d 360, 376 (5th Cir. 2018) (quoting Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 468 (2001)). **The agency’s argument here is all elephant and no mousehole.** It asks us to believe Congress authorized it to create and regulate an elaborate industry the statute does not even mention. **Because we cannot suspend our disbelief that high, we reject the agency’s position.**

The agency claims, not that Act affirmatively empowers it to regulate aquaculture, but that the Act fails to “express[] Congress’s unambiguous intent to foreclose the regulation of aquaculture.” Once again, this is the argument that presumes power given if not excluded. **We have resisted that siren song before and we again decline to be seduced.**

DISSENT - Higginson

I would uphold NMFS’s decision that it may regulate how fish are reared and harvested in the exclusive economic zone because this authority follows from Congress’s expansive grant of authority to conserve and manage offshore “fishery resources,” without distinguishing between methods of fishing or types of fish. See § 1802(15) (defining “fishery resource” as “any fishery, any stock of fish, any species of fish, and any habitat of fish” (emphasis added)).

. . . . fishing, from time immemorial, has involved ingenious varieties of lines, pots, cages, nets and enclosures.

-Congress provided an expansive definition of “fishing,” explicitly including “any operations at sea in support of” “any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.” Spawning, raising, and then taking or
harvesting fish from offshore nets, pens, or other enclosures are “operations at sea” supporting “any . . . activity” that results in the taking or harvesting of fish.

--Congress’s clear purpose to conserve and maintain our nation’s offshore fisheries, coupled with its explicit and capacious grant of authority over “all fish,” lead me to conclude that modern aquaculture methods of fishing fit vitally in, not out of, the Magnuson Act regime.

4. Arbitrability of Seamans' Claims – **Brian McEwing of Reeves McEwing**

The case of *Kozur v. F/V ATLANTIC BOUNTY, LLC*, USDC NJ Civil Action: 18-08750 concerned the enforcement of an arbitration clause in a seaman employment contract. This concerned comparison of FAA to State Arbitration Statute. Plaintiff's argued FAA was preemptive; uniformity of maritime law; FELA venue provision incorporated in the Jones act; and NJ Legislative changes to prohibit wavier of LAD claims.

Facts Matter: Injured fisherman acknowledged he had a side business doing construction that required written contracts. He was aware of written contracts had knowledge of contracts and binding the person.

NJAA was applied as FAA was not applicable due to the fact that seaman's claims are exempt under section 1 of the FAA.

When drafting an arbitration clause the required content of the clause should address:
- Check your client's operations for state conflict of law
- Provide FAA alternative for enforcement
- Bold and capitalize the content of the clause
- Clear and unambiguous language
- Employer pays for arbitration
- Notify of rights being given up (e.g. jury trial)

You must give the seaman an opportunity to review. **Carolyn Latti of Latti & Anderson** in Boston spoke in opposition to the use of mandatory arbitration clauses for two reasons. First, often times the fishermen's education level may not allow him/her to appreciate the consequences of what they are signing. Second, often times arbitration is more expensive and can take longer than going to court.

5. NGO Enforcement of Environmental Regulations – **Chris Harrell**

North Carolina Coastal Fisheries Reform Group, et al. v. Capt. GASTON LLC, et al., Eastern District of NC No: 4:20-cv-151-FL.

This is a case brought by a nongovernmental entity under the Clean Water Act against fishermen engaged in shrimping. Two issues raised by the NGO.

A. Does throwing bycatch back into the water equate to pollution thus violating the Clean Water Act when other fishing statutory schemes like Magnuson-Stevens Act require the bycatch to be thrown back.

B. Whether the dredge that hits the bottom equates to dredging requiring a permit in compliance with the Clean Water Act.

If the Court agreed with NGO's first issue would mean that fishing with your child with live bait would violate the Clean Water Act. The second issue concerns statutory construction as to the meaning of dredging. This case involves a handful of vessel owners. The outcome does not impact the other 100s of boat owners yet. More to come on this issue in May of 2021.

