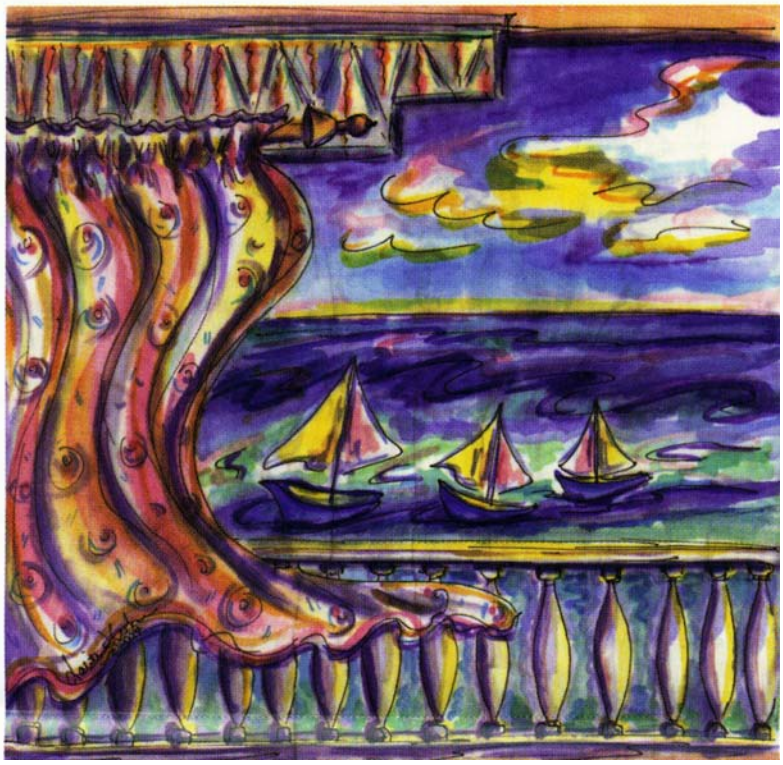
The Maritime Law Association
Of the United States

FALL MEETING



CONTINUING LEGAL EDUCATION IN SANIBEL HARBOUR

October 24 – 27, 2007

Sanibel Harbour Resort & Spa

SANIBEL HARBOUR RESORT AND SPA

Continuing Legal Education
Thursday, October 25, 2007

Time	Panel	Moderator and Panelists
1:00 - 2:45 p.m.	**Intermodal Contracting and Multimodal Liability:** A View from Surface Transportation Attorneys	**Moderator: Steven W. Block** Betts, Patterson & Mines, Seattle, WA **Panelists –** **David T. Maloof,** Maloof Browne & Eagan, Rye, NY **Hyman Hillenbrand** DeOrchis Hillenbrand Wiener & O'Brien, Ft Lauderdale, FL **Greg E. Summy,** Norfolk Southern Corporation, Norfolk, VA **William D. Taylor** Hanson, Bridgett, Marcus, Vlahos & Rudy, Sacramento, CA **Eric Zalud**, Benesch Friedlander, Cleveland, OH
2:45 – 3:00 p.m.	**Break**	
3:00 – 4:45 p.m.	**Recent Developments Concerning Marine Pollution and Environmental Matters**	**Moderator: Thomas S. Rue**, Johnstone, Adams, Bailey, Gordon & Harris, Mobile, AL **Panelists –** **Michael G. Chalos**, Chalos, O'Connor & Duffy Port Washington, NY **Joe Poux**, U. S. Dept. of Justice, Environmental Crimes Section, Washington, D.C.

SANIBEL HARBOUR RESORT AND SPA

Continuing Legal Education
Friday, October 26, 2007

Time	Topic	Speakers
8:30 – 9:30 a.m.	**Professionalism and Ethics for the Maritime Practitioner**	**Honorable Virginia M. Hernandez Covington** U. S. District Court, Middle District of Florida, Jacksonville, FL
9:30 – 10:30 a.m.	**Regulatory Updates and Marine Security**	**Bryant E. Gardner** Winston & Strawn, Washington, D.C.
10:30 – 10:45 a.m.	**Break**	
10:45 – 11:45 a.m.	**Recent Developments and Trends in Cargo and Limitation of Liability**	**P. Michael Leahy** Moseley Prichard Parrish Knight & Jones, Jacksonville, FL
11:45 – 12:45 p.m.	**Recent Developments and Trends in Maritime Personal Injury**	**W. Sean O'Neil** The O'Neil Group, LLC., Houston, TX

INTERMODAL CONTRACTING AND MULTIMODAL LIABILITY:

A View from Surface Transportation Attorneys

Steven W. Block

INTERMODAL CONTRACTING AND THE NEW LAW GOVERNING MULTIMODAL LIABILITY: SURFACE TRANSPORTATION ATTORNEYS OF THE TRANSPORTATION LAWYERS ASSOCIATION OFFER THEIR UNIQUE PERSPECTIVES

Greg E. Summy
David T. Maloof
William D. Taylor
Eric Larson Zalud
Hyman Hillenbrand

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A Day(s) in the Life of an Intermodal Shipment

By

Greg E. Summy[1]

During my 30 years of representing transportation companies in the United States, the most significant change I have witnessed in transportation is the growth of intermodal transportation. The reasons for this growth have been the subject of many articles, books, papers, discussions over the water cooler and at cocktail hour, and who knows where else. We all know why this growth has happened. The primary driver has been the migration of the production of goods from the United States to overseas locations. As the need for inland transportation of containerized products increased, surface transportation providers developed infrastructure, systems, organization and operations that were designed to service this growing market. For railroads and motor carriers, it was akin to the "follow the traffic" adage that many surface transportation attorneys steeped in a regulatory background found familiar. After seeing factories close and domestic traffic dwindle, but noticing that people were still purchasing from other sources the products these factories used to make, many surface transportation companies altered their business processes to capitalize on the intermodal market.[2]

Baby boomers will recognize the title of this paper from The Beatles song, "A Day in the Life." The titles of papers I write rarely are products of extensive thought or rumination. Rather, the titles just sort of come to me. This was no exception. In this paper, I want to give the maritime lawyer an idea of what happens to a containerized shipment when it leaves the cozy confines of the cargo deck of a massive steamship and makes the journey inland to the receiver. In addition, I want to give you an idea of the legal relationships the shipment encounters along the way. I had to add a plural to "day", since the journey usually takes more than a day. But then as I was beginning to think about the paper, I thought about the song. Remember…

> "Woke up, got out of bed
> Dragged a comb across my head
> Found my way downstairs and drank a cup

[1] General Solicitor, Norfolk Southern Corporation. The views expressed in this paper are his, and not necessarily those of Norfolk Southern.

[2] For an interesting overview of containerized shipping, see *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, by Marc Levinson.

And looking up, I noticed I was late
Found my coat and grabbed my hat
Made the bus in seconds flat"[3]

So how many of the products mentioned in the song are made in the United States? Beds? Used to come from Michigan and North Carolina. Some still do. Now? Asia. Most mattresses are still made domestically. Combs? No question that those are made overseas. Coffee mugs? May be produced domestically if you have an individualized, artsy one. Otherwise, no. Coffee or tea? Maybe Hawaii for coffee, but highly likely to be imported. Clocks? Probably Asia. Watches? Europe and Asia. Coats and hats? I have some golf hats that claim to be made in the USA, but not many. Coats? I don't think so. A bus? Assembly, probably yes; components, of mixed origin.

What's the point of this little diversion? As you read this paper, look at the things around you, and think about how many of them spent some of their lives as products in an intermodal container.

I am sure most of you know more about what happens when a shipment arrives in port than I do. For this discussion, I'll skip the steps of how the shipment is unloaded from the ship, and go directly to how the shipment either exits a gate by truck or leaves by train.[4] In both situations, the transaction that takes place is an *interchange.* The shipment leaves the possession of the steamship line and enters the possession of a motor carrier or a railroad. If the port where the ship arrives has what is known as *on-dock rail*, the shipment is loaded by port labor onto a railcar (in this situation, almost always a *well car*). If the port and the railroad work well together, the port personnel load a particular car with shipments that have a final destination of the same rail terminal, and the railcars are coupled together in block order.[5] Railroad operating people get pretty cranky when a cut of cars[6] is received that is supposed to be properly blocked but instead is a hodgepodge of containers and cars with multiple destinations. If this happens too

[3] THE BEATLES, *A Day in the Life*, on Sgt. Pepper's Lonely Hearts Club Band (Capitol Records, 1967)

[4] This paper will ***not*** discuss the steps needed to clear customs.

[5] This is also known as *blocking*, or having the train *properly blocked.* The railroad will tell the port the blocks that it wants and where it wants them, such as, for example, "I want the Columbus block at the head end, Chicago in the middle and Atlanta at the tail end."

[6] This is another railroad term. A *cut of cars* is a group of railcars that are received together.

frequently, expect the port to get a call from the local trainmaster or terminal superintendent[7] expressing displeasure about the situation, often accompanied by colorful language. In any event, after the cars are loaded and made ready for transportation, the railroad picks up the cars with a locomotive and travels, in all likelihood, to the origin terminal yard. I'll discuss what happens after that later in this paper.

If the shipment is to move by truck out of the facility, it might go to a railroad or it might go to the ultimate destination. Steamship lines provide both containers and chassis for the movement of their shipments. Two types of agreements should be in place in order for a shipment to exit the marine terminal by truck. First, the steamship line should have a transportation contract with its customer to move the shipment to destination. I am sure MLA members are familiar with such a document. This contract should cover the transportation service provided, the rates for such service, liability for claims and other matters typical to such relationships. My colleagues Bill Taylor and Eric Zalud will discuss these contracts as part of their respective presentations. The other agreement the steamship line should have in place is an interchange agreement. The interchange agreement, in this situation, would be between the steamship line and a motor carrier. This agreement allocates responsibility for the condition of the container and chassis while the container and chassis are in the possession of the motor carrier, and also covers liability while the motor carrier is on the premises of the facility operator. In addition, the agreement should provide for use charges if the equipment is not returned on a timely basis. About 85-90% of intermodal containers and chassis move under the terms of the Uniform Intermodal Interchange Agreement (the "UIIA"), which is administered by the Intermodal Association of North American ("IANA"). The UIIA itself is found very easily at www.uiia.org.

Several years ago, the UIIA provided that a motor carrier was responsible for virtually every phase of the operation of the equipment while the equipment was in its possession. After extensive negotiations between the motor carriers, railroads and steamship lines, the UIIA was amended, effective in early 2005, to provide that a motor carrier was not responsible for defects

[7] A terminal superintendent has overall responsibility for the smooth operations of a given terminal. A trainmaster's specific duties can be somewhat difficult to define, but in very general terms, he or she is responsible for assuring that trains get moved within a given territory. A sports analogy might be to a "slash" player in football (such as a defensive back/wide receiver/kick returner) or a 6th man in basketball who is capable of playing the two or three positions. A trainmaster is expected to have a number of skills and be good at all of them.

in the equipment other than those specified in an attachment to the UIIA. In essence, the defects listed in the attachment are of the type that the driver should see in the required "walk-around" inspection.[8] Defects not listed in the attachment are often referred to as latent defects or hidden defects, and are of the type that a driver would not be able to see during the walk-around inspection. The rationale for the amendment was that the motor carrier should be responsible for defects in equipment it does not own or lease that its driver is able to detect when it picks up the equipment at the terminal.

Federal law and proposed regulations have changed the landscape with respect to equipment condition and interchange even further. As part of SAFETEA-LU[9], the Federal Motor Carrier Safety Administration ("FMCSA") was charged with promulgating regulations covering the inspection, repair and maintenance of intermodal equipment. In accordance with the direction given to it by this law, FMCSA published a Notice of Proposed Rulemaking on December 21, 2006.[10] Comments from interested parties have been received, and the industry awaits FMCSA's determination on the final rule.[11] When effective, these new "roadability" regulations will affect the operations of all equipment providers of intermodal equipment. Thus, parties engaged in the interchange of equipment at an intermodal terminal will need to be conversant with these regulations.

If the shipment moved by rail to a destination yard, that shipment would leave the rail facility by truck, and the series of transactions and legal relationships described above would be essentially the same.

So what happens when the shipment moves inland by rail? Discussed before was how the shipment gets to the origin yard. At the origin yard, the various blocks are uncoupled and switched to outbound trains headed to the applicable destination yard or to an intermediate yard.

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[8] The Federal Motor Carrier Safety Regulations make a driver of a commercial motor vehicle responsible for being certain that a vehicle is safe to operate before taking it out on the road. See 49 CFR 392.7 and 396.13(a), among other pertinent safety regulations.

[9] Section 4118 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which is now codified at 49 U. S. C. 31151. I sometimes wonder if more time is spent on making up the names of these laws to get catchy acronyms than on the substance of the laws themselves.

[10] Docket No. FMCSA-2005-23315, *Requirements for Intermodal Equipment Providers and Motor Carriers and Drivers Operating Intermodal Equipment.*

[11] FMCSA says this should occur in the spring of 2008. *Traffic World*, September 10, 2007.

The containers do not leave the cars until reaching the destination yard unless there has been has been a significant mistake in handling.[12]

When the shipment arrives at the destination yard, activity picks up from the legal perspective. The train arrives at the terminal and takes the cars to an unloading track. A contractor operating a crane will lift the containers off of the railcar and place the container on the ground or on a chassis. Placement on a chassis is known as a "live lift". At the same time this activity occurs, someone in the yard office is notifying the railroad's customer that a shipment is "available" for pickup, or the railroad's information system may generate this notification automatically. When a customer is notified of shipment availability, the clock for "free time" starts. "Free time" is the time that a customer has to pick up a shipment before incurring storage charges. The amount of free time varies by terminal, and generally depends on the number of containers that move through the facility and the size of the facility. It is very important to keep an intermodal terminal fluid.

If the operations of the railroad and the customer are functioning smoothly, the customer notifies its dray carrier and the shipment is picked up shortly after it's available. When the shipment leaves the facility[13] the same gate transactions and legal relationships discussed earlier occur.

One other possibility is worth mentioning. Scattered throughout the intermodal network are private facilities. These are intermodal yards that are not operated by a railroad or steamship line. When an intermodal train is delivered to a private facility, the rail carrier has accomplished delivery of the shipment when the cars are placed on the interchange track. If a customer uses a private facility, it will need to have an agreement of some sort with the private facility operator. This is different than when the destination yard is a rail facility, where the rail carrier's responsibility ends when the shipment is outgated.

So this is a basic overview of what happens when an intermodal shipment moves inland. In order to provide a steamship line with thorough representation, an attorney should have a good

[12] Railroad employees switch cars at rail yards. Generally, contractors lift containers on and off of railcars at railroad intermodal facilities.

[13] When a shipment leaves the facility by truck, it is outgated. When it enters by truck, it's ingated. Although railroad operations can be somewhat mysterious, the terms used usually aren't (e.g., ingate, outgate, loading track, unloading track, interchange track and my personal favorite, the runaround track.

working understanding of how this process works, and the various legal relationships that are involved.

The Evolution of a Transportation Law Practice --
One Lawyer's Perspective

by

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I am honored to be part of the Transportation Lawyers Association ("TLA") group of member attorneys invited to share our experiences as practitioners serving a major part of our Country's domestic and international economy. I emphasize the word "transportation" as descriptive of a client base we all represent, without reference to specific modes of transit. The recognition of the overarching focus of this area of the law is no accident. Indeed, the transition is not a matter of semantics. The terminology reflects an evolution from a regulatory, to a deregulatory, and, finally, commercial reality that we serve a dynamic industry which consists of interconnecting facets, crossing all modes of carriage and services. Today, the membership of TLA mirrors and confirms this collective dynamic. We no longer refer to ourselves as "motor carrier" attorneys (actually, the term "surface transportation attorneys" is, on reflection, too narrow as well). Like you, we see ourselves as transportation lawyers, providing legal resources to a broad-based constituency. My role today is to give context to the transformation from a regulatory to contract environment, which permeates our transportation practices today, across all modes of commerce.

The Supreme Court gave recognition and credence to the aftermath of this fluid evolution. The business reality of intermodalism is firmly entrenched in the Supreme Court's decision in *Norfolk and Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004) (a focus of today's presentation)[14]. I will leave it to David Maloof and Hy Hillenbrand to dissect *Kirby* and its progeny. My reference to this case is to emphasize that the Court was willing to fashion a result which acknowledged the attributes of and the need for commercial uniformity in the global economy, all of which is served through a network of transportation resources, from start to finish. We stand ready to provide legal counsel to memorialize such multimodal arrangements; not as representatives of the motor carrier sector, but as professionals with an expertise in

[14] This will no doubt spark enlightened and intense debate.

transportation and all that is encompassed in the stream of global commerce. The business relationships that sustain this distribution engine do not function in a vacuum. Instead, the so-called "seamless" transportation phenomenon requires coordinated effort of a number of transit modes, acting together in order to accomplish the delivery of a container, a piece of equipment, and other commodities, from origin to destination. This is the business process we are called upon to understand and represent.

In order to comprehend and articulate this process, we, as transportation lawyers, must have an appreciation for and an understanding of the nuances of the laws, regulations and treaties impacting maritime, motor carriers, railroads, freight forwarders, air cargo, and broker/third-party logistics companies. Today, the common bond between these entities is more often than not contractual in nature, developed to define and implement customer distribution arrangements, beyond the classic structure of bills of lading and other historical and collateral terms and conditions borne of the "old days" of regulation or common law. As lawyers, we have a universal goal to serve the diverse interests affecting the shipment of goods, without the artificial labels historically tied to certain segments of the industry. Our horizons are broader; our due diligence more complex.

Without dating those of us who witnessed first-hand the transformation from motor carrier attorneys to transportation lawyers, I will try to provide a perspective in terms of my own experience. My roots as a former "motor carrier" lawyer were nurtured early-on within a regulatory environment that was fairly consistent for both interstate and intrastate commerce, essentially built around the concept of satisfying or defending against the burden of proving "public convenience and necessity" ("PC&N") as the gateway to entry in the trucking industry. This evidentiary standard was the relic of a statutory and economic structure inherent in the *Act to Regulate Commerce of 1887,* and its many successors, including, as particularly relevant to this discussion, the *Motor Carrier Act of 1935* ("MCA") and so forth.

The practice which emerged as a result of the MCA was driven by applications for operating authority and the related administrative and adversarial proceedings venued throughout the country. In recognition of this specialized practice, serving a specialized clientele, the early practitioners in this arena formed the Motor Carrier Lawyers Association ("MCLA") which necessarily branded the group of attorneys as representatives of the motor carrier industry, setting them apart from attorneys representing other modes of transit. It was indeed a nice, cozy

legal club which I joined at the tail end of the regulatory cycle. We did battle at hearings during the day, socialized at night, only to return the next morning, ready to fight again as to whether an applicant should be allowed to encroach upon the services of existing motor carrier competitors. This type of regulatory advocacy was not unique to motor carrier counsel. Railroads and airlines operated within the conditions under the same "PC&N" evidentiary format. Not surprisingly, attorneys serving these industries formed their own professional bar associations to share common practice interests and war stories in the comfort of a regulatory environment. Thus, by virtue of regulated practices, attorneys were characterized by the modes they represented: motor carrier lawyers; railroad attorneys; air transit practitioners; and, of course, maritime lawyers.

Ultimately, the party ended and the MCLA, by necessity, transformed itself into the TLA. The organization's doors were opened to members beyond the "pure" motor carrier practitioner. Being astute and practical lawyers, the membership of TLA (although, not without some resistance) could readily see and appreciate that the march to agency and statutory deregulation would forever change the administrative practice landscape. It became a practical matter of either "sink or swim." Those who persisted on a regulatory track would soon learn that a practice limited to ICC advocacy would no longer prove viable.

Those of us who had a broader vision confronted to a very simple realization. Instead of seeing the *Interstate Commerce Act,* its regulations and the ICC's Rules of Practice and Procedures as the essence of our legal experience, we asked: "Why not pierce the 'statutory veil' and give recognition to the fact that we should represent the business needs of our transportation clients beyond an ICC or PUC hearing room?" In answer to this rhetorical question, we began to expand our horizons to become <u>transactional</u> transportation lawyers.

As practitioners began to accept the reality of change, industry groups such as the MCLA likewise faced a similar metamorphosis in its focus and membership. While preserving its historical quality for the highest levels of professionalism and camaraderie, always hallmarks of TLA, the over 700 attorney members of TLA now represent diverse practice interests not limited solely to trucking company clients, but all connected to "transportation." This diversity is well-represented here, given that Greg Summy, from the Norfolk-Southern, is the Immediate Past President of TLA, and Steve Block, a well-regarded maritime attorney, has been an active member of TLA, serving a term on its Executive Committee. In fact, to further emphasize the items of theme of this presentation, Steve will moderate a panel entitled: "Maritime Service

Contract Issues and Current Trends, Recent Legal Developments and How Developing Industry Practices Affect other Modes of Transportation" at the upcoming 40th Transportation Law Institute, co-sponsored by TLA, in Washington D.C. on November 2, 2007.

Like the MCLA, its attorneys could not ignore the signs of change. The push for deregulation was internal within and external outside the ICC. The gathering storm clouds were all around. With economist Alfred Kahn leading the way, deregulation became the economic buzz word of the late 1970's, leading to a movement for free enterprise and open competition within the transportation and other business sectors, at both federal and state levels. Ultimately, as a result of a combination of factors, fueled by the economic, political and social realities of this era, and beyond, the regulatory attorney was faced with an eroding practice base attributable to influences beyond our control.

The full force of the move away from a regulatory environment was evident in the late 1970's as appointees to the ICC brought to the agency a philosophy intended to implement and enforce a form of administrative deregulation. For example, the ICC issued decisions which broke down the barriers to contract transportation by permitting railroads and motor carriers to serve shippers under such arrangements for selective services. Fast on the heels of the *Motor Carrier Act of 1980*, the agency released its decision in *Dixie Midwest Express, Inc. Extension*, 132 MCC 794 (1982), which allowed brokers to arrange for transportation services directly with a motor carrier as contract shippers, forever altering the classic shipper/carrier hierarchy. In fact, *Dixie Midwest* was a principal factor in the birth of the broker industry which, as we all know, has matured into the logistics market that dominates transportation today.

The ICC's own activism did not go unnoticed by Congress. In an effort to "rein-in" the Commission and set its own deregulatory agenda, Congress launched a progressive and intentional strategy to change the regulatory landscape. Congress first passed the *Airline Deregulation Act of 1979* (air), the *Motor Carrier Act of 1980)* (motor carrier), and, finally, *The Staggers Rail Act of 1980* (railroads) ("Staggers"). These laws were the predecessors of similar legislative efforts to deregulate other specialized transit services (such as buses).

While restructuring the jurisdiction of the ICC, Congress used the MCA and Staggers to deliver a statutory mandate that contract relationships would be permissible in transportation industry, in lieu of a regulatory format to determine the rights of the parties to motor carrier or railroad services. No longer were such arrangements deemed to be illegal as contrary to the

principle against discrimination in public services (the foundation for the original *1887 Act).* Instead, Congress openly invited the users and providers of transportation services to enter into written agreements to define the elements of their joint business undertakings, outside of administrative oversight. Congress sent a clear message that the industry should think in commercial, rather than regulatory, terms.

For the most part, in the beginning, shippers and carriers were slow to heed Congress's mandate. The initial use of the freedom to contract was restricted, represented by modest, short-form agreements. Things changed dramatically when shippers where hit with undercharge claims during a period defined as the "undercharge crisis," fueled by the post-MCA influx of new carriers, the recession of 1982-1984, and aggressive bankruptcy attorneys who charged that shippers had underpaid motor carriers in violation of the Filed Rate Doctrine ("FRD" retained in the MCA of 1980 demonstrating that Congress was unwilling to fully implement a deregulation strategy by that statute). The shipping community looked for safe-harbor defenses to defeat millions of dollars in claims arising from the inconsistency between rates they paid and tariff provisions legally mandating higher charges (by virtue of the FRD). Ultimately, the U.S. Supreme Court and various lower courts came to the rescue in the form of a judicially created contract defense.

In a line of decisions addressing the "undercharge crisis," the Supreme Court sanctioned a "contract defense" to the Filed Rate Doctrine. Realizing that contract arrangements could now be used to defeat the use of tariff rates, and the terms and conditions thereof, shippers were eager to take advantage of Congress's alternative to common carrier arrangements. Contracts came into vogue.

At the same time, and in order to create a further distance from potential undercharge exposure, shippers also turned to brokers as a resource to handle their shipments. As a result, and given the ***Dixie Midwest*** case, the third-party logistics industry was legitimized in a big and significant way, leading to today's logistics market.

In addressing a business need, shippers, carriers, and brokers (or third-party intermediaries) joined together to create and nurture the dominant logistics industry, the existence of which is dependent on sophisticated and complex written agreements between all of the parties to such arrangements. The gradual evolution of this industry through the greater use of contracts provided a much needed practice opportunity for transportation lawyers as an

alternative to the “old” regulatory days. Ironically, in promoting a deregulatory agenda, Congress, at the same time, created the contract environment in which we all operate today. Congress’s outreach in this regard has been extended to the maritime industry as well. *The Shipping Act of 1984*, and its aftermath, created contract opportunities for ocean carriers and, later NVOCCs, and their customers.

As transactional lawyers, we now play a pivotal role in negotiating, drafting, construing and, at times, litigating the terms and conditions agreed upon to meet distribution requirements. While the ICA, particularly given certain provisions of the *ICC Termination Act of 1995* (namely, 49 USC Section 14101(b)(1), which has created the so-called "waiver issue") still has some relevancy in the overall scheme of due diligence, contractual formation requires a greater comprehension not only of the dichotomy of each mode of transit integral to the service, but also the rules of the road, the sea, and the air that often dictate the negotiation strategy of each party to the agreement.

As a result, the due diligence process tests our basic contract skills, industry knowledge and the appreciation for how all of the elements in a single source or multi-modal shipment come together to accomplish the delivery of product. To demonstrate the extent of the substantive subjects which are frequently “deal points” in the transaction, please see the attached Appendix 1 consisting of:

1. Appendix 1A - Bob Spira's[15] paper entitled *"Trends in Contract Logistics Agreements"* which summarizes a survey sponsored by the Association for Transportation Law, Logistics and Policy ("ATLLP") as to the use of and trends in documentation "defining outsourced logistics transactions." Although the research is a few years old, it is still relevant to show developing interest in and strategies driving contract logistics arrangements.

2. Appendix 1B - Gerry Smith's[16] contract checklist which identifies the multiple issues which may be part of the negotiating process to reach terms of a final agreement between the parties.

3. Appendix 1C - A copy of the Table of Contents taken from a comprehensive shipper/carrier contract drafted by me which serves as an "issue-spotting" due diligence outline.

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[15] Reprinted with the permission of Robert M. Spira, Esq., Benesch, Freidlander, Coplan & Aronoff LLP

[16] Reprinted with the permission of Gerald F. Smith, Esq., Pezold Smith Hirschmann & Selvaggio, L.L.C.

4. Appendix 1D - A copy of the Table of Contents taken from a Logistics Service Agreement prepared for a client 3PL which, again, identifies substantive contract terms reached by the parties to such a service.

These materials provide exemplars of the practical considerations which come into play in the contract development process.

The extent to which contract transportation dominates our practices is further evidenced by the focus on this subject at TLA's various educational and professional programs. Moreover, several industry groups, such as the American Trucking Association ("ATA"), the Transportation Intermediaries Association ("TIA"), and the Transportation and Logistics Council ("TLC") have published their own model, "off-the-shelf" form of contracts geared to the particular needs of the constituency of each organization.

Of course, the ultimate terms used by the parties will reflect the various expectations and interests of the parties. In today's transportation environment, the first challenge is to decide "who's doing what to whom" in terms of functionality and the legal consequences arising therefrom. I will leave it to Eric to sort through and provide guidance in characterizing the contract players and the significance of the obligations and duties they may accept in any transactions.

Overall, I can safely say that each day in my practice I am called upon to address a contract-related matter. I suspect that this is true for all of you. I know that among TLA lawyers, contracts are an integral part of every day practice. Over time, we have leveraged our expertise in this industry to adjust to changing practice demands, emerging as major resources for the diverse interests of our clients by adhering to a macro, rather than a micro, approach to meeting the contractual needs of transportation users and providers in whatever form, no matter how complex the requirements might be, and notwithstanding interstate and international boundary lines, all to the benefit of our clients who, like us, must appreciate, as the Supreme Court did in *Norfolk Southern*, that freight does not move in vacuum.

Appendix 1A

TRENDS IN CONTRACT LOGISTICS AGREEMENTS

Robert M. Spira*

Contract logistics arrangements have become a popular service option for shippers. Industry experts estimate that these arrangements currently generate approximately $25 billion in annual revenues to logistics service providers and that revenues from these contracts will grow to $100 billion a year within the next ten years.[17]

Third party logistics arrangements reflect a change in the way transportation services are purchased and sold. Under a contract logistics agreement, the shipper no longer deals directly with its service providers, but "outsources" its requirements to a logistics specialist who creates and manages an integrated network of distribution and logistics services. When the shipper signs a logistics contract, the shipper is relying on the expertise of the logistics specialist to improve the efficiency of the shipper's distribution system. Legal documentation describing and regulating the relationship between the shipper and the logistics service provider creates challenges for all parties to the arrangement.

I. The Survey

Although more shippers are taking advantage of the services offered by logistics specialists, there has been little research into the nature of the contractual arrangements being used among the parties to these agreements. To help answer some questions regarding the nature of these contractual arrangements, the Association for Transportation Law, Logistics and Policy (ATLLP) sponsored a survey on contract logistics agreements. The survey results are attached as Appendix I.[18]

Using the results of the survey, we can answer several fundamental questions regarding the legal documentation defining outsourced logistics transactions. What service offerings are covered? Who participates

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Robert M. Spira is an Attorney at Law in Cleveland, Ohio. Mr. Spira received his B.A. from Miami University in 1969, and his J.D. from Case Western Reserve School of Law in 1972. He is immediate past president of the Association for Transportation Law, Logistics and Policy and is currently a member of the Association's Executive Committee.

The author would like to acknowledge Tom Foster, Dr. Brian J. Gibson and the staff of ATLLP for their support and assistance with the research on which this article was based.

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[17] Even these estimates fail to describe the full potential market for service providers. At an address to the Association for Transportation Law, Logistics and Policy's Annual Meeting in June, 1997, Joseph Nicosia, President of GATX Logistics, Inc., estimated current "outsourceable" logistics costs to be in excess of $400 million per year.

[18] The survey is the result of the work of members of ATLLP who work in the field of logistics. Tom Foster, Editor at Large at Logistics Management & Distribution Report, and I began drafting the survey in August of 1996. The concepts covered by the survey and the format for the survey questions were reviewed with logistics specialists and academics.

The survey was mailed to approximately 1,800 shippers, logistics service providers and carriers. The survey results are based on the 111 surveys returned to us with answers. The majority of the businesses responding (sixty percent) were sellers of transportation and logistics services. Forty percent of the respondents were buyers of these services (e.g., shippers).

Statistically analysis of the survey results is the work of Dr. Brian J. Gibson, the Director of the Southern Center for Logistics and Intermodal Transportation at Georgia Southern University.

The attached survey results in Appendix 1 are the "raw numbers" developed by Dr. Gibson and material extracted from answers to the "essay questions" that were included as part of the survey.

in the negotiations? Which issues are negotiated most often? Which issues are the most difficult? How are the parties resolving these issues?

The information contained in the survey results will be a valuable resource for persons involved in the preparation and negotiation of a contract logistics transaction. Although the survey will not produce the right answer for any specific transaction, it reveals trends, benchmarks, and standards applicable to the logistics industry and to logistics contracts. A person familiar with the results will be better prepared to anticipate the important issues that will need to be resolved in a contract and some possible resolutions to those issues. In some cases, the survey also describes the relative popularity of contract provisions included in agreements in response to those issues.

The survey results provide access to the collective experience of the shippers, carriers and logistics specialists who provided us with their answers to survey questions. Their answers are based on hundreds of different contract logistics transactions.

The discussion that follows is based on the results of the survey. It focuses principally on differences between the responses of (1) shippers and providers, (2) survey participants who signed a few contracts and survey participants who signed many contracts, and (3) survey participants from smaller business organizations and survey participants from larger business organizations. In this discussion, except where otherwise indicated, the terms "provider" or "providers" include all survey responses given by persons identifying themselves as a "logistics service provider" or other similar term, or as a "carrier."[19]

II. Services

A. Services Purchased.

Comments from survey respondents:

Shippers rarely, without assistance, know exactly what they expect and wish the third party to do.

Full disclosure of expectations by shipper, accurate and complete information as well as communications between shipper and provider is most important. A provider must be honest and able to back up the services they offer and perform.

Both parties require a complete understanding regarding service, cost and meeting deadlines.

Some providers view development of a clear definition of the scope of the services as the most difficult challenge in the preparation of a successful contract arrangement. A clear definition of the services is necessary for the shipper to know what to expect from the provider, for the provider to develop a fair and accurate price for the services, and for both parties to evaluate the performance of the arrangement.

Shippers use contract logistics agreements principally to arrange for truckload and less than truckload motor carrier services. Eighty percent of shippers responding to the survey indicated that they had included truckload services in at least one of their contract logistics agreements covered by the survey: seventy-two percent indicated they had included less than truckload services.

Shippers used other services as well. For example, forty percent used ocean services, thirty-eight percent used rail services, and thirty-six percent used air freight services. Therefore, contract logistics provides a convenient way for shippers to purchase a variety of transportation and distribution services.

[19] The survey results reflect some differences in the way the shippers view the service providers from the way the service providers view themselves. Although thirty-two percent of the shippers describe the providers as "shipper's agent," "property broker" or "forwarder," only eight percent of providers describe themselves using those terms. Most providers use the term "Contractor" or "Logistics Service Provider" to identify themselves in their contracts.

Almost without exception, shippers purchased a wider range of services than any single provider offered. For example, as indicated above, eighty percent of the shippers purchased truckload motor carriage. Only sixty-seven percent, however, of the providers responding to our survey provided truck-load carriage services. This trend demonstrates the role performed by providers who act as logistics "integrators." Integrators buy a variety of services at "wholesale" and bundle them into a single package.

B. Service Standards.

Comments from survey respondents:

For those agreements having a "shared savings" clause, the parties must define the base line from which savings will be gained.

Problems include lack of clarity in customer expectations; inaccurate data upon which assumptions (and therefore scope o/work) are built; lack of openness regarding a customer's true and long term financial objectives.

Establishing the standards by which the service provider's performance is measured can be even more difficult than describing the services themselves. The standards are necessary to support incentive arrangements and rate adjustment mechanisms that may be included in the contract. Although viewed as a difficult issue in the negotiations by only fifty-six percent of the survey respondents, service standards were considered one of the most difficult" issues to resolve in the . negotiations, one of the "most important issues to resolve in detail, and an issue that has caused the most disputes after the agreement has been signed.

Survey data tell us that the question of service standards is often ignored or avoided in contract negotiations. Shippers and providers who treat their contracts carefully, however, realize that the issue must be fully resolved for the arrangement to be a success over an extended period. The issue is a difficult one. The parties will duck it if they are not sophisticated, if there is pressure to implement the services quickly, or if the contract is relatively unimportant.

Of the contracts that included service standards, the most popular standards were on time delivery (thirty-seven percent) and on time pick up (twenty-six percent). Other standards employed by survey respondents included "overall system cost reduction" (10.8 percent) and "customer satisfaction surveys" (10.8 percent). The difficulty is not in selecting the standard, but in establishing a proper measure for that standard and in keeping track of performance to determine if the standard has been met.

III. Document Preparation

A. The Drafting Process.

Comments from survey respondents:

Generally, larger more complex arrangements involve outside legal counsel representing the shipper. This fact' sometimes lengthens the process unnecessarily.

Most corporate attorneys are not familiar with outsourcing contracts. They forget the contractor is not in the insurance business and want him to be 100 percent responsible. Yet, time after time they could buy insurance for less than the contractor who adds his premium. to his cost of covering 100 percent.

The party providing the first draft of the contract documentation has a significant advantage because that party can control the agenda to be discussed and the details of the contract language. Logistics contracts are no exception to this traditional rule of the lawyering game. Consequently, in significant transactions, lawyers play "capture the draft" during the preliminary stages of each negotiation. The survey results revealed that, most of the time (fifty-four percent), the game is won by a service provider. The shipper furnished the first draft only twenty-nine percent of the time.

For a shipper, controlling the drafting process can be an uphill struggle. A provider can produce a first draft quickly because it is likely to have "standard" documentation prepared or access to a series of transaction documents that can be used as the basis for a first draft. Under those circumstances, only the largest and most experienced shippers can insist on taking the lead in the contract preparation.

