No. 94-220

In The

Supreme Court of the United States

October Term, 1994

SEA SAVAGE, INC., UNDERWRITERS SUBSCRIBING TO POLICY A&PH 12890 AND AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

v.

CHEVRON U.S.A., INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION OF LAW PRESENTED

Whether coverage of the Longshore and Harbor Workers' Compensation Act extends to a worker injured while transiently or fortuitously upon navigable waters.

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The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Sea Savage, Inc. and its underwriters. Both Petitioner and Respondent have consented to the MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests – shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety-five years of its existence, has sponsored a wide

range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-nine national maritime law associations constituting the Comité Maritime International,[4] in the movement to

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[1] 46 U.S.C. §§ 1300-1315.

[2] 9 U.S.C. §§ 1-15.

[3] *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Preventing Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672, Oct. 20, 1972, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 3-4 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4] These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved

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[5] *E.g.*, Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, T.S. 576, *reprinted in* 6 *Benedict on Admiralty*, Document No. 4-1 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); International Convention for the Unification of Certain Rules of Law Relating to Ocean Bills of Lading ("Hague Rules"), Aug. 24, 1924, 51 Stat. 233, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 1-1 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 3-2 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships, Oct. 10, 1957, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 5-2 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, May 27, 1967, *reprinted in* 6C *Benedict on Admiralty*, Doc. No. 15-5 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, *reprinted in* 6 *Benedict on Admiralty*, Document No. 6-3 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, IMCO No. 77.04.E, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 5-4 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994).

with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[8] It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law. Such a situation exists in this case. A conflict between circuits, as is present here, not only destroys uniformity of U.S. maritime law but also creates unpredictability in an area in which consistency is essential.

STATEMENT

In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983) [hereinafter *Perini*], and again in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) [hereinafter

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[6] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[7] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

[8] *E.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

Herb's Welding], this Court explicitly reserved the question "whether [Longshore and Harbor Workers' Compensation Act (hereinafter the "Act" or the "LHWCA")] coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters." *Perini*, 459 U.S. at 324 n.34; *Herb's Welding*, 470 U.S. at 427 n.13. In this case, the United States Court of Appeals for the Fifth Circuit held that the Act's coverage does extend to such a worker. As the Court below acknowledged, this "interpretation of the LHWCA conflicts with that of the United States Court of Appeals for the Eleventh Circuit." App.[9] at 17a n.5 (citing *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991)). In *Brockington*, the Eleventh Circuit held that a land-based worker being transported from a job site was not covered by the LHWCA.

Petitioners in this case, Sea Savage, Inc., and its underwriters ask the Court to resolve the conflict by reversing the decision below and holding, in agreement with the Eleventh Circuit, that a land-based worker does not become a "maritime worker" covered by the Act simply because he is injured or killed during transportation over navigable waters. Respondent in this case, Chevron U.S.A., Inc. ("Chevron"), is also before the Court as petitioner in No. 94-33, in which it seeks review of the same decision below. In that petition, Chevron (in agreement on this issue with the present petitioners) also asks the Court to reverse the Fifth Circuit decision and adopt the view of the Eleventh Circuit. We therefore assume

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[9] Citations to "App." refer to the Appendix to the Petition for Certiorari in this case (No. 94-220).

that Chevron, as respondent, will support the present petition.[10]

The MLA, as *amicus curiae*, agrees with Chevron and the present Petitioners in urging the Court to grant certiorari and resolve the conflict between the Fifth and Eleventh Circuits on this important question of maritime law.[11] Unlike the parties, however, we take no position on the underlying merits and express no view on how the conflict should be resolved. We simply recognize the importance of having a uniform rule governing the scope of coverage under the Act – whatever that rule might be.

REASONS FOR GRANTING THE WRIT

The issue in this case – the scope of coverage of the Longshore and Harbor Workers' Compensation Act – is important to employees who might be covered by the Act, to employers who might be liable for compensation

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[10] The apparent lack of adversariness was explained by the Fifth Circuit as follows:

> After the parties filed their briefs, the Randalls settled with Sea Savage and its underwriters and assigned their claims to them. Thus, Sea Savage and its underwriters have taken the place of the Randalls on this appeal. As will be seen, however, they have not adopted all the legal positions taken by the Randalls at trial.

App. at 2a n.1.

[11] Although the MLA is filing a brief as *amicus curiae* only in No. 94-220, the Court will undoubtedly wish to consider both of these cases together. Our arguments in favor of granting certiorari in this case apply with equal force in No. 94-33.

payments, to third parties who might be liable for damages under section 905(b), 33 U.S.C. § 905(b), of the Act, and to the insurance companies that provide coverage for either type of liability. This Court has long recognized the importance of LHWCA coverage issues, as can be seen in cases such as *Perini* and *Herb's Welding*. Furthermore, it is an issue where uniformity and predictability are important because employers must conform their actions to the law's requirements if they might have employees covered by the Act.

A consideration of the broad implications of the Fifth Circuit's decision gives some indication of the importance of the issue in this case. The court below held that a worker injured while on actual navigable waters in the course of employment is covered by the Act. If this broad holding is correct, then a New Orleans messenger who takes a ferry across the Mississippi River to deliver a package to a business on the opposite shore will be covered if he is injured during this brief voyage. Similarly, a Houston attorney investigating a claim on board a vessel anchored in the Ship Channel can recover under the Act if she slips and falls on the deck. And the delivery boy for a Biloxi pizza parlor will be entitled to benefits under the Act if he is injured while delivering an order to crew members on a vessel docked in the harbor. None of these workers would traditionally be thought of as "maritime employees," but because each was injured while transiently or fortuitously upon actual navigable waters within states of the Fifth Circuit, each is entitled to LHWCA benefits under the decision below. If that is to be the governing rule of law, this Court should announce it clearly and unambiguously so that everyone involved can

plan their affairs (and obtain insurance coverage) accordingly.