6. *Marty Melerine & Oyster Fisheries, Inc. v. Tom's Marine & Salvage, LLC, et al.* Supreme Court CA No.: 2020-C-00571 *Writ Granted*, 2020 La. LEXIS 2455, 2020-00571 (La. 10/20/20); 2020 WL 6145156, La. Court of Appeal, Fourth Circuit No.: 2019-CA-0672 2020 La. App. LEXIS 406; 2019-0672 (La.App. 4 Cir. 03/04/20); 2020 WL 1056806, 34th JDC No.: 17-0472 – **Andrew Wilson of Milling Benson Woodward, LLP**

This case arises from the accidental grounding of a tug in an oyster lease on a Louisiana state water bottom. The case is presently being briefed for oral argument before the Louisiana Supreme Court. The case is significant from a general maritime law standpoint as it raises the issue of whether damages in a maritime tort case should be determined based upon artificial, abstract formulas developed outside legal proceedings, or, must be based upon traditional proof of causation and elements of recovery under general maritime law, including actual evidence such as business records tethered to facts rather than formulas.

As to the facts, after the grounding the tug ran one engine for 45 minutes to dislodge the hull but was unsuccessful, and therefore waited for the rising tide to float off the next day. Despite the tug's limited contact with the oyster reef, suit was filed by the oyster fisherman who held the lease where the tug grounded as well as by the adjacent leaseholder who, together, claimed that somehow 42 acres within the leases were covered with sediment by the tug's propeller. The jury awarded over $140,000 per acre which the oyster fishermen lease for just $3 per acre per year from the State. The total award was approximately $6 million, which oddly enough matched the amount of available insurance coverage which Plaintiffs' counsel revealed to the jury in violation of the Louisiana Code of Evidence. The award bore no relation to either oyster fisherman's records of earnings or oyster production.

If the lower Courts' decisions are upheld, this could be the seminal case under maritime law allowing for the use of formulas developed under extra-judicial rulemaking by a state agency, the Louisiana Dept. of Natural Resources ("LDNR"), and an arbitration board, the Louisiana Oyster Lease Damage Evaluation Board ("OLDEB"). The latter was created to resolve oyster lease damage disputes between oyster fishermen and the oil & gas industry through a form of arbitration. Neither LDNR nor OLDEB has jurisdiction over members of the marine transportation industry, nor did the latter ever agree to be bound by the exorbitant damage awards generated by the formulas.

The OLDEB formulas require uniform awards based upon criteria that are not confined to facts and actual evidence of causation or actual economic loss to establish damages. If allowed in this case, this approach could prove problematic as were many of the awards in the BP DEEPWATER HORIZON Spill settlement where causation was essentially assumed and formulas were primarily relied upon rather than facts to determine the amount of the claim awards, resulting in significant if not exorbitant payments. If these damages

are allowed in this matter, this may allow for formulas and a presumption of causation to supplant traditional elements of proof under general maritime law in other jurisdictions.

This triggers uniformity considerations as the current jurisprudence under both general maritime law and the similar and consistent Louisiana law as determined by the Louisiana Supreme Court to date requires the same or similar elements of proof to recover damages where oyster leases are concerned. Rather than apply the general maritime law or its Louisiana state law analogue, the lower courts in this matter have gone in a different direction and allowed recovery under formulas developed by a separate state arbitration board with little or no consideration of the Plaintiffs' actual oyster production records, income tax returns, or true business records related to the specific oyster leases at issue. The uniformity concern arises from the following premises:

a. Plaintiffs invoked general maritime law as the basis for their claims filed in state court seeking recovery for damages to their oyster leases and all related economic loss resulting from the grounding of the Defendants' tug on one of their oyster leases.

b. Plaintiffs included a claim for punitive damages under general maritime law in their Petition.