B. The Negotiating Process.

Comments from survey respondents:

Negotiations should result in a complete understanding of both parties regarding service, cost and meeting deadlines.

When the contract is pending but the operation is running, negotiation of or enforcement of a contract agreement is extremely difficult – there is no direct recourse as the contract is technically nor in effect.

One important area of inquiry in the survey related to the identity of. the persons actively involved in the contract negotiations. The level of management involved with a problem can reveal much about the attitudes of a business toward that problem. As described in Table 1, senior management of shippers and service providers is directly involved in the negotiations approximately one half of the time. Table 2 illustrates that shippers involve their "highest ranking logistics executive" (*e.g.*, Traffic Manager, Vice President of Purchasing) in the negotiations almost eighty percent of the time. On the other hand, less than half (forty-eight percent) of the service providers usually involve their highest ranking sales executive in the negotiations. The difference may be that the service providers handle a large number of negotiations in the ordinary course of their business. Therefore, the highest ranking executive may serve more as a coordinator and manager than as an active participant.[20]

TABLE 1

SENIOR EXECUTIVES IN NEGOTIATIONS		
	Shippers	Providers
Usually Involved	46%	53%
Hardly Ever Involved	34%	30%

TABLE 2

HIGHEST RANKING LOGISTICS OR SALES EXECUTIVE IN NEGOTIATIONS		
	Shippers	Providers
Usually Involved	78%	48%
Hardly Ever Involved	9%	19%

We were particularly interested in how often shippers and providers were represented by counsel in the preparation and negotiation of logistics contracts. Survey statistics indicate that, in general, twenty-four percent of the survey respondents usually use staff counsel, and eleven percent usually use outside counsel. As indicated by Table 3 and Table 4, there was little difference in the use of attorneys between shippers and providers.

[20] These results should be analyzed in light of the relative size of the business organization of the survey respondents. Forty-five percent of the survey respondents had less than $10 million in revenues. Management of businesses of that size may not be deep or specialized.

TABLE 3

STAFF COUNSEL IN NEGOTIATIONS BY TYPE OF ENTITY		
	Shippers	Providers
Usually Involved	29%	33%
Hardly Ever Involved	63%	55%

TABLE 4

OUTSIDE COUNSEL IN NEGOTIATIONS BY TYPE OF ENTITY		
	Shippers	Providers
Usually Involved	16%	14%
Hardly Ever Involved	84%	78%

There were some differences in the use of attorneys based on the number of logistics contracts signed by the participant. As demonstrated by Table 5 and Table 6, survey participants who signed only a few contracts were substantially more likely to be represented by counsel. For example, thirty-seven percent of the survey participants who signed only one or two contracts a year usually used staff counsel in the negotiations as opposed to nineteen percent of the participants who signed more than ten contracts per year. Twenty percent of the participants who signed one or two contracts a year usually used outside counsel in the negotiations. Only eight percent of the participants who signed ten or more contracts a year usually used outside counsel in the negotiations.

TABLE 5

STAFF COUNSEL IN NEGOTIATIONS BY NUMBER OF CONTRACTS		
	One or Two Contracts a Year	More Than Ten Contracts a Year
Usually Involved	37%	19%
Hardly Ever Involved	56%	73%

TABLE 6

OUTSIDE COUNSEL IN NEGOTIATIONS BY NUMBER OF CONTRACTS		
	One or Two Contracts a Year	More Than Ten Contracts a Year
Usually Involved	20%	8%
Hardly Ever Involved	73%	82%

Table 7 and Table 8 demonstrate utilization of attorneys based on the revenue of the survey participant. According to the survey results, the larger the business organization, the more likely that staff attorneys "will be involved. Forty-five percent of survey participants with revenues of more than $30 million a year usually used staff counsel for their logistics contracts. Twenty-five percent of survey participants with revenues of less than $10 million a year usually used staff counsel. On the other hand, there was almost no difference in the utilization of outside counsel based on the revenues of the survey participant. Fifteen percent of the participants with annual

revenues of less than $10 million usually used outside counsel for these negotiations. Seventeen percent of the participants with annual revenues of more than $30 million usually used outside counsel for these negotiations.

TABLE 7

STAFF COUNSEL IN NEGOTIATIONS BY REVENUES		
	Less Than $10 Million	More Than $30 Million
Usually Involved	25%	45%
Hardly Ever Involved	67%	45%

TABLE 8

OUTSIDE COUNSEL IN NEGOTIATIONS BY REVENUES		
	Less Than $10 Million	More Than $30 Million
Usually Involved	15%	17%
Hardly Ever Involved	82%	78%

C. Issues Addressed.

Comments from survey respondents:

Issues that should be addressed in negotiations include an inventory limit of liability – what is the common standard for an inventory variance, and therefore, the liability that the provider/vendor should assume.

The parties should negotiate frequency and method of payment for logistics services.

Agreements should include remedies for failures of vendors used by logistics service providers, in terms of performance and service standards.

The survey identified the issues that are considered a significant pan of the contract negotiation. In general, the respondents as a group viewed the following issues to be important: method of determining compensation (eighty-one percent), insurance and indemnification (seventy-eight percent), and liability for loss and damage to cargo (seventy-seven percent). Issues considered less important included benchmarks for gain sharing (eighteen percent), shipper obligations on termination (twenty-six percent), and software protection (twenty-nine percent).

For the most pan, there was very little difference in the issues that shippers and providers believed are significant. Table 9 describes the issues in which differences of more than ten percent were recorded.

TABLE 9

ISSUES USUALLY ADDRESSED BY TYPE OF ENTITY		
Issue	Shippers	Providers
Insurance and indemnification	89%	77%
Cargo liability	86%	75%
Termination obligations	41%	21%
Rate adjustment	44%	66%

Analysis of results based on the number of contracts signed also revealed only a few differences among survey participants. The issues in which differences of more than ten percent were recorded are set forth on Table 10.

TABLE 10

ISSUES USUALLY ADDRESSED BY NUMBER OF CONTRACTS		
Issue	One or Two Contracts a Year	More Than Ten Contracts a Year
Personal injury and property damage	48%	70%
Service standards	61%	44%
Confidentiality	53%	63%
Benchmarks for gain sharing	25%	13%

Analysis of the survey results based on the size of the business organization revealed several issues that were viewed differently depending on the size of the survey respondent. Based on these results, it appears that the larger business organizations are entering longer term, more sophisticated, arrangements. As a result, their contract negotiations address issues, such as data standards and protection of confidential information, that become more relevant in these types of arrangements. The issues where differences of more than ten percent were recorded are set forth on Table 11.

TABLE 11

ISSUES USUALLY ADDRESSED BY REVENUES		
Issue	Less Than $10 Million	More Than $30 Million
Minimum term	64%	92%
Cargo liability	75%	88%
Compensation method	75%	96%
Rate adjustment	43%	59%
Service standards	57%	69%
Data standards	21%	63%
EDI	24%	38%
Confidentiality	49%	70%
Software protection	23%	35%
Benchmarks for gain sharing	13%	26%

IV. Other Issues

Comments from survey respondents:

Problems in logistics contracts include the overall limited knowledge of agreements and contractual issues to address when employing contract trucking services, freight forwarders and customs clearance agents.

There must be a willingness to examine the process to introduce changes that reduce the overall cost of logistics activity; too many fiefdoms within corporations (purchasing, sales, operations, etc.) care only for selfish interest; a holistic approach is imperative to long-term success.

Many providers examined promised "seamless" start-up; "we'll take the won)' out of the start-up process for you." The chosen firm was not prepared, depended heavily on displaced staff and team, brought little to the party. We canceled the contract within six months - bad experience.

Shippers seem slow to involve the customer services/sales management in logistics agreements (and negotiations); there is subsequently a "disconnect" that surfaces after implementation. Most agreement failures that I've seen involve after-the-fact involvement/intervention by these departments.

You cannot do a contract and leave it at that. There must be ongoing communications and analysis of daily operations. This prevents disputes.

By its nature, the contract logistics. survey could address only a limited range of issues. As indicated by the comments of survey respondents set forth above, there are issues not addressed by the survey that are important to the success of a contract logistics arrangement. Most of these issues are management and people issues that cannot be solved by contract language. These comments, however, reinforce the importance of a commitment on the part of management to examine and reevaluate the arrangement and to make changes based on circumstances.

V. Conclusion

Analysis of the survey results provides a substantial amount of information regarding the environment in which contract logistics agreements are negotiated and implemented. Some generalizations can be drawn from the survey results:

1. There are few significant distinctions between shippers and providers regarding the preparation of contract logistics agreements.

2. Businesses that sign only one or two logistics contracts a year are likely to devote substantial time and resources toward the contracts in which they are involved.

3. Business organizations with revenues greater than $30 million per year are more likely to be involved in contract negotiations that deal with a wide range of sophisticated business and legal issues.

The survey reveals much useful and interesting information regarding logistics contracts. The logistics executives who participated presented an accurate reflection of a dynamic industry that is just beginning to reach maturity.

APPENDIX I

ATLLP SURVEY ON CONTRACT LOGISTICS AGREEMENTS

Results

In this survey, when we refer to a "contract logistics agreement," we are referring to a written contract signed by the parties that is intended to cover the terms and conditions under which a logistics service provider agrees to assume responsibility for a defined-portion of a shipper's logistics system. Transportation or distribution services mayor may not be included as part of the agreement.

When we refer to the "Survey Term," we are referring to the time period between September 1, 1994 and August 31, 1996.

In questions 1 through 4, we are trying to find out more about the companies who are entering into contract logistics agreements. We are also seeking some general information regarding the agreements covered by the survey.

1. Please estimate the number of contract logistics agreements negotiated by your organization during the Survey Term. *(Answer is percent of all respondents)*:

1 to 5	6 to 20	21 to 50	51 to 100	more than 100
39.6	33.3	18	6.3	2.7

2. Please estimate the annual aggregate revenue (in millions) expected to be realized by the logistics service provider from the agreements described in Question 1. above *(Answer is percent of all respondents)*:

$0 to 10	$10 to 30	$30 to 50	$51 to 100	in excess of $100
45.0	27.9	9.0	8.1	7.2

3. Please indicate each capacity in which your organization signed a *contract logistics agreement* during the Survey Term (check all that apply) (*Answer is percent of all respondents*):

32.4	Shipper	42.3	Carrier
14.4	Shipper's agent	15.3	Consultant
9.0	Property broker	17.1	Freight Forwarder
53.2	Logistics Service Provider	37.8	Warehouseman
	(or similar designation)	8.1	Other

4. Please indicate the legal term used most often to describe the role and responsibilities of the logistics service provider in the contract logistics agreements in which your organization participated during the Survey Term (*Answer is percent of all respondents*):

8.1	Shipper’s Agent	16.2	Warehouseman
3.6	Property Broker	17.1	Contractor
3.6	Freight Forwarder	1.7	Other
18.9	Carrier	20.7	No response

5. Please indicate all of the services that have been covered in the *contract logistics agreements* in which your organization participated during the Survey Term (check all that apply) (*Answer is percent of all respondents*):

65.8	LTL Services	26.1	Ocean Services
72.1	TL Services	25.2	Customs
31.5	Rail Services	64.9	Warehousing
34.2	Air Services	23.4	Other

6. We would like to know who controls the drafting process. On a scale of 1 to 5, with 1 designating "never" and 5 designating "always," please estimate how often the first draft of a contract logistics agreement was provided by the following (*Answer is percent responding "4" or "5"*):

28.8 a shipper
37.8 a logistics service provider
15.3 a carrier
2.7 a consultant
8.1 other

7. We would like to identify the issues addressed in the negotiations. On a scale of 1 to 5 with 1 designating "never" and 5 designating "always," please estimate how often the following issues were a substantial part of the negotiations (*Answer is percent responding "4" or "5"*):

72.1 Length of the minimum term (*i.e.*, the period of time that the agreement cannot be canceled) .
78.4 Insurance and Indemnification
57.7 Liability for personal injury and property damage
77.5 Liability for loss or damage to cargo
81.1 Method of determining compensation (*e.g.*, fixed fee, cost plus)
49.5 Method for adjusting the rates
56.7 Specific service standards to be met by the logistics service provider
47.7 Minimum standard for the volume and quality of data provided by the shipper (*i.e.*, data provided before the contract is signed on which the system and rates are based)
26.1 Shipper obligations upon termination (*e.g.*, equipment buy back, assumption of real estate lease)
25.2 Terms and conditions regarding electronic data interchange
56.7 Terms and conditions to protect against disclosure of confidential information
28.8 Terms and conditions to protect against improper or unauthorized distribution or use of software
18.0 Benchmarks for gain sharing

8. We would like to know more about who participates in the negotiations. On a scale of 1 to 5 with 1 designating "never" and 5 designating "always," please estimate how often each of the following actively participated in the negotiations on behalf of your organization (*Answer is percent responding "4" or "5"*):

45.9 Senior level corporate executive
66.6 Highest ranking logistics executive (for shippers)
55.8 Highest ranking sales executive (for providers)
44.1 Other logistics executive (for shippers)
36.9 Other sales executive (for providers)
24.3 Staff attorney
10.8 Outside attorney
9.9 Other

9. We would like to know more about the negotiating process. *Please rank, in the order of frequency,* the number of negotiating sessions (*e.g.*, phone calls, face to face negotiations) needed to produce a final agreement (complete the blank with the appropriate ranking from 1 to as many as may apply) (*Answer is percent ranked "1" or "2"*):

18.0 No negotiations required (first draft or standard form acceptable)
27.9 One or two negotiating sessions
41.1 Three or four negotiating sessions
36.0 More than four negotiating sessions

10. We would like to know more about how the parties resolved some of the significant issues that arise in the negotiations. *Please rank, in the order of frequency* in which they were used in an agreement signed during the Survey Term, the following contract provisions (complete the blank with the appropriate ranking from 1 to as many as may apply) (*Answer for all pans of question 10 is percent ranked "1" or "2"*):

(a) the length of the minimum non-cancelable term of the agreement:

13.5 No term specified
18.9 Less than one year 40.5 One 10. three years 23.4 Three to five years
3.6 Other

(b) the method of determining the compensation to be received by the logistics service provider:

38.7 Fixed fee per shipment, per trip, etc.
25.2 Fixed fee per week, per month, etc.
16.2 Cost plus
5.4 Gain sharing
15.4 Rate per mile
14.4 Other

(*Please rank the following contract provisions in order of frequency in which they were used:*)

(c) service standards to be met by the logistics service provider:

7.2 No standards
26.1 On time pick up.
37.8 On time delivery
7.2 Cycle time reduction
2.7 Guaranteed backhaul
10.8 Overall system cost reduction
13.5 Loss and damage
10.8 Customer satisfaction survey
4.5 Other

(d) remedies for failure of the logistics service provider to meet the specific service standards:

15.3 No remedy
29.7 Financial penalty
12.6 Default and legal damages
43.2 Termination of the agreement
8.1 Other

(e) remedies for failure of the shipper to meet minimum volumes specified:

22.5 No remedy
33.3 Right to adjust rate
15.3 Right to redesign system
22.5 Right to cancel agreement
6.3 Other

(*Please rank the following contract provisions in order of frequency in which they were used:*)

(f) remedies for failure of the shipper to meet the minimum standard for data regarding the transportation system on which the system and rates are based:

21.6 No remedy
27.0 Right to adjust rate
25.2 Right to redesign system (with new rates)
19.8 Right to cancel agreement
2.7 Other

(g) commitments on the part of the shipper to assume obligations of the logistics service provider upon termination of the agreement:

38.7	No commitments
11.7	Equipment buy back
11.7	Equipment lease assumption
12.6	Real estate lease assumption
3.6	Pension withdrawal liability
5.4	Employee liability (*e.g.*, accrued vacation expense)
2.7	Other

11. From among the issues described above, please identity (*Answers for all parts of question 11 are most frequent responses*):

(a) the issue most difficult to resolve in negotiations:

pricing issues
liability and insurance issues
compensation and gain sharing issues
service standards
performance measurement

(b) the issue that you believe is the most important to discuss and resolve in detail:

service standards/expectations
pricing issues
contingency planning – dealing with change or problems
insurance and liability
gain sharing

(c) the issue that has caused the most disputes after the agreement is signed:

actual performance vs. standards
liability and claims issues
lack of promised volume
rate adjustments

APPENDIX 1B

CHECKLIST OF LOGISTICS MANAGEMENT[21]

/ / Access to Premises

/ / Accessorial Charges

/ / Accounting

/ / Acquisition of Additional Fixed Rates

/ / Advancing Charges

/ / Advertising

/ / Affirmative Action

/ / Allowances - Rebates

/ / Amendments and Supplements

/ / Amendments and Waiver

/ / Appointment of Mediator

/ / Arbitration of Disputes

/ / Assignment

/ / Attorney Fees

/ / Backhaul Considerations

/ / Bankruptcy

/ / Benchmarks

/ / Benefit of the Agreement

/ / Bonds and Undertakings

/ / BMC 32 Coverage

/ / Budget and Remuneration Procedures

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/ / Cancellation

/ / Captions and Titles

/ / Change of Control

/ / Claims Procedures

/ / Combination Orders

/ / Compliance with Law

/ / Commodities (Classifications, Mix)

/ / Communications

/ / Complaints

/ / Confidentiality

/ / Conflict Resolution

/ / Consultation with the Client

/ / Continued Provisions

/ / Cost of Negotiations

/ / Credit

/ / Currency

/ / Dedicated Movements

/ / Default and Cure

/ / Definitions

/ / Definition of Provider

/ / Delivery Schedule

/ / Delivery Location(s)

/ / Delivery Procedure

/ / Detention-Furnished,
Not Used

/ / Discounts on Collect Shippers

/ / Distribution Services

/ / Diversion and Reconsignment

/ / Documentation-Contract

/ / Documentation-Bill of Lading

/ / Documentation-Invoicing

/ / D.O.T./O.S.H.A./E.P.A. (Gov't. Regu.)

/ / Effect on Court Proceedings

/ / Emergency Charges

/ / Employees of _____

/ / Entire Agreement (Integration)

/ / Environmental Representations, Obligations and Indemnity

/ / Equal Opportunity

/ / Equipment Supply

/ / Equipment Type

/ / Exclusivity

/ / Exclusive Use of Vehicle

/ / Escalation and De-Escalation

/ / F.O.B. Terms

/ / Forced Majeure

/ / Further Assurances

/ / Governing Publications

/ / Hazardous Materials

/ / Identity of Parties

/ / Indemnification

/ / Indemnification Procedure

/ / Indemnity by the Client

/ / Independent Contractor

/ / Initial Term

/ / Injunctive Relief or Anti-Injunctive Relief

/ / Inspection and Testing

/ / Insurance by _____

/ / Insurance by the Client

/ / Interest

/ / Lease and License

/ / Legal Relationship

/ / Length of Contract

/ / Liabilities and Claims Procedures

/ / Liability - Cargo

/ / Liability - Consequential Damages

/ / Liability - Freight Charges of other Carriers

/ / Liability - Time Limitations

/ / Liability - for Loss and Damage

/ / Liability - for Loss Excess

/ / Limitation of Liability

/ / Liquidated Damages

/ / Maintenance of Providers Personnel at the Premises

/ / Material Breach

/ / Meet and Confer

/ / Meeting Competition (Most Favored Nation)

/ / Modification

/ / Multiple Trailerload Shipments

/ / Mutual Indemnification

/ / Negotiation

/ / New Business Operations

/ / Non-Payment by Client

/ / Non-Payment of Carriers

/ / Non-Solicitation

/ / No Third Party Beneficiary

/ / Notices

/ / Notice of Accidents, etc.

/ / Offset of Accounts

/ / Options

/ / Origins of Shipment -
Source Locations

/ / Other Termination

/ / Other Procedures Applicable To Termination

/ / Overcoming Force Majeure

/ / Packaging

/ / Pallets-Interchange

/ / Pallets-Return

/ / Payments - C.O.D

/ / Payment and Credit Terms

/ / Payments-Freight Collect

/ / Payment - Prepaid

/ / Payment - Repayment

/ / Payment - Repayment

/ / Performance Bond

/ / Performance Guarantees

/ / Permits (Other than those Affecting Capacity to Contract)

/ / Physical Counts and Other Systems

/ / Parol Evidence Rule

/ / Price Schedule-Rates

/ / Procedures on Termination

/ / Proof of Insurance

/ / Proper Law of Contract

/ / Protective Services

/ / Public Notices

/ / Rate - Alternative

/ / Rate - Application

/ / Rate - Full Value

/ / Rate - Increases

/ / Rate - Minimum Charge

/ / Rate - Released Value

/ / Reconsignment

/ / Records - Inspection

/ / Records - Retention

/ / Reference Rule

/ / Renegotiation

/ / Renewal Including Evergreening

/ / Representations and Warranties Regarding Products

/ / Requirement to Disclose

/ / Responsibility for Failure of Contract (Including Labor)

/ / Resolution of Budgeting and Variance Issues

/ / Return of Damaged Products

/ / Return of Shipment - Undeliverable

/ / Right of Rejection-Carrier

/ / Right of Rejection-Consignee

/ / Risk of Loss - Insurance

/ / Round-Trip Fully Loaded Routes

/ / Routing

/ / Salvage

/ / Sanitation Standards

/ / Sealing Trailers

/ / Security Matters

/ / Services to be Provided from the Premises

/ / Severability

/ / Scope of Contract Motor Carrier Services

/ / Schedules

/ / Shipment Frequency

/ / Software (Ownership: Injunction, etc.)

/ / Sorting of Segregating

/ / Specific Performance

/ / Shortage-Over and Astray

/ / Status of Service Freight Forwarder-Broker, Carrier, etc.

/ / Stop-Off Privileges

/ / Subcontracting

/ / Subrogation

/ / Surcharges

/ / Taxes

/ / Term

/ / Terminal Services

/ / Termination

/ / Termination at End of Term

/ / Termination for Failure to Meet Performance Criteria

/ / Termination by Either Party

/ / Transportation Services

/ / Time-In-Transit

/ / Time of Delivery

/ / Trade Relations and Joint Advertising

/ / Trade Secrets

/ / Transit Services (i.e., storage in transit)

/ / Unsafe Goods

/ / Volume Commitment

/ / Volume Incentives

/ / Volume Penalties

/ / Waiver - (ICCTA)

/ / Warehousing

/ / Warranties

/ / Weights - Gross and Dunnage

/ / Weights - Minimum Factor, Overflow

/ / Weights - Minimum Factor

APPENDIX 1C

Comprehensive Outline Of The Terms and Conditions of a Working Contract Carrier Transportation Agreement

By William D. Taylor, Esq.

1. DEFINITIONS

1.1 Collateral Contract Documents
- A. Manifest
- B. Bill of Lading
- C. Tariff/Schedule/Classification or Similar Document

1.2 Contract Motor Carrier
1.3 Contract Shipper
1.4 Customer(s)
1.5 Product
1.6 ICCTA
1.7 US DOT
1.8 ICC
1.9 STB
1.10 Waiver
1.11 AAA
1.12 TLA
1.13 IDR
1.14 Qualified Drivers
1.15 Hazmat/Hazardous Materials
1.16 Transportation Services or Services
1.17 Safety Rating
1.18 Material or Materially
1.19 Laws and Regulations
1.20 Expedited or Time-Sensitive Delivery
1.21 Currency
1.22 Headings
1.23 Extended Meanings
1.24 Appendices
1.25 Indemnification Procedures
1.26 Change of Control
1.27 Operating Authority(ies)
1.28 Billings

APPENDIX 1-D TO BE SUPPLIED AS A HARD COPY HANDOUT

The Evolving Rule of Freight Intermediaries in Multimodal Transport: the Logistics Spokes that Spin the Wheels of Commerce

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Some of the most frequently asked, and frequently litigated, questions in this new era involve freight intermediaries. Issues arise both in litigation, and in the negotiation of transactions and contracts, as to what exactly *is* the entity involved, in terms of its role in the shipping sequence and potential liabilities. Whose agent is the intermediary? What liability regime applies to it? What are its registration requirements? These, and a panoply of other questions are often raised, and often litigated. This paper discusses some of those questions, provides some answers, and reviews some illustrative cases.

Surface Freight Forwarders

Definition:

Arranges transport, but also (1) plays a role in the assembly, consolidation, break bulk and distribution of the freight; (2) assumes responsibility (and liability) for transportation from the place of receipt to the place of destination; and (3) uses an interstate carrier for any part of the transport, 49 U.S.C. §13102(8). All §13102(8) criteria must be met. *Chemsource v. Hub Group,* 106 F.3d, 1358, 1361 (7th Cir. 1997), *Independent Machinery, Inc. v. Kuehne & Nagle, Inc.*, 867 F. Supp. 752, 757 (N.D. Ill. 1994). Need not *perform* each function, but must "proffer" them. *Phoenix Assurance Co. v. K-Mart Corp.*, 977 F. Supp. 319, 324 (D.N.J. 1997); *Metropolitan Shipping Agents of Illinois, Inc. v. United States,* 342 F. Supp. 1266, 1269 (D.N.J. 1972); *Superior Transportation Systems, Inc.--Petition for Declaratory Order--Classification of Operations Conducted for Boise Cascade Corp.*, 1995 WL 623273 *2 (I.C.C. Oct. 18, 1995). *Cf. National Motor Freight Traffic Association, Inc. v. United States,* 205 F. Supp. 592, 594-97 (D.D.C. 1962), *aff'd,* 372 U.S. 246 (1963) (per curiam). At least one

case has held to the contrary. *Pacific Austral Party, Ltd. v. Intermodal Express, Inc.*, 1990 WL 141010 *2 (N.D. Ill. Sept. 26, 1990.)

"[T]he term 'assembles and consolidates' means the assembly or consolidation of less than carload quantities into carload shipments." *Chemsource, supra,* 106 F.3d, at 1361.

Registration Requirements:

1. Must register with DOT.

Liability Regime:

2. Carmack liability; considered "carriers" under ICCTA.

Agency Relationships:

Differing Views:

1. Agent of Shipper. *Zenith Elec. Corp. v. Panalplina, Inc.*, 68 F.3d 197, 198.

2. Depends upon facts of particular freight scenario. *Constructors Tecnicos v. Seafood Serv., Inc.*, 945 P.2d 841, 846 (5th Cir. 1991).

3. Independent Contractor. *Koninklijke Nedlloyd BV. v. Uniroyal, Inc.*, 433 F. Supp. 121, 128 (S.D.N.Y. 1977);

4. Service is indicia. *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971) (noting service for others as one indication of independent contractor's status).

Limitation of Liability Issues:

1. Released value doctrine applies.

Transportation Brokers

Definition:

1. Broker: A person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation. 49 U.S.C.§ 13102(2).

2. A broker does not have a role in the actual assembly or carriage of the goods. *Transportation Revenue Management, Inc. v. First NH Investment Services Corp.,* 886 F. Supp. 884, 886 (D.D.C. 1995).

3. An independent party serving as a middleman between motor carriers and the shipping public. *Reiter v. Cooper,* 507 U.S. 258 (1993); arranges transport with a motor carrier for shipper for compensation, but does not act as a carrier which actually provides transport for compensation.

4. Determination as to broker or forwarder status based upon what services entity offers rather than declared purpose. *United States v. California,* 297 U.S.C. 175, 181 (1936).

5. Both domestic and international air freight forwarders may act simply as brokers in arranging transportation with a carrier as an agent for a disclosed principal (14.C.F.R. 297.5 (1992)); *See St. Laurent v. Air Freight Transportation Corporation of N.J.*, 86 A.D.2d 511, 445 N.Y. F.2d 745 (1st Dept. 1982).

Liability Regime:

1. Non-Carmack, common law, contractual, *See Servicemaster Co. v. FTR Transport, Inc.* 868 F. Supp. 90, 95 (E.D. Pa. 1994) (contract between broker and shipper not subject to federal regulation). Released value doctrine does not apply. *Chemsource v. Hub Group, Inc.,* 106 F.3d 1358, 1361 (7th Cir. 1997); *Custom Cartage, Inc. v. Motorola, Inc.,* Fed. Cas. (as. P. 84,082) (N.D. Ill. 1999). Also, potential tort liability for negligent selection. Negligent selection causes of action are oft alleged, but rarely have succeeded. Most courts find that the broker is obligated to ensure that the motor carrier is appropriately insured and has a satisfactory rating with the DOT.

2. Carrier/shipper may also seek recovery directly from broker's surety. Of course, this recovery is limited to the amount of the broker's surety bond on file– generally $10,000.00. *See Milan Express Co. v. Western Surety Co.,* 792 F. Supp., 571 (M.D. Tenn. 1992).

Registration Requirements:

1. Must register with DOT.

Agency Relationships:

Generally considered independent contractors; sometimes considered shippers' agents. *Cf. Gelfand v. Action Travel Center, Inc.,* 55 Ohio App. 3d 193 (1988).

Limitation of Liability Issues:

Released value doctrine does not apply to brokers. *Chemsource, Inc. v. Hub Group,* 106 F.3d 1358, 1361.

Air Freight Forwarders

Liability Regime:

Federal aviation law has historically recognized both direct and indirect air carriers. *DHL Corp. v. CAB,* 584 F.2d 914 (9th Cir. 1978). Ordinarily, direct carriers perform custodial transportation while indirect carriers undertake to be legally responsible for safe delivery and provide logistical support including procuring and assembling cargo for shipment, packaging, booking cargo and arranging for surface transportation.

An indirect air carrier has been defined as a freight forwarder who issues an airway bill, *Martin Marietta Corp. v. The Harper Group,* 950 F. Supp. l250 (S.D.N.Y. 1997), and is treated as a carrier under the Warsaw Convention. *Pan Am v. CF. Freight,* 23 Avi. Cases 17, 189 (S.D.N.Y. 1990).

An indirect air carrier is treated as a custodial carrier both under federal common law on domestic moves and under the Warsaw Convention in international carriage and is afforded the same defenses and opportunities for limitation of liability. *Confeccos Texteis DeVouzela v. Space Tech Systems Inc.,* 972 F.2d 1338 (9th Cir. 1992).

Warsaw Convention Applicability to Air Freight Forwarders:

Section I of Article 18 of the Warsaw Convention requires that the loss be "presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air." 49 U.S.C. § 40105, Article 18. However, this presumption may be rebutted by evidence demonstrating that the loss occurred on land or in a warehouse outside the airport. *See Victoria Sales Corp. v. Emery Air Freight, Inc.,* 917 F.2d 705, 706-07 (2d Cir. *1990); Royal Ins. Co. of America v. Air Express Int'l,* 906 F. Supp. 218, 219-20 (S.D.N.Y. 1995).

Carmack Applicability to Air Freight Forwarders:

The Carmack Amendment applies to the extent freight is transported by motor carrier (1) between a place and (a) a place in another state. Carmack Amendment, 49 U.S.C. §10521(a)(1)(a). The Carmack Amendment does not apply to transportation provided on contiguous municipalities, or in a zone that is adjacent to and commercially part of the municipality. *Id.* at § 10526(d). For instance, transport from Newark to New York City is within the same commercial zone and is not governed by the Carmack Amendment. *See Sega v. AM. Express Freight,* 1985 WL 577784 at *5 (quoting 49 C.F.R. § 1048.20(a)(b)). Contrarily then, if air freight forwarders become involved in interstate land transport, outside the airport's commercial zone, their liability *may* be governed by Carmack.

However, if Carmack does not govern, federal common law does, and federal common law incorporates the released value doctrine. *First Pennsylvania Bank v. Eastern Airlines,* 731 F.2d 11 13, 1122 (3d Cir. 1984).

Air freight forwarders are exempt from Carmack applicability where the air freight forwarder's use of motor transportation is necessitated by circumstances, such as weather or mechanical failure which is beyond the control of the air freight forwarder. Overbooking or over-solicitation of air space does not create the type of emergency situation contemplated by this provision. *See Phoenix Assurance Co. v. K-Mart Corp.,* 977 F. Supp. 319, 324 (D. N.J. 1997); *Quality Exchange, Inc. v. Universal Air Freight, Inc.,* 574 F. Supp. 622, 625 (W.D. N.C. 1983) (gathering authorities).

Liability Limitations:

Air freight forwarders or indirect carriers may limit their liability under federal common law, on a released valuation basis. *Deiro v. American Air Lines, Inc.,* 816 F.2d 1360, 1365 (9th Cir. 1987) (under released value doctrine, in exchange for low carriage rate, passenger-shipper deems to have released carrier from liability beyond a stated amount). Such a liability limitation is enforceable only if: (1) it resulted from a fair, open, just, and reasonable agreement between carrier and shipper, entered into by the shipper for the purposes of obtaining the lower of two or more shipping rates-proportioned to the amount of risk, and (2) the shipper was given the option of additional

recovery upon paying a greater rate. *See Williams Dental Co. v. Air Express Int'l*, 824 F. Supp. 435, 441 (S.D.N.Y.), *aff'd mem*, 17 F.3d 392 (2d Cir. 1993). In determining whether these requirements for enforceability of the air forwarders liability limitations are met, courts have considered such factors as: (1) whether the carrier was given adequate notice of the limitation of liability to the shipper, (2) the economic stature and commercial sophistication of the parties, and (3) the availability of 'spot' insurance to cover shipper's exposure.

Customs Brokers

Definition:

A customs broker is a person who is licensed under 19 CFR 111.1 to transact customs business on behalf of others. Customs brokers prepare customs documents for clearance through U.S. Customs and the customs departments of foreign shipping destinations. They deal with the entry and admissibility of the merchandise pursuant to these customs regulations, the classifications and valuation thereof, the payment of duties, taxes or other charges assessed or collected by Customs upon merchandise by reason of its importation, or the refund or rebate or drawback thereof. *See* 19 CFR 111.1. *See also, General Electric Co. v. Harper Robinson & Co.*, 18 F. Supp. 31, 34 (S.D.N.Y. 1993).

Liability Regime:

Common law and Contractual

Limitation of Liability Issues:

The Customs Modernization Act of 1993, 19 U.S.C. §1641 (the "Mod Act") provides at (f) that: "The Secretary may not prohibit customs brokers from limiting their liability to other persons in the conduct of customs business. . . ".

However, in any event, if a claim against a customs broker is not related to any error or breach of its contract as a customs broker, but instead emanates from the broker's arranging for the delivery 'of freight once it has passed through customs, a customs broker can limit its liability, particularly when there is an established prior course of dealings between the customs broker and the shipper. *See General Electric Co. v. Harper Robinson & Co.*, 818 F. Supp. 31, 35 (E.D.N.Y. 1993); *Calvin Klein Ltd. v. Trylon Trucking Co.*, 892 F.2d 191, 195 (2d Cir. 1989) (upholding $50.00 limitation on

liability where parties were business entities with ongoing commercial relationship involving numerous prior transactions); *Capital (converting Equipment v. LEP Transport, Inc.*, 750 F. Supp. 862 (N.D. 111. 1990), *aff'd.* 965 F.2d 391 (7th Cir. 1992).

Shippers' Agents

Definition:

Arranges for transport on behalf of the shipper.

Registration Requirements:

Need not register with FHWA.

Liability Regime:

NonCarmack; common law; contractual. *Tuggle v. Piggyback Consolidated, Inc.*, 1997 U.S. Dist. LEXIS 22175 (C.D. Cal.)

Agency Relationships:

> Agent of Shipper: An agent with no ownership interest in the goods who is acting on behalf of a disclosed principal is not liable for breach of contract by the principal. *See Ariel Maritime Group, Inc. v. Zust Bachmeier of Switzerland, Inc.,* 762 F.Supp.55, 59 (S.D.N.Y. 199 *1); Seguros Banvenez, S.A. v. SIS Oliver Drescher,* 761 F.2d 855, 860 (2d Cir. 1985); *Interocean Shipping Co. v. National Shipping and Trading Corp.,* 462 Fd.673, 678 (2d Cir. 1972); *Sea-Land Serv., Inc. v. Amstar Corp.,* 690 F. Supp. 246 (S.D.N.Y. 1988).

Logistics Managers

Definition:

Logistics managers provide seamless transportation service. They may operate their own trucks or hire carriers to pick up shipments and take them to the logistic manager's dock for packaging, consolidating and loading to carrier's facilities, or they may conduct these services on the shipper's premises. 'The logistics manager functions as a broker, a freight forwarder and a customs broker. Normally, logistics managers are not responsible for safe delivery unless they have held themselves out as a carrier by either promising safe delivery or issuing their own airway bill (for air cargo). *Pan American World Airways Inc.* v. C*F. Air Freight Inc.*, 23 Av.Cas. (CCH) §17,189 (S.D.N.Y. 1990).

Registration Requirements:

None.