The conflicting Eleventh Circuit decision also has far-reaching implications. If *Brockington* is correct, there is no LHWCA coverage for a worker injured while traveling during his workday from one offshore platform to another to perform a specific task on each one. Even though most of his working day is spent in a vessel on actual navigable waters (where he is exposed to all of the hazards traditionally associated with maritime employment), his duties are performed on "artificial islands" and he is a "land-based worker." If he is injured by a traditional maritime hazard, he will not receive LHWCA benefits in the Eleventh Circuit because his time at sea (however extensive it may be) is simply transportation to and from job sites. If that is to be the governing rule of law, this Court should announce it clearly and unambiguously so that everyone involved can plan their affairs (and obtain insurance coverage) accordingly.

Resolving this conflict is important for a wide range of employees (from the New Orleans messenger to the peripatetic offshore worker) because the difference between LHWCA benefits and benefits under state workers' compensation law can be substantial. In Louisiana, where the present case arose, for illustrative purposes, a "land-based" oilfield worker would be limited to a maximum weekly benefit of $323.00 under the state's compensation act.[12] A similarly situated offshore worker injured on a platform on the Outer Continental Shelf and

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[12] La. Reg., Vol. 20, No. 8 at 956 (Aug. 20, 1994).

covered by the LHWCA pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), would be held to the greater maximum weekly benefit of $760.92.[13] The disparity in other states is similar, *e.g.*, the maximum weekly state compensation benefit in Texas is $464.00[14] and in Mississippi it is $243.75.[15]

Just as this conflict is important for the workers who might receive LHWCA benefits, it is important for the employers who must obtain the insurance to cover these payments. And just as a worker's benefits are higher under LHWCA than a typical state compensation law, an employer's premiums will also be higher if LHWCA coverage is required. The same oilfield worker paid at the aforedescribed weekly benefit rates would be rated under the National Council on Compensation Insurance rating classification code as "oil or gas well drilling or redrilling - 6235."[16] Under this code the premium for this employee for state workmen's compensation benefits is quoted by the Louisiana Workers' Compensation Corporation at $38.12 per $100.00 of payroll expense. For the same

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[13] *OWCP Notice to Insurance Carriers, Self-Insured Employers Under the Longshore and Harbor Workers' Compensation Act, and Other Interested Persons* (U.S. Department of Labor, Employment Standards Administration, Notice No. 77, Sept. 16, 1994).

[14] *Texas Workers Compensation Manual* (1994). (Flakive, Ogden & Laston)

[15] *Workers Compensation Law of Mississippi and Rules of the Commission* (Mississippi Workers Compensation Commission, 1994).

[16] *Basic Manual for Workers Compensation and Employers Liability* (National Council on Compensation Insurance, 2d prtg. 1988).

employee to be covered under the Longshore and Harbor Workers Compensation Act, the premium quoted by the Louisiana Workers' Compensation Corporation is $87.68 per $100.00 of payroll expense, more than twice that required for state compensation benefits.[17] Moreover, the importance of the issue is not simply monetary. Under Section 38 of the Act, 33 U.S.C. § 938, an employer risks criminal liability if it fails to "secure the payment of compensation" (generally by obtaining insurance coverage, see Section 32(a)(1) of the LHWCA, 33 U.S.C. § 932(a)(1)), as the Act requires.

The present conflict is particularly serious because the Fifth and Eleventh Circuits include the states where LHWCA issues have traditionally been the most significant. But the conflict also creates serious problems for the rest of the country which must deal with the uncertainty engendered by conflicting answers to a question that this Court has left open. If messengers for a New York delivery company might travel on the Staten Island ferry, should the company purchase LHWCA insurance (just in case the United States Court of Appeals for the Second Circuit follows the Fifth Circuit)?

We recognize that one aspect of this case is unusual: all of the parties before the Court are seeking reversal of the decision below. Although a lack of adversariness might counsel against granting certiorari as a general matter, it should not be an impediment here. When similar situations have arisen in the past, the Court has

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[17] *Class Rules* (Louisiana Workers' Compensation Corporation, Aug. 15, 1992 ed. & Supp. Circular No. 93-5, Nov. 23, 1993).

appointed an *amicus* to brief and argue the unrepresented point of view. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 160 n.4 (1991); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 n.3 (1988). In a case of this importance, the Court should have no trouble finding a well qualified *amicus* who is familiar with the Longshore and Harbor Workers' Compensation Act, as well as with the Louisiana statute and the general maritime law (either of which might apply if the Act does not). One possibility the Court might wish to consider would be Professor David W. Robertson. The Court is already familiar with his work in this field, having cited his academic writings in several LHWCA cases, including *Perini*, 459 U.S. at 310 n.10, 312 n.21, at 324 n.33, and *Herb's Welding*, 470 U.S. at 417 n.2, 419, 441 n.13 (dissenting opinion), 445 n.17 (dissenting opinion). Furthermore, he filed an *amicus* brief in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), proposing an analytic approach similar to the one that the Court adopted in its opinion. Alternatively, there are scores of other Louisiana lawyers who regularly represent LHWCA claimants; the Court should have little trouble identifying one who would be pleased to defend the judgment below.

CONCLUSION

This case presents an important issue that the Court has explicitly reserved on two prior occasions and on which the lower courts are in acknowledged conflict. The case presents the issue cleanly, without extraneous problems that might prevent the Court from resolving the

question presented. The petition for certiorari should be granted.

Respectfully submitted,

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