c. Defendants raised limitation of shipowner's liability as a defense.

d. Both of these maritime law remedies, (i.e., punitive damages and limitation of liability), were decided and denied by the jury, but the jury still awarded over $6,000,000 based upon formulas.

e. In property damage cases involving vessels, maritime law, not state law, applies because the cause of action arises under maritime law. *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 302, n.2 (5th Cir. 1976).

f. For this reason, general maritime law and/or the Admiralty Extension Act applies to claims for damage to oyster leases resulting from vessel activity whether filed in state or federal court. *Fox v. Southern. Scrap Export Co.*, 618 So.2d 844, 847 (La. 1993); *Grasshopper Oysters, Inc. v. Great Lakes Dredge & Dock, LLC*, 2014 U.S. Dist. LEXIS 103284, *2 (E.D. La. July 28, 2014); *Western Geophysical Co. v. Adriatic, Inc.*, 1996 U.S. Dist. LEXIS 11862, *10-11 (E.D. La. August 9, 1996)

g. Regardless, property damage principles are the same under federal maritime law and Louisiana law: the goal is to restore the victim to the position he was in before his property was damaged. *Martin v. D&S Marine Serv., L.L.C.*, 11-1489 (La. App. 3 Cir. 04/04/12); 90 So. 3d 559 ; *Massie v. Deloach*, 04-1425 (La. App. 3 Cir. 3/2/05), 896 So.2d 1246, *writ denied*, 05-786 (La. 5/6/05), 901 So. 2d 1107.

h. Additionally, a defendant can only be held liable for damages that he has been proven to have caused. *Martin v. D&S Marine Serv., L.L.C.*, 11-1489 (La. App. 3 Cir. 04/04/12); 90 So. 3d 559; *Freeport*, 526 F.2d 300.

i. The Louisiana Supreme Court to date has applied the same or similar elements of proof including causation for recovery for damage to oyster leases as under maritime law above: (1) "the loss of seed oysters and loss of anticipated income from production from those

oysters;" and, (2) the change in "value of plaintiff's leasehold interest" before and after the harm. *Inabnett v. Exxon Corp.*, 93-0681 (La. 09/06/94); 642 So.2d 1243, 1256

j. Louisiana law related to oysters may only be applied when not in conflict with federal maritime law. *Fox v. S. Scrap Exp. Co.*, 618 So.2d 844, 847 (La. 1993)

k. The lower courts' use of abstract damages formulas presents a direct conflict with applicable general maritime law as applied by federal and state courts.

The case will be set for oral argument in January, 2021, and a decision will likely issue within four months thereafter. It is anticipated that several amicus curiae briefs will be filed.

7. Case Updates **- Richard Beaumont – Standard Club**

USCG Office of Commercial Vessel Compliance Mission Management System Work Instruction CVC-WI-025(1) August 21, 2020

Certain commercial fishing vessels are required by the Coast Guard and Marine Transportation Act of 2012 to complete a dockside safety exam at least every 5 years. Vessels required are those built before July 1, 2013, are at least 50ft long, and operate beyond 3-mile territorial sea baseline. Successful completion of the dockside exam is documented with a CG-5587 Form and the examiner provides a CFVS Decal, which is valid for two years from the exam date. So the exam is valid for 5-years, but the decal—the external visible signal of having passed the exam—is only valid for 2-yrs. Those fishing vessels not displaying a valid decal are more susceptible to CG Targeted Field Operations like boardings at-sea and during shore side dock-walks

This is an initiative from the Coast Guard to improve safety in one of the most hazardous occupations in the country, commercial fishing, through the theory that more frequent safety exams lead to safer operations.

Shamrock Group v. Base, Inc., 19-cv-12407-DJC (D. Mass. 2020)

A Membership Agreement and Operations Plan is and agreement among members of a Sector forming a not-for-profit entity, approved by NOAA, to aggregate sector allocations of catch, to participate in Special Access Programs, and to take advantage of other benefits. Under the CFR, NMFS requires vessel owners in that Sector to adhere by the Operations Plan. The Membership Agreement at issue in this case contains a right of first refusal for sales in favor of other Sector members.