Liability Regime:

Common Law, contractual.

Agency Relationships:

Generally, a shippers' agent.

The evolution of liability regimes, legal principles and categorization issues as applied to intermediaries is evolving on a daily basis. This area is also one of the fastest growing, and fastest changing, aspects of the transportation business itself, particularly as it is spurred by the rampant growth of the internet, e-commerce, and the proliferation of dot-coms. That growth has already spawned new and different categories of intermediaries, such as internet freight consolidators and internet freight exchanges, which are out there doing business now. These entities cannot be easily pigeonholed into existing intermediary categories. Consequently, they will undoubtedly spawn interesting new legal, contractual and registration issues down the road (and probably another outline.)

Case Studies: The Logistics Miasma Swirls

The services and roles of third party logistics providers, such as transportation brokers, logistics managers, surface freight forwarders, and international freight forwarders are a constantly evolving work in progress. The role of the freight intermediary expands and contracts, based upon the nature of the multimodal transport involved, the exigencies of the marketplace, and the tectonics of the intertwined global economy. Oftentimes, that role only truly crystallizes in the crucible of the actual transport of the freight itself. The dizzying array of liability regimes that are involved in domestic and international multimodal shipments, lends itself to theories and allegations which seek to characterize freight intermediaries as *shippers*, as *carriers*, as NVOCC's, warehousemen and even as *manufacturers' suppliers*. As courts seek to walk this tightrope of interlocking and overlapping liability regimes, they reason their way to conclusions that often run afoul of the conclusions from *other* jurisdictions, but nonetheless serve as precedent, and didactic examples of pragmatic lessons.

To Be or Not To Be? Is a Broker, a Motor Carrier.

At the threshold of any analysis in many cases involving freight intermediaries is the initial categorization inquiry. Is the entity a transportation broker? A freight forwarder? A carrier, or even a shipper? This issue was recently addressed in *Roadmaster (USA) Corp. v. Calmodal Freight Systems, Inc.*, 153 Fed. Appx. 827; 2005 U.S. App. LEXIS 23203 (3rd Cir. 2005). In that case, Roadmaster, an importer, sued Calmodal, alleging that Calmodal breached an oral agreement for the interstate transport of goods. Roadmaster contended that Calmodal acted as an interstate carrier, and not a broker, for these freight shipments. The parties agreed that if Calmodal was a broker, it would not be liable under the Carmack Amendment for freight loss and damage. At trial, the court found that Calmodal did not act as an interstate motor carrier, relying upon testimony that Calmodal had merely "arranged for" the interstate transportation.

> Even if Roadmaster had not waived the right to present the issue, its argument lacked merit. Roadmaster seeks to invalidate the contract between itself and Calmodal as illegal, and therefore unenforceable, because Calmodal allegedly violated the Interstate Commerce Act by acting as a broker without a license. However, the Act provides a specific penalty for brokers operating without a license. *See* 49 U.S.C. Section 14901(a) (providing that a person that 'does not comply with Section 13901 is liable to the United States for a civil penalty of not less than $500 for each violation and for each additional day the violation continues). It is inappropriate to 'add judicially to the remedies' by rendering a private contract void when a Congressional statute provides specific penalties for violation. *See Kelly v. Kosuga*, 358 U.S. 516, 519, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959).

Id. at 830. Thus, the distinction between whether the entity is a carrier or a broker can mean the difference between significant freight loss and damage liability. If an alternate breach of contract claim is not pleaded against the transportation broker, that cause of action may also be lost. Finally, a base level of inquiry in dealing with any freight intermediary is to confirm that it is licensed. While that lack of a license was not determinative in this case, it can be a factor in other determinations by the court, or by a jury.

The Himalayas Reach Ohio – Kirby Lives!

Recently, the U.S. Supreme Court, in a rare foray into freight loss and damage and liability limitation scenarios, found, in *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, that a Himalaya clause in a maritime bill of lading extended liability limitations to downstream inland carriers in the shipment sequence. Despite an anomalous decision from the Second Circuit, Kirby is the standing extant pronouncement of the U.S. Supreme Court on this issue.

This issue was discussed in a typically complicated freight loss and damage scenario for an international shipment in *Limited Brands, Inc. v. F.C. (Flying Cargo) Int'l Ltd.*, 2000 U.S. Dist. LEXIS 17029 (S.D. Ohio 2006). In that case, Limited Brands, Inc. sought recovery for freight lost in transit from Israel to Columbus, Ohio. Mast Enterprises, Inc. ("Mast") was a Limited subsidiary that arranged for the delivery of manufactured goods to Columbus. Mast had purchased certain goods from the manufacturer in Tel Aviv, Israel, which Mast subsequently sold to Victoria Secret, also a Limited subsidiary.

Mast then contracted with F.C. Flying Cargo International ("Flying Cargo") for the shipment of the 596 cartons of garments from Israel to Columbus, Ohio. Flying Cargo hired its affiliate, Danmar Lines, to arrange for the carriage of the merchandise. Danmar accepted the merchandise for carriage and issued a master airway bill and bills of lading for the shipment, which was loaded into a container in Israel.

Mast had a long-term agreement with Flying Cargo for freight forwarding services from Israel to Columbus. Flying Cargo acted as the local agent in Israel for the parent company of Danmar, Danzas AEI International, Inc. Flying Cargo issued the bills of lading as agent of Danmar. Flying Cargo was listed on each of the bills of lading as the "forwarding agent" and "agents for the carrier".

Danmar then retained ZIM Container Lines ("ZIM") for ocean transport of the shipment from Israel to New York. Danmar also retained defendant Cargo Connections Logistics Corp. ("Cargo Connections") to transport the shipment overland from the U.S. port to the freight port's station in Columbus, Ohio. Cargo Connections then retained Palmer Industries to transport the container to Columbus.

The container arrived in New York without incident. One week later, Cargo Connections hauled the container from the port terminal in New York to a freight station in New Jersey, for overnight storage prior to its transportation to Ohio. Palmer Industries was in charge of operating this facility. Sometime after its arrival, the container was stolen from Palmer Industries' facility.

The bills of ladings for the shipments issued by Danmar contained a Himalaya clause, and a subcontracting clause by which the carrier was entitled to subcontract portions of the carriage. The Himalaya clause made clear that all defenses and limitations of the carrier shall be available to all persons of whose services the carriers makes use for the performance of the contract. The clause also contained a covenant by the shipper not to sue entities in the shipment sequence, other than the carrier. The Limited plaintiffs brought an action alleging that all the defendants were liable under the Carriage of Goods by Sea Act ("COGSA").

All defendants filed motions for summary judgment. Flying Cargo also filed a motion to dismiss on the grounds that there was no personal jurisdiction over it in Ohio. Flying Cargo contended that it was incorporated under the laws of Israel, had its principal place of business in Israel, had no officers, employees or other business related activity in Ohio and that its only point of contact with Ohio was this single shipment. The Limited presented an affidavit stating that Mast and Flying Cargo had a "long-term business relationship", in which Mast used Flying Cargo for freight forwarding services. In light of that allegation, the court found that there *was* personal jurisdiction over the Israeli corporation, in Ohio. This is not overly surprising, since the court specifically recognized that in our multi-modal global economy, freight movements may invoke liability in distant fora: "The court also considers the inherently multi-national and multi-modal nature of COGSA cases in the maritime character of the contracts at issue in this case." *Id.*, Slip op. at 6, n. 5.

The other defendants moved to dismiss on the basis of the covenant not to sue provision. The court then discussed the ramifications of *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004):

> A limitation of liability provision, commonly referred to, as in this case, a Himalaya clause, extends to inland carriers. In *Kirby*, the Supreme Court announced that Himalaya

> clauses, properly drafted, extend downstream to all sub-carriers. The Court noted that, in complex over-seas cargo cases, the parties recognize and contemplate the use of various modes of transportation. According to the court, this industry practice means that the parties must have anticipated that the services of a land carrier, not just the original overseas carrier would be necessary in performing the contract.

Id., slip op. at 6-7. Further explaining *Kirby*, the court noted that:

> The more general issue was whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation. The Supreme Court found that the contracts arranged by the intermediary-freight forwarder prevented the cargo owner from suing the land-carrier for more than the freight forwarder negotiated. The Court held that 'when it comes to liability limitations for negligence resulting in damage, an intermediary can negotiate reliable and enforceable agreements with the carriers it engages'. *Kirby*, 543 U.S. at 33. Thus, an intermediary freight forwarder binds a cargo owner to the liability limitations it negotiates with downstream carriers.

Id., slip op. at 7.

Consequently, the court found that *Kirby* "compelled the conclusion" that Palmer Express and Cargo Connections *could* invoke the maritime bill of ladings' Himalaya clause. However, as the court explained, the action *could* continue against Danmar:

> *Kirby* emphasized that the shipper retained the right to proceed against a carrier who, as the party with full knowledge of the bills of lading at issue 'should bear responsibility for any gap between the liability limitations and the bills.' *Kirby* 543 U.S. at 35. Section 1303(8) of COGSA similarly prevents a carrier from completely exonerating itself from liability. Inasmuch as the covenant not to sue contained in the bills of lading does not relieve the carrier, in this case Danmar, from liability, it comports with section 1308(8) of COGSA.

Id. at 7.

The court also noted that neither COGSA nor the bills of lading precluded Danmar from pursuing its subcontractors for indemnity or contribution. Also, even

though plaintiffs had not chosen to avail themselves of their rights against the carrier Danmar, that did not render the bills of lading and the covenant not to sue therein contrary to COGSA. The court then dismissed plaintiff's claims against Palmer Industries and Cargo Connections.

The liability of freight forwarder Flying Cargo, however, was a different story. The court directly pointed out the *Kirby* intent to protect *downstream* maritime and inland carriers. It was doubtful that Flying Cargo was a downstream carrier. As the court explained:

> Nonetheless, the relationship between plaintiffs and Flying Cargo is a separate matter from the liability of downstream carriers. Having authorized Flying Cargo in some manner to enter into transportation agreements, plaintiffs are bound under *Kirby* to the agreements this intermediary made with third-party subcontractors. *Kirby*, however, does not vitiate all liability between carriers, or freight forwarders acting as common carriers, and cargo owners.

Id., slip op. at 8. The court then denied the summary judgment motion filed by lying Cargo.

This case elucidates upon several important points. First, in spite of the itinerant holding in the Second Circuit, *Kirby* remains the law of the land. Its finding that Himalaya clauses protect downstream inland carriers is coalescing and crystallizing with each decision of its progeny. Shippers should know that the limitations *of which they are aware*, can protect downstream carriers and intermediaries, *of whom they are unaware*. However, intermediaries, carriers, and their counsel should remember to scrutinize where in the shipping sequence their actions fall. *Kirby* does not apply to upstream carriers or intermediaries, as this holding confirms.

The Edge of the Envelope: Freight Forwarder as Manufacturer Supplier?

As phenomena such as freight assembly warehouses, just in time inventory and RFID continue to grow and evolve, so do the categories into which plaintiffs attempt to pigeonhole freight forwarders. This expansion is exemplified in the recent case of *Delgadillo v. Unitrons Consolidated, Inc.,* 191 Fed. Appx. 547; 2006 U.S. app. LEXIS 18331 (9th Cir. 2006). In that case, plaintiffs Alfredo Delgadillo and his wife filed a *product liability claim* against freight forwarder Unitrons Consolidated Inc. ("Unitrons")

and freight forwarder Superspeed Transportation Inc. ("Superspeed") The district court granted summary judgment to the defendants, and the plaintiffs appealed.

Delgadillo sought to hold the forwarders liable under a provision of the Idaho Product Liability Act that holds: "[a] product seller, other than a manufacturer, is also subject to the liability of the manufacturer . . . if [t]he manufacturer is not subject to service of process under the laws of the claimant's domicile; or . . . [t]he claimant would be unable to enforce the judgment against the product manufacturer." The manufacturer in this instance was admitted to be unavailable under the Act. Consequently, the forwarders would be liable under Idaho's Act if they were determined to be "product sellers" under that Act.

The Act defined "product seller" as: "any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use of consumption". The defendants contended that they were freight forwarders. They described themselves as "travel agents for cargo". They contended that their role was simply to "arrange for the shipment" of the subject machine to the United States, prepare the paperwork and collect and pay freight charges. These activities, the forwarders asserted, were insufficient to qualify them as "product sellers" under the Act.

In reviewing the District Court's summary judgment decision, the Appellate Court discoursed that:

> The district court properly focused its attention on the nature of [the forwarder's] involvement in placing the product into the stream of commerce. Viewing the evidence in the light most favorable to the [forwarders], the district court determined that: (1) the lack of a freight forwarding license could lead a reasonable trier of fact to infer Appellees had sold the product; (2) the invoices demonstrating Appellees engaged in other transactions involving industrial equipment could lead a reasonable trier of fact to infer the Appellees have sold other products; (3) the Appellees' insurance policy could lead a reasonable trier of fact to infer Appellees feared liability for distribution of products and; (4) the Appellee's possession of a negotiable bill of lading could lead a reasonable trier of act to infer the appellees had title to the product.

Id., slip op. at 4.

The court agreed, however, with the district court that this evidence was insufficient to find that the forwarders were product sellers under the Act. There was no evidence that the sale of the product was the principal purpose of the transaction. The invoices and insurance policy only permitted a reasonable fact finder to infer that the forwarders may have been involved in the sale or distribution of other goods, not that they had sold or distributed the relevant product at issue. As the court elaborated:

> [T]here is little evidence from which a reasonable trier of fact could conclude that the [forwarders] benefited from the sale of the product; there is no evidence that [the forwarders] advertised the product, marketed the product, financed the purchasing of the product, or created consumer demand for the product; and there is no evidence Appellees had any knowledge or control over the product. Rather, all the evidence tends to show that [the forwarders] acted as typical freight forwarders and their role was merely to arrange the transportation of the product from the Chinese manufacturer-seller to the American buyer.

Id.

This holding draws a line in the sand as to the expansion of freight forwarder categorization. There are similar statutes in the product liability acts of most states, in light of the manufacture of many consumer products overseas. Consequently, such an attempt may be made in other jurisdictions. If a freight forwarder or warehousing company plays a role in actual final assembly of products, it could very well metamorphose into a "manufacturer supplier" under a state's product liability statute. Another item of note is that once again, the fact that the freight forwarder was unlicensed, although not determinative, most certainly did not help the freight forwarder in the court's analysis.

The Customs Broker Feature of Logistics Management; A Form Endorsement of Liability Limitation

The evolving liability of customs brokers was recently discussed in *Morgan Home Fashions, Inc. v. UTI United States, Inc.*, 2004 U.S. Dist. Lexis 13412; 2004 AMC 803 (February 9, 2004, D.N.J.). In that case, Plaintiff Morgan Home Fashions, Inc. ("Morgan"), a New Jersey importer of soft goods to wholesalers and retail chains in the U.S., had contracted with Defendant UTI to serve as Morgan's customs broker. UTI

would expedite the movement of imported goods through the customs process for Morgan. UTI was a licensee of the United States Department of Homeland Security, formerly, the United States Custom Service. UTI rendered custom services to Morgan Home on over 100 prior shipments. Those shipments were memorialized by an invoice with standard contractual terms and conditions, including a limitation of UTI's liability to either $50 per shipment, or the fees charged for the services provided, whichever was less. The customer also had the option of paying a special fee to increase the limit of UTI's liability to the shipment's actual value. The terms required that such option be exercised in writing by the customer, prior to shipment. These terms and conditions had been adopted and promulgated by the National Customs Brokers and Freight Forwarders Association of America, of which UTI was a member. Other than the inclusion of these clauses, UTI had never specifically informed Morgan that its liability would be thus limited.

Morgan ended its business with UTI as a result of alleged negligence and delays relating to 42 specific shipments. Morgan then filed a complaint against UTI alleging breach of contract, negligence, breach of fiduciary duties, breach of covenant of good faith and fair dealing, and failure to properly perform services as an agent. After removal, UTI filed a motion for summary judgment, asking the court to determine that as a matter of law, its liability was limited to $50 per shipment.

The court first gave a brief history of liability limitations for customs brokers:

> For some time, Federal regulations specifically prevented custom brokers like [UTI] from limiting their liability . . . However, those regulations were overturned in 1993, thereby permitting custom brokers to use exculpatory clauses for protection from liability . . no longer barred by federal regulations, the legality of a given exculpatory clause now hinges upon applicable state law.

In examining the validity of the exculpatory clause, the court concluded that:

> Generally, the courts must ascertain whether the parties 'so clearly allocated the risks that each party knew, or should have known, the existence of its contingent liability and was thus placed in a position where it could protect itself against such laws by adequate insurance coverage or otherwise.' . . . Based on an application of these

> considerations to the instance case, this court finds that the exculpatory clause must be upheld.
>
> The terms of the contract were spelled out in plain and clear language in each of over 100 transactions between the parties. *Simply because the information was listed on the back of an invoice, does not undermine its clarity. . .* Although the small font and light print of the relevant terms may have made them somewhat difficult to read, they do not approach the near illegibility that has been deemed too inconspicuous to be enforceable. . . . In addition, *where contractual terms are less clear, repeated opportunities for review of the terms can substitute for such conspicuousness. . . . A long line of past dealings like those between the present litigants establishes that contractual terms should be understood by all parties. . . .* The exculpatory clause was included in the contract, and Plaintiff cannot escape its dictates by failing to read it as 'one who does not choose to read a contract before signing it is nevertheless bound by its terms.'

Id. (emphasis added).

The court noted other similar authority from various jurisdictions and then analyzed Plaintiff's claim that it was a smaller company than UTI and thus should receive deferential treatment:

> It is uncontested that Plaintiff failed to object or request changes to the limitation of liability despite an express contractual provision which gave them the opportunity to do so. Although Plaintiff asserts a significant difference in the size of the companies, this is not sufficient to establish that the parties were on unequal footing with respect to the transactions in dispute. *Where the smaller of two businesses is nonetheless experienced in the world of making contracts, no inequality has been found.*

Id. (emphasis added).

The court next considered, and rejected, Morgan's rather creative policy arguments:

> Plaintiff maintains that 'the business of importing goods into the United States would come to a standstill without federally licensed and regulated custom's brokers . . . It is a violation of public policy to permit a licensed

> professional to contract away its professional obligations.' [quoting Morgan's brief]. Such an assertion runs directly counter to the 1993 decision by Congress to repeal the restriction on the use of exculpatory clauses by custom brokers. This legislative decision was a pronouncement of public policy which the court sees no reason to invalidate. Moreover, the fact that the contractual provision has been a standard contractual clause approved by the National Custom Brokers and Forwarder Association of America, Inc. and promulgated to its members for some time without manifesting any significant problems provides further evidence that the public at large has not been injured by its use.

Id.

Finally, the court rejected Morgan's claim that the small monetary size of the liability limitation itself would render it unenforceable:

> Finally, Plaintiff's claim that the maximum liability as provided in the contract 'is a mere pittance' with respect to the value of the shipments does not suffice to render the exculpatory clause unenforceable. The size of the liability cap is relevant only in its relation to the size of the expected compensation to the party who is protected by the cap on liability, in this case, the Defendant. The appropriate inquiry in this context is thus 'whether the cap is so minimal compared with the expected compensation, that the concern for the consequences of a breach is drastically minimized.' . . .
>
> * * *
>
> Whether the size of the liability cap is disproportionate to the size of Plaintiff's damages (and to Defendant's exposure to liability), as Plaintiff contends, is of little legal import. The liability cap in the invoice was not mandatory and could have been adjusted pursuant to Section 8(b) [of the Contract]. The parties presumably could have also purchased insurance to cover the risk of potential damages."

Id. The court then granted the motion of UTI to cap liability of $50 per shipment. Obviously this case is helpful to all of those entities that seek to assert liability limitations. These limitations are often contained in various contracts in any shipping sequence, including those used by freight intermediaries.

Conclusion:
The Brave New World and the
Crystallization of New Functions and Relationships

The growth of third-party logistic managers and, now, fourth-party logistic managers, has burgeoned in recent years. Shippers and consignees are striving for—and indeed—demanding, just-in-time inventory, "one stop shopping", electronic tracking of shipments, and any other innovations that will make their supply chains more efficient. While the traditional surface freight forwarders, transportation brokers, and air freight forwarders still do a regular and consistent business, logistics managers, 3PL's and 4PL's, are becoming ever more prevalent in the transportation industry. These entities are not easily pigeonholed. Often, they transcend statutorily defined transportation entity categories. On many occasions, they are involved in various aspects and links in the transportation continuum. Their activities also often cross international borders, in addition to transcending transportation modes.

Because of this metamorphosing amalgamation of functions, new relationships in the transportation continuum are being formed that simply did not exist before. These relationships are often fluid and transitory. On other occasions, these relationships can be summarized, and can sometimes be captured and memorialized, in contractual documents. The case law involving freight loss and damage claims, freight charge issues and even personal injury liability has been well ensconced for many years, with numerous previously irrefutable principles. However, the fluid and instantaneously reactive expansion of logistic managers, 3PL's, and 4PL's is causing courts to recognize that they must adopt new legal principles, and legal analyses, to, in essence, catch up with the industry.

***Kirby v. Sompo*:**

How the Second Circuit Has Reversed the Supreme Court of the United States

Hyman Hillenbrand, Esq.[22]

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In November of 2004, a unanimous Supreme Court of the United States in the case of *Norfolk & So. Ry Co. v. Kirby*, 543 US 14 (2004), clearly explained the relationship between maritime law and U.S. domestic transportation law on a multimodal shipment. Kirby was an Australian manufacturer that sold all of the components of a catalytic converting manufacturing plant to General Motors to be installed at their facility in Huntsville, Alabama. There were 10 large components, each of which was placed in a large wooden crate, which in turn would be placed into 10 maritime containers to provide multimodal transportation between the manufacturing facility in Sydney, Australia and the G.M. plant in Huntsville, Alabama. There would be a motor carrier leg from the manufacturing facility to the port in Sydney, ocean transit between Sydney and Savannah, Georgia, and rail transit between Savannah and the G.M. plant in Huntsville, Alabama.

Kirby put up for bids its transit requirements in Australia to find someone to arrange the transportation on its behalf. It hired an international freight forwarder by the name of ICC, which entered into a written contract with Kirby. The international freight forwarder's contract limited ICC's liability to $500 per package, pursuant to the provisions of the Carriage of Goods by Sea Act. Kirby was offered an opportunity to pay a higher rate, i.e. an ad valorem charge to get higher liability, but instead it chose to purchase insurance to cover the difference between the $500 per package and the full value of the components of the plant which it had sold to General Motors for $1.4

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million. The ICC contract further provided that ICC was authorized to make transportation arrangements on Kirby's behalf on any terms it thought prudent.

ICC then contracted with the Hamburg-Sud Lines to provide ocean carriage from Sydney to Savannah, Georgia. In almost identical language, ICC agreed with Hamburg Sud to limit Hamburg Sud Lines' liability to $500 per package, pursuant to the provisions of the Carriage of Goods by Sea Act. Hamburg Sud provided ICC as its shipper with the identical opportunity to declare a higher value, and pay higher transportation charges, which ICC declined because it had no instructions from Kirby to do so, and because it was the low bidder to make the transit arrangements, and that required that the cargo be shipped at the $500 package limitation. The Hamburg Sud bill of lading, however, was an intermodal bill of lading form because it contracted with ICC to deliver the goods to General Motors in Huntsville, Alabama.

Hamburg-Sud in turn contracted with Norfolk Southern to provide the rail transportation between Savannah, Georgia and Huntsville, Alabama, pursuant to a Norfolk Southern exempt circular contract. In that contract Norfolk Southern's liability was equivalent to the lowest limitation of liability of any carrier from origin to destination, with a maximum cap on overall liability of $100,000 per shipment.

Both Hamburg Sud's bill of lading as well as ICC's bill of lading conferred all of the rights and liability limitations to their agents and servants and inland carriers under the standard Himalaya clause.

Everything went well in transit until approximately 100 miles prior to destination, when the Norfolk Southern train was involved in a derailment, and all of the 10 containers and their contents were destroyed. Kirby, of course, received full payment pursuant to its insurance policy, and when Norfolk Southern, the only carrier against whom a claim was filed, offered $5,000, suit was filed against Norfolk Southern in the United States. Kirby's insurer filed a separate suit against ICC in Australia, and a settlement was made pursuant to a confidentiality agreement, the terms of which were never disclosed to anyone.

The suit that was filed in the District Court of Atlanta alleged common law negligence causes of action. Norfolk Southern moved to dismiss the complaint based upon preemption of Carmack and the Carriage of Goods by Sea Act, and the common

law causes of action were dismissed, and an amended complaint was filed for breach of contract and breach of the Carmack Amendment obligations. Summary judgment was thereafter granted in the district court, limiting the liability of Norfolk Southern to $5,000, pursuant to the provisions of the two Himalaya clauses, the $500 package limitation under C.O.G.S.A., and many prior decisions holding that the inland carrier would get the benefit of the maritime contracts where they were hired by the maritime carrier to perform an inland leg of a multimodal shipment.

The Eleventh Circuit reversed, holding that ICC was an independent contractor, and that Kirby was not bound by the Hamburg-Sud bill of lading, and therefore Norfolk Southern was not entitled to limit its liability against Kirby, despite the clear language in the two bills of lading, and despite the opportunity of Kirby and its agent to pay a higher rate and get full liability. It was also argued in the Eleventh Circuit by Professor Sturley that the Australian shipper under the Carmack Amendment was not offered a choice of rates and choice of liabilities by Norfolk Southern, and therefore the limitation of liability was ineffective vis-à-vis Norfolk Southern. The Eleventh Circuit liked the agency argument better because it broke the chain between Kirby and Norfolk Southern, thus giving Kirby's insurance company a windfall recovery against Norfolk Southern.

In the Supreme Court decision, the Supreme Court recognized a long line of Supreme Court cases which stood for the proposition that he who hires someone to make transportation arrangements for his cargo is bound by the agreement made by the parties. In fact, in following that principal laid down by the Supreme Court in 1874 and reaffirmed in 1914 in *Great N. Ry. v. O'Connor*, 232 U.S. 508 (1914). The Second Circuit itself had reaffirmed that principal in the case of *Nippon Fire & Marine Ins. Co. v. Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), where the agent who made the arrangements violated his authority because he was specifically prohibited from shipping at a limited liability, and nevertheless the Second Circuit upheld the limited liability of the two airlines that shipped the computers at a minimum value.

Further, The Supreme Court indicated that if the parties agree that pursuant to the provision in the Carriage of Goods by Sea Act, Sec. 7 the parties were at liberty to extend the Carriage of Goods by Sea Act inland, and both bills of lading did so. Thus, The Supreme Court following many prior precedents came to the conclusion that if the parties

extend COGSA inland, as Congress had intended, and if the maritime bill of lading provides through its Himalaya clause defenses for inland carriers and agents, then international shippers such as Kirby would be bound by the terms of the agreement made on their behalf, and thus The Supreme Court reversed the Eleventh Circuit's decision and held that Kirby's insurer could only recover the $500 per package that it had agreed to when it hired ICC. To be sure, Professor Sturley argued in his Supreme Court brief that the Carmack Amendment and the failure of Norfolk Southern to give Kirby a choice of rates and choice of liabilities prohibited Norfolk Southern from limiting its liability to Kirby. Because of the multimodal nature of the shipment, The Supreme Court brushed away that argument, and another argument in the *Colgate-Palmolive Co. v. Dart S/S Canada*, 724 F.2d 313 (2d Cir. 1983) case where that Court held that local law applied, thus ignoring all of the provisions the parties had agreed to in the maritime contract.

Then along comes *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, 456 F.3d 54 (2d Cir. 2006), where the Union Pacific was hired to transport a shipment of cargo that was damaged in transit on Union Pacific. In *Sompo*, the ocean carrier's bill of lading contract limited Union Pacific's liability to $500 per package via the Himalaya clause and Union Pacific's own exempt circular offered the ocean carrier and opportunity to declare a higher value and pay a higher rate but since Sompo's insured did not declare a value to the ocean carrier, the ocean carrier did not declare a value to Union Pacific. Consistent with Kirby the district court judge granted summary judgment limiting Union Pacific's liability to $500 per package.

In the 2d Circuit, the Union Pacific relying on Kirby argued that pursuant to the ocean carrier's bill of lading contract, the extension of COGSA inland, and the Himalaya clause protecting inland carriers, Union Pacific's liability was limited to $500 per package. In reversing the district court, the Second Circuit, in a 50-page pseudo-scholarly opinion held that The Supreme Court was wrong in its analysis, claiming that the Carmack Amendment trumped the contracts entered into by the parties and that the Union Pacific had to offer the shipper, (not its shipper, the ocean carrier), an opportunity to declare a higher value and pay a higher rate.

The Second Circuit did this based on a number of false premises that appear in its pseudo-scholarly decision. First, it erroneously concluded that the issue of Carmack

Amendment was never argued to The Supreme Court by Professor Sturley, and therefore The Supreme Court overlooked the effect of the Carmack Amendment. Can you imagine Professor Sturley failing to make such a basic argument? In fact, he made such an argument, but The Supreme Court found that the actual contracts between the parties governed the transportation at issue.

Second, the Second Circuit erroneously concluded that on multimodal shipments, the Carmack Amendment's provisions clearly applied, whether or not the contracts made for the transportation recognized that fact. The original Carmack Amendment had its own jurisdictional provision. It governed shipments from one state in the United States to another state in the United States, and shipments from one state in the United States to an adjacent foreign country. It never covered shipments from a foreign country into the United States. As far back as the *Alwine v. Pennsylvania R. Co.*, 15 A. 1d 507 (Pa. Sup. Ct. 1940) decision in 1940, and the cases that followed *Alwine*, it has always held that a through shipment made under a Canadian bill of lading into the United States was governed by Canadian law and a Canadian bill of lading. The Second Circuit overruled all those decisions by holding that the recodification of the Carmack Amendment, which was not supposed to change its content, in fact now made any shipment that had any transportation in the United States, even intra-state, subject to the Carmack Amendment.

Third, it overlooked the specific provision in the Carriage of Goods by Sea Act which allows the parties to insert in the contract a provision that COGSA governs domestic U.S. transportation extending COGSA inland (actually, prior to or after the tackle-to-tackle COGSA service).

Clearly, for someone who participated in writing the briefs and constructing the oral argument in The Supreme Court, the *Sompo* decision is wrong on so many levels based upon basic court structure. Even if the Second circuit believed that The Supreme Court made a wrong decision, it was duty bound to follow that erroneous decision until such time that The Supreme Court itself would reverse its position.

Recently, the Eleventh Circuit in the *Altadis USA, Inc. v. Sea Star Line LLC*, 458 F.3d 1288 (11th Cir. 2006) case followed the decision in *Kirby* after having been reversed based upon its decision in the *Kirby* case itself. The Supreme Court accepted *cert.* based upon the conflicts between the circuits, but unfortunately the case was settled before The

Supreme Court could rule. We will have to wait until another day for the Second Circuit to be overruled.

The *Sompo* Decision:
A Look Back Into The Future of Intermodal Cargo Claims

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When the United States Supreme Court issued its decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), and preceded to radically extend maritime law inland to cover intermodal cargo claims, they fail to consider fundamental transportation law. Namely, they did not take note (at least overtly) that Congress had already created a statutory scheme, in the form of the Carmack Amendment, 49 U.S.C.A. § 11706, along with the Staggers Amendment 49 USC § 10502(e), which for nearly a century had already broadly regulated such cargo claims.[23]

And so on Nov. 9th, 2004-- after just one month of consideration following oral argument-- Justice Sandra Day O'Connor wrote, and the Supreme Court ruled unanimously, that the ocean liability regime passed by Congress known as the Carriage of Goods by Sea Act (COGSA) then found at 49 Stat. 1208, 46 U.S.C. App § 1303, could be applied contractually to inland intermodal railroad cargo claims, without shippers ever being offered a Carmack liability option.

The ruling was profound in its effect. Under COGSA the liability of carriers can be limited to $500 per package, a carrier can be exonerated from liability if it exercised due diligence to avoid the cargo damage, and all law suits for cargo damage must be filed within 1 year of the cargo delivery. In contrast, under the Carmack Amendment, full carrier liability is presumed (in the absence of a tightly scripted method of confirming that a shipper has agreed to a lesser released value), carriers are subject to *de facto* strict liability (subject only to a handful of relatively rare exceptions) and while claims can be

[23] The Justices were not solely at fault. Apparently the issue of the Carmack Amendment's applicability to the claim at issues was never put squarely before them by the parties. Indeed, to the contrary, at the *certiorari* stage, cargo interest brief took the position that the Supreme Court should accept the case because it did not involve Carmack.

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contractually required to be filed with the carrier within 9 months, a shipper has two years from declination of their claim before it must fie a law suit.

The anomaly of the Supreme Court's ruling did not go unnoticed by those of us who often represent cargo interests for a living. On April 27th, 2005 in the "Outside Counsel" column of the New York Journal (Volume 233, no. 80) I and my colleague Barbara Sheridan wrote as follows:

> **Carmack Amendment Ignored**
>
> Exercising this admiralty jurisdiction, the [Kirby] Court extended principles of the maritime law in order to limit the shipper's recovery for cargo damage from the railroad. Perhaps even more surprising is that the Supreme Court ignored the fact that Congress had already provided for a non-admiralty law liability scheme applicable to railroads, particularly the Carmack Amendment.
>
> Thus, with the stroke of a pen, and with no congressional mandate, admiralty lawyers, a plurality of which practice in New York, have suddenly found their area of law vastly expanded and have been called upon to master an entirely new industry over a century after its creation.

The article went on to note the enormous practical significance of the *Kirby* decision for future shippers, given the lack of voluntary incentives for the railroad industry, to offer fair rates to them:

> In holding that the train wreck in *Kirby* fell within the Court's admiralty jurisdiction, the Court thus overlooked an entire statutory scheme that Congress had already enacted to regulate the railroad industry. As noted above, the Court's ruling has the potential of denying shipper's significant rights that should be available to them pursuant to these statutes. This is particularly troublesome in that just four railroads[24] account for 95% of the industry's traffic in this country. William J. Augello, Transportation Logistics and the Law, s*upra,* p. 31. Indeed, these four railroads control over 107,500 miles of railroad track, and, as to be expected, their dominance has been enormously profitable for them; in 2002, they had combined revenue of $35.6 billion. *See* www.oligopolywatch.com/ 2003/

[24] These four railroads are Union Pacific, Burlington Northern Santa Fe, CSX Corporation and Norfolk Southern. William J. Augello, Transportation Logistics and the Law, (TCPC 2001), p. 31, note 50.

> 11/01.html, "Industry brief: US railroads". The net result of having such few railroads control the vast majority of the industry's business is that a virtual oligopoly exists in the industry, thus providing shippers with a single alternative to transport goods by rail in that region.[25] In exchange for such privileges, it can be said that Congress has required those railroads offer their shippers options such as Carmack liability.

It would be two years, however, on July 10th, 2006 before the Second Circuit Court of Appeals, tiptoeing gingerly around the evident oversight of their senior colleagues, would rule that the Carmack Amendment does indeed apply to intermodal rail cargo claims. *Sompo Japan Ins. Co. v. Union Pacific Railroad Co.,* 456 F.3d 54 (2nd Cir. 2006).

In contrast to Justice O'Connor, the Second Circuit took almost a year to write the *Sompo* opinion, which runs to almost 20 full pages on Westlaw. Noting that in *Kirby* the issue of the Carmack Amendment's applicability was not squarely raised, they did not treat it as binding precedent. Rather, they found more persuasive an exceptionally detailed District Court opinion out of the Fifth Circuit, *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 829-30 (N.D. Tex. 2003).

The *Sompo* Court ultimately reached the following pertinent transportation law conclusions:

1. Rail claims, whether they be domestic in origin or international intermodal movements, are subject to the Carmack Amendment and the Stagger's Rail Act of 1980.

2. Those domestic statues require, in order for a railroad to obtain a limitation of liability, that it must specifically offer the shipper the option of having full Carmack liability.

3. These principles apply equally to both import and export shipments.

Sompo has since been carefully followed by District Judges in the Second Circuit: *Sompo v. Union Pacific*, 2007 WL 2230091 (S.D.N.Y. 2007) (J. McMahon); *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 2007 WL 541958 (S.D.N.Y. 2007) (J. Kaplan).

[25] Union Pacific and Burlington Northern Santa Fe largely dominate the West, and CSX and Norfolk Southern dominate the East and South. *See* www.oligopolywatch.com/2003/11/01.html.

One impediment to the Second Circuit reaching its *Sompo* decision even sooner was the fact that four other Circuit Courts of Appeal previously held that the Carmack Amendment generally did not apply to intermodal shipments *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986); *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394-395, (7th Cir. 1992); *Shao v, Link Cargo (Taiwan) Ltd.* 986 F.2d 700, 701-704, (4th Cir. 1993); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003).

Reviewing those decisions, the Second Circuit concluded, "Most Courts that have answered this question tend to reiterated the Eleventh Circuit's articulation of its holding in *Swift Textiles v. Watkins MotorLines Inc. ..*" In short, the other Circuit Courts had engaged in little primary analysis beyond accepting the *Swift Textiles* ruling, which dated back twenty years. The purported ruling in *Swift Textile* was that the Carmack Amendment only applied to intermodal shipments when a separate domestic bill of lading was issued with respect to those shipments, and that had in fact become the law in four Circuits.

The Second Circuit noticed, however -- as had the Judge in *Berlanga*-- a fundamental inconsistency between the facts in the *Swift Textile* case and with the manner in which the Eleventh Circuit had articulated its holding. The holding states that the Carmack Amendment will apply " as long as the domestic leg [of the shipment] is covered by separate bill or bills of lading. But as the Second Circuit noted:

> The court's statement that a domestic bill of lading is *necessary* for Carmack to apply is perplexing to say the least. Indeed, it was the separate domestic bill of lading (covering a purely intrastate journey) in *Swift* that the motor carrier employed, unsuccessfully, to argue that Carmack *did not* apply. Once the *Swift* court had determined that the parties intended a continuous shipment from the foreign place of origin to the final destination, it deemed the separate domestic bill of lading to be irrelevant. Further, the version of Carmack in force at the time of *Swift* explicitly provided that a motor (or rail) carrier's failure to issue a bill of lading did not remove the carrier from Carmack's reach, *see* 92 Stat. at 1359, 1361, 1453, and that provision still exists as to rail carriers, *see* 49 U.S.C. § 11706(a).

> The disconnect between *Swift's* reasoning and the articulation of its holding has not gone unnoticed. *See, e.g., Berlanga,* 269 F.Supp.2d at 829. In fact, recognizing *63 the inconsistency, one court has hypothesized that *Swift's* use of the phrase "as long as" instead of "even if" was due to a typographical error. *See Canon USA,* 1992 WL 82509, at *7. We are therefore reluctant to rely on any line of precedent derived from *Swift's* articulated holding." (Emphasis in original).

The Second Circuit went on to note the large amount of "confusion" caused by *Swift Textile's* articulated holding. For example, in *Capitol Converting, supra*, 965 F.2d 391, the Seventh Circuit, having committed themselves to trying to find some logic in the decision, held that Carmack would only apply to a shipment of goods that originated in a foreign country if there was "a separate domestic segment" of the shipment. In point of fact, the Second Circuit noted, that could not have been the basis of the *Swift Textile* holding, because the Eleventh Circuit stated clearly that the shipment in question was a single shipment in "continuation in foreign commerce." *Sompo, supra,* 456 F.3d at 63, n.11. Moreover, if *Capital Converting's* view of the basis for *Swift Textiles* holding was correct, then the Eleventh Circuit should have held that the Carmack Amendment did not apply because "unlike the domestic *interstate* shipment in *Capital Converting*, the domestic shipment in *Swift* was an *intrastate* shipment to which Carmack clearly does not apply." *Sompo, supra,* 456 F. 3d 63, n 11. (Emphasis in original).

But the errors did not stop there. As the *Sompo* Court noted, several Courts then went on to adopt the *Capitol Converting* explanation of the *Swift Textile* holding-- entirely erroneous as it may be-- and to find on that basis that the Carmack Amendment did not apply to other intermodal shipments. *See Tokio Marine & Fire Ins. Co. v. Kaisha,* 25 F.Supp.2d 1071, 1081 (C.D.Cal.1997); *N.Y. Marine & Gen. Ins. Co. v. S/S "Ming Prosperity"*, 920 F. Supp. 416, 425 (S.D.N.Y.1996); *Toshiba International Corp. v. M/V Sea-Land Exp.*, 841 F. Supp. 123, 128. (S.D.N.Y. 1994).

Finally, by way of proving that overlooking relevant transportation law was not the sole province of the United States Supreme Court, the Eleventh Circuit on August 7th, 2006, decided *Altadis USA, Inc. v. Sea Star Line LLC,* 458 F3.d 1288 (7th Cir. 2006). Notwithstanding the fact that the *Sompo* decision had come down almost a month before,

the Eleventh Circuit in *Altadis* failed to distinguish the decision[26] (and thus one can only assume overlooked it) and ruled once again that the Carmack Amendment did not apply to intermodal shipments, absent a separate inland bill of lading. *Id.* at 1291-1293. The shipment in *Altadis* happened to involve motor truck cargo, but the principles set forth in *Sompo* with respect to Carmack's jurisdictional scope should have applied with equal force, assuming that the holding itself was valid.

Interestingly enough, the US Supreme Court granted *certiorari* in *Altadis, but* the case settled before oral argument.

Sompo has generated much discussion. Some trucking law practitioners have published articles lamenting the decision, but not surprisingly, given the decision's detailed research, almost all of the scholarly debate has been favorable. In a paper prepared as part of the New York Forum of Maritime Law Professors' Spring CLE Program at the Association of the Bar of City of New York in May of 2007, entitled "When Ocean Cargo is Damaged in a Train Wreck," the leading maritime law Professor Michael F. Sturley of the University of Texas School of Law described the *Sompo* decision as "a detailed analysis of the question" wherein the Court "carefully examined" the issue of the scope of Carmack's applicability. Sturley went on to say that "that the Second Circuit and the District Court in *Berlanga* were the only courts that had carefully examined the issue." Similarly, the highly respected Benedict's Maritime Bulletin (Volume IV, 3-4, Third/Forth Quarter 2006) published an article entitled "A Challenge to Kirby" which stated that "the reasoning in *Sompo* as to the applicability of Carmack is compelling." And Judge Lewis Kaplan known as one of the most scholarly judges in the Southern District of New York, has described the decision as "an exceptional instructive opinion." *Rexroth Hydraudyne B.V. v. Ocean World Lines Inc., supra*, 2007 WL 541958 (S.D.N.Y. 2007).

At the Tulane Maritime Law Institutes 2007 Conference the question of whether Sompo will ultimately be upheld by the US Supreme Court was put to three leading admiralty law professors; two of the three agreed that it would be so upheld, with the

[26] Again, the transportation bar appears to have let down the bench by failing to bring the *Sompo* decision to the *Altidas* court's attention-- although briefing was indeed completed well before *Sompo* came down.

third stating that he did not know the case well enough to give an opinion. The *Sompo* decision may now be history, but it is also quite likely to be the future.

RECENT DEVELOPMENTS CONCERNING MARINE POLLUTION AND ENVIRONMENTAL MATTERS

Thomas S. Rue

RECENT DEVELOPMENTS CONCERNING MARINE POLLUTION AND ENVIRONMENTAL MATTERS

Moderator: **Thomas S. Rue**, Johnstone, Adams, Bailey, Gordon & Harris, Mobile, AL

Panelists: **Michael G. Chalos**, Fowler, Rodriguez & Chalos, Port Washington, NY
Joseph Poux, U.S. Department of Justice, Environmental Crimes Section, Washington, D.C.

VII. NUTS AND BOLTS DISCUSSION OF U.S. COAST GUARD INVESTIGATION PROCEDURES AND TACTICS

A) COAST GUARD ROLE AS A LAW ENFORCEMENT AGENCY IN MARPOL INVESTIGATIONS (GOOD OR BAD IDEA?)

B) EFFECTIVE USE OF 14 U.S.C. 89(A)

C) SECURITY AGREEMENT REQUIREMENTS AND LEGAL BASIS THEREFOR

VIII. APPLICABLE CRIMINAL STATUTES UTILIZED IN U.S. PROSECUTIONS OF MARPOL VIOLATIONS

A) PRINCIPLES OF RESPONDEAT SUPERIOR

B) THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

C) APPLICABLE FINES, PROBATION COMPLIANCE PROGRAMS AND OTHER PENALTIES

IX. WHERE DO WE GO FROM HERE?

Chalos, O'Connor & Duffy, LLP

- **THE CRIMINALIZATION OF MARITIME ACCIDENTS AND MARPOL VIOLATIONS IN THE UNITED STATES**

Michael G. Chalos

Chalos, O'Connor & Duffy

MARPOL Violation Prosecutions in US--Government's Position

- Enforcement of US laws
- Punishment of Wrongdoer by Fines and/or Jail Time
- Deterrence of Wrongdoer
- Deterrence of Other Potential Wrongdoers
- Protecting the Environment for all
- Flag States Not Enforcing Marpol

The Reality

- **Shipping industry is an easy target**
- **Shipping companies are perceived as having lots of money and will pay large fines rather than fight**
- **No political constituency**
- **No organized political muscle**
- **Good publicity for US government on Environmental enforcement**

Current Status of MARPOL Violation Prosecutions in US

- US DOJ and Coast Guard are well organized with task forces to investigate and prosecute shipowners, operators, managers and seafarers for Marpol violations
- Prosecutions are on the rise
- Security demands (monetary and maintaining crew during investigation) for release of vessel increasing and becoming more onerous
- Fines are getting larger
- Court ordered and enforced compliance programs

How and Why?

- **OWS equipment do not always operate as advertised or as intended**
- **Poor culture for protection of environment and adherence to regulations**
- **Lack of maintenance of OWS equipment and poor training of crew in its use and in record keeping**
- **Lack of available reception facilities**
- **Aggressive US government investigations and prosecutions**
- **“Whistleblowers”- can get up to 50% of fine**

PHILIPPINE DAILY
INQUIRER
BALANCED NEWS, FEARLESS VIEWS

Big Mike makes hasty retreat to Singapore

By Nikko Dizon

THE BELEAGUERED husband of President Macapagal-Arroyo left yesterday morning for Singapore, deftly eluding members of the media waiting for him at the Ninoy Aquino International Airport Terminal 1 in Pasay City.

Jose Miguel "Mike" Arroyo requested early

BIG MIKE/A21

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US makes 4 RP seamen rich as environment heroes

RUDY ESPERAS

INSTANT MILLIONAIRES. Four seamen receive a total of $250,000 from the US Embassy for alerting the US Coast Guard that their ship was dumping oil waste into the Pacific. The awardees, from left, Jonathan Sanchez, Jimmy Piamonte, Richard Santillan and Florencio Tolentino flank Charge d'Affaires Joseph Mussomeli.

By Nikko Dizon

THE UNITED States not only heaped praises on them for their heroic deed. It also turned them into millionaires.

But the four Filipino seamen—instrumental in the conviction of violators of international and US environmental laws—chose to make only a brief appearance before the media at the US Embassy yesterday.

They disappeared as soon as the press conference was over.

Jonathan Sanchez, Jimmy Piamonte and Florencio Tolentino each received $75,000 (or an estimated P4 million) while Richard Santillan got $25,000 (P1.35 million) from the US Justice Department.

The reward was for their initiative in informing the US Coast Guard that their vessel, MV Katerina, had violated international and US environmental laws.

US Charge d'Affaires Joseph Mussomeli handed them large "mock" checks in a brief ceremony at the embassy's Charles Parsons Ballroom. The embassy did not say when the real money was given to them.

Two of the seamen came with their wives.

"I know this is an inspiring story. But they are private citizens and they said they do not wish to be interviewed

US MAKES/ A22

Gov't Authority for Marpol Violations Investigations

- **The MARPOL Protocol ("MARPOL") is an international treaty implemented in the United States by the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. §§ 1901 et seq.**
- **APPS makes it a crime for any person to knowingly violate MARPOL, APPS, or the federal regulations promulgated under APPS. 33 U.S.C. § 1908(a).**

- **These regulations apply to all commercial vessels, including vessels operating under the authority of a country other than the United States, when these vessels are operating in United States waters or while at a port or terminal under the jurisdiction of the United States. 33 C.F.R. § 151.09.**
- **The United States has no jurisdiction over a foreign flag vessel for any violation of MARPOL that occurs outside the US 12 miles jurisdictional limit.**

- **The United States Coast Guard regularly inspects the Oil Record Book during port state inspections to determine compliance with United States law and the MARPOL Protocol and to assure that ships are not an environmental threat to United States ports and waters.**
- **The United States Coast Guard is charged with enforcing the laws of the United States and is empowered under 14 U.S.C. § 89(a) to board vessels and conduct inspections and investigations of potential violations and to seize evidence.**

- **If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, the Coast Guard is empowered to deny a vessel's entry to a United States Port or detain a vessel 33 C.F.R. §§ 151.07(b).**
- **The Coast Guard is also required to report to the United States Attorney's office for the District in which the vessel is inspected all suspected violations of any US laws.**

CRIMINAL STATUTES & SANCTIONS

- There are a broad array of criminal sanctions available to prosecutors against crewmembers, owning and managing corporations, and individuals in such corporations.

- Prosecutors can and will:

  - arrest, detain and/or confiscate vessels to obtain security and/or collect fines/penalties;

  - criminally charge and hold vessel personnel;

  - criminally charge owning/operating and/or management companies; and

  - criminally charge responsible corporate officers, as well as, managing company personnel.

CORPORATE LIABILITY

- **A corporation can incur incur vicarious liability for the actions of its employees undertaken in the course of their employment if such actions are intended for the benefit of the corporation.**
- **A corporation may have direct criminal liability for the acts of its directors, and officers.**
- **A corporate officer/director may be found criminally liable just because of his/her position of responsibility.**
- **The fact that the company and its employees, officers and/or directors are outside the US not a bar to the dogged efforts of US prosecutors.**

Applicable Criminal Statutes

- False Statement Act (18 USC Sec.1001)
- Act for the Prevention of Pollution from Ships (APPS) (33 USC Sec 1901 et seq)
- Conspiracy (18 USC Sec 371)
- Obstruction of Justice (18 USC Sec 1505)
- Tampering with Witnesses (18 USC Sec 1512)
- The Clean Water Act (CWA) 33 USC Sec 1251
- Sarbanes-Oxley Act of 2002, 18 USC Sec 1519

“RED FLAGS”

- **Flexible by-pass hoses in and around OWS**
- **Flange nuts and bolts around OWS and overboard discharge valve that show recent use**
- **Freshly painted piping, flanges, nuts & bolts**
- **Oil on valve stems on discharge side of OWS**
- **Oil in piping between OWS and overboard discharge valve**
- **Oil in overboard discharge valve**
- **Inoperable and/or malfunctioning OWS**

Red Flags (Cont'd)

- **Inoperable Incinerator**
- **Lack of spares or record of maintenance of OWS and/or Incinerator**
- **Engineering crew's inability to operate OWS and/or Incinerator**
- **Improper and or missing ORB entries**
- **Amounts recorded as transfers exceed tank capacity**
- **Repeat entries**
- **Bilge soundings do not conform to ORB entries**

Red Flags (Cont'd)

- **Evidence of Oil Content Meter (or "15 ppm sensor") not working properly or overridden**
- **Existing piping/valve arrangement does not match original piping diagrams**
- **Non-use or excessive use of Incinerator**
- **Unauthorized cross over valves and piping**
- **Whistleblowers**

Crewmembers' Rights in US

- **No crewmember can be forced to speak to US authorities if there is a possibility that by doing so they will incriminate themselves (5th Amendment)**
- **Each crewmember is entitled to consult with counsel before speaking to authorities**
- **If a crewmember does choose to speak with authorities, such crewmember must be completely truthful**
- **If English is not the crewmember's first language can ask for interpreter**

WHERE DO WE GO FROM HERE?

- **Prosecutions obviously not working**
- **Government and industry must work together**
- **Owners/Operators must:**
  - **Provide better and more sophisticated equipment**
  - **Change culture of shipboard and shoreside personnel by better training and closer supervision of onboard activities**

- **Government and industry need to explore ways and means of developing more available reception facilities**
- **Government and industry need to work together on an EPA type of protocol agreement whereby industry agrees to establish and abide by certain best practices, compliance programs and initiatives and in return receives a “safe harbor”/non-prosecution consideration for any illegal conduct by rogue employees**

Chalos, O'Connor & Duffy, LLP

Thank You for Your Attention

Michael G. Chalos

PROFESSIONALISM AND ETHICS FOR THE MARITIME PRACTITIONER

Hon. Virginia M. Hernandez Covington

Professionalism and Ethics for the Maritime Practitioner

Virginia M. Hernandez Covington
United States District Judge
Middle District of Florida
Jacksonville, Florida
October 26, 2007

I. The Maritime Bar

A. MLA

1. Founded in 1899

2. Membership - lawyers, judges, law professors, and distinguished maritime professionals. Members from all over the World, not only the United States.

B. Maritime bar relatively small in size, compared to other bars. Considered by most in the legal community to be a very close-knit, collegial group. The Maritime bar maintains a reputation as being a cut above other lawyers in regard to their level of professionalism and ethics.

C. Maritime attorneys must maintain the good reputation with which you are attributed and hold yourselves to that high standard to which other lawyers should emulate. Yet, maritime attorneys are still subject to same ethic concerns facing other lawyers.

II. Ethics - The Basics

A. **Rule 11, Federal Rules of Civil Procedure**

1. **Rule 11 (b): Representations to Court.** By present to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that

to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

a. **Rule 11 (b)(1):** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

b. **Rule 11 (b)(2):** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

c. **Rule 11 (b)(3):** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

d. **Rule 11 (b)(4):** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief

B. **ABA Model Rules**

1. **ABA Model Rule 3.1** - a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

2. **ABA Model Rule 3.3(a)(2)** - a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the

lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

3. **ABA Model Rule 4.4(a)** - In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

C. **MLA Code of Conduct**

1. **(1)** I will comply with all rules and codes of professional conduct and respect the law and preserve the decorum and integrity of the judicial process.

2. **(3)** I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior.

3. **(4)** I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity.

4. **(9)** I will not mislead or make any misrepresentation to the court.

D. **Power of the Court to Sanction**

1. **28 U.S.C. § 1927**

a. "To justify an award of sanctions pursuant to section 1927, an attorney must engage in unreasonable and vexatious conduct . . . ." Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 (11th Cir. 2003). Bad faith is required, which is more than mere negligence or lack of merit. Id.

b. Amlong v. Amlong, P.A. v. Denny's Inc., 457 F.3d 1180 (11th Cir. 2006). Bad faith is measured not on the attorney's subjective intent, but the objective conduct. Id. at 1190. "An attorney's knowledge and intent at each step in the drama may be relevant to the ultimate legal determination that the conduct is objectively reckless, or that bad faith is evident." Id. at 1192 n.1.

III. Professionalism - What we should strive for

A. **Follow the local rules** - example: Rule 3.01(g), Local Rules, M.D. Fla. Requires parties to certified that they have conferred with opposing counsel and have tried to resolve this matter prior to filing the motion, and to notify the court if opposing counsel has an objection to the motion.

B. **Resolution prior to trial** - as many conflicts or issues as possible should be resolved before trial.

C. **Lost art of accommodation**

1. Extensions of time
2. Avista Management v. Wausau Underwriters Insurance Co., No. 6:05-cv-1430-Orl-31JGG, 2006 U.S. Dist. LEXIS 38526 (M.D. Fla. June 6, 2006) (the rock, paper, scissors case).

D. **Respect all involved**

1. **ABA Model Rule 4.4** - Respect For Rights of Third Persons
2. **Rule 611(a), Federal Rules of Evidence** - Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and

presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

IV. Problems in Professionalism Today

A. Past - Civility

1. **ABA Cannons of Professional Ethics of 1908 (last amended in 1963)** - Original rules of conduct were more general and did not address specific conduct as much as the present model rules. This was probably due to previous generations believing that some modes of conduct were so obviously unethical that rules against them were unnecessary.
2. Over time, lawyers behavior has changed, and the rules of professional conduct have changed as well, becoming more specific. Thus there can be an attitude of "what the rule does not prohibit, it permits." The rules inform lawyers how far they can push the envelope, and encourages the same behavior from their adversaries.

B. Present - Problems with clients, professionalism vs. representation

1. Mark D. Nozette & Robert A Creamer, Professionalism: The Next Level, 79 Tul. L. Rev. 1536 (2005). Today's emphasis seems to be on the lawyer's duty to "zealously" represent his client. Lawyers cannot disregard their duty to the legal system and their peers in the name of representation.

C. Issues Facing Maritime Attorneys

1. **Dealing with non-maritime attorneys** - because of the specialized

practice of maritime law, admiralty lawyers may find themselves in the position to take advantage of non admiralty lawyers.

2. **When to get local counsel?** Maritime attorneys may often find themselves involved in litigation in districts and states other than their own. The place of the litigation may have a close knit legal community, so when is it appropriate, and when will it help, to hire local counsel?

3. **New Electronic Discovery Rules** - Amendments to the Federal Rules of Civil Procedure, which took effect in December 2006, recognize electronically stored information and set specific rules governing discovery. Fed. R. Civ. P. 26. New rules recognize a party's right to obtain e-discovery, but with it comes the risk of inadvertent disclosure of confidential or privilege information. How can attorneys guard against inadvertent disclosure, and how should they handle possible inadvertent disclosures of privileged information?

4. **Electronic Communications** - With the explosion of technology, there are many more ways to contact and communicate among attorneys. With devices such as the Blackberry and webcams, now an attorney is almost never unreachable. How do attorneys use these modes of communication effectively and ethically? *See* Judge Karen Cole, Fourth Judicial Circuit of the State of Florida, "Fostering Communication: Technology and Technique" (Sept. 10, 2007).

Guidelines for Professional Conduct

FOREWORD

In 1993 the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines for professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from both Florida and around the country, the professionalism committee determined that, with minor modifications, the guidelines which had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore, in 1994, at the request of the professionalism committee, the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines For Professional Conduct. The Trial Lawyers Section sought the endorsement of the Guidelines from the Florida Conference of Circuit Judges, and at its meeting held in September 1995, the Conference approved the Guidelines. In so doing, the Conference wishes to make clear that the Guidelines do not have the force of law and that trial judges will still have the right and obligation to consider issues raised by the Guidelines on a case by case basis. Nevertheless, both the Trial Lawyers Section and the Florida Conference of Circuit Judges hope that publication and widespread dissemination of these Guidelines will give direction to both lawyers and judges as to how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section is also intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines will simply reflect their current practice. However, it is hoped that the widespread dissemination and implementation of these Guidelines will result in an overall increase in the level of professionalism in trial practice in Florida.

PREAMBLE

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. But in striving to fulfill that duty, a lawyer must be ever conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties, however, is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, in recognition that they must be applied in a manner consistent with the interests of one's client and the Rules of Professional Conduct, and in keeping with the long tradition of professionalism among and between members of the Trial Lawyers Section of The Florida Bar, the following Guidelines for Professional Conduct are hereby adopted. Although we do not expect every lawyer will agree with every guideline, these standards reflect our best effort at encouraging decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

A. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME.

Scheduling and Continuances

1. Attorneys are encouraged to communicate with opposing counsel prior to scheduling depositions, hearings and other proceedings, in order to schedule them at times that are mutually convenient for all interested persons. Alternatively, if an attorney does not communicate with opposing counsel prior to scheduling a deposition or hearing, the attorney should be willing to reschedule that deposition or hearing if the time selected is inconvenient for opposing counsel.

2. Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer should promptly agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.

3. A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.

4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.

5. Counsel should never request a calendar change or misrepresent a conflict in order to obtain an advantage or delay. However, in the practice of law, emergencies affecting our families or our professional commitments will arise which create conflicts and make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make such request of other counsel only when absolutely necessary.

6. Attorneys should endeavor to provide opposing counsel, parties, witnesses, and other affected persons, sufficient notice of depositions, hearings and other proceedings, except upon agreement of counsel, in an emergency, or in other circumstances compelling more expedited scheduling.

7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

EXTENSIONS

8. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.

9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted between counsel as a matter of courtesy unless time is of the essence.

10. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

11. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.

13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving the right to seek reciprocal scheduling concessions. However, a lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

B. SERVICE OF PAPERS.

1. The timing and manner of service should not be used to the disadvantage of the party receiving the papers.

2. Papers and memoranda of law should not be served at court appearances without advance notice to opposing counsel and should not be served so close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers.

3. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

4. Service should be made personally or by courtesy copy facsimile transmission when it is likely that service by mail, even

when allowed, will prejudice the opposing party.

C. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS.

1. Written briefs or memoranda of points of authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic or sociological data if such data appear in or are derived from generally available sources but only if these would be subject to judicial notice and if sufficient backup data and its sources are presented contemporaneously.

2. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

D. COMMUNICATION WITH ADVERSARIES.

1. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

2. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

3. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.

4. Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.

5. A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.

6. During the course of representing a client, a lawyer should not communicate on the subject of the representation with a party known to be represented by a lawyer in that matter without the prior consent of the lawyer representing such other party unless authorized by law to do so.

E. DEPOSITIONS.

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

2. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

3. In scheduling depositions upon oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.

4. When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.

5. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

6. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

7. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice or by appearing angry at the witness.

8. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Rules of Civil Procedure or applicable case law. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought. When objecting to the form of a question, counsel should simply state "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should by stated succinctly and only what is necessary to state the grounds should be stated.

9. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so, the courts are urged to take stern action to put a stop to such practices and to serve as a deterrent to others.

10. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information.

11. Counsel for all parties should refrain from self-serving speeches during depositions.

12. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

F. DOCUMENT DEMANDS.

1. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

2. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case. If a document request is objectionable only in part, the documents responsive to the unobjectionable portion should be produced in a timely manner.

3. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.

4. Documents should be withheld on the grounds of privilege only where appropriate. Where documents are withheld, the withholding party should immediately provide a list of the privileged documents showing the date, author and general description and a statement of the basis for withholding the document.

5. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.

6. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

G. INTERROGATORIES.

1. Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.

2. Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.

3. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

4. A lawyer should never use discovery for the purpose of harassing or improperly burdening an adversary or causing the adversary to incur unnecessary expense.

H. MOTION PRACTICE.

1. Before setting a motion for hearing, counsel should make a reasonable effort to resolve the issue.

2. A lawyer should not force his or her adversary to make a motion and then not oppose it.

3. Following a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should immediately be submitted to the court. Attorneys should promptly provide, either orally or in writing, proposed orders to opposing counsel for approval prior to submitting them to the court. Opposing counsel should then promptly communicate any objections and at that time, the drafting attorney should immediately submit a copy of the proposed order to the court and advise the court as to whether or not it has been approved by opposing counsel. The order must fairly and adequately represent the ruling of the court.

I. DEALING WITH NON-PARTY WITNESSES.

1. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition or to obtain necessary documents in the possession of a non-party witness.

2. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.

3. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available as soon as possible to the adversary at his or her expense even if the deposi-

tion is cancelled or adjourned.

J. EX PARTE COMMUNICATIONS WITH THE COURT AND OTHERS.

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom such case is pending.

2. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application. A lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced if the application or communication is made on regular notice.

3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters. Counsel should always notify opposing counsel of dates and times obtained from the court for future hearings on the same day that the hearing date is obtained from the court. Copies of any submissions to the court (such as correspondence, memoranda of law, case law, etc.) should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, at the same time a copy should be hand-delivered or faxed to opposing counsel. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel at the time the material is submitted to the court.

4. A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual informality to a judge, uncalled for by their personal relations. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or having the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION.

1. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

3. In every case, counsel should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

L. PRE-TRIAL CONFERENCE.

1. A lawyer should carefully read the order setting trial and complete the pre-trial conference statement in full to the extent it can be agreed to by the parties.

2. A lawyer should be familiar with the evidence in the case.

3. A lawyer should be sure discovery is completed or address the need for additional discovery with opposing counsel well in advance of the pre-trial conference. All counsel should use due diligence in preparing the case for trial and should file a motion for continuance of the pre-trial conference or of the trial only if counsel has been unable to complete preparations in spite of diligent efforts.

4. A lawyer should evaluate the case and have a figure in mind at which the case could reasonably settle with authorization from the client to do so.

5. A lawyer should determine if the court needs to, and agrees to, hear any motions at the pre-trial.

6. The attorney who will try the case must appear at the pre-trial conference, unless excused by the court.

7. A lawyer should not ask for a continuance unless the client agrees and signs the motion.

M. TRIAL CONDUCT AND COURTROOM DECORUM.

1. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct which is degrading to the court.

2. Be punctual and prepared for any court appearance.

3. Stand as court is opened, recessed or adjourned; when the jury enters or retires from the courtroom; and when addressing, or being addressed by, the court.

4. Examination of jurors and witnesses should be conducted from a suitable distance. A lawyer should not crowd or lean over the witness or jury and during interrogation should avoid blocking opposing counsel's view of the witness.

5. Counsel should address all public remarks to the court, not to opposing counsel.

6. A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel.

7. Counsel should refer to all adult persons, including witnesses, other counsel, and the parties by their surnames and not by their first or given names.

8. Only one attorney for each party shall examine, or cross examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross examination.

9. Counsel should request permission before approaching the bench. Any documents counsel wish to have the court examine should be handed to the clerk.

10. Have the clerk pre-mark the potential exhibits.

11. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness for examination. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.

12. In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the court.

13. Generally, in examining a witness, counsel shall not repeat or echo the answer given by the witness.

14. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the jury, unless the offeror knows or has reason to believe the opposing lawyer will accept it.

15. In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.

16. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

17. During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.

18. A lawyer should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's permission or leave of court.

19. A lawyer should abstain from conduct calculated to detract or divert the fact-finder's attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.

20. A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.

21. A charge of impropriety by one lawyer against another in the course of litigation should never be made except when relevant to the issues of the case.

22. A lawyer should not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. A lawyer, however, may advance, guarantee or acquiesce in the payment of:

(a) expenses reasonably incurred by a witness in attending or testifying;

(b) reasonable compensation to a witness for his lost time in attending or testifying;

(c) a reasonable fee for the professional services of an expert witness.

23. In appearing in his or her professional capacity before a tribunal, a lawyer should not:

(a) state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

(b) ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to

degrade a witness or other person;

(c) assert one's personal knowledge of the facts in issue, except when testifying as a witness;

(d) assert one's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

24. A question should not be interrupted by an objection unless the question is patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

25. A lawyer should address objections, requests and observations to the court and not engage in undignified or discourteous conduct which is degrading to court procedure.

26. Where a judge has already made a ruling in regard to the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although he is at liberty to make a record for later proceedings of his ground for urging the admissibility of the evidence in question. This does not preclude the evidence being properly admitted through other means.

27. A lawyer should not attempt to get before the jury evidence which is improper.

28. A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like.

29. A lawyer should never attempt to place before a tribunal, or jury, evidence known to be clearly inadmissible, nor make any remarks or statements which are intended to improperly influence the outcome of any case.

30. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

31. Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence.

Further, if this occurs unintentionally and is later discovered, it should immediately be disclosed or otherwise corrected.

Creed of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit.

My word is my bond.

Oath of Admission to The Florida Bar

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

MARITIME LAW ASSOCIATION
CODE OF PROFESSIONAL CONDUCT

This Code of Professional Conduct was prepared by the Committee on Professional Relations chaired by Ben L. Reynolds of Houston, and approved by the Board of Directors at its meeting on May 1, 1997. It was approved by the Membership at the October 31, 1997 meeting. Maritime lawyers generally enjoy a good reputation for professional conduct, and this Code should help us maintain the high standards to which we all aspire.

1. I will provide the highest level of competency and efficiency in the performance of all legal services.

2. I will comply with all rules and codes of professional conduct, and respect the law and preserve the decorum and integrity of the judicial process.

3. I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior.

4. I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity.

5. I will maintain the trust of my clients by keeping them well-informed and actively involved in making decisions affecting them.

6. I will resolve all disputes expeditiously and not engage in any course of conduct which unnecessarily increases cost or delays litigation.

7. I will engage in the discovery process, seeking an expeditious result for my client's legitimate interest, while avoiding abuse and harassment of witnesses and parties.

8. I will contribute time and resources to pro bono activities.

9. I will not mislead or make any misrepresentation to the court.

10. I will exemplify and instill in others the tenets of this Code of Professional Conduct.

LAWYERS' TOP 10 PET PEEVES

2007 Judicial Professionalism Symposium, 4th Circuit

1) **Not Being on Time**

- Not returning another lawyer's call promptly.

- Not responding promptly to a lawyer's correspondence.

- Untimely responses to discovery requests (e.g., Interrog. & Requests for Production).

2) **Not Being Accommodating**

- Cancelling depositions or scheduling them at the last minute.

- Being difficult in scheduling.

- Refusing to cancel matters when opposing counsel has a family crisis (e.g., when counsel was called suddenly to his dying mother's bedside out of town).

3) **Lack of Manners**

- Failing to introduce yourself to opposing counsel.

- Incivility and lack of respect for fellow counsel.

- Being rude to opposing counsel or counsel's office staff.

4) **Inadequate Communication**

- Sending a fax at night to opposing counsel on a matter coming before the court the morning after. Also, keeping a firm's fax machine turned off and requiring "permission" to send a fax, which includes having to explain what the fax is about.

- Ending letters with, "I remain, very truly yours."

- Failing to put fax numbers and e-mail addresses on pleadings and correspondence.

5) **Discovery Matters - Evidence Withheld or Disorganized**

- Denying possession of evidence when in fact they are withholding it improperly.

- Not producing documents in response to a request for production in a timely, organized, and orderly manner.

- Producing duplicate copies of documents, making the production appear larger.

6) **Inadequate Consequences - Lack of Sanctions**

- When opposing counsel blatantly violates court orders and repeatedly delays discovery, and the judge fails to sanction such conduct.

LAWYERS' TOP 10 PET PEEVES

2007 Judicial Professionalism Symposium, 4th Circuit

cont'd

7) Inadequate Motions & Pleadings

- Lack of brevity in briefs.

- Filing memoranda of law on significant motions and then showing up at the hearing only to argue case law not in the brief as the crux of their argument.

- Creating "strawman" arguments and advocating "red herring" issues.

- Failing to cite authority forming the basis for a motion.

8) Unfair Hearing Practices

- Bringing case law to a hearing either without copies for opposing counsel, or with highlighted copies for the judge, but not opposing counsel.

> ["*If I were a judge, I would have procedures for my division that prevented this and if a lawyer did not have appropriate copies, I would not consider the case law submitted.*"]

9) Judges shouting

10) Mischaracterization

Mischaracterizing opposing counsel's oral statements in a responsive written correspondence.

JUDGES' TOP 10 PET PEEVES

2007 Judicial Professionalism Symposium, 4th Circuit

1) Not Being on Time

When lawyers are late to court or unprepared. It "delays the train schedule."

2) Failing to Identify Yourself

- Beginning your argument in court without first identifying yourself, who you are representing, and the motion under consideration. Even a judge's best friend should go through the ritual.

3) Forgetting to Inform the Judge or JA

- Faxing or electronically filing a motion to opposing counsel the night before an early morning hearing without providing the judge with a courtesy copy.

- Failing to provide the judge with a courtesy copy of an "emergency motion" in state court (because it is likely that the motion will not be seen as quickly as necessary since all motions are sent up from the clerk's office in a stack of files that all look alike).

- Failing to notify the judge's JA that a case has been resolved, especially when it affects the court's calendar, so that someone else can be given that time.

4) Providing Incomplete Information

- Sending or dropping off a proposed order with no cover letter, no identification of the hearing that it relates to and/or failing to mention whether the proposed order was run by opposing counsel prior to submitting it to the court.

5) Improper and Unprofessional Manners at Court Appearances

- Speaking over each other or over the court.

- Continuing to argue after a ruling is made.

- Reacting emotionally to a ruling, as if an adverse ruling were a personal affront. It is not. "If, for some reason, the case is indeed personal to you, you are too close to the issue to be the attorney for the client."

- Using sarcasm in arguments and comments to each other or to the court.

- Directing your arguments to each other rather than to the court.

- Making improper or distracting gestures (e.g., holding up a hand while opposing counsel is arguing a motion, huffing and puffing, rolling your eyes, etc.).

- When litigants, witnesses or lawyers in chambers and courtrooms:
  - chew gum;
  - dress inappropriately (wearing flip-flops, tank tops, shorts, etc.);
  - dress informally or disheveled;
  - fail to turn off their cell phones; and
  - set a drink/cup on the podium in court.

JUDGES' TOP 10 PET PEEVES
2007 Judicial Professionalism Symposium, 4th Circuit

cont'd

6) Ineffective Presentation of Argument

- Failing to answer the question posed by the judge. "Oftentimes, a lawyer is so busy thinking about what he is going to say next, he forgets to listen to the question being asked."

- Making arguments irrelevant to the analytical framework at issue.

- Poorly drafting motions. "They tend to suffer."