NOAA took civil action against Commercial Fishermen, the Rafaels. They reached a settlement that required the Rafaels to divest themselves of all commercial fishing vessels and permits in a sale to be approved by NOAA. Pursuant to the Membership Agreement, the Rafaels provided notice of the sale to other members intending to abide by the right of first refusal. Later, they withdrew their notice and informed the Sector board they intended to sell to a non-Member.

Another member, Base, the defendant in this case, sued the Rafaels for breach of the Membership Agreement in state court seeking arbitration. Base initiated AAA arbitration against the Rafaels. While arbitration was pending, the Rafaels closed on the sale of their vessels and permits to a non-Member. Base amended their arbitration demand to include the non-Member purchasers alleging that they wrongfully acquired assets. The purchasers then filed suit in state court seeking declaratory relief that they were not obligated to arbitrate the claims and staying the arbitration proceedings. Base removed that declaratory action to federal court on 28 U.S.C. § 1331, federal question jurisdiction, alleging interpretation of the Membership Agreement and Operations Plan involved a federal question. Plaintiffs (the asset purchasers) moved to remand.

The U.S. District Court for the District of Massachusetts here held that the complaint on its face does not allege any federal claim; it seeks declaratory relief. To determine whether the plaintiffs are bound by the Membership Agreement is a matter of interpreting the terms of that agreement. It is not a federal question; it is a breach of contract question. The fact that the contracts were created to comply with federal law and enacted by a federal agency is too tenuous a connection to rise to the level of a substantial question of federal law. What's more, there is no preemption by the MSA because there is no evidence that Congress intended jurisdiction under the MSA to render inoperative any and all state laws or state law claims bearing tangentially upon a federal fisheries law.

As the claim in this case was whether plaintiffs can be compelled to arbitrate, the court denied the defendant's motion and remanded the case to state court to decide that question.

Pacific Choice Seafood Co. v. Wilbur Ross, U.S. Secretary of Commerce, NMFS
No. 18-15455, D.C. No. 4:15-cv-05572-HSG (9th Cir. 2020)

This is a recent opinion from Ninth Circuit by *de novo* review affirming the Northern District of California's order to uphold on summary judgment NMFS 2010 rule imposing a quota system for the Pacific non-whiting groundfish fishery limiting any one entity from controlling more than 2.7% of outstanding quota share.

The Plaintiffs-Appellants (Pacific Choice Seafood) was found by NMFS in 2015 to control at least 3.8% of the quota share, and under the MSA Pacific Choice was ordered to divest its excess share. Pacific Choice challenged the rule limiting quota shares to 2.7% raising two challenges.

Their first challenge was that NMFS misinterpreted "excessive share"—which is the statutory language in the MSA at 16 U.S.C. § 1853a(c)(5)(D)—when it focused its rationale on vessel profitability instead of market power. The panel applied step-two of the *Chevron* framework to this challenge because the Act was ambiguous as to what factors NMFS must consider. The court held that NMFS did consider market power, and it was reasonable to use factors in addition to market power when setting the limit.

Their second challenge was that the rule was arbitrary and capricious because it failed to consider all relevant factors to arrive at the 2.7% limit. The panel disagreed holding that the record showed NMFS considered market power among other factors in a reasoned process from which the 2.7% limit was reasonably discerned. The other factors considered were social benefits, impact on labor, impacts on processors, impacts on harvesters, impacts on the public, number and sizes of companies, within-sector competition, market power, efficiency, geographic distribution, communities, and fairness and equity. Thus, holding that NMFS did not act arbitrarily or capriciously in setting the 2.7% limit. Rejecting both challenges, the Ninth Circuit affirmed the district court.