7) Disparaging Another Lawyer Before the Judge

- Sending the judge copies of letters about their complaints toward each other and, likewise, airing personal arguments about each other in front of the judge. A lawyer must not disparage another lawyer in front of a judge.

8) Failing to Confer or Agree with Opposing Counsel

- Failing to "confer" with opposing counsel regarding attempts to resolve discovery matters prior to setting a hearing on a motion to compel. It is inappropriate to send letters to the judge indicating that counsel has conferred when, in fact, it is evident that no attempt was made to confer as required (i.e., in person or on the phone).

- Agreeing to an amount of attorneys' fees at a hearing, but later sending a proposed order reflecting a different amount, with a cover letter claiming that a copy was sent to opposing counsel. This is not proper notice.

- When jurisdiction is reserved in a QUADRO and a lawyer appears *ex parte*, it is improper to request the judge to enter an order prior to the parties' agreement and without their signatures confirming that they have agreed.

9) Failing to Limit Discovery in Accordance with the Rules

- Failing to limit discovery requests more precisely as to time, scope, and the appropriate number of questions. A lawyer should avoid being over-broad or vague.

- Only ask for what you are entitled to, and only object to things that you are not required to provide.

10) Using Improper Verbiage in a Proposed Order

- Submitting a proposed order on a matter that did not require a hearing, yet reciting in the proposed order that the matter "came on to be heard" when it actually never did.

Member Services

Ethics Opinions

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-2
(September 15, 2006)

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

RPC:	4-1.1, 4-1.2, 4-1.4, 4-1.6, 4-4.4(b)
Opinions:	93-3, New York Opinion 749, New York Opinion 782
Case:	*Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005)
Misc:	David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004), *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004)

The Board of Governors of The Florida Bar has directed the committee to issue an opinion to determine ethical duties when lawyers send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now becoming issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as "information describing the history, tracking, or management of an electronic document." [1]

Metadata can contain information about the author of a document, and

can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.[2]

This opinion does not address metadata in the context of documents that are subject to discovery under applicable rules of court or law. For example, the opinion does not address the role of the lawyer acting as a conduit to produce documents in response to a discovery request.

The Florida Rules of Professional Conduct require lawyers to protect information that relates to the representation of a client. Rule 4-1.6(a) provides as follows:

> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The Comment to Rule 4-1.6 further provides:

> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

In order to maintain confidentiality under Rule 4-1.6(a), Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information that leave the lawyers' offices, including electronic documents and electronic communications with other lawyers and third parties.

Rule 4-4.4(b) addresses inadvertent disclosure of information and provides as follows:

> A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The comment to rule 4-4.4 provides additional guidance:

> Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to

promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:

(1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.

(2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.[3]

(3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the

lawyer must "promptly notify the sender." *Id.*

The foregoing obligations may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:

> To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

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[1]*The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), available at http://www.thesedonaconference.org. The Microsoft Word and Microsoft Office online sites also contain detailed information about metadata, showing examples of metadata that may be stored in Microsoft applications and explaining how to remove this information from a final document. Examples of metadata that may be hidden in Microsoft documents include the name of the author, the identification of the computer on which the document was typed, the names of previous document authors and revisions to the document, including prior versions of a final document.

[2]Further references regarding metadata and eliminating metadata from documents may be found on Microsoft's user support websites at http://support.microsoft.com/kb/290945 and http://support.microsoft.com/kb/q223790/. *See also*, Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001* http://techrepublic.com.com/5100-1035_11-5034376.html. The court's discussion of metadata in *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005) is also very helpful.

[3]The ethical implications of such hidden information in electronic documents have been discussed in legal journals and ethics opinions in other states, The New York Bar Association has issued Opinion 749 (2001), which concluded that attorneys may not ethically use computer software applications to surreptitiously "mine" documents or to trace e-mail. New York Ethics Opinion 782 (2004), further concluded that New York lawyers have a duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets. Legal commentators have published articles about ethical issues involving metadata. David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential

Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). *See also*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004).

[Updated: 10-31-2006]

REGULATORY UPDATES AND MARINE SECURITY

Bryant Gardner

CHARTING 2007 WASHINGTON
Regulatory Updates & Marine Security

Presentation Before the
United States Maritime Law Association

Fall 2007

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I. Introduction

The 110th Congress represents a sea change, with Democratic leadership taking the wheel for the first time in twelve years. When there is a change of power, the new leadership tends to float a raft of new proposals, and to put its stamp on existing proposals. So far, the 110th Congress appears to be sailing that course.

Security and the environment continue to be high priorities for both Congress and the Coast Guard. Indeed, many believe that the recent trend has been for the Coast Guard to emphasize its post-9/11 security role at the expense of so-called "legacy" marine safety functions such as vessel documentation and inspection. With the Coast Guard's increased focus on homeland security, some in Washington have been calling for a transfer of marine safety functions to a new civilian agency—a change the Coast Guard vigorously opposes. Although the U.S. Maritime Administration ("MARAD") appears to be positioned to assume any functions jettisoned by the Coast Guard, Congress seems hesitant to put regulatory and promotional functions under the same roof.

II. Marine Security

A. Safety and Accountability for Every Port ("SAFE Port") Act

The 109th Congress enacted the SAFE Port Act on October 13, 2006.[2] This Act sought to improve maritime and cargo security, and also dealt with the Maritime Transportation Security Act of 2002 ("MTSA").[3] In addition, the Act authorized $400 million in annual port security grant funding for the next five years, although it does not guarantee appropriations. Fiscal Year ("FY") 07 appropriations included $567 million for the Port Security Grant Program, Transit Security Grant Program, and Emergency Management Performance Grant Program, which on August 16, 2007, the Department of Homeland Security announced had been supplemented by an additional $260 million.[4]

B. Transportation Worker Identification Credential Program ("TWIC")

MTSA directed the Secretary of Transportation to implement a system of transportation security cards to be issued to all persons seeking access to facilities and vessels, with

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[2] Security and Accountability for Every Port Act, Pub. L. No. 109-347, 120 Stat. 1884 (2006) (hereinafter, "SAFE Port Act").

[3] The Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002) (hereinafter, "MTSA").

[4] U.S. DEPARTMENT OF HOMELAND SECURITY, DHS ANNOUNCES ADDITIONAL $260 MILLION IN SUPPLEMENTAL GRANTS FUNDING (Aug. 16, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1187294574562.shtm (press release).

implementing regulations required by January 1, 2007.[5] Persons without TWICs must be escorted through any secure area of a vessel or facility.

The Act requires that all persons holding valid merchant mariner credentials as of the date of enactment are to be issued cards by January 1, 2009 under the new law,[6] and under Coast Guard implementing guidance, vessels and facilities must be in compliance with TWIC regulations no later than September 25, 2008.[7]

The Transportation Security Administration ("TSA") estimated that between 750,000 and 1.5 million workers will require TWICs.[8] The SAFE Port Act provides for implementation at the top 10 priority U.S. ports by July 1, 2007, the next 40 by January 1, 2008, and the remainder by January 1, 2009.[9] The schedule is ambitious, and it remains to be seen whether 2008 and 2009 deadlines will be met, particularly in light of the failure to meet the first deadline.

The TWIC program has ignited significant controversy in the industry and has been plagued by delays, missed deadlines, and technological shortcomings. Some commentators have opined that the wellhead of the program's shortcomings is that it focuses too narrowly on transportation workers that come back to the same facility every day, as opposed to casual laborers, mariners, truck drivers, and other mobile workers, causing a serious underestimation of the number of cards and readers that will be required.[10]

The TWIC program has also been criticized for its adoption of Federal Information Processing Standard, FIPS 201-1 instead of the internationally accepted International Civil Aviation Organization ("ICAO") standard.[11] Critics assert the incompatibility will hamper U.S. efforts to monitor foreign seafarers, the efforts of crews to monitor port workers on their own ships, and the ability of foreign ports to monitor U.S. seafarers without simply restricting them to their ships.[12]

There have been other contentious issues with the TWIC program, to be sure. Citing cost, operators of tugs and other small vessels protested requirements to place readers on their vessels, and the SAFE Port Act therefore includes a threshold exemption for crew, to be determined by the Coast Guard.[13] There has been sometimes heated debate about what kinds of offenses will disqualify applicants for TWICs, and the law saddles the Coast Guard with the definitional burden.[14] While unions have fought to ensure that their members' livelihoods are not threatened by minor disqualifying offenses, other interests, led by Senator Jim DeMint (R-S.C.) have worked to tighten the list of offenses and bar felons from holding TWICs. Lastly,

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5 MTSA, § 102, 116 Stat. at 2068-84. *See also* SAFE Port Act, § 104, 120 Stat. at 1888-91.

6 SAFE Port Act, § 104, 120 Stat. at 1888-91.

7 U.S. COAST GUARD, GUIDANCE FOR THE IMPLEMENTATION OF TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL (TWIC) PROGRAM IN THE MARITIME SECTOR, NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 03-07 (July 2, 2007).

8 *See* Mike Rodriguez, *TWIC Should Employ International Standards and Preempt State & Local Access Cards* at 6, THE PROPELLER CLUB QUARTERLY (Summer 2007).

9 SAFE Port Act, § 104,120 Stat. 1888-91.

10 Rodriguez, *supra* at 6.

11 *Id.*

12 *Id.*

13 SAFE Port Act, § 104,120 Stat. at 1888-91.

14 *Id.*, § 106, 120 Stat. at 1891.

there has been dialogue about how to ensure that new employees can function while they await the issuance of a TWIC. Under the implementing guidance, new employees may obtain accompanied access for 30 consecutive days, with another 30 days available with consent of the Captain of the Port.

TSA's 114-page final TWIC rule took effect on March 26, 2007,[15] setting out the process for issuance and use of the cards. The rule requires all facilities to restrict access to secure areas to persons holding cards, and unescorted access to vessels will require cards by September 25, 2008. TWIC cards are intended to be "smart cards" but because readers are not widely available yet, they operate primarily through photograph identification.

On July 10, 2007, the United States Coast Guard announced the availability of published guidance for the implementation of the TWIC program.[16] These guidelines are easier to digest and are intended to help both Captains of the Port and the maritime industry with implementation of the new regulations. The guidance provides information for transportation workers and vessel and facility owners/operators on the enrollment process for TWICs, informing personnel of their TWIC responsibilities and how to use TWICs for access control and escorting procedures, among other things.[17] Although the guidance does not lay out an implementation schedule, TSA and the Coast Guard informed Congress on July 12, 2007 that all enrollment centers in the United States will be operating by September 30, 2008. As discussed below, several current proposals for legislation would streamline the TWIC process to prevent burdens duplicative of merchant mariner credentialing requirements.

C. Container & International Supply Chain Security

The SAFE Port Act also includes provisions to increase container security and prevent weapons of mass destruction ("WMDs") from entering the United States.[18] Additional security screening measures will apply to all containers entering the U.S. through 22 of the highest volume ports by 2008, expanding to other U.S. ports by 2009.[19] Moreover, the Act requires the initiation of a rulemaking to create procedures and standards for container screening within 90 days of enactment.[20] Section 123 of the Act requires the development of a random container search program based upon empirical scientific research design and, along the same line, § 203 calls for the development of an Automated Targeting System to identify high risk cargo for inspection, which will require the submission of additional information regarding cargo bound for the United States.

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15 Transportation Work Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License, 72 Fed. Reg. 3492 (Jan. 25, 2007).

16 Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Navigation and Vessel Inspection Circular (NVIC), 72 Fed. Reg. 37,537 (July 10, 2007).

17 U.S. COAST GUARD, GUIDANCE FOR THE IMPLEMENTATION OF TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL (TWIC) PROGRAM IN THE MARITIME SECTOR, NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 03-07 (July 2, 2007).

18 SAFE Port Act, § 121, 120 Stat. at 1898-99.

19 *Id.*, § 121(a), 120 Stat. at 1898.

20 *Id.*, § 121, 120 Stat. at 1898-99. *See also id.*, § 232, 120 Stat. at 1916-17 (requiring 100% container screening to identify high-risk containers and scanning of high-risk containers so identified).

The SAFE Port Act also directs Homeland Security to develop a strategic plan to enhance supply chain security and legislates some of the Administration's post-9/11 supply chain initiatives, including the Customs Trade Partnership Against Terrorism ("C-TPAT") and the Container Security Initiative ("CSI").[21] CSI requires TSA to identify and examine intermodal containers posing a threat before they enter the United States.[22] Under C-TPAT, transportation providers are invited to provide additional information and cooperation to increase cargo security, in exchange for benefits such as lowered scrutiny and decreased likelihood of disruptive cargo searches.[23]

On August 3, 2007, the President signed H.R. 1, the Implementing the 9/11 Commission Recommendations Act of 2007,[24] which requires electronic sealing and scanning of all containers prior to loading for shipment to the United States.[25] The provision requires the issuance of temporary implementing regulations within 180 days from the issuance of the report required by a container inspection pilot program under the SAFE Port Act. Permanent regulations are required within a year from the date of that report.

The 9/11 Commission Recommendations Act of 2007 authorizes appropriations "as may be necessary," and according to the Congressional Budget Office ("CBO"), the Act will require $21 billion in funding over five years.[26] Notably, the cost of the electronic seals has not been estimated because it would be carried out by the private sector. However, the CBO notes that the cost would be over $131 million for 2007, and increase over time, such that it would trigger the Unfunded Mandates Reform Act.[27] In addition, the cost of scanning in-bound containers would be $160 million over 5 years, on top of the $140 million annual cost of the existing Container Security Initiative ("CSI").

Industry and Administration representatives have voiced concern that H.R. 1 is unworkable, exceeds U.S. authority, and will hamper the free flow of trade. The U.S. Chamber of Commerce, for example, said the legislation would have "a crippling effect on global trade, without significantly improving security, and would severely disrupt global supply chains and impair the free flow of trade."[28] The World Shipping Council also opposed the legislation, sharply criticizing the law's failure to establish how the container scanning will be done and by whom:

> It would seem elementary that U.S. legislation requiring every container to be scanned before being loaded onto a vessel in a foreign port would address the issue of who is to perform this activity. This legislation fails to do so. It does not require U.S. Customs to do this, as it is clearly impossible for U.S. Customs to undertake such an activity within the jurisdiction of other foreign

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21 *Id.*, Subtitle B, §§ 201 & 205, 120 Stat. at 1894-97, 1902-03, & 1906.
22 *Id.*, § 205, 120 Stat. at 1902-03.
23 *Id.*, § 211 & 214, 120 Stat. at 1909-10.
24 Pub. L. No. 110-53, 121 Stat. 266 (2007).
25 *Id.*, § 1701, 121 Stat. at 489-91.
26 CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: H.R. 1, IMPLEMENTING THE 9/11 COMMISSION RECOMMENDATIONS ACT OF 2007 (Feb. 2, 2007).
27 *Id.* at 14-15.
28 Pike and Fischer, SHIPPING REGULATION, Report No. 07-17 (Aug. 20, 2007).

> nations. It does not require foreign governments to do so, as it has no such authority. The legislation simply says that containers shall be scanned.[29]

A Department of Homeland Security spokesman raised a similar concern in a July 27, 2007 interview, stating: "Congress cannot simply tell the host country what to do. We have to work with the host country and cooperate, and do that well before the operational steps are taken."[30] Foreign ports and others in the industry have been irked by H.R. 1's 100% scanning requirement because they view it as an elimination of the preferential status they earned through participation in the C-TPAT program.

D. Maritime Facility Security Plans

MTSA mandated security plans for certain facilities identified by the Coast Guard as facing a risk of involvement in a "transportation security incident."[31] MTSA required the submission of security plans for approval by the end of 2003, and facilities were required to operate under those plans no later than July 1, 2004.[32]

The SAFE Port Act contains several clarifications to the facility security plan requirements. Under the Act, the facility security officer must be a U.S. citizen,[33] and the Coast Guard must conduct inspections of each facility security plan at least twice a year (one of which must be unannounced).[34] The new legislation emphasizes that security plans must include provisions detailing measures for individuals needing access to secure areas with respect to the transportation of intermodal containers, including truck drivers and individuals operating within rail facilities.[35] And under the Act, facility operators must conduct security exercises for high-risk areas.[36]

In July 2007, the Coast Guard extended the compliance dates for facilities seeking to redefine secure areas in their facility security plans. A Final Rule Notice issued on July 13, 2007[37] explained that the original final rule[38] required these submissions to be made to the appropriate Captain of the Port by July 25, 2007. However, the guidance issued by the Coast Guard, which contained information on eligible facilities and the acceptable definition of "secure

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29 *Id.* (quoting July 30, 2007 statement of the World Shipping Council).

30 *Id.*

31 MTSA, § 102, 116 Stat. at 2068-84.

32 33 C.F.R. § 105.115.

33 SAFE Port Act, § 102, 120 Stat. at 1888.

34 *Id.*, § 103, 120 Stat. at 1888.

35 *Id.*, § 102, 120 Stat. at 1888.

36 *Id.*, § 115, 120 Stat. at 1897.

37 Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License, 72 Fed. Reg. 38,486 (July 13, 2007) (to be codified at 33 C.F.R. pt. 105).

38 Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License, 72 Fed. Reg. 3492 (Jan. 25, 2007) (to be codified at 33 C.F.R. pts. 101-106, & 125; 46 C.F.R. pts. 10, 12, & 15; 49 C.F.R. pts. 1515, 1540, 1570, & 1572).

area," was not issued until July 6, 2007.[39] Therefore, the Coast Guard provided an extension to give facility owners and operators the opportunity to take the Coast Guard's guidance into account before submitting their revised security plans. TWIC procedures do not need to be incorporated into existing facility and vessel security plans until the next regularly scheduled submission, five years from the last plan approval date.[40]

Since 9/11, seamen have often been unfairly confined to their vessels at U.S. ports, and denied shore leave by facilities owners wary of permitting access to aliens not employed or credentialed by the facility. This is particularly true in petroleum terminals and other terminals handling hazardous materials. In some instances, crew have been denied the simple privilege of visiting a payphone located on the pier to call their families. Section 306 of the House version of the FY 08 Coast Guard Authorization Act, H.R. 2830, would require facility security plans to incorporate a system whereby seamen and seamen's welfare organizations can transit through the facility to the vessel, free of charge.

The Senate version of the FY 08 Coast Guard Authorization Act would legislatively establish a facility security program akin to the successful C-TPAT program.[41] Moreover, the proposal would permit independent, third-party entities to certify foreign ports' compliance with International Ship and Port Facility code standards. Critics have questioned the wisdom of permitting private contractors to perform this function, citing security risks.

E. Maritime Domain Awareness & the America's Waterway Watch Program

In the wake of September 11th and the Coast Guard's transfer to Homeland Security, the agency took a fresh look at maritime security, and realized that the government really does not have a clear, unified picture of what is happening in the U.S. maritime domain. To address this, the Coast Guard, in partnership with the Navy and other agencies, developed the Maritime Domain Awareness ("MDA") initiative. Conceptually, MDA involves the collection, synthesis, and dissemination of intelligence and information provided from U.S. government agencies, joint forces, international coalition partners and forces, and commercial entities. The information collected from these sources will be synthesized together to create a comprehensive common operating picture ("COP") that will be distributed to individuals with access to classified data. Through the COP, authorities will be able to monitor vessels, cargo, people, and areas of interest, as well as access relevant databases and collect, analyze, and distribute important information. It is hoped that through this information sharing process, it will be possible to identify and neutralize threats as early as possible. Additionally, MDA will operate as a key enabler for various security programs such as the CSI, Proliferation Security Initiative, and sanctions enforcement.

In furtherance of MDA, the Coast Guard appeals to the American public for help through America's Waterway Watch ("AWW"), a maritime version of "be on the lookout for suspicious packages." AWW is described as a national public awareness program centered around the

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[39] U.S. COAST GUARD, GUIDANCE FOR THE IMPLEMENTATION OF TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL (TWIC) PROGRAM IN THE MARITIME SECTOR, NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 03-07 (July 2, 2007).

[40] *Id.* at 40.

[41] S. 1892, § 802, 110th Cong. (2007).

participation of people who live, work, or play on or near the water, being aware of any suspicious activity that could threaten homeland security. The program encourages individuals to be sensitive to any unusual events, objects, or people they may encounter around ports, marinas, docks, riversides, or beaches, and to report any suspicious activities to the Coast Guard National Response Center and other appropriate law enforcement agencies. One controversial aspect of AWW has been reporter's immunity. Some have questioned whether this promotes racial and cultural profiling. Recognizing the importance of MDA and the AWW, Representative Gus Bilirakis (R–FL) introduced a resolution in the House of Representatives to support the goals of AWW and encourage public participation in the program in order to increase maritime security awareness.[42]

One of the key features of MDA has been earlier knowledge of approaching vessels. Central to achieving earlier knowledge is Long Range Vessel Tracking ("LRVT"). Current technology, such as the Global Maritime Distress and Safety System, provides a means for tracking vessels, but the Coast Guard has not yet implemented a system, preferring to develop a global system through the International Maritime Organization ("IMO"). In the SAFE Port Act, Congress directed the Coast Guard to issue regulations establishing and implementing an LRVT system by April 1, 2007.[43] Additionally, the Coast Guard and Maritime Transportation Act ("CGMTA") of 2006 directed the development of a pilot program for tracking up to 2000 vessels using satellite technology and authorizing $4 million per year to carry out the program.[44] Section 419 of the Act provides a grant for the development of a device that integrates a Class B Automatic Identification System transponder with a wireless maritime data service approved by the Federal Communications Commission.

In a press release issued April 3, 2007, the Coast Guard announced that it had met the April 1 deadline to track all large commercial vessels within U.S. waters.[45] In addition, the Coast Guard stated that the IMO is developing a long-range identification and tracking system that would provide an unclassified system for tracking over 40,000 ships worldwide by the end of 2008. This would permit the U.S. to obtain tracking information from ships operating within 1000 nautical miles of the coast.

LRVT initiatives have spurred a frenzy of lobbying activity by the marine exchanges. The exchanges already perform this function, to some extent, by publishing the worldwide locations of cargo vessels and tracking data relevant to each vessel. The exchanges are concerned that a central, federally funded LRVT program could marginalize or make their services obsolete. Therefore, they have encouraged a program based on their services. It remains to be seen what role, if any, they will play in whatever LRVT system is finally adopted.

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42 H.R. Res. 549, 110th Cong. (2007) (unenacted).

43 SAFE Port Act, § 107, 120 Stat. at 1891.

44 Coast Guard and Maritime Transportation Act of 2006, § 404, Pub. L. No. 109-241, 120 Stat. 516 (hereinafter, "CGMTA 2006").

45 UNITED STATES COAST GUARD, COAST GUARD MEETS SAFE PORT ACT DEADLINE (Apr. 3, 2007) (press release).

F. Merchant Mariner Credentials Improvement Act

Representative Steve LaTourette (R-OH) introduced H.R. 1605, the Merchant Mariner Credentials Improvement Act, in late March 2007. The bill aims to streamline the merchant mariner licensing process and reduce the regulatory burden for mariners. It would make licenses valid for five-year periods, renewable in advance for additional periods of the same length. Furthermore, the proposal would prohibit the Coast Guard from charging fees for credentials not issued or denied within 30 days of application, prohibit duplicative fingerprinting for both TWIC and merchant mariner credentials, establish an interim licensing process for newly hired seaman on tugs and offshore vessels, permit one-year extensions for merchant mariner credentials if needed to eliminate processing backlogs, and make license renewals effective on the date that the previous license expires. The legislation would also require studies to address the shortage of merchant mariners and further refine the credentialing process.

As of this writing, the bill awaits consideration by the House Transportation and Infrastructure Committee. The most recent version of the FY 08 Coast Guard Authorization Act, H.R. 2830, would include similar provisions.

G. Amendments to Sentencing Guidelines and PATRIOT Act Reauthorization

The United States Sentencing Commission ("USSC") promulgated several amendments to the sentencing guidelines and commentary, to take effect on November 1, 2007.[46] The amendments largely involve the USA PATRIOT Improvement and Reauthorization Act of 2005 ("PATRIOT Reauthorization Act")[47] and the Department of Homeland Security Appropriations Act for FY 07.[48] The amendments address new offenses created by the PATRIOT Reauthorization Act, which include crimes dealing with mining of U.S. navigable waters and violence against maritime navigational aids.

A new offense in the PATRIOT Reauthorization Act involves the placement of a dangerous device or substance in the water that is likely to destroy or damage ships or interfere with maritime commerce.[49] In addition, §§ 2K1.4(a)(1) and (a)(2) are amended to add an offense for the destruction or attempted destruction of a vessel maritime facility or such vessel's cargo.[50] Finally, the USSC amendments added a new base offense involving the destruction or tampering with aids to maritime navigation.

H. Committee on Foreign Investment in the United States & DP World

The Committee on Foreign Investment in the United States ("CFIUS") originated during the Ford Administration as an executive branch process to prevent technology transfers to

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[46] Notice of Submission to Congress of Amendments to the Sentencing Guidelines effective November 1, 2007, 72 Fed. Reg. 28,558 (May 21, 2007).

[47] USA PATRIOT Improvement and Reauthorization Act of 2005 ("PATRIOT Reauthorization Act"), Pub. L. No. 109-177, 120 Stat. 192 (2006).

[48] Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

[49] 18 U.S.C. § 2282A.

[50] The definition for these terms will be derived from Title 33 of the Code of Federal Regulations.

foreign entities presenting a threat to the national security of the U.S.[51] CFIUS operates out of the Treasury Department and involves several federal agencies. In 1988, Congress enacted the "Exon-Florio" provision[52] which amended the Defense Production Act[53] to make CFIUS subject to congressional oversight.

Exon-Florio, as originally enacted, gave the President authority to block proposed foreign acquisitions threatening national security.[54] However, under this mandate, CFIUS focused on defense production factors such as national defense production requirements and the consequences of transferring military equipment technology to nationals that support terrorism instead of considering acquisitions of domestic U.S. infrastructure (ports, transportation assets, etc.). To fix this oversight, in 1992 Congress amended Exon-Florio with the "Byrd Amendment," which requires CFIUS to investigate proposed acquisitions where the purchaser is controlled by or acting on behalf of a foreign government and the transaction could affect national security.[55]

In 2006, CFIUS came unexpectedly into the public eye with news that Dubai Ports World ("DP World") had purchased a group of U.S. ports. Because DP World is owned by the Emirate of Dubai, concerns arose about the acquisition of interests in various terminals by a Middle Eastern government with alleged connections to terrorism. Congress stepped-in and asked for a review of the manner in which foreign transactions were being evaluated by CFIUS and discovered that the DP World transaction had not been subject to a formal investigation, thereby violating the Byrd Amendment.

In response to the fallout from the DP World case, Members of the 109th Congress introduced over two dozen bills reforming CFIUS, one of which was scheduled for conference committee but was never signed into law. However, when the 110th Congress convened, it took up the issue of CFIUS reform and on July 18, 2007, the Foreign Investment and National Security Act of 2007 was presented to President Bush for consideration.[56]

Signed into law on July 26, 2007, the Foreign Investment and National Security Act of 2007[57] establishes CFIUS by statute and provides Congress with increased oversight of its activities. Additionally, the legislation would require full-blown national security investigations of bids by state-owned companies, restrict investment in "critical infrastructure" and formalize the role of the national intelligence director in such reviews. Time will tell whether there is any truth to critics' complaints that the legislation will chill foreign investment in the United States.

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51 Executive Order No. 11,858(b), 40 Fed Reg. 20,263 (May 7, 1975).

52 The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107 (1988) (amending § 721 of the Defense Production Act of 1950).

53 50 U.S.C. App. § 2170.

54 The Omnibus Trade and Competitiveness Act of 1988, 100-418, § 5021 102 Stat. 1107.

55 National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837(a), 106 Stat. 2315, 2463 (1993) (amending § 721 of the Defense Production Act of 1950).

56 H.R. 556, 110th Cong. (2007).

57 Pub. L. No. 110-49, 121 Stat. 246 (2007).

I. LNG Security

A February 2007 GAO report raised concerns regarding the ability to provide adequate security for the expected increase in LNG vessels and terminals, suggesting that the Coast Guard lacks the required assets.[58] In response, the FY 08 Coast Guard Authorization Act includes provisions detailing new maritime security requirements for LNG vessels.[59] It clarifies that the Coast Guard shall be responsible for providing security around LNG vessels entering U.S. ports. The provision also requires that, as part of their facility security plans, operators of LNG terminals in the U.S. must provide assets that can be used by the Coast Guard to provide marine patrols around LNG terminals and vessels. Interestingly, the bill states that the security arrangements for an onshore LNG terminal, as part of its facility security plan, may not be based upon the provision of security by a state or local government. And, as discussed in more detail below, recent legislation encourages the use of U.S. Flag LNG vessels and U.S. crews, citing security needs.

J. Smuggling of Aliens

Chapter 707 of the FY 08 Coast Guard Authorization Act, S. 1892, would impose stiff new criminal penalties on vessels that knowingly bring unlawful aliens into the United States, including imprisonment and criminal forfeiture. It would be an affirmative defense if the alien is a stowaway or was brought onto the vessel to save life and the Coast Guard was timely informed of the rescue.

III. MARAD & Coast Guard Administrative Changes

A. Coast Guard

1. Coast Guard reorganization

The Coast Guard reorganized itself, creating new numerically designated divisions and abandoning the old alphanumeric codes. This reorganization is not intended to have any substantive effect on the regulated public and the Coast Guard has said the purpose is to acknowledge internal changes resulting from sector realignment. The Coast Guard's system of sectors provide unified control and command for conducting its mission objectives in the sector's assigned Area of Responsibility ("AOR"). The amendments stemming from the reorganization deal with sector boundaries, marine inspection zones, and Captain of the Port zones, reporting

[58] GOVERNMENT ACCOUNTABILITY OFFICE, MARITIME SECURITY: PUBLIC SAFETY CONSEQUENCES OF A TERRORIST ATTACK ON A TANKER CARRYING LIQUID NATURAL GAS NEED CLARIFICATION, GAO 07-316 (Feb. 2007).

[59] H.R. 2830, § 328, 110th Cong. (2007).

relationships between the various field units, and the identity of field units overseeing certain issues.[60]

On July 17, 2007, the Coast Guard established the Deployable Operations Group, which aligns all Coast Guard deployable, specialized forces under the unified, single command of Rear Admiral Thomas Atkin. The group acts to combine specially trained and equipped maritime homeland security forces throughout the Coast Guard so that they can be quickly deployed anywhere and anytime needed. These specialized forces consist of about 3000 Coast Guard personnel from twelve Maritime Safety and Security Teams, two Tactical Law Enforcement Teams, the Maritime Security Response Team, eight Port Security Units, three National Strike Teams, and the National Strike Force Coordination Center.[61] And as a little lagniappe, the Coast Guard reschristened their "law specialists" as "judge advocates" further aligning the agency with the other armed services.[62]

Many industry observers have complained that this reorganization underscores the perceived neglect of the Coast Guard's traditional commercial marine safety functions in favor of its homeland security role.

2. Removal of commercial marine safety to another agency

On August 2, 2007, the Subcommittee on Coast Guard and Maritime Transportation of the House Committee on Transportation and Infrastructure conducted an oversight hearing on the Coast Guard's Marine Safety program. Subcommittee Chairman Elijah E. Cummings (D-MD) has stated that the hearing aimed to assess whether the Coast Guard still has the resources, experience, and expertise to implement effectively the nation's marine safety program, or whether the Coast Guard can no longer cope with its numerous missions. Industry representatives opined that the Coast Guard's heightened focus on security has caused it to neglect marine safety, and recommended that these functions be moved out of the Coast Guard and assigned to a civilian agency. The subcommittee considered whether leadership in marine safety lacks adequate background and expertise in that area. Additionally, representatives of the regulated community lamented what they perceived as atrophy of the Coast Guard's marine safety expertise. As of this writing, it remains to be seen whether new legislation will be introduced to strip the Coast Guard of its marine safety functions

3. Coast Guard ALJs under fire

An article in the Baltimore Sun on June 24, 2007 raised serious questions about the system of Coast Guard's administrative law judges and their impartiality in hearing cases on the credentialing of mariners.[63] In the article, a former ALJ revealed, among other things, that the Chief ALJ had directed her to rule for the Coast Guard.

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[60] Coast Guard Sector, Marine Inspection Zone, and Captain of the Port Zone Structure; Technical Amendment, 72 Fed. Reg. 36,316 (July 2, 2007) (to be codified at 33 C.F.R. Pts. 3, 20, 100, 104, 110, 125, 151, 160, 162, & 165; 46 C.F.R. pts. 1, 2, 4, 5, 16, 28, 45, 50, 67, 115, 122, 153, 169, 170, 176, & 185).

[61] UNITED STATES COAST GUARD, COAST GUARD ESTABLISHES DEPLOYABLE OPERATIONS GROUP (July 17, 2007) (press release).

[62] CGMTA 2006, § 218, 120 Stat. 516, 526.

[63] Robert Little, "Justice Capsized?", BALTIMORE SUN (June 24, 2007).

On July 31, 2007, the Subcommittee on Coast Guard and Maritime Transportation of the House Committee on Transportation and Infrastructure conducted an oversight hearing on the Coast Guard's Administrative Law System. Union representatives, former ALJs, and several Coast Guard officers testified regarding the impartiality of the Coast Guard's ALJs. Thus far, there has been no legislative action, although the Coast Guard has pledged to look into the issue.

4. Establishment of ombudsman

Making a tack toward customer service, the FY 08 Coast Guard Authorization Act, H.R. 2830, would establish "District Ombudsmen." Under the proposed legislation, each Coast Guard operational district would have such an ombudsman to serve as a liaison with the regulated community for dispute resolution, assigning priority to those grievances which the Coast Guard views as posing the greatest likelihood of harm.

5. Establishment of e-filing at NVDC

Older maritime lawyers will recall the days when documentation filings for a transaction were required to be done in person at the vessel's home port Coast Guard office. These functions were later consolidated in the National Vessel Documentation Center ("NVDC") in Falling Waters, West Virginia. However, filings have remained either in person or by facsimile with follow-on original document transmission.

On August 2, 2007, the Coast Guard published a "direct final rule; request for comments" establishing electronic filing for vessel documentation.[64] The rule will eliminate the requirement to provide certain original documents and eliminate additional fee for filing by facsimile. The rule will become effective October 31, 2007 barring an adverse comment to the August 2 notice.

B. MARAD

MARAD issued a press release on April 9, 2007 announcing that it is reorganizing into four core functional units. The Office of Intermodal Systems Development will focus on the nation's waterway transportation system and will oversee activities such as congestion mitigation projects, port development, shipper and carrier outreach, marine highway projects, and passenger industry development. The Office of Environment and Compliance will address the regulatory and compliance challenges facing the maritime community, especially in the subjects of security, safety, the environment, and research and development. The Office of Business and Workforce Development will conduct MARAD's current U.S. industry promotional activities involving marine insurance, export initiatives for U.S. maritime entities, cargo preference, marine and shipyard financing, shipyard and shipbuilding development, etc. Lastly, the Office of National Security will operate assets for the Department of Defense, and plan for emergency sealift. MARAD will also be establishing a series of gateway offices throughout the country.

Some in the industry have opined that these changes further deemphasize MARAD's traditional U.S. flag promotional programs in favor of flashier new initiatives, such as Marine Highways or the role of MARAD assets in support of disaster events such as Hurricane Katrina. Lastly, the draft FY 08 Transportation Authorization Report chastises MARAD for undertaking

[64] Vessel Documentation; Recording of Instruments, 72 Fed. Reg. 42,310 (Aug. 2, 2007).

the reorganization while failing to notify or brief the Committee on Appropriations in contravention of law.

IV. Deepwater

The Integrated Deepwater Systems Program ("Deepwater") is a 25-year, $24 billion program launched in the 1990s to renew and revitalize the U.S. Coast Guard's aging fleet of ships and aircraft. Building contracts were signed in 2002, and five years later, the program finds itself adrift and in hot water.

In 2005, the Coast Guard halted plans to lengthen each of its 110-foot patrol boats by 13 feet after engineering faults were discovered.[65] In November, Commandant Thad W. Allen deemed the eight patrol boats already lengthened too dangerous to use. The vessels are now headed for permanent decommissioning. Additionally, the flagships of Deepwater, the eight state-of-the-art, 418-foot National Security Cutters, have structural flaws that will likely shorten their projected service life and require costly repairs. Lastly, the Coast Guard cancelled a $600 million contract to build the first 12 of 58 fast cutters because they were found to be overweight and plagued with design disappointments.

Critics have suggested two main problems with Deepwater.[66] First, the Coast Guard did not proceed incrementally, but instead aimed to create a "system-of-systems," building scores of new cutters, small boats, manned and unmanned aircraft all with complementary communications and electronics systems. Second, the Coast Guard did not cultivate the in-service capability to run the program, but placed the program almost wholly within the hands of two outside contractors, Northrop Grumman and Lockheed Martin, who were asked to run the program as a joint venture. These contractors did not keep the Coast Guard informed of problems with the program, such as failures in initial procurements, cutter-expansions, and other performance failures uncovered by the Department of Homeland Security's Inspector General.

On April 17, 2007, in an effort to correct its past mistakes, the Coast Guard resumed control of Deepwater from the contractors. The contract itself is under investigation by the Department of Justice.

Congress has expressed its dissatisfaction with the management of the Deepwater program, viewing the program as a waste of taxpayer funds. Proposals to fix the program have tended to promote taking the program away from the joint contractors, Northrop Grumman and Lockheed Martin, and returning management to the Coast Guard itself.

Senators Maria Cantwell (D-WA) and Olympia Snowe (R–ME) introduced S. 924 on March 20, 2007, which would require an outside review of all Deepwater assets for which contracts have not been issued and require the Coast Guard to report to Congress before awarding any new contracts. The bill reported out of Committee on April 25, 2007.

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[65] Additionally, § 408 of CGMTA 2006 imposed numerous requirements to report to the relevant congressional committees regarding Deepwater's progress.

[66] *See, e.g.*, The Coast Guard: In Deepwater, THE ECONOMIST (Apr. 19, 2007).

In the House, Representative Elijah Cummings (D–MD) introduced H.R. 2722, which also called for the restructuring of Deepwater. Under H.R. 2722, a private firm would be prohibited from acting as Deepwater's lead system integrator, which is responsible for procuring and integrating new assets for the program. However, this prohibition does not take effect immediately – the private consortium would be allowed to continue operating for the next few years until the Coast Guard has the personnel and expertise to act as lead system integrator. Although Cummings had originally proposed a Coast Guard takeover in two years, Representative Steven LaTourette (R-OH) argued that the Coast Guard needed more time to incorporate the procurement expertise needed to effectively operate as the program's general contractor. Under an amendment by Gene Taylor (D-MS), the bill would also permit the Coast Guard to draw upon the Navy's procurement experience in carrying out Deepwater. Lastly, H.R. 2830, the Coast Guard Authorization Act, would authorize $1 billion for Coast Guard acquisition and construction for FY 08, including $837 million for Deepwater.[67] The bill passed the House on July 31, 2007 and awaits action by the Senate as of this writing.

Lastly, but not least among the Deepwater reform efforts, H.R. 1585, an FY 08 Defense Authorization Act, would prohibit the use of "Lead Systems Integrators," requiring an acquisition workforce to accomplish "inherently governmental functions" in procurement.

V. Marine Safety

A. Coast Guard Alternative Compliance Program Rulemaking

In 1995, the Coast Guard launched its Alternative Compliance Program ("ACP") pilot in an effort to harmonize domestic and international marine safety and environmental protection standards. Under the ACP, owners and operators of eligible vessels were permitted to request inspections by an authorized classification society. The initial pilot applied only to the American Bureau of Shipping. However, the program has worked well and therefore the Coast Guard issued a Notice of Proposed Rulemaking on May 22, 2007, proposing to amend the vessel inspection regulations to expand the ACP.[68] The proposed rule would update the list of certificates the Coast Guard issues, add passenger vessel safety certificates and high-speed craft safety certificates to those issued by classification societies, incorporate Coast Guard policy regarding eligibility of classification societies participating in the ACP, recognize classification societies other than the American Bureau of Shipping, and expand the ACP to include oceanographic vessels.

The comment period ended on July 23, 2007. If the proposed rules are implemented in the future, the ACP should reduce the regulatory burden on the maritime industry while maintaining high levels of safety and also provide increased flexibility in the construction and operation of U.S. flag vessels. As of this writing, the agency has not yet promulgated its final rule.

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[67] Coast Guard Authorization Act for Fiscal Year 2008, H.R. 2830, § 101, 110th Cong. (2007) (as passed the House).

[68] Alternate Compliance Program: Vessel Inspection Alternatives, 72 Fed. Reg. 28,650 (May 22, 2007) (to be codified at 46 C.F.R. pts. 2, 8, & 189).

VI. Environmental Measures

The maritime sector continues to receive significant attention from the federal government with respect to its environmental impact, especially with the change to Democratic leadership in Congress. New legislative and regulatory efforts have aimed to tweak the existing water pollution structure and to address marine air pollution and invasive species. As has been the case in the past, much of the debate revolves around the decision to create new rules now instead of waiting for the establishment of a coordinated international regime. Moreover, industry commentators have complained that the Government should spend more time enforcing the rules it has and less time promulgating new rules, because the proliferation of rules without enforcement provides cost incentive and advantage to sub-par operators.

A. Implementation of MARPOL Annex VI

Annex VI to the International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978, ("MARPOL") came into force internationally on May 19, 2005 and had an immediate effect on ships built on or after that date. The convention sets limits on sulfur and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone depleting substances. Ships built prior to the Annex's entry into force would be required to comply with Annex VI on the first scheduled dry docking after May 15, 2005, but no later than May 19, 2008.

Annex VI has yet to be implemented in the United States because the Annex VI Implementation Act of 2006[69] did not clear the Senate before the end of the 109th Congress. However, the Democratic-controlled House restarted the legislative process by passing H.R. 802 on March 26, 2007. The Senate has yet to pass the legislation.

H.R. 802, as passed by the House, would change several portions of the previous House version, H.R. 5811. First, H.R. 802 would expand the jurisdictional reach of Annex VI to the exclusive economic zone of the U.S. ("EEZ").[70] The text of the bill states that this expanded jurisdiction applies only "to the extent consistent with international law." However, the meaning of that qualifier is not clear. At a minimum, this means that vessels in innocent passage are not subject to U.S. jurisdiction. In addition, it should also mean that criminal penalties incurred for violations occurring in the EEZ can only be monetary, as provided by the United Nations Law of the Sea Convention. If this provision of the legislation survives the Senate, the meaning of the qualifier should be clarified.

Second, H.R. 802 gives the Coast Guard and the Environmental Protection Agency ("EPA") the power to designate "by order" areas "from which emissions from ships are of concern with respect to the public health, welfare, or the environment."[71] H.R. 5811, on the other hand, had only allowed such designations according to available scientific data. Therefore, H.R. 802 delegates a remarkable amount of power to the enforcement agencies to designate areas where it will apply and provides the agencies with largely unbridled discretion. Enforcement

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[69] H.R. 5811, 109th Cong. (2006).

[70] The exclusive economic zone of the United States reaches up to 200 miles offshore. H.R. 802 § 4, 110th Cong. (2007). *See also* H. Rep. No. 110-54 (2007).

[71] H.R. 802, § 4, 110th Cong. (2007).

agencies would be free from both the procedural safeguards of the regulatory process and evidentiary safeguards that require scientific data prior to making designations. Although this new approach has been received favorably by the agencies, it leaves operators and owners at the mercy of the Coast Guard and EPA.

Third, H.R. 802 significantly expands the power of EPA provided in H.R. 5811. Under H.R. 5811, EPA's regulatory role was restricted to consultation with the Coast Guard regarding Regulations 13, 14, 15, and 18 of Annex VI (which involved nitrous oxides, sulfur oxides, volatile organics, and fuel oil quality).[72] However, H.R. 802 expands EPA's power to include Regulations 12, 16, 17, and 19 (involving ozone depleting substances, incineration, reception facilities, platforms, and drilling rigs), and also eliminates the requirement to consult with the Coast Guard. In addition, H.R. 802 gives EPA far-reaching enforcement power over reception facilities, fuel quality and any matter referred by the Coast Guard.[73] The legislation would grant EPA wide ranging power over air emissions and expose owners and operators to criminal penalties for record keeping misstatements related to air emissions, similar to oil record book prosecutions under MARPOL Annex I.

B. Other Proposals to Reduce Marine Air Pollution

The California congressional delegation, who are acutely sensitive to air pollution issues thanks to Los Angeles' infamous smog, have become impatient waiting for the Administration to navigate multilateral lawmaking options, quipping that the EPA's delays merit its rechristening as the "Environmental Pollution Agency."[74]

On May 24, 2007, Senator Barbara Boxer (D–CA), Representative Hilda Solis (D–CA), and Representative Jane Harman (D-CA) introduced the Marine Vessel Emissions Reduction Act of 2007 ("MVERA") in the Senate and House.[75] Whereas H.R. 802 would shift enforcement responsibility to EPA and strengthen criminal enforcement, MVERA actually seeks to cut air pollution from ships that contribute to the smog and soot pollution around U.S. ports.

The bill would require ships to use cleaner-burning, lower-sulfur content fuels that would reduce soot and smog-producing emissions when ships are nearby American ports.[76] Specifically, the MVERA would limit the sulfur content of fuel used by both domestic and foreign-flagged marine vessels when they enter or exit U.S. ports starting on December 31, 2010. The limit will be no more than 1000 parts per million unless EPA determines that such a level is not feasible by December 31, 2010. In addition, EPA would set standards for new and current engines in domestic and foreign-flagged vessels that enter or exit U.S. ports to obtain the "greatest degree of emission reduction achievable." The standards would require compliance by January 1, 2012 at the latest.

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72 H.R. 5811, § 5, 109th Cong. (2006).

73 H.R. 802, § 8, 110th Cong. (2007).

74 *Boxer says EPA stalling ports' air cleanup*, LOS ANGELES TIMES (Aug. 10, 2007) ("'We must set standards now,' Boxer said. 'The Bush administration is waiting for international negotiations to produce tighter standards, but those negotiations were recently delayed for at least another year. We must stop wasting time.'").

75 S. 1499, 110th Cong. (2007); H.R. 2548, 110th Cong. (2007).

76 The bill would require low-sulfur bunkers or diesel when within 200 miles of the West Coast of the U.S., with applicable limits on the East Coast and Great Lakes determinable by the EPA.

The bill has been referred to committees in the Senate and House, and has received support from the American Lung Association, the Mayor of Long Beach, the Port of Los Angeles, and the South Coast Air Quality Management District.

C. EPA Marine Diesel Rule

On April 3, 2007, EPA proposed the Clean Air Locomotive and Marine Diesel Rule for engines less than 30 liters per cylinder, which would set stringent emission standards and require the use of advanced technology to lower emissions.[77] The proposal involves all types of diesel engines, including those from a wide range of marine sources, such as ferries, tugboats, yachts, and marine auxiliary engines and also includes generators on ocean-going ships. If implemented, the Rule would cut particulate matter emissions from these engines by 90% and nitrogen oxides emissions by 80%. Standards for new marine diesel engines would begin in 2009 and long-term standards would phase-in starting in 2014. The rule also discusses a possible remanufacturing program for existing large marine diesel engines, similar to the current program for locomotives.

D. Invasive Species & Ballast Water Management

Zebra mussels have cut swimmers' feet and fouled hulls for centuries in Europe. They are thought to have emigrated to the United States on the hull of a transoceanic ship in the 1980s, and were spotted first in Lake St. Clair. Since then, they have spread throughout all the Great Lakes and throughout the Mississippi River system. In recent years, they have acted as the poster child for increasingly energetic efforts to control invasive species in the marine environment.

Recognizing the importance of this issue, the House put forth an extensive program for ballast water treatment and management in the Coast Guard Authorization Act for FY 08.[78] This Act contained a provision entitled the "Ballast Water Treatment Act of 2007" setting out a national policy prohibiting introduction of nonindigenous aquatic nuisance species in U.S. waters with a goal that by 2015, ballast water discharged in U.S. water will have no living organisms. Under the Act, vessels will be required to conduct all ballast water management operations in accordance with ballast water management plans designed to minimize discharge of aquatic nuisance species. These plans must include procedures to be used to dispose of sediment at sea and on shore, describe the safety procedures for the vessel and the crew associated with ballast water management, and must designate an officer on board in charge of ensuring that the plan is properly implemented.

There are several troubling provisions in the Act. First, it would authorize differing state programs regulating ballast, provided they are not inconsistent with the Act's requirements. Second, applicable vessels will be required to maintain a "Vessel Ballast Water Record Book" on board, which would detail each operation of the vessel involving ballast water or sediment

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[77] Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression-Ignition Engines Less than 30 Liters Per Cylinder, 72 Fed. Reg. 15,938 (proposed Apr. 3, 2007) (to be codified at 40 CFR pts. 92, 94, 1033, 1039, 1042, 1065, & 1068).

[78] H.R. 2830, Title V, 110th Cong. (2007).

discharge. Such a book would present the government with yet another means for imposing strict criminal liability on seafarers, owners, and operators.

The Ballast Water Treatment Act of 2007 also includes a citizen suit provision. This allows any interested person to bring action in the United States Court of Appeals for the District of Columbia Circuit for judicial review of a final regulation issued to implement this Act. This petition must be filed within 120 days after the date when the notice for rulemaking appears in the Federal Register, but if the petition is based on circumstances arising after the 120th day, the petition should be filed within 120 days after those circumstances arise. However, a regulation for which review could have been obtained cannot be subject to judicial review in any civil or criminal proceeding for enforcement.

The August 29, 2007 Congressional Budget Office ("CBO") Budget estimate for the Coast Guard Authorization Act of for FY 08 concludes that its ballast water treatment requirements in the Ballast Water Treatment Act, compounded by security requirements in the in the broader Coast Guard Authorization Act, are likely to trigger the Unfunded Mandates Reform Act.[79]

On May 25, 2007, Representative Steven LaTourette (R–OH), Ranking Member of the House Transportation and Infrastructure's Coast Guard Subcommittee, introduced H.R. 2423, the Ballast Water Management Act of 2007, which provides for the management and treatment of ballast water in order to protect U.S. lakes, rivers, and coastal waters from invasive aquatic species. If enacted, the Act would require new ships to include the appropriate technology to improve the efficiency of ballast water exchange or incorporate alternative water treatment processes. However, the Act requires treatment of ballast water with technology that does not currently exist. Therefore, the bill allows the Coast Guard to delay implementation of national standards "if technologies are not available and to accelerate the implementation of standards if systems are certified ahead of schedule."

On June 7, 2007, Senators Daniel Inouye (D–HI) and Ted Stevens (R–AK) introduced S. 1578, also called the Ballast Water Management Act of 2007,[80] which would broaden the reach of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990[81] and acknowledge the 2004 IMO agreement regarding ballast water management. Both of these proposed bills have been referred to committee. On August 2, 2007, Senator Inouye withdrew the legislation because of concerns that the bill appears to encroach on the Clean Water Act protections and States' rights.[82] Staff level meetings have been underway in August to amend the legislation and get it passed in compromise form.

Each of these various proposals differs in some potentially significant ways, and although it is unclear which will evolve into law, the volume of proposals suggests some new law on ballast water and invasive species is very likely.

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79 CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, H.R. 2830, COAST GUARD AUTHORIZATION ACT OF 2007 (Aug. 29, 2007).

80 S. 1578, 110th Cong. (2007).

81 16 U.S.C. § 4701(a).

82 Pike and Fischer, SHIPPING REGULATION, Report No. 07-17 (Aug. 20, 2007).

E. The Delaware River Protection Act

The Delaware River Protection Act ("DRPA") was signed into law in July 2006 as part of CGMTA 2006.[83] DRPA was written in response to the ATHOS I oil spill on November 26, 2004, which occurred when an abandoned item on the riverbed tore open the side of a tanker in the Delaware River, causing the discharge of approximately 473,500 gallons of heavy Venezuelan crude. The spill fouled 115 miles of coastline, caused a three-day shutdown of the Port of Philadelphia, and led to temporary shut-down of reactors at the Salem nuclear power plant.

DRPA also provides increased liability limits for parties held responsible for an oil spill to reflect inflation since 1990, requires increases at least every three years (current limits are set at the greater of $3000 per gross ton or $22 million for single-hull vessels, the greater of $1900 per gross ton or $16 million for double-hull tank vessels, and the greater of $950 per gross ton or $800,000 for all other vessels).

Reflecting its heritage as a reaction to the ATHOS I incident, the Act requires notification to the Coast Guard as soon as a person has knowledge of the release from a vessel or facility into the navigable waters of the United States any object that creates an obstruction prohibited under the Rivers and Harbors Act of 1899.[84] Such statements or reports may not be used against the disclosing party in any civil action, save a false statements prosecution.

Lastly, the Act includes a number of provisions aimed at the protection of the Delaware River and Bay (which handles approximately 85% of the oil imports for the Eastern United States), including the establishment of an oil spill advisory, submerged oil removal, and contingency plan updating.

F. Oil Pollution Prevention and Response

On June 14, 2007 Senators Maria Cantwell (D–WA) and John Kerry (D-MA) introduced a bill to strengthen the Oil Pollution Act of 1990 ("OPA") and expand the authority of the Coast Guard.[85] The bill is a broad effort to address some perceived shortcomings in the operation of OPA and to strengthen protection of the marine environment. Among other things, it would require the Coast Guard to finalize all OPA rulemakings, pass regulations addressing the most frequent sources of human error, strengthen vessel inspections, and create regulations permitting the formation of non-profit enterprises to aid in compliance with OPA. The bill would also strengthen programs to increase our understanding of oil spill prevention, detection, and response.

Title VII of the Senate version of the FY 08 Coast Guard Authorization Act, S. 1892, includes numerous provisions aimed at strengthening oil spill prevention and response. The legislation targets, *inter alia*, vessel-to-vessel transfers, small spills, spill detection, and response tugs.

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83 CGMTA 2006, Title VI.

84 *Id.*, § 602 (citing 33 U.S.C. § 403).

85 S. 1620, 110th Cong. (2007).

G. NPDES Permits for Vessel Discharges

In March 2005, the United States District Court for the Northern District of California struck-down EPA's longstanding exemption of discharges "incidental to the manual operation of a vessel" pursuant to § 402 of the Clean Water Act, and in March 2006 remanded to EPA, giving the agency until September 2008 to establish National Pollution Discharge Elimination System ("NPDES") regulations for operational discharges.[86] Although the decision is on appeal to the Ninth Circuit, the situation presents a real threat to the regulated community.[87]

On June 21, 2007, EPA issued a public notice requesting the inspection of NPDES permits upon vessel operations.[88] Commenters to the EPA docket have explained that this will be unworkable as applied to the normal operation of vessels. For example, permits would be required for *de minimus* discharges such as chain locker effluent, boiler blowdown, deck run-off, brine from the production of fresh water, seawater cooling discharge, gray water, and small boat engine wet exhaust. Commenters also oppose the proposal because it would permit individual states to impose additional requirements, creating an enormous compliance burden for vessels due to their mobile, multi-jurisdictional operations. EPA's Assistant Administrator for Water has publicly appealed to Congress for help clarifying jurisdiction over ballast water.

H. Clean Water Restoration Act

Representative Jim Oberstar (D–MN) introduced the Clean Water Restoration Act of 2007[89] on May 22, 2007, which would amend the Federal Water Pollution Control Act ("FWPCA")[90] to clarify the jurisdiction of the United States over U.S. waters. If enacted, the bill would expand the jurisdiction of the FWPCA to the maximum limit provided in the Constitution, which would overturn several Court decisions, including the consolidated cases of *Rapanos v. United States*,[91] *Carabell v. United States*,[92] and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[93] that have limited federal agency authority to regulate water pollution.

On June 5, 2007, the EPA and the U.S. Army Corps issued guidance implementing the Supreme Court's decisions in *Rapanos* and *Carabell* (herein referred to as *Rapanos*), which addressed jurisdiction over "waters of the United States" under § 404 of the FWPCA. The guidance stated that the agencies would assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are somewhat permanent, and wetlands that directly abut such tributaries.[94]

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86 *Northwest Envtl. Advocates v. EPA*, 30 S.R.R. 1083 (N.D. Cal. 2006).

87 *Northwest Envtl. Advocates v. EPA*, No. 06-17188 (9th Cir.).

88 Development of Clean Water Act National Pollutant Discharge Elimination System Permits for Discharges Incidental to the Normal Operation of Vessels, 72 Fed. Reg. 34,241 (June 21, 2007).

89 H.R. 2421, 110th Cong. (2007).

90 33 U.S.C. §§ 1251 *et seq.*

91 126 S. Ct. 2208 (2006).

92 *Id.*

93 531 U.S. 159 (2001).

94 Environmental PROTECTION AGENCY AND DEPARTMENT OF THE ARMY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*

The agency would also decide whether to exercise jurisdiction over the following based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable water: non-navigable tributaries that are not relatively permanent, wetlands adjacent to such tributaries, and wetlands adjacent to, but that do not directly abut, a relatively permanent non-navigable tributary. The significant nexus analysis involves assessing the flow characteristics and functions of the tributary and the functions performed by the wetlands adjacent to the tributary to determine if they in combination significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

The Clean Water Restoration Act of 2007 proposes expanding the jurisdiction of the FWPCA by striking "navigable waters of the United States" and inserting "waters of the United States," which will be broadly defined as "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams," etc. Therefore, if the bill is enacted, it would significantly expand FWPCA jurisdiction beyond the bounds stated by the plurality of the Supreme Court in *Rapanos*.

VII. Jones Act

A. Vessel Rebuilding

Under current law, Jones Act-qualified U.S.-flag vessels are restricted to a certain percentage of foreign repairs.[95] If they exceed certain steel thresholds detailed by U.S. Coast Guard regulations, they will risk permanently losing their Jones Act privileges.[96] Many U.S. shipyards became concerned with the extent of foreign shipyard repairs being conducted on U.S.-flag vessels, and therefore voiced their concerns that the administration of the regulations was too lenient. Both houses of Congress ended up introducing bills on the subject. In the House, an amendment was adopted that would take away a vessel's eligibility to carry Department of Defense cargo unless all repairs were conducted in the U.S. The Senate, on the other hand, considered proposals to lower the threshold percentage of foreign steel work, but these proposals were rejected on several arguments, including that lower thresholds could violate international trade agreements. In the end, the compromise legislation enacted in the FY 07 Defense Authorization Act allowed the Department of Defense to favor U.S.-repaired and Jones Act-qualified U.S.-flag vessels when granting cargo contracts.[97]

More recently, the Shipbuilders Council of America ("SCA") joined two separate suits by competitors to Jones Act operators, challenging vessels' continued eligibility for the coastwise trades on the basis of foreign rebuilding. In the first suit, Matson Navigation obtained a favorable ruling from the Coast Guard with respect to conversion of vessels from container ships to ro/ro-container ship combinations, permitting some work in China and other work in Mobile.

(June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf (last visited Sept. 8, 2007).

[95] 46 U.S.C. §§ 12101(a) & 12132(b).

[96] 46 C.F.R. § 67.177.

[97] John Warner National Defense Authorization Act for Fiscal Year 2007 (FY 07 Defense Authorization Act), Pub. L. No. 109-364, § 1017, 120 Stat. 2083, 2379-80 (2006).

With the work partially completed, Matson's ro/ro competitor, Pasha Hawaii Transport, and SCA sued the Coast Guard in the United States District Court for the Eastern District of Virginia, alleging that its rulings improperly interpreted the Jones Act.[98] The suit was dismissed on April 16, 2007 by Judge Ellis, who found the controversy not yet ripe because the Coast Guard had not yet issued a coastwise endorsement to the Matson vessel at issue. The second suit, filed in July 2007 by SCA, Crowley Maritime Corp., and Overseas Shipholding Group, challenges the Coast Guard's ruling permitting the SEABULK TRADER to be double-hulled overseas, again alleging a failure to administer properly the Jones Act's restriction on foreign repairs.[99] If the plaintiffs prevail in these suits, it would overturn longstanding Coast Guard practice and create substantial uncertainty in the industry.

The Senate version of the FY 08 Coast Guard Authorization Act, S. 1892, requires the Coast Guard to review and report on improvements for the "major component" and steel weight thresholds for rebuilding determinations.[100]

B. Short Sea Shipping

In recent years, MARAD has promoted short sea shipping or "marine highways" initiatives as a means of relieving overland highway congestion while invigorating the U.S. flag fleet. Toward that end, MARAD maintains a website[101] intended to serve as "an electronic clearinghouse to promote waterborne transportation as an engine of economic growth." MARAD also conducts workshops aimed at putting together shippers and carriers to further develop usage of coastwise and inland waterway alternatives to congested overland highways. One significant hurdle to the further development of marine highways is the double imposition of the Harbor Maintenance Tax ("HMT") on such cargoes—once upon international arrival and again upon arrival following domestic shipment.[102]

The Short Sea Shipping Promotion Act of 2007 was introduced by Elijah Cummings (D–MD), to amend the Internal Revenue Code to provide an exemption from the HMT for certain commercial cargo loaded or unloaded at U.S. ports or Canadian Great Lakes ports.[103] The bill was referred to the House Committee on Ways and Means on March 13, 2007 and awaits further action.

In a similar vein, Representative Stephanie Tubbs (D-OH) introduced the Great Lakes Short Sea Shipping Enhancement Act of 2007, H.R. 981, which would exempt from the HMT cargo loaded or unloaded at U.S. ports in the Great Lakes or St. Lawrence Seaway system. The exemption would not apply to bulk cargoes.

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98 *Shipbuilders Council of Am. v. U.S. Dep't of Homeland Security*, No. 1:06cv1297 (E.D. Va.).

99 *Shipbuilders Council of Am. v. U.S. Dep't of Homeland Security*, No. 1:07cv665 (E.D. Va.).

100 S. 1892, § 506, 110th Cong. (2007).

101 http://www.marad.dot.gov/MHI/index.asp.

102 For a further discussion of this problem, *see* NATIONAL PORTS AND WATERWAYS INSTITUTE, UNIVERSITY OF NEW ORLEANS, "SHORT SEA VESSEL SERVICE AND HARBOR MAINTENANCE TAX" (Oct. 2005), *available at* http://www.shortsea.us/scoop_hmt_report.pdf.

103 H.R. 1499, 110th Cong. (2007).

Finally, Representative Dave Weldon (R-FL), introduced the Blue Water Highway Act.[104] This proposal would exempt cargo shipped between U.S. mainland ports from the HMT. As of this writing, each of the three foregoing HMT exemption bills awaits action in committee.

C. Hurricane Waivers

Hurricanes Katrina and Rita led to waivers of the Jones Act, in accordance with the Act of December 27, 1950, which provides that the Jones Act and other navigation and vessel-inspection laws can be waived when "necessary in the interest of national defense."[105]

In the aftermath of Hurricane Katrina, the Bush Administration temporarily waived the Jones Act with respect to the carriage of oil and petroleum products. This 18-day waiver was unprecedented, according to the public records of the Customs Service, because it was for a period of time, instead of a particular voyage. Jones Act advocacy groups, including the Maritime Cabotage Task Force ("MCTF"), did not object to this waiver and stated in a letter dated September 2, 2005 that "we respect the President's decision in light of the unusual and temporary circumstance caused by the downed pipelines and the dimensions of human tragedy" even though "the industry normally opposes coastwise waivers because of the robust capacity of the domestic fleet."

After Hurricane Rita, the Bush Administration also waived the Jones Act for the carriage of oil and petroleum products for 27 days. However, the MCTF urged the Administration not to issue any additional blanket waivers and to follow the procedure outlined in a 1990 agreement between the Customs Service, the Energy Department, and MARAD, which requires that MARAD notify all affected U.S.-flag carriers of a waiver request.

There were several additional waiver requests not included in the two waivers for Hurricanes Katrina and Rita. One such request was from a group of agricultural interests, including the American Farm Bureau Federation, which applied to waive maritime cabotage for the remainder of the 2005 calendar year for carriage of agricultural products to ease the burden on the transportation system and limit the negative impacts of the port and waterway recovery efforts on U.S. agricultural producers. The MCTF opposed the request and urged the government to resist providing case-by-case waivers. Ultimately, the government denied the agricultural waiver request.

More recently, there has been debate whether terrorism contingency and preparedness plans should incorporate Jones Act waivers. However, cabotage interests have been effective to date in blocking these proposals.

D. Anchor Handling and Offshore Service Vessels

Numerous questions regarding the applicability of the Jones Act have arisen in the context of evolving technology for the exploration of oil and natural gas. One such question is whether certain anchors are considered merchandise, as covered in the Jones Act, or fittings,

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104 H.R. 1701, 110th Cong. (2007).

105 46 U.S.C. § 501.

which are exempt from the Jones Act. Additional questions about what constitutes a Jones Act "point in the United States" also surround anchor handling and offshore service vessels.

Customs and Border Protection ("CBP") issued a ruling on January 18, 2005, in response to a query from the Offshore Marine Service Association, which confirmed that the Jones Act applied to the carriage of suction anchors from a U.S. port to a location over the U.S. outer continental shelf where a drill ship had previously sunk or temporarily capped a well. However, in a 1992 ruling, CBP determined that anchors carried by anchor handling tugs attached to anchor lines from drilling rigs would be considered fittings of the drilling rigs, not merchandise as defined by the Jones Act.

The 2005 CBP ruling was refined by the CGMTA 2006. The version passed by the House included the following provision: "Only a vessel for which a certificate of documentation with a registry endorsement is issued may be employed in the setting or moving of anchors or other mooring equipment of a mobile offshore drilling unit that is located above or on the outer Continental Shelf of the United States . . . ."[106] A vessel that is built outside the U.S. and is beneficially owned by non-U.S. citizens (albeit through an entity that qualifies to document a U.S.-flag vessel) qualifies for a registry endorsement.

The Department of Homeland Security commented on the legislation and indicated that it would take no position on the amendment. However, it noted that the provision would preclude a U.S. vessel, which holds only a coastwise endorsement, from employment that she was already eligible to perform. This problem was addressed by the Senate Commerce Committee where the legislation was amended to the following: "No vessel without a registry or coastwise endorsement may engage in the movement of anchors or other mooring equipment from one point over or on the United States outer Continental Shelf to another such point in connection with exploring for, developing, or producing resources from the outer Continental Shelf." A compromise was ultimately adopted that restricted the "setting, relocation, or recovery of anchors or other mooring equipment" of a Mobile Offshore Drilling Unit "located over the outer Continental Shelf" and the "transportation of merchandise or personnel to or from a point in the United States from or to a mobile offshore drilling unit located over the Continental Shelf that is not attached to the seabed" to U.S.-flag vessels with or without coastwise endorsements.[107]

Under current law towing vessels less than 200 gross tons engaged in the offshore mineral oil industry need not be operated by an individual with a U.S. license if the vessel has offshore mineral and oil industry sites or equipment as its ultimate destination or place of departure.[108] A provision in the House version of the Coast Guard Authorization Act would strip away this exemption, such that persons operating such towing vessels must be licensed to operate that type of vessel in the particular geographic area.

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106 H.R. 889, § 415, 109th Cong. (2005).

107 CGMTA 2006, § 310, 120 Stat. 515, 529-30. Section 705 of the SAFE Port Act permits the chartering by or on behalf of a lessee to be employed in anchor handling in connection with Alaskan offshore exploration activities. Section 206 of S. 1778 would add similar language to 46 U.S.C. § 12111.

108 46 U.S.C. § 8905.

E. LNG Vessels

The current House version of the Coast Guard Authorization Act also includes a provision that would amend 46 U.S.C. § 12111 to require a U.S. registry endorsement for any vessel engaging in regassifying on the navigable waters of the United States unless the vessel or facility transported the gas from a foreign port.[109] Additional measures have been introduced to promote U.S. seafarers on LNG vessels calling at U.S. terminals, discussed in further detail below.

VIII. Maritime Security Program ("MSP")

A. Maintenance & Repair Reimbursement Program

Section 3517 of the Maritime Security Act of 2003 authorized the creation of a "Maintenance and Repair Reimbursement Pilot Program" for MSP-enrolled vessels.[110] This section was amended in the FY 06 Defense Authorization Act, which authorized significant funding for the program.[111]

The pilot program allows MARAD to enter into reimbursement agreements with MSP contractors that would require such persons to conduct all of their shipyard repairs in the U.S., with a few exceptions. In exchange, the MARAD would reimburse the participating MSP contractor for the difference between the fair and reasonable cost of the U.S. shipyard repair and the cost of the foreign shipyard repair.

In February 2006, MARAD promulgated a proposed rule to implement the pilot program.[112] However, several industry commentators argued that the Administration did not have the authority to make the pilot program mandatory with regard to any existing MSP agreements, although the Shipbuilders Council submitted comments supporting MARAD's authority. Therefore, the comment period was reopened, and subsequently closed on September 22, 2006.[113]

MARAD issued its final rule on February 6, 2007.[114] In the notice, MARAD concluded that Congress intended the maintenance and repair provisions to be a condition only on future MSP agreements awarded, such that they were only voluntary for the existing 60 vessels in the program.

The 2007 Defense Authorization allowed $19.5 million for the pilot program[115] and tried to kick-start the program by providing that MSP contractors that enter into pilot program agreements under § 3517 would be protected from any MSP agreement funding cutbacks.[116]

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109 H.R. 2830, § 319, 110th Cong. (2007).
110 Pub. L. No. 108-136, 117 Stat. 1392 (2003).
112 Pub. L. No. 109-163, § 3503, 119 Stat. 3551 (Jan. 6, 2006).
112 71 Fed. Reg. 6438 (Feb. 8, 2006) (to be codified at 46 C.F.R. pt. 296).
113 71 Fed. Reg. 49,399 (proposed Aug. 23, 2006) (to be codified at 46 C.F.R. pt. 296).
114 72 Fed. Reg. 5342 (Feb. 6, 2007) (to be codified at 46 C.F.R. pt. 296).
115 John Warner Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 3501, 120 Stat. 2083, 2514 (2006).
116 *Id.*, § 3502(f).

However, current drafts of the FY 08 Defense Authorization and Appropriations Bill in the House and Senate do not contain an appropriation of funds for the Maintenance and Repair Reimbursement Program.[117]

B. Transferability of MSP Agreements

In 2004, Congress reauthorized the MSP[118] and in this reauthorization, MSP Operating Agreements remained relatively freely transferable, with the exception that they must be to a person that is "eligible to enter into that" agreement, and subject to MARAD and Department of Defense approval. In addition, because the 2004 reauthorization provides relatively liberal citizenship eligibility requirements, the majority of the 60 existing MSP Operating Agreements are used by non-U.S. citizen controlled companies.

The 2007 National Defense Authorization Act added a U.S. citizenship requirement to transfers, providing that the Department of Defense may not approve the transfer of a MSP Operating Agreement to a non-U.S. citizen, as defined in § 2 of the Shipping Act of 1916, unless there is no U.S. citizen who is interested in obtaining the MSP Operating Agreement, and the vessel meets Department of Defense requirements.[119] The latter provision was added in conference at the request of the Senate.

C. Mortgagee Reporting

In 1996, Congress revised the law to allow non-U.S. citizens to serve as mortgagees of Jones Act vessels.[120] Under foreign lease finance laws, a U.S. domiciled entity owned by non-U.S. citizens may own U.S.-flag vessels in the coastwise trade as long as they are demise chartered for a minimum of three years to a coastwise-qualified company and the entity is mainly involved in leasing or other financing transactions.

In the past few years, Jones Act interests have argued that the 1996 liberalization is too broad, providing a loophole for foreign interests to control Jones Act vessels. Congress has yet to accept any of the legislative initiatives offered to close this "loophole." However, 46 U.S.C. § 12120 grants the Coast Guard the authority to obtain reports from various persons with an interest in a vessel to ensure compliance with vessel documentation laws, and CGMTA 2006 added mortgagees to the list of persons from whom the Coast Guard may obtain information to ensure compliance with the law.[121]

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[117] S. 1547, 110th Cong. (2007), S. 1548, 110th Cong. (2007), H.R. 1585, 110th Cong. (2007); S. 567, 110th Cong. (2007); H.R. 3222, 110th Cong. (2007).

[118] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 3531(a), 117 Stat. 1392, 1806-07 (2003).

[119] Pub. L. No. 109-364, § 3502(a), 120 Stat. at 2514.

[120] Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 1113, 110 Stat. 3901, 3971 (1996), *codified as amended at* 46 U.S.C. § 12119.

[121] *See also*, S. 1778, § 207, 110th Cong. (2007) (adding mortgagees to reporting parties under 46 U.S.C. § 12139).

The Coast Guard issued its final rule on foreign lease finance on October 19, 2006, which essentially implements CGMTA word-for-word.[122] In addition, the final rule contains further guidance as to which foreign entities may qualify to own a Jones Act vessel under the revised law.

IX. U.S. Flag Vessel Crewing

A. LNG Tanker Crewing

The LNG trade has grown in recent years as a "clean" alternative source of energy. However, LNG can be volatile, leading many U.S. communities to be concerned over the transport of LNG products to terminals in or near their communities. When the former governor of Massachusetts signed an executive order pushing forward the application process for the building of additional terminals, 22 state legislators responded with a statement urging the state and federal governments to take action to assure a U.S.-citizen crew presence aboard all vessels using offshore facilities.

The Deepwater Port Act, as amended in 2002, established a licensing system for the construction, operation, and ownership of deepwater port structures seaward of U.S. territorial waters.[123] The Secretary of Transportation has delegated to MARAD the responsibility for issuing such licenses. Congress further amended the Act in 2006, requiring a program to promote the development of U.S. flag LNG vessels (of which there is none) and established highest priority for the licensing for LNG facilities to be supplied by U.S. flag carriers.[124]

In an effort to address some of these issues, MARAD reached agreements with several applicants in 2007, increasing the number of American crew aboard vessels involved in the LNG trade. These applicants for offshore LNG terminals agreed to have a minimum of 25% of their crewmembers aboard be U.S. citizens. They also agreed that 10% of their chartered vessels would be crewed by Americans.

Lastly, some policymakers have been seriously discussing a 100% U.S. citizen crewing requirement for LNG vessels calling in the U.S., although no concrete proposal has come forward.

B. Riding Gangs

United States law has historically required mariners on U.S.-flag vessels to be U.S. citizens, although operators have been permitted to use foreign nationals to perform maintenance while riding the vessel. After 9/11, many started to question the appropriateness of this practice and the call went out for increased regulation.

CGMTA 2006 addressed the use of foreign riding gangs, as did the FY 07 Defense Authorization Act, which continue to permit the practice in order to avoid placing U.S. flag

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122 Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade, 71 Fed. Reg. 61,413 (Oct. 13, 2006) (to be codified at 46 C.F.R. pts. 67 & 68).

123 33 U.S.C. §§ 1501–1524.

124 CGMTA 2006, § 304, 120 Stat 516, 527.

vessels at a competitive disadvantage. However, there are some significant restrictions regarding the use of foreign maintenance personnel.[125] Under the new laws, foreign maintenance personnel may be used only when qualified U.S. citizen workers are unavailable. Additional restrictions include a 60-day work limit on foreign maintenance personnel, limitations on what kind of work the riding gangs may perform, and security background checks.[126]

C. Passenger Vessel Manning

United States law previously required U.S. citizen officers on U.S.-flag passenger vessels, but allowed up to 25% of unlicensed crew members to be individuals admitted to the U.S. for permanent residence. The FY 07 Defense Authorization Act relaxed this requirement for large passenger vessels operating U.S.-flag passenger vessels on Hawaiian island itineraries, which largely benefits Norwegian Cruise Line. The Authorization allows up to 25% of the unlicensed crew members to be aliens, provided that they have worked for their employer for at least one year and also meet other criteria.[127]

X. Tax Provisions

A. Exclusions from Gross Income of Foreign Corporations

The U.S. Internal Revenue Service issued regulations,[128] effective June 25, 2007, regarding the exclusion from gross income of income derived by certain foreign corporations involved in the international operation of ships or aircraft.[129] The regulations revise § 1.883-3, which deals with the eligibility of controlled foreign corporations for the income exclusion, after the repeal of certain provisions in the American Jobs Creation Act of 2004. The changes include reporting requirements and elimination of the requirement to provide names and address of ultimate shareholders when claiming the tax exemption under § 883. Additionally, the regulations allow taxpayers to treat certain ground services such as cargo handling and maintenance services as incidental to the operation of ships, meaning that such incidental income can qualify for the § 883 exemption. The regulations also provide guidance for foreign corporations that are organized in countries providing an exemption from taxation for certain shipping and air transport income only through an income tax convention.

B. Tonnage Tax

Congress created a "tonnage tax" under the American Jobs Creation Act of 2004, under which the international income of U.S.-flag ships would be taxed based on their tonnage, rather

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125 *Id.*, § 312, 120 Stat. at 530; John Warner Defense Authorization Act for Fiscal Year 2007, § 2028, 120 Stat. 2380-81 (vessels chartered by the Department of Defense); H.R. Rep. No. 109-413 (2006) (Conf. Rep.).

126 CGMTA 2006, § 312, 120 Stat. at 530.

127 Pub. L. No. 109-364 § 3509, 120 Stat. at 2518.

128 Exclusions From Gross Income of Foreign Corporations, 72 Fed. Reg. 34,600 (June 25, 2007) (to be codified at 26 C.F.R. Pts. 1 & 602).

129 I.R.C. § 883.

than at the 35% corporate income tax rate.[130] However, language was included during the House and Senate conference which provided that a U.S.-flag vessel could not use the tonnage tax on international income if she also operated over 30 days per year in U.S. domestic commerce.

On May 24, 2007, Senator Daniel Inouye (D–HI) introduced S. 1495, a bill to amend the Internal Revenue Code to modify the application of tonnage tax on vessels operating in both international and domestic trade. S. 1495 would repeal the tonnage tax 30-day limit on domestic operations and therefore allow these vessels to use the tonnage tax on their international income. The proposal would benefit carriers from Senator Inouye's state, which are more likely to engage in both Jones Act and international trades because of Hawaii's unique geography. This bill has been referred to the Committee on Finance.

C. Short Sea Shipping Tax Proposal

Discussed in greater detail *supra*, several proposals been floated to change the taxation of Jones Act vessels to promote the "marine highways" short sea shipping initiative. It remains to be seen whether they will succeed.

XI. Protection of Seafarers

In many instances, seafarers have suffered disproportionately from the zealous enforcement of criminal penalties for violations of environmental laws and antiterrorism initiatives. For example, in OWS bypass cases, foreign seafarers have been held in the U.S. for many months while the U.S. Attorneys' Offices complete their investigation. The Senate version of the FY 08 Coast Guard Authorization Act attempts to remedy some of these injustices by allowing the posting of a bond as an alternative to revoking the seaman's clearance under 46 U.S.C. § 60105.[131] Other provisions would permit the Coast Guard to pay expenses from a new federal "Support of Seafarers Fund" designed to aid seafarers involved in an investigation, or reimburse shipowners who have bonded seafarers as an alternative to revoking their § 60105 clearance.

XII. Elimination of Jurisdiction Over Maritime Government Contract Disputes in the District Courts

In the 1970 *Scanwell Laboratories* decision, the United States Court of Appeals for the District of Columbia Circuit held that plaintiffs protesting government contract awards may bring their bid protests in the United States District Courts under the Administrative Procedure Act.[132] The United States Court of Federal Claims ("COFC") had jurisdiction to hear only pre-award bid protests but, in 1996, Congress passed the Administrative Dispute Resolution Act ("ADRA"), which amended the Tucker Act and provided that both the COFC and United States

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130 American Jobs Creation Act of 2004, Pub. L. No. 108-357, Subch. R., 118 Stat. 1418 (2004).

131 S. 1892, § 916, 110th Cong. (2007). Section 60105 is the clearance required before leaving a U.S. port.

132 *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

District Courts would have jurisdiction over claims involving government contract disputes.[133] However, ADRA also provided a sunset provision terminating federal District Court jurisdiction over bid disputes starting January 1, 2001.[134] The loss of *Scanwell* jurisdiction in the District Courts struck a blow to bid protesters because they lost choice of forum and ability to proceed in their home forum, and because the success rate for bid protests in COFC is remarkably low.

The Suits in Admiralty Act ("SAA") sets out separate rules for admiralty disputes with the federal government, and establishes jurisdiction in the plaintiff's home district. Clever admiralty lawyers have applied the SAA to escape ADRA's requirement that all bid protests be brought in COFC, and COFC has held that it lacks jurisdiction over maritime bid protests.[135] This practice has remained a thorn in the paw of the Department of Justice for years and, unable to find relief in the courts, it has taken its case to Congress.

The National Defense Authorization Act of 2008[136] includes a provision stripping the District Courts of their historical jurisdiction over all maritime contract disputes pursuant to the Suits in Admiralty Act. Although the government pursues this change to close what it perceives as a loophole and corral all bid protests in COFC, the provision threatens uniformity in maritime law and revokes an important jurisdictional tool for maritime bid protest plaintiffs.

XIII. Looking Ahead

Maritime issues are rarely top of the agenda, and Congress has been preoccupied with numerous issues, including the Iraq War, the budget, product safety, taxes, and the economy. Nevertheless, the 110th Congress has been very active and there are several areas which it will probably pass new legislation affecting the maritime industry. It seems likely that there will be a continued tightening of port security, more stringent environmental requirements (especially regarding ballast water and air pollution), and renewed oversight of the Deepwater program. Additionally, there will likely be a smattering of small, special-interest U.S. flag bills, possibly pitting shipowners against the yards on issues such as foreign rebuilding.

Within the executive branch, it appears likely that there will be renewed attention to marine safety after what has been perceived as a long period of neglect following the Coast Guard's migration to Homeland Security. Whether this emphasis will come from the Coast Guard or a new civilian marine inspection agency remains to be seen.

Democratic control of Congress has already begun to affect the flavor of maritime legislation surfacing on Capitol Hill. It will be interesting to see what happens during the 2008 elections and whether the voter sentiment that toppled Republicans on the Hill is reflected across town on Pennsylvania Avenue.

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133 Pub. L. No. 104-320, 110 Stat. 3870 (1996) (*codified at* 28 U.S.C. § 1491(b)(1)).

134 Pub. L. No. 104-320, § 12(d), 110 Stat. at 3875.

135 *See, e.g.*, *Asta Eng'g, Inc. v. United States*, 46 Fed. Cl. 674 (2000).

136 H.R. 1585, §§ 849-850, 110th Cong. (2007). *See also*, S. 567, §§ 805 & 1042 110th Cong. (2007).

RECENT DEVELOPMENTS AND TRENDS IN CARGO AND LIMITATION OF LIABILITY

Michael Leahy

Developments & Case Summaries in Limitation of Liability and COGSA

Presentation Before the
United States Maritime Law Association

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The Carriage of Goods by Sea Act

Formerly - 46 App. U.S.C. §§ 1300-1315

Presently - 46 U.S.C.A. 30701 note

COSGA Case Summaries - 2007

First Circuit

National Starch and Chemical Trading Co., Ltd., et al, v. M/V Star Inventana, et al, 2006 WL 3519306, 2007 AMC 132 (D.Me. 2006)

National Starch operates processing facilities in the U.S., Canada, and Thailand. The dispute arose out of a shipment of starch carried aboard the *Star Inventana* in 2001. The shipment was loaded in Thailand and discharged in Portland, Maine in accordance with the contract/charter party. Star Shipping was responsible for the cargo from the time of loading until it was discharged, pursuant to the charter party. During loading there were rain-induced weather delays, when holds were closed and stevedores were allowed to remain in the hold.

Upon unloading, stevedores found a plastic bag containing 4 to 6 plastic bottles and what appeared to be human feces, and broken glass among the bags. The sack of starch upon which this contamination rested was visibly stained. The National Starch representative ultimately did not object to the continued discharge of the shipment. The bag on top of the stained bag was taken to the warehouse and stacked with the other sacks according to the storage plan. It was testified that this bag would be extremely difficult to find. If the bottom of this bag was contaminated, it could have exposed other bags to contamination in the warehouse. The decision was ultimately made to reject the shipment. National Starch filed an insurance claim on the rejected shipment and received reimbursement. They also made a salvage sale for non-food uses.

COGSA gave the court jurisdiction. Under COGSA, a plaintiff may establish a prima facie case of damages by establishing by a preponderance of evidence that the goods were delivered to a shipper undamaged and discharged in a damaged condition. Here, National Starch established its case and shifted the burden to Star to prove that they exercised due diligence or that the loss was caused by one of COGSA's enumerated "uncontrollable causes of loss."

Defendants failed to exercise due diligence by allowing the introduction of glass and fecal matter, and also upon discovery of the contamination. Defendants were responsible for potential reconditioning costs of the starch as a result of their lack of due diligence. National Starch was not required to inspect and test each sack. Star argued that the top tier of cargo was suitable for use in human food. Regardless of whether this shifts the burden under COGSA, the court found that Star bore the burden of proving they diligently preserved the clean top. National Starch was entitled to damages subject to COGSA's $500 per package limit.

Second Circuit

Ferrostaal, Inc. v. M/V TUPUNGATO, 230 Fed.Appx. 11 (2d Cir. 2007)

Ferrostaal, an importer and the owner of a shipment of steel coils, appealed from a judgment of the U.S. District Court for the Southern District of New York in consolidated cargo damage cases brought under COGSA, 46 U.S.C. § 30701 note. Ferrostaal sought to recover for alleged rust damage and physical damage to steel coils carried on the vessel M/V Tupungato on a voyage from Chile to New Orleans. The district court concluded that Ferrostaal had failed to prove that the damages occurred aboard the Tupungato.

The Second Circuit began its analysis by stating that under COGSA, Ferrostaal bore the burden of proof of showing by a preponderance of the evidence that the coils were damaged while in the Tupungato's care. The court stated that this could be accomplished in either one of two general ways. First, Ferrostaal could provide direct evidence of the condition of the goods at delivery to the Tupungato and at discharge. Alternatively, Ferrostaal could show "the characteristics of the damage suffered by the goods justified the conclusion that the harm occurred while the goods were in the defendant's custody."

The Second Circuit recognized that the district court's determination that Ferrostaal had not established a prima facie case was primarily based on the following conclusions: (1) Ferrostaal failed to show by a preponderance of evidence that the coils were discharged from the Tupungato in bad condition and (2) Ferrostaal failed to show that any alleged external wetting or mishandling which caused the rust and physical damage occurred on the Tupungato, as opposed to one of the other legs of the journey before the coils were inspected and the damage discovered. In light of the above, the appeals court affirmed the district court's opinion by stating that its review of the record yields no indication that the district court improperly applied the burden of proof.

Ibeto Petrochemical Industries Ltd. V. M/T Beffen, 475 F.3d 56, 2007 AMC 213 (2d Cir. 2007)

Ibeto, cargo receivers, filed suit in Nigeria regarding alleged contamination by seawater of a shipment of oil being carried by the motor tanker BEFFEN pursuant to a bill of lading incorporating among other things a charter party. Ibeto subsequently arrested the BEFFEN in Nigeria to obtain security. In an abundance of caution, Ibeto also demanded London arbitration under the charter party and filed suit in New York. In the New York action, the various defendants answered and counter claimed seeking 1) to have the pertinent issues decided via London arbitration and 2) limiting any recovery to $500 pursuant to COGSA. Intending to pursue its Nigeria action, Ibeto sought to close the London arbitration and moved for a voluntary dismissal without prejudice of its New York district court action.

The District Court, concluded the counterclaims plead by the defendants foreclosed the right to voluntary dismissal. In its decision, the District Court found *inter alia* that widely disparate results might obtain because Nigerian Courts would not apply the provisions of COGSA, and issued an injunction of the Nigerian action. Ibeto appealed.

The Second Circuit determined they were without jurisdiction to review the merits of the appeal insofar as it challenged the District Court's order denying voluntary dismissal as the order was non-final and not appealable.

The Second Circuit found the District Court had carefully applied the test set forth in the China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F2d 33, 35-36 (2d Cir. 1987) where an anti-suit injunction against parallel litigation may be imposed only if: 1) the parties are the same in both matters; and 2) resolution of the case before the enjoining court dispositive of the action to be enjoined. Once past this threshold, a number of additional factors should be considered including whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum.

Ultimately, the Second Circuit determined that the injunction was too broad, and that District Court should modify its injunction so that it is directed specifically to the parties; and furthermore, that "there is no need for the permanent injunction that the District Court seems to have issued."

Compania Sudamericana de Vapores S.A. v. Sinochem Tianjin Co., 2007 WL 1002265, 2007 AMC 1467 (S.D.N.Y. 2007)

Sinochem supplied calcium hypochlorite to Compania Sudamericana de Vapores S.A. ("CSAV") for shipment from Tianjin, China to San Antonio, Chile aboard the M/V Aconcagua. The bill of lading described the cargo and included the IMO and UN reference numbers applicable to calcium hypochlorite (which could be referenced in the International Maritime Dangerous Goods Code (IMDG) for the proper storage of the chemicals). During the voyage, the calcium hypochlorite exploded, destroying the cargo and nearly sinking the ship.

CSAV filed an action against Sinochem in the High Court of Justice, Queen's Bench Division, in London ("London Litigation"). While the London action was pending, CSAV filed a maritime action against Sinochem in the Southern District of New York seeking attachment of certain assets of Sinochem pending the outcome of the London Litigation. The New York court granted the attachment. Sinochem subsequently moved pursuant to Rule E(4)(f) to vacate the court's ex parte order granting CSAV a maritime attachment and garnishment.

To determine whether or not the attachment was proper, one of the necessary factors was whether a viable admiralty claim existed. In the London Litigation, CSAV asserted that Sinochem was strictly liable for its shipment of calcium hypochlorite. Since COSGA §1304 (6) imposes strict liability on shippers of dangerous goods with the shipper's only defense being that the carrier knew or should have known of the inherent dangers of the cargo, Sinochem argued that CSAV had knowledge of the danger because of the IMO and UN reference numbers on the bills of lading. The court, however, found these reference numbers to be inadequate notice under COSGA and therefore concluded a viable claim existed.

After analyzing the other factors under the attachment test, i.e. the defendant could be found within the district, 3) the defendant's property could be found within the district, and 4) there was

no statutory or maritime law bar to the attachment, the court concluded that the attachment was proper and denied Sinochem's motion to vacate its order.

American Home Assurance Co. v. M/V JAAMI, 2007 WL 1040347, 2007 AMC 1461 (S.D.N.Y. 2007)

This case arose from damage to cargo that occurred when the JAAMI grounded. Before the Court were motions to dismiss based on mandatory foreign forum selection clauses made by two defendants, Hapag-Lloyd Container Linie, GmbH and NYK Line. Because both defendants interposed the answers, the Court construed the motions as motions for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure.

The parties did not dispute that COGSA governed the rights and liabilities of the parties as the cargo was shipped from Bangladesh to New York and Georgia. American Home argued, *inter alia*, that the enforcement of the forum selection clauses, would lessen the defendants' liability in violation of § 3(8) of COGSA, 46 U.S.C. § 30701 note.

In addressing American Home's argument the court stated that in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995), the Supreme Court rejected the contention that the inconvenience and expense of proceeding in a foreign forum lessened a carrier's liability. The court found that the test for whether a foreign forum selection clause is valid under § 3(8) of COGSA is whether the substantive law to be applied [by the chosen forum] will reduce the carrier's obligations to the cargo owner below what COGSA guarantees. American Home argued that the foreign forum selection clauses reduced the carriers' liability to well below the COGSA guarantees because the statutes of limitations may have run in the German and Japanese forums. However, the court pointed out that Courts in this district have held repeatedly that a time bar in a foreign jurisdiction is not a basis for invalidating a forum selection clause.

The court dismissed American Home's claims stating in the instant case, the only lessening of liability that American Home has alleged is that their claims will be time barred in the foreign forums. As discussed above, a time bar is not a basis for invalidating a foreign forum selection clause. The court decided that American Home had failed to even allege how the substantive law to be applied by the German and Japanese would reduce the carriers' obligations below that what COGSA guarantees.

Sompo Japan Ins. Co. v. Union Pacific Railroad Co., 2007 WL 2230091 (S.D.N.Y. 2007)

Sompo filed suit against Union Pacific for damages related to a shipment of tractors from Japan to Georgia. The District Court granted partial summary judgment in favor of Union Pacific, giving effect to the contract for carriage which incorporated COGSA by reference and declining to apply the Carmack Amendment (49 U.S.C. § 11706) and the Staggers Act (49 U.S.C. § 10502(e)), effectively limiting Union Pacific's liability to $500 per parcel.

This case again came before the Southern District of New York on remand from the Second Circuit, which reviewed the district court's findings de novo, and resolved the previously unsettled question of what law applied to the United States rail leg of the international multimodal shipment,

finding the Carmack Amendment applied. The District Court recognized that since the parties had stipulated to the amount of actual damages incurred by Sompo, the sole issue remaining in this case was whether Union Pacific's liability was limited to $16,000 ($500 per parcel) or the stipulated amount of damages, $328,192.32, Sompo's actual damages.

In resolving this issue the key was: when Union Pacific negotiated the applicable terms of carriage of the tractors, did it provide the shipper an opportunity, consistent with Staggers, to receive full Carmack liability coverage as well as 'alternative terms'? The court found that the paper trail was so confusing that no reasonable shipper would have been on notice of a limitation in liability and that full Carmack liability was not offered for the shipment. Accordingly, Union Pacific did not comply with the provisions of Carmack and Staggers which resulted in Union Pacific being liable for the stipulated amount of $328,192.32.

Lykes Lines Limited LLC v. Bringer Corp., 2007 WL 766170 (S.D.N.Y. 2007)

Lykes filed a complaint against Bringer, Brasif Duty Free Shop Ltda ("Brasif"), Axa Seguros Brasil S/A ("Axa"), Eurotrade Ltd. ("Eurotrade"), and Parbel of Florida ("Parbel") seeking to enforce a forum selection clause in a bill of lading requiring claims to be adjudicated in the U.S. District Court of the Southern District of New York. Lykes had been sued in Brazil by Axa for alleged cargo damage.

Lykes argued the Brazil action deprived it of the limitation of liability provided by COGSA and the application of U.S. law. Primarily, Lykes sought a declaration under COSGA to limit its liability for the damaged goods.

After a lengthy factual analysis, the court dismissed Lykes's complaint finding no personal jurisdiction over Axa because Lykes did not properly serve Axa's agent in the U.S. and could not show good cause for not doing so. The other defendants were dismissed from the lawsuit for lack of subject matter jurisdiction because without Axa in the lawsuit, the court found there was no case or controversy.

Calchem Corp. v. Activsea USA LLC, 2007 WL 2127188 (E.D.N.Y. 2007)

Calchem commenced this action against Activsea and Activair (collectively "Activsea") on April 4, 2006, alleging that Activsea erroneously transported cargo for Calchem to Shanghai, in violation of Activsea's agreement to ship the cargo to Hong Kong. On May 31, 2006, Activsea brought a third party action against Ocean World Lines, Inc. ("OWL"), alleging that OWL negligently delivered Calchem's cargo to Shanghai, in violation of OWL's agreement with Activsea to transport the goods to Hong Kong, and seeking contribution and/or indemnification from OWL.

On October 5, 2006, OWL filed a Fourth Party Complaint against COSCO Container Lines, Inc. and COSCO North America (collectively, "COSCO"), alleging that COSCO negligently transported Calchem's cargo to Shanghai, in violation of OWL's agreement with COSCO to transport the goods to Hong Kong, and seeking contribution and indemnification from COSCO in

the event liability was imposed on OWL for damages allegedly sustained by Calchem and Activsea.

The issue before the Court was COSCO's motion to dismiss the Fourth Party Complaint pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, based on the forum selection clause in the bill of lading issued by COSCO to OWL, which designates the People's Republic of China as the proper forum.

The court granted Fourth Party Defendant COSCO's motion to dismiss holding that OWL made no showing that enforcing the forum selection clause would be unreasonable or unjust or that the clause is invalid due to fraud or overreaching.

Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 2007 WL 541958, 2007 AMC 791 (S.D.N.Y. 2007)

Hydraudyne contracted with Ocean World Lines for the transport of cargo. OWL in turn contracted with Cosco Shanghai to carry the cargo to the Port of Houston. The contract between Cosco Shanghai and OWL identified OWL GmbH as Shipper and OWL as Consignee which had the effect of giving OWL GmbH exclusive right to give instructions concerning the handling of the cargo. Hydraudyne instructed OWL to hold the cargo and not release it to TDI, explaining that TDI had defaulted financially to Hydraudyne. The instructions were relayed to Cosco by OWL. Cosco subsequently improperly released the cargo to TDI, constituting breach of contract of carriage.

The issue in this case is whether an NVOCC or other non-rail carriers were entitled to the benefit of the COGSA package limitation under the parties' contracts. COGSA refers to "unreasonable deviation" without defining the term or clarifying its relationship to COGSA's limitation of carrier liability to the $500 per package in §4(5). Case law has filled the gaps.

In the Second Circuit, it is now clear that the consequences of finding that a carrier made an unreasonable deviation are that the carrier is barred from invoking the $500 COGSA limitation of liability. In Sedco v. S.S. Strathewe, the court said that "unreasonable deviation" is limited to two circumstances: geographic deviation and unauthorized on-deck stowage. As Hydraudyne offered no persuasive basis for supposing that the erroneous failure to adhere to the delivery "hold" constituted such a deviation, the court granted defendants' motion for partial summary judgment limiting their liability to no more than $13,500.

International Marine Underwriters v. M.V. PATRICIA S, 2007 WL 102101 (S.D.N.Y. 2007)

A motion to dismiss for lack of personal jurisdiction asked the Court to determine whether a ship and its owner are *prima facie* bound by the forum selection clause in a bill of lading entered into between an affiliate of a slot-charterer and a shipper. The court denied the motion to dismiss, because the affiliate was specifically mentioned in the slot charter agreement and because the original charter agreement entered into by the ship's owner contemplated being bound by the subcharterers' bills of lading. The Court cited Joo Seng Hong Kong Co., Ltd. V. S.S. Unibulkfir, 483 F.Supp. 43 (S.D.N.Y. 1979)(more than one party is frequently held liable to a cargo interest

under a COGSA bill of lading. Obviously then, there can be more than one COGSA carrier of a given shipment). "Every bill of lading which evidences a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, including bills of lading issued under or pursuant to a charter party, is subject to COGSA."

Great American Ins. Co. of N.Y. v. A/P Moller-Maersk, et al, 482 F.Supp.2d 357, 2007 AMC 1326 (S.D.N.Y. 2007)

Plaintiff Great American Ins. Co. sued as subrogee to recover for the loss of a cargo container shipped under a through bill of lading from North Carolina to Guatemala City. The bill of lading contained a "hijacking clause" which removed the carrier from liability arising out of a hijacking. The Harter Act governs the responsibilities of carriers until 'proper deliver' of the cargo has been made. Great American argued that because the container was not delivered to the consignee's door in Guatemala City as per the bill of lading, proper delivery was not made and the Harter Act applied, the hijacking clause was invalid, and the defendants were liable for the loss of the container.

The court determined that "proper delivery" for Harter Act purposes does not mean delivery to the ultimate consignee at the end of intermodal transportation. It means delivery to the inland carrier. The court thus granted Maersk's motion for summary judgment.

M/V DG Harmony, 2007 AMC 181 (S.D.N.Y)

Certain carrier defendants moved for partial reconsideration or clarification, contending that the Court could not and should not have dismissed their claims for indemnification for amounts paid and expenses incurred litigating or settling cargo claims filed against them in South America. The court granted the motions for partial reconsideration, as the court did not actually consider the merits of the motions for summary judgment with respect to the South American Indemnity Claims. The court denied these motions for summary judgment as there was no showing of entitlement to summary judgment as a matter of law with respect to the South American Indemnity Claims.

PPG sought summary judgment, asking the Court to dismiss the South American Indemnity Claims because the foreign law in question doesn't recognize COGSA. PPG argued that under COGSA the carrier defendants would be protected by a fire defense if the loss was caused solely by PPG's acts or omissions, and that the court cannot impose tort indemnity based on South American law. The court rejected PPG's argument as a matter of law. They cited no authority holding that maritime indemnity should be denied merely because a liability imposed by a foreign court would be contrary to U.S. law. Further, the South American Indemnity claims could not be dismissed just because South American courts would not apply COGSA. Finally, the situation with respect to the South American Cargo Claims was different from the cargo claims asserted in the case at bar, because the latter claims were asserted directly against PPG while the former claims were not. Accordingly, PPG's request for summary judgment dismissing the South Amerian Indemnity Claims was denied.

Third Circuit

Rosario v. H&M Intern. Transp. Service, Inc., 2007 WL 2065828 (D.N.J. 2007)

Jose Rosario ("Rosario") brought an action against H&M International Transportation Services, Inc. ("H&M") for damages arising out of a motor vehicle accident which resulted in damaged cargo. H&M moved for summary judgment arguing that since COSGA governed the dispute, Rosario's action was untimely under COSGA's one year statute of limitations. Because Rosario filed its complaint more than thirteen months after the date on which the goods would have been delivered, his claim was time barred.

Since the bill of lading extended the provisions of COSGA to the pre- and post-loading periods, the court found COSGA applied to the period during which the accident occurred. Therefore, pursuant to COSGA, the one year statute of limitations began to run on the date when Rosario's shipment should have been delivered. Thus, by filing its claim more than thirteen months after the scheduled date of delivery, the court held that Rosario's complaint was untimely and H&M was entitled to summary judgment.

Fourth Circuit

American Roll-On Roll-Off Carrier, LLC v. P&O Ports of Baltimore, Inc., 479 F.3d 288, 2007 AMC 471 (4th Cir. 2007)

American Roll-On Roll-Off, LLC ("American") brought an action against P&O Ports of Baltimore, Inc. ("P&O") asserting negligence and seeking indemnification after a piece of loaded equipment broke free of its lashings and damaged its ship and other cargo. Since this action was not filed within one year after the cargo was delivered, the district court granted summary judgment in favor of P&O finding that the bill of lading's one-year statute of limitations barred American's action against P&O.

American appealed the district court's indemnification ruling claiming that the district court erred by applying the one-year bill of lading statute of limitations period rather than the three-year limitation period established under the stevedoring agreement. On appeal, P&O argued that by virtue of the Himalaya clause contained in the bill of lading, it received the benefit of all COSGA defenses available to the carrier, and therefore could transform the bill of lading statute of limitations into a limitation period governing indemnification claims by the carrier.

The court was unconvinced by this reasoning and concluded that American's post settlement status as a cargo owner did not affect its right to seek indemnity from P&O to satisfy claims it paid for the damaged cargo. Further, since this was an indemnity action, the bill of lading's one year statute of limitations was inapplicable. Therefore, the appellate court found that the district court erred in dismissing the claim since American's complaint was filed within the three-year statute of limitations period for an indemnity claim.

Turning Point Industries, SDN BHD v. Global Furniture, Inc., 643 S.E.2d 664, 2007 AMC 1434 (N.C. App. 2007)

Global ordered 39 furniture containers from Turning Point. Geologistics shipped those containers to various ports within the US. Global received all 39 containers. During the course of business, Global became delinquent in accounts payable to Turning Point thus Turning Point instructed Geologistics not to release further containers without Turning Point's approval. When Turning Point failed to receive additional payments, it filed suit against Global and Geologistics jointly and severally for breach of contract, demanded a payment on account, and failure to stop shipments in transit.

Turning Point was able to obtain summary judgment against Global for the money owed. The trial court found that Turning Point's claims against Geologistics were barred by the nine-month statute of limitations contained in the bills of lading and entered summary judgment for Geologistics.

Turning Point appealed arguing that since its claims were asserted under COSGA and were brought within one year, its claims were timely and the trial court erred. The North Carolina appellate court affirmed the trial court's ruling finding that 1) Geologistics did not obtain control over the containers until they were discharged from the ships; and 2) COGSA only applied to the transit and ceased to apply when the goods were unloaded. Accordingly, the COGSA time-limit did not apply to Turning Point's claim against Geologistic and the nine-month statute of limitations did. Turning Point's claim was thus time barred.

Fifth Circuit

Scapa Forming Fabrics v. Blue Anchor Line, 2007 WL 1959143 (5th Cir. 2007)

Scapa and Wurttembergische (collectively "Scapa") filed an action against Blue Anchor Line for damages to a weaving loom machine that it had shipped from Germany to the United States. The loom was shipped in an open top container on deck and was damaged when saltwater came through the opening.

The district court concluded that since Blue Anchor Line's bill of lading was silent as to the stowage of open top containers, it was a clean bill of lading and a clean bill of lading implied below-deck storage. Blue Anchor Line therefore unreasonably deviated from its contract of carriage and was liable to Scapa for the damage to the loom. Furthermore, as a result of this deviation, the district court determined that Blue Anchor Line was not entitled to limit its liability under COSGA.

Blue Anchor Line appealed arguing that the district court erred in ruling that it unreasonably deviated from the bill of lading by stowing the loom on deck because even if the bill of lading required below deck storage, its deviation was reasonable and thus it was entitled to limit its liability under COSGA. The appellate court disagreed and affirmed the district court's decision.

Pemeno Shipping Co. Ltd. V. Louis Dreyfus Corp., 2007 WL 150350 (S.D.Tex. 2007)

This case concerns a cargo of bug-infested wheat that was shipped aboard plaintiff Pemeno's vessel. Defendant BAGS brought a motion for summary judgment.

BAGS claimed that it could not be liable in contract or under COGSA because it was acting for a disclosed principle when it signed the Bill of Lading. Pemeno had the burden of establishing the existence of a valid contract, and the applicability of COGSA. BAGS introduced a letter from Verde Rocca instructing it to ship the wheat on Verde Rocca's behalf, supporting the conclusion that BAGS was acting as Verde Rocca's agent when it signed the Bill of Lading. BAGS motion for summary judgment was granted.

Ambraco, Inc. v. M/V CLIPPER FAITH, 2007 WL 1550960 (E.D. La. 2007)

This case involved an action by Ambraco and Great American Insurance to recover substantial damages sustained to cargo, which allegedly resulted from improper loading, securing and/or handling of the cargo while it was in the care, custody and control of Defendants and/or aboard the M/V Clipper Faith. Ambraco filed suit in the Eastern District of Louisiana and then subsequently filed the identical claim in the High Court of London. The M/V CLIPPER FAITH filed a motion to dismiss the case for improper venue based the bill of ladings forum selection clause which also designated that English law applied.

The court recognized that Ambraco had the burden of proving that the forum selection clause was unreasonable under the circumstances. The court further characterized that burden as a heavy one stating that the burden may only be carried by showing: (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

Based on the above the court found that Ambraco had not carried their burden and thus the court granted the M/V CLIPPER FAITH's motion to dismiss for improper venue.

Cargill Ferrous Intern v. M/V Medi Trader, 2007 WL 1012828 (E.D.La. 2007)

Cargill brought an action for damage to cargo against M/V Medi Trader under COSGA for damage to steel coils. For Cargill to prevail in its action against the Medi Trader under COSGA, it had to first establish a prima facie case by proving that the cargo was loaded in an undamaged condition and discharged in a damaged condition.

Generally, a clean bill of lading is prima facie evidence of cargo loaded in an undamaged condition. However, in this case the court found the bills of lading issued to Cargill contained conflicting language; they were recorded "clean on board" but with the attached notation "some strips broken/loose, packing material have [sic] slight indents."

In light of this inconsistent language, the court determined that the bills of lading were issued clean because the relevant contracts between the parties called for the issuance of clean bills of lading and that was the phrasing used on the bills. The court held that to permit canned language stating "some strips broken/loose, packing material has slight indents" to defeat the cleanliness of the bills would be to undermine the reasonable reliance a shipper and consignees put on a "clean on board" notation. The court buttressed this conclusion by the fact that the notations on the bills of lading did not bear on the type of damage claimed by Cargill, i.e. rusty and corroded from saltwater rather than any damage from broken packaging material.

The Medi Trader countered claiming: 1) the bills of lading were issued in contravention of the charter parties' clauses requiring the bills to be issued in conformity with the Mate's receipts and 2) since the materials were packaged, the bills of lading did not establish a prima facie case of the undamaged condition of the cargo at loading. The court was unpersuaded by both these arguments finding that the bills of lading were issued in essential conformity with the Mate's receipts and the evidence presented showed that the cargo was loaded in good order.

Accordingly the court concluded that Cargill carried its burden of proof in showing the cargo was loaded in an undamaged condition. Following this conclusion the court found sufficient evidence to show that the goods were unloaded in a damaged condition and that the Medi Trader did not exercise due diligence to avoid the damage and therefore held the Medi Trader liable to Cargill for the damaged goods.

Sixth Circuit

Fortis Corp. Ins., S.A. v. Viken Ship Mgmt. A.S., 481 F.Supp.2d 862 (N.D. Oh. 2007)

Fortis sought to recover for damage to a shipment of steel coils damaged while being shipped from Poland to Ohio. Fortis brought suit against the following entities involved in the shipment: Viken Ship Management A.S. ("VSM"), and Viken Lakers A.S. ("Viken Lakers").

Viken moved for summary judgment, claiming that the action by Fortis was time-barred under COGSA. Fortis, however, argued that COGSA did not govern the shipment and the dispute. The issue in the case was whether a genuine issue of material fact existed as to whether COGSA's one-year statute of limitations applied to the dispute between the parties.

The court held that the vessel manager was not a "carrier" under COGSA, and, thus, Fortis' claim against the vessel manager was not governed by COGSA's one-year statute of limitations. The court further held that Viken, the vessel owner, was a "carrier" under COGSA, and thus Fortis' claim against Viken was governed by COGSA's one-year statute of limitations.

Ninth Circuit

Starrag v. Maersk, Inc., 486 F.3d 607, 2007 AMC 1217 (9th Cir. 2007)

Starrag and Starrag-Heckert, Inc. (collectively "Starrag") appealed from the district court's order granting partial summary judgment and applying the $500 per package liability limitation under the COGSA to three machines shipped with Maersk, Inc. that were damaged while being transported across a container yard operated by Maersk Pacific Ltd., a terminal operator.

Starrag argued that the package limitation could not apply to damage that occurred after Maersk unloaded the machines from their ship, and that application of the limitation conflicted with COGSA and the Harter Act. In addition, Starrag claimed that the term "delivery" in Maersk's Combined Transport Bill of Lading (CTBL) was ambiguous, and therefore should be read to restrict the package limitation to damage occurring after the machines were loaded onto the ship and before the cargo was unloaded.

The Ninth Circuit affirmed the lower court's decision that COGSA's $500 per package liability limitation applied in this case and limited the Maersk defendants' liability to $1,500. The court held that (1) contractual extension of the terms of the COGSA, including the package limitation, beyond the "tackle to tackle" period did not conflict with COGSA; (2) the contractual extension of the COGSA did not require special notice in short form documents; and (3) the district court properly interpreted the term "delivery" in the CTBL to mean some point beyond delivery of the goods to the dock, and reasonably found that "delivery" had not occurred when the machines were damaged.

APL Co. Pte. Ltd. V. UK Aerosols Ltd., 2007 WL 607902, 2007 A.M.C. 368 (N.D.Cal. 2007)

APL brought a breach of contract and negligence action against defendants UK Aerosols, UG and Kamdar. The parties filed cross-motions for summary judgment.

APL argued that UG and Kamdar were bound by the bill of lading, and that they breached Clauses 9 and 19, premised on failure to properly secure goods and failure to pack the goods so as to withstand the risk of carriage, respectively. UG and Kamdar asked the court for summary judgment, arguing they were COGSA shippers under §1304(3) and that the relevant clauses of the bill of lading were invalid as applied to them. They also argued Clause 19 was void under COGSA §1303(6). APL asked for summary judgment on the issue of liability and damages, arguing that the bill of lading was valid under COGSA because UG and Kamdar do not meet the statutory definition of shippers.

The court agreed with APL, looking to the Shipping Act of 1984 and admiralty common law to find the definition of shipper. In this case, it was undisputed that the bill of lading was issued to UKA as "Shipper" and that UKA entered into a contract for shipment of goods with APL. UG and Kamdar presented no evidence that they contracted with APL for shipment of the goods or otherwise controlled shipping arrangements.

The court granted APL's motion for summary judgment for breach of contract under Clause 9. The court found that Clause 19 did not violate §1304(6) of COGSA because it did not impose strict liability on a shipper in spite of the carrier's own negligence. The court found UG and Kamdar to be in breach of Clause 19, as they failed to acquire APL's express written consent, and therefore granted APL's motion for summary judgment.

Mazda Motors of America Inc. v. M/V Cougar Ace, 2007 WL 2344934 (D.Or. 2007)

In an *in rem* admiralty action, Mazda brought a claim against M/V Cougar Ace for cargo damage to a shipment of automobiles. The Cougar Ace appeared in action solely to dismiss the complaint pursuant to Rule 12(b)(3) on the grounds that the bills of lading contain a forum selection clause requiring suit be brought in Japan.

Mazda argued that because the forum selection clause did not specifically identify the Cougar Ace (the language was limited to that of any action against the "Carrier" which was Mitsui O.S.K. Lines, Ltd.), the clause was not applicable.

The court was unpersuaded by Mazda's argument that the clause was inapplicable because it only included the "Carrier" for two reasons: 1) the Cougar Ace was a party to the bills of lading by virtue of ratification. Accordingly, it was entitled to the benefit of its protective provisions, such as the forum selection clause and 2) since the bills of lading incorporate the terms of COSGA, the same liabilities (and necessarily the same defenses) were imposed on the vessel as on the carrier.

While this determination essentially dismissed the case on the basis of the forum selection clause, the court went into great detail discussing a Himalaya Clause argument that was presented by both parties. Mazda attempted to argue that because the Himalaya clause incorporated COSGA and COSGA contained provisions that contemplated *in rem* cargo claims in admiralty, the forum selection clause could not be invoked. Again, the court disagreed with Mazda finding that COSGA applied to both the carrier and the ship, and that ship may be liable for cargo claims as well as the carrier. This did little to support the argument that the forum selection clause should be applied to the carrier, but not the ship.

Strickland v. Evergreen Marine Corp., 2007 WL 539424 (D.Or. 2007)

Strickland and Mitchell brought claims for negligence and breach of contract under the common law and COGSA alleging they purchased custom-carved wood furnishings from an Indonesian manufacturer; that they hired defendants to transport the goods from Indonesia to Oregon; and that on arrival in Oregon the goods were ruined by water damage. Abco, which arranged the shipment, moved for summary judgment contending that Strickland's claim was time-barred. Strickland moved for summary judgment on Abco's affirmative defenses, and moved to compel production of documents from Abco.

In arguing that Strickland's claims were time barred, Abco relied in part on COGSA's one-year statute of limitations. Since the claims against Abco were brought more than one year after Strickland discovered the damage, Abco argued that the claims are time barred. However, COGSA applies only from "tackle to tackle," that is, from when goods are loaded onto the vessel

until the goods are discharged from the vessel. Because it was unclear when the goods were damaged, Abco relied on the bill of lading which provided that COGSA provisions "shall govern before loading on and after discharge from the vessel and throughout the entire time the Goods are in the custody of the Carrier." Strickland argued that the COGSA statute of limitations did not apply because Abco acted as a freight forwarder rather than a carrier. Strickland also argued that the terms of the bill of lading were not binding on them because the bill of lading provided by Abco was illegible.

The court determined that because Abco arranged to ship Strickland's goods from Indonesia to the United States, and issued a bill of lading to Strickland, Abco was, as a matter of law, a NVOCC and not a freight forwarder. Further, the court enforced the terms of the bill of lading stating that Strickland was represented by counsel and filed an initial complaint before the one year statute of limitations had expired, however, counsel did not name Abco as a party. The court further pointed out that the bill of lading clearly gave Abco's address, telephone, and fax numbers and there was no evidence that Abco tried to conceal the limitation provision from Strickland. In addition, the court recognized that there was no evidence that Abco lulled Strickland into a false sense of complacency regarding the time limit from bringing a claim against it.

Thus, the court granted Abco's motion for summary judgment and denied Strickland's motion for summary judgment as moot. The court further denied Strickland's motion to compel.

The Limitation of Liability Act

Formerly - 46 U.S.C.App. §§ 181 *et seq.*

Presently

46 U.S.C.A. § 30501 (Formerly 46 App. USCA § 186)

46 U.S.C.A. § 30502 (Formerly 46 App. USCA § 188)

46 U.S.C.A. § 30503 (Formerly 46 App. USCA § 181)

46 U.S.C.A. § 30504 (Formerly 46 App. USCA § 182)

46 U.S.C.A. § 30505 (Formerly 46 App. USCA § 183; 46 App. USCA § 189)

46 U.S.C.A. § 30506 (Formerly 46 App. USCA § 183)

46 U.S.C.A. § 30507 (Formerly 46 App. USCA § 183; 46 App. USCA § 184)

46 U.S.C.A. § 30508 (Formerly 46 App. USCA § 183; 46 App. USCA § 183b)

46 U.S.C.A. § 30509 (Formerly 46 App. USCA § 183c)

46 U.S.C.A. § 30510 (Formerly 46 App. USCA § 183)

46 U.S.C.A. § 30511 (Formerly 46 App. USCA § 185)

46 U.S.C.A. § 30512 (Formerly 46 App. USCA § 187)

Limitation Case Summaries - 2007

First Circuit

Brown v. Teresa Marie IV, Inc., 477 F.Supp.2d 266, 2007 AMC 954 (D. Me. 2007)

The 95 foot steel hull fishing vessel F/V Teresa Marie IV sank while fishing offshore, in fair weather, negligible seas and wind, and good visibility. Brown, a crewmember on the vessel, brought a seaman's action for Jones Act negligence, unseaworthiness, and maintenance and cure. The two named defendants, Teresa Marie IV, Inc., and Atlantic Trawlers Fishing, Inc., filed petitions for limitation under the Limitation of Liability Act, 46 U.S.C. §30505. The vessel owners and the claimants then moved for summary judgments in the Limitation Action.

In denying the vessel owners' motion for summary judgment, the Court worked through several issues. First, the Court noted that defendant Atlantic Trawlers Fishing, Inc., was not an owner of the vessel, but only a provider of maintenance and management services, and therefore could not limit liability under the Limitation of Liability Act. Second, the Court noted that maintenance and cure claims are exempt from limitation under the Act, and therefore the Court readily denied the summary judgment motions as to those counts.

The Court then worked through a bifurcated analysis as to the remaining limitation issues, considering first whether negligence or unseaworthiness caused the F/V Teresa Marie IV to sink, and if so, whether the owners had privity or knowledge of that negligence. Crewmember Brown argued the unseaworthiness of the vessel was beyond dispute, as the vessel sank in calm weather and seas, and it was undisputed that weather did not contribute to the sinking. After hearing the evidence, however, the Court concluded there were at least three triable issues of genuine fact to preclude summary judgment. These included whether overloading the vessel caused the sinking, whether the owner failed to train the captain and crew in the proper procedures to load the vessel, whether the ballast tanks were leaking, and whether the shaft alley and/or stuffing box were leaking. In addition, the Court noted that unseaworthiness is usually a question of fact to be determined by the jury.

Johnson, Limitation Proceedings v. Gary Anderson, 2007 AMC 1119 (D. Conn. 2007)

Petitioner Matthew Johnson filed his federal court petition for limitation of liability after his private power boat collided with the private power boat of Gary Anderson, on Candelwood Lake, a landlocked Connecticut lake. Anderson filed a timely claim in the limitation proceeding, and moved to dismiss the limitation for lack of subject matter jurisdiction. He argued the locality test for admiralty jurisdiction was not met since Candelwood Lake was landlocked and therefore not navigable. In response Johnson argued the Limitation of Liability Act provided an independent basis for admiralty jurisdiction, relying upon Richardson v. Harmon, 222 U.S. 96 (1911).

Reviewing the cases, the Court granted the Motion to Dismiss for lack of subject matter jurisdiction. The Court noted that the passage of the extension of Admiralty Jurisdiction Act, 46 U.S.C. §740, altered the applicability of the 1911 Richardson decision. Moreover, the Court cited cases from the 4th, 5th, 7th, 8th, 9th and 11th Circuits finding that the Limitation of Liability Act does not provide an independent basis for admiralty jurisdiction.

Second Circuit

Otal Investments Limited v. M.V. Clary, 494 F.3d 40 (2nd Cir. 2007)

In the early morning of December 14, 2002, three vessels collided while attempting to navigate a traffic separation scheme in the English Channel, north of Dunkerque, France. One of the vessels sank, and the owners of that vessel filed a Limitation of Liability Action in the United States.

The District Court found one vessel to be at fault. However, on appeal the Second Circuit after a lengthy discussion of the collision regulations, found all three vessels to have been at fault.

The Limitation of Liability Act issue addressed by the Second Circuit was whether an Order limiting liability under the Act should have international application. The District Court did not attempt to apply the order outside U.S. jurisdiction. The Second Circuit agreed, citing Complaint of Bowoon Sangsa Company, 720 F.2d 595 (9th Cir. 1983), and Petition of Bloomfield SS Company, 422 F.2d 728 (2nd Cir. 1970), and held the limitation of liability Order did not extend to parties outside the United States.

In the Matter of the Complaint of the City of New York, 475 F.Supp.2d 235, 2007 AMC 702 (E.D.N.Y. 2007)

On October 15, 2003, the Staten Island Ferry, Andrew J. Barberi, crashed into a maintenance pier near the Staten Island Ferry terminal. Eleven people were killed and scores injured.

The City of New York, as the owner of the vessel, sought to limit its liability to the value of the vessel under the Limitation of Liability Act. In a related criminal case, the city's director of ferry operations at the time of the accident, Patrick Ryan, admitted he knew that the standard operating procedure for the Staten Island Ferries, requiring two qualified captains to be in the pilot house while the vessel was underway, was not regularly followed. This was critical, as the cause of the accident was determined to be fatigue by the captain in the pilothouse, the very reason for the rule requiring two captains to be on duty.

The issue in the limitation case was whether Ryan's failure to enforce the two pilot rule constituted causally related negligence, which would be imputed to the city. The city argued that an internal policy, such as the two pilot rule in the city's standard operating procedure, did not establish a standard of care. The Court analyzed in detail what "reasonable care under the circumstances" meant in this case. It concluded the issue was not whether the city could foresee each of the possible causes of the pilot's disability, but rather, whether the city could foresee the

possibility that the pilot would become disabled. It found the city's two pilot rule to be evidence that the city perceived the risk of pilot negligence.

Reviewing principles of negligence law theory formulated by Judge Hand in United States v. Carroll Towing Company , 159 F.2d 169 (2nd Cir., 1947), and subsequent cases elaborating Judge Hand's theory, the Second Circuit denied the City of New York's petition to limit liability. The City's failure to enforce its own two pilot rule was evidence of negligence causally related to the accident, and the failure of the city's director of ferry operations to enforce the rule was imputed to the city.

American Steamship Owners Mutual Protection and Indemnity Association, Inc., v. LaFarge North America, Inc., 474 F.Supp.2d 474, 2007 AMC 1250 (E.D.N.Y. 2007)

The American Club brought a Declaratory Judgment Action in Federal District Court in New York, to determine whether its P&I policy with LaFarge North America extended to a particular barge which had broken loose from its terminal in New Orleans during Hurricane Katrina, and allegedly caused damage. LaFarge was already a defendant in litigation in New Orleans as a result of the barge movements, and LaFarge had filed for limitation of liability in the Louisiana District Court. The issue before the Southern District of New York was whether to decide the coverage issue immediately, or to transfer the declaratory judgment action to New Orleans pursuant to a Motion to Transfer Venue filed by LaFarge.

The Court engaged in a lengthy analysis of the factors involved in the transfer motion under 28 U.S.C. §1404, not directly related to limitation proceedings as such. The Court placed heavy emphasis on timing. The Court noted that a direct action had been filed by third party plaintiffs in New Orleans against the American Club, about a month before the American Club filed its Declaratory Judgment Action in New York City. However, the Court noted that it could take years to resolve the complicated litigation in Louisiana, and all the while the American Club was responsible for the litigation costs of LaFarge. In denying the Motion to Transfer the Declaratory Judgment Action from New York to Louisiana, the Court concluded the cause of judicial efficiency was best served by a prompt decision on the coverage issue by the New York Court.

Lockheed Martin Corporation v. Unknown Respondents, 2007 AMC 1338 (N.D.N.Y. 2007)

On December 20, 2000, a Lockheed Martin employee and test engineer named Rocko Morganti fell overboard from the Lockheed vessel Little Toot II. As a test engineer, Morganti worked on sonar transducers, not as a crewmember of the boat. He nevertheless volunteered to assist with the stern line of the work boat. The air temperature at Cayuga Lake in upstate New York, where the accident occurred, was approximately 20 Fahrenheit. The workboat Captain Lee Agard, made several attempts to assist Morganti in climbing back onto the boat after Morganti fell into the water, but before he could be saved, Morganti drowned in the frigid water.

Lockheed filed a limitation of liability action, and then a summary judgment motion. Lockheed argued the sole proximate cause of the accident was Morganti's failure to don a life preserver in accordance with established safety procedures, and that in any event Morganti should

not have exceeded the boundaries of his employment as a test engineer by trying to help with the mooring lines. In response, Morganti's survivors filed their own summary judgment motion.

The Court followed the two step analysis of 1) determining whether the accident was caused by acts of negligence or conditions of unseaworthiness, and if so, 2) whether the vessel owner had privity or knowledge of such negligence.

With regard to the causes of the accident, the Court found that Lockheed's failure to ever provide Captain Agard with any boat safety or water rescue training, Agard's negligence in failing to instruct Morganti in safety procedures and failing to require him to wear a life jacket, the failure to have proper water safety and rescue equipment (including life jackets) on board the vessel, failure to have proper operational guidelines, and failure to keep the vessel Little Toot II in a proper condition of repair, all contributed to the accident. Many of these factors were set out in an OSHA violation charged to Lockheed.

Next, the Court found Lockheed indeed had privity and knowledge of these causal acts of negligence. The Court found that the local Lockheed managers, responsible for the day to day operation of the Little Toot II, had knowledge of the causal safety issues. They were responsible for Captain Agard's actions and, most significantly, their knowledge of the safety issues were imputed to the corporation. Therefore, the Court denied Lockheed's Motion for Summary Judgment on the limitation action and granted the summary judgment on Morganti's survivors.

Paul Urbaniak v. Shoreline Cruises, Inc., 459 F.Supp.2d 154, 2007 AMC 399 (N.D.N.Y. 2006)

The M/V Ethan Allan, owned and operator by Shoreline Cruise, Inc., sank in Lake George, New York, in October, 2005. Shoreline Cruise filed for limitation for liability under the Limitation of Liability Act. The issue in the limitation proceeding was whether Lake George was a navigable waterway, allowing admiralty jurisdiction.

Shoreline Cruises argued that Lake George empties into Lake Champlain vis a vis the LaChute River, and from Lake Champlain into the St. Laurence Seaway. It also cited 33 CFR §329 suggesting the LaChute River is included in the jurisdiction of the Corps of Engineers as a navigable waterway. Finally, it relied upon a New York State Appellate case suggesting the LaChute River is navigable.

However, the Court noted evidence that the LaChute River has six waterfalls and many rapids, and is not navigable by commercial traffic, nor by any traffic without portage of the vessel at certain portions of the transit. The Court rejected the state appellate decision on navigability of the river as "based on historical, rather than contemporary analysis". As the LaChute River was not navigable to contemporary commercial traffic, the Court held Lake George to be a non-navigable body of water, and therefore, found there was no subject matter jurisdiction for the limitation action.

Dobson v. Gioia, 39 A.D.3d 995 (N.Y.A.D. 3 Dept. 2007)

Dobson sued, among others, the owners of a small pleasure craft for injuries sustained in a boating accident on a lake in New York. Suit was filed in the New York State Court. Gioia, the owner of the pleasure boat, moved the trial court for an order limiting liability to the value of the boat. Trial court denied the motion and the Gioias appealed.

The state appellate court acknowledged that the Gioias could plead limitation as an affirmative defense in their answer. However, the court stated that it was clear that the federal courts sitting in admiralty had exclusive jurisdiction over the limitation defense "once the vessel owner's right to limited liability was contested". The appellate court went on to say that given the establish opposition to the claim for limited liability, the New York state court lacked jurisdiction to entertain the defense.

Third Circuit

In the Matter of the Complaint of Moran Towing Corporation, 497 F.3d 375, 2007 WL 2242491 (3rd Cir. 2007)

In June 2001, the M/V Astro Libra collided with a Moran assist tug, the John Turecamo, while attempting to berth in Philadelphia. The docking pilot aboard M/V Astro Libra, Thomas Sullivan, was provided contractually by Moran Towing Corporation. The owners of M/V Astro Libra sought monetary damages from Moran as a result of the accident. Moran filed a limitation action under the Limitation of Liability Act.

After a bench trial, the District Court entered an order exonerating Moran and the Moran tug John Turecamo from all claims. The M/V Astro Libra owners appealed, arguing the District Court erred when it found that the docking pilot was an independent contractor, rather than an employee of Moran, and in finding that Domenic Rizzo, the captain of the tug John Turecamo, a Moran employee, was not negligent in piloting the tug.

The Second Circuit upheld the District Court finding on both issues. With regard to whether the docking pilot, Sullivan, was an independent contractor or an employee or Moran, the Court noted the piloting clause in the contract for Sullivan's services indicated that docking pilots were borrowed servants of the contracting ship, and cited authority upholding such clauses. The Court also noted that Sullivan was a self-employed pilot affiliated with the Docking Pilots Association, whose members provide docking services to companies other than Moran.

With regard to the finding that Rizzo, captain of the tug John Turecamo, was not negligent, the court found the record supported the finding that sheer from the M/V Astro Libra contributed to the collision, and accepted the testimony of Moran's expert that the master of the Astro Libra should not have pre-positioned the tug Turecamo where he did.

For these reasons, the Second Circuit upheld the ruling of the District Court exonerating Moran from liability.

In the Matter of the Complaint of J.A.R. Barge Lines, LP v. M/V Bill Dyer, 2007 WL 674348 (W.D.Pa.. 2007)

On January 21, 2003, while employed by Mon River Towing as a deckhand on the M/V Rose G. near Dravosburg, Pa., Mark Smith stepped in a bight of line on deck, and severely broke his leg when the line took tension and he was pulled first into the water and then up onto another vessel. His leg was later amputated.

Smith filed a claim for maintenance and cure against Mon River. Limitation Actions were filed by Mon River and Ingram Barge Company, the owners, respectively, of the workboat Rose G and the Barge 4833. Smith filed a claim in both of the limitation cases, asserting he was a Jones Act Seaman on both the workboat and the barge. Ingram also filed a claim in the Mon River limitation action, arguing it was entitled to indemnification from Mon River. Smith and Mon River entered into a settlement agreement, but the Court refused to dismiss Mon River from the related claims brought by Ingram.

Subsequently, Smith filed suit against another entity, Tri-River, owner of the tug Bill Dyer, which had passed close to Barge 4833 at the time of his accident. Smith alleged the Bill Dyer was unseaworthy and passed too close to the Rose G, contributing to his accident. Tri-River then filed its own limitation action, in which Smith filed a claim.

A special master was appointed by the District Court to file a "Report and Recommended Findings of Fact and Conclusions of Law Regarding Liability, Causation and Exoneration/Limitation of Liability". The Court in this lengthy opinion went through each of the numerous findings and conclusions of the special master, and the likewise numerous objections to the findings and conclusions filed by the parties.

The Court left undisturbed the special master's key findings of fact, including that the lighting was adequate at the Ingram facility, and that "junk lines" on Barge 4833 did not contribute to the accident, that Mon River was not negligent in rehiring Smith after a prior drug testing incident, and that the tug Bill Dyer did not create an abnormal wake as it passed the accident scene.

The Court also left undisturbed key conclusions of law of the special master, including that Smith was not a seaman with regard to Tri-River, owner of tug Bill Dyer, that Barge 4833 was not unseaworthy, that Ingram acted reasonably and did not proximately cause or contribute to Smith's accident, and that both Ingram and Tri-River were entitled to exoneration from liability.

Fifth Circuit

In Re: Omega Protein, Inc., 2007 WL 803934 (W.D.La. 2007)

In October of 2004, the fishing vessel Gulf Shore, owned and operated by Omega Protein, allided with offshore platform 17B, owned by Sampson Contour Energy. Omega initiated an action for limitation of liability, and four claimants, including Sampson as owner of the platform, and three crewmembers injured on the platform, came forward and filed claims.

The Court worked through the issues of negligence and of privity or knowledge. First, the Court noted the presumption of negligence on the part of the moving vessel that allided with the fixed platform, but also noted that the presumption may be rebutted. The vessel owner Omega presented evidence that the platform was not lighted at the time of the allision, which occurred before sunrise. The Court accepted this testimony and found the presumption of negligence on the part of the vessel to be rebutted. However, claimants presented evidence that the captain of the fishing vessel turned on the wheelhouse light and made a call on his cell phone shortly before the allision. The Court found this violated rule 5 (improper lookout) and rule 7 (improper use of radar) of the COLREGS, and therefore constituted negligence. By turning on the wheelhouse light, the captain created a mirror effect with the fishing boat's windows so that he could not properly see out, and by calling on his cell phone, he was improperly distracted from his lookout duties. Likewise, turning on the wheelhouse light made is impossible to see the radar screen and use the radar properly.

The Court next considered whether the vessel owner had privity or knowledge of this negligence. The Court characterized the negligence causing the allision as "a mistake of navigation", so that the question became whether the owner exercised reasonable care in selecting a qualified and competent master. Reviewing the qualifications of the fishing vessel master, including over 20 years of service without incident, a U.S. Coast Guard masters license, no hearing or vision problems, and reviewing cases, the Court found Captain Stewart of the fishing vessel to be competent. Therefore, the owner Omega was justified in hiring him and his negligence was not imputed to the corporate owner. Omega was permitted to limit liability to the value of the vessel.

In Re: Athena Construction, LLC, 2007 WL 1668753 (W.D.La. 2007)

While being pushed by an inland tugboat, a spud barge dropped its spud which subsequently hit a natural gas pipeline and caused an explosion. Central Boat Rentals, the operator of the tug, filed a limitation action.

Subsequent to this filing, a number of claimants brought a consolidated action against Central which included a claim for punitive damages. In response to this punitive damages claim, Central filed a motion for partial summary judgment arguing that punitive damages, as a type of non-pecuniary damages, were unrecoverable under both the Jones Act and general maritime law. Claimants countered by asserting that punitive damages were neither pecuniary nor non-pecuniary and therefore recoverable. Further, several of the claimants argued that the issue of pecuniary damages was not ripe for review because, prior to the consolidated litigation, they filed claims in state court which, in the event Central was unsuccessful in its limitation action, would be pursued in state court. As such, claimants argue that the federal court should refrain from ruling on the issue of punitive damages since they should be allowed to litigate these claims in state court, their chosen forum.

Following a lengthy discussion of summary judgment motions and ripeness, the court concluded that no matter which forum the claim for punitive damages was adjudicated in, the Jones Act and general maritime law would apply. The court noted it would not be inappropriate in the interest of judicial economy and efficiency for it to rule upon the issue of punitive damages. However, despite having the jurisdiction to adjudicate the issue, the federal court was not required

to do so and could in its discretion not rule. In light of several claimants' desire to litigate their claims in state court, the court decided to refrain from ruling on the punitive damages issue and denied Central's motion for summary judgment.

Kostmayer Construction Company, LLC v. Karline's Geismar Fleet, Inc., 2007 WL 2265236 (E.D.La. 2007)

On September 13, 2005, the M/V CSS Chicora was underway on the Mississippi with the barge OU701 in tow. The barge struck a stationary vessel, the M/V Navious Star. Philadelphia Point Fleet, owners of M/V Chicora, filed for limitation of liability. After the owners of M/V Navious Star and others filed a claim against the owners in the limitation action, Philadelphia Point moved for summary judgment. The claimants argued the vessel owners failed to maintain and inspect the vessel, and failed to properly train the crew, both of which rendered the vessel unseaworthy. Claimants also argued the petitioners failed to establish that they were the vessel owners in the first instance, rather than merely the vessel operator.

After reviewing the Limitation of Liability Act, and when privity or knowledge of negligence is imputed to a corporate owner under the Act, citing in Re: Hellenic, Lines, Inc., 252 F.3d 391 (5th Cir., 2001), the Court decided there were issue of fact remaining as to all of the limitation issues, and denied the Motions for Summary Judgment in the limitation action.

In the Matter of the Complaint of Ingram Barge Company, 2007 WL 2088369 (E.D.La. 2007)

A barge owned by Ingram Barge Company, broke loose from its mooring in New Orleans when Hurricane Katrina made landfall on August 29, 2005. The barge was later found in the lower ninth ward of New Orleans and it was alleged the barge broke through the flood wall and caused or contributed to the flooding of the area. Ingram, as owners of the barge, filed a petition for exoneration from or for limitation of liability to the value of the barge.

In addition to Ingram, the barge owner, two other entities filed for limitation of liability. Domino was a marine transportation broker with management and operational control over the vessel, and Unique owned the tug M/V Regina H which assisted in moving the barge in its last mooring operation before the storm hit.

Due to the "complexity" of the action, the Court determined the case would be tried in phases. Phase one was to address the privity or knowledge of those parties asserting limitation of liability. The Court recognized in a footnote this was the reverse of the usual procedure of determining first whether there was negligence which caused the accident, and then, second, determining whether the owners had privity or knowledge of that negligence.

Ingram, Unique and Domino all argued none of their "managing agents" had privity or knowledge or any of the alleged acts of negligence asserted by the claimants in the limitation accidents. The Court relied upon eight factors to determine whether an employee is a managing agent, as set forth in In re: Hellenic Lines, Inc., 252 F.3d 391 (5th Cir., 2001). With regard to Ingram, the Court scrutinized whether the employees present were managing agents with knowledge of allegedly improper moorings of the barge, or alleged failure to retrieve the barge

after it initially broke from its moorings. The Court was satisfied that the employees involved in these matters were not managing agents, and even if they did have knowledge of the facts alleged, that knowledge would not be imputed to Ingram. However, the issue was not finally resolved as the Court noted that claimants had stated "many other punitive acts of negligence and conditions of unseaworthiness" that allegedly caused the barge to break from its moorings. The Court declined to rule on these issues, saving it for another phase of the litigation not reported in this opinion.

The Court's analysis for Unique and Domino, the other entities claiming limitation of liability, was similar. Using the In re: Hellenic Lines factor, the Court determined that those employees involved in the mooring operation of the barge prior to the arrival of the hurricane were not managing agents of their employers. The Court was satisfied Unique and Domino did not have privity or knowledge of the state of the moorings lines of the barge.

However, as in its analysis of the Ingram privity or knowledge issue, the Court noted there were other factors alleged by the claimants to have negligently caused the barge to break its moorings. The Court reserved analysis of these allegations for another phase of the litigation, not reported in this opinion.

The case provides an interesting analysis of the In re: Hellenic Lines factors for imputing privity and knowledge to a corporation based on the activities of employees involved with the vessel at issue. However, as the opinion states, this ruling was "not a final determination on limitation of liability", as the Court saved analysis of other factual issues for a subsequent phase of litigation.

In the Matter of Southern Scrap Metal Company, LLC., 2007 WL 1234995 (E.D.La. 2007)

In this Hurricane Katrina case, a dry dock owned by Southern Scrap Material Company broke free from its moorings after the hurricane made landfall in August of 2005, and partially sank in a navigable channel. The government considered the sunken dry dock a hazard to navigation, and the Army Corps of Engineers removed it, later charging Southern Scrap eight million dollars for the removal cost. Southern Scrap then filed a limitation of liability proceeding asking that its liability, if any, be limited to the value of the dry dock, approximately $316,000.00.

The government argued that the Wreck Act, part of the Rivers and Harbors Act, found in 33 U.S.C. §409 provides the government an *in personam* action against Southern Scrap and an exclusion from the limitation proceeding. The Court agreed. Rejecting Southern Scrap's argument that application of the Wreck Act turned on whether the vessel owner was at fault in the sinking of the vessel, the Court found that the 1986 amendment to the Wreck Act removed from the Wreck Act any reference to fault. Moreover, U.S. Supreme Court and Fifth Circuit case law supported the government's argument that the standard for liability under the Wreck Act changed from fault to strict liability.

The Court found the government's claim of eight million dollars against Southern Scrap for removal of the barge was permitted under the Wreck Act notwithstanding Southern Scrap's efforts to limit its liability under the Limitation of Liability Act.

In Re: Hilcorp Energy Company, 2007 WL 1655571 (E.D.La. 2007)

Kennison was injured while working aboard a twelve foot aluminum johnboat owned and operated by Hilcorp. Kennison sued Hilcorp and BLR Construction in state court in Plaquemines Parish, Louisiana. Hilcorp filed a limitation action in the above referenced federal court.

Kennison submitted a claim in the limitation proceeding and entered into certain stipulations reserving all limitation of liability issues for the federal court and moved to lift the federal court limitation stay to proceed in state court. Hilcorp contested the motion arguing Kennison's stipulations were insufficient to lift the stay.

The court noted Fifth Circuit law requires a claimant to stipulate: (1) the federal admiralty court reserves exclusive jurisdiction to determine all limitation of liability related issues; (2) no judgment will be asserted against the vessel owner in excess of the value of the limitation fund; (3) to the extent that multiple claimants are involved, the priority in which the claims will be paid and (4) whether potential derivative actions exist and if so the stipulations should cover all potential claimants.

The court noted that Kennison had failed to rebut Hilcorp's contention that Kennison's wife is a potential claimant creating the risk of a competing claim. Further, the deadline for any and all claimants to contest Petitioner's right to exoneration or limitation of liability had not run. Thus, the Court could not determine whether the matter involved multiple claimants and/or potential derivative actions requiring Kennison to further stipulate to the priority in which claims would be paid. Kennison's motion was denied without prejudice and would be re-considered after the aforementioned deadline.

Nolan J. Broussard, Jr., v. Stolt Offshore, Inc., 467 F.Supp.2d 668, 2007 AMC 1423 (E.D.La. 2006)

Stolt Offshore filed a limitation of liability action after a crewmember, Broussard, alleged Jones Act negligence and unseaworthiness against Stolt Offshore, resulting in a back injury. The evidence during a three day non-jury trial indicated Broussard was injured while lifting a fuel hose from the hold to the main deck in an unsafe manner. The master of the vessel knew of the unsafe procedure for lifting the fuel hoses on the vessel, and in fact the same procedure had been used for four years.

With these facts, the Court concluded the vessel was unseaworthy and privity and knowledge would be imputed to the vessel owner. First, the actual knowledge of the captain of the unsafe procedure was imputed to the vessel owner. Second, the corporate ship-owner was deemed to have constructive knowledge of the unseaworthy condition as it had been the practice on board the vessel for 4 years.

The vessel owner was denied its petition to limit its liability.

Grand Casino of Mississippi, Inc., Limitation Proceedings Grand Casino Biloxi, 2007 AMC 962 (S.D.Miss. 2007)

During Hurricane Katrina, two "casino barges" owned by Grand Casino of Mississippi broke free of their moorings, traveled inland and caused damage to property. Grand Casino, as owners, filed for limitation of liability under the Limitation of Liability Act. The claimants in the limitation action argued the casino barges were not vessels, and therefore there could be no admiralty jurisdiction, and therefore no action under the Limitation of Liability Act.

The Court found the issue to be controlled by the Fifth Circuit decision of Pavone v. Mississippi Riverboat Amusement Corp, 52 F.3d 560 (5th Cir., 1995), in which a floating dockside casino in Biloxi, Mississippi was held not to be a vessel. The barge in Pavone like the barge in the instant cause, was indefinitely, if not permanently moored to the shore, received all services from the shore, and employed no navigational or nautical crew, but only people associated with the casino operation.

The vessel owner Grand Casino argued the definition of "vessel" had been expanded by the Supreme Court in Stewart v. Dutra Construction Company, 543 U.S. 481 (2005), which held a spudded dredge to be a vessel. The Court disagreed. It focused on the language in the Dutra opinion addressing whether the watercraft's use as a means of transportation on water is a "practical possibility or merely a theoretical one". The Court found that the casino barge, indefinitely or permanently moored, receiving water, power, sewer, cable TV, data processing and other facilities from the shore, was not a vessel. Therefore, the Court found no admiralty jurisdiction upon which to base a limitation of liability claim.

Sixth Circuit

Clinton River Cruise Co., v. De La Cruz, 213 Fed. Appx. 428 (6th Cir. 2007)

De La Cruz was a passenger on a small dinner cruise vessel plying the Clinton River in Mount Clemons, Michigan. Near the end of the cruise, DeLaCruz and another passenger, undressed, handed their shoes, wallets, cell phones and other items to friends and dove overboard in an apparent race to land. DeLaCruz drowned. Clinton, the owner of the dinner cruise vessel, filed a petition for exoneration from or limitation of liability in federal court. The DeLaCruz estate filed a claim in that proceeding.

Both parties moved for summary judgment. Clinton sought exoneration from liability on the ground that DeLaCruz's own actions were the sole proximate cause of his death. Alternatively Clinton sought limitation of liability asserting it lacked privity and knowledge of any alleged negligence on the part of its employees.

The District Court held that Clinton was negligent *per se* based on alleged violations of the vessels certificate of inspection regarding manning requirements. Specifically, the District Court considered a U.S. Coast Guard Certificate of Inspection requiring the vessel to be manned with two deckhands. The District Court ruled as a matter of law that only one of the two crewmembers aboard the vessel was a deckhand. Accordingly the District Court applied the Pennsylvania Rule

finding a statutory violation intended to prevent the type of accident encountered requiring the vessel owner to show that its violation could not have been the cause of the accident.

The Sixth Circuit acknowledged there was no statutory definition of a deckhand. However, a Coast Guard circular recommended that a deckhand be familiar with, among other things, man overboard procedures, ships maneuvering characteristics, emergency communications and line handlings. Depositions of the two crewmembers were taken providing some support for the District Court's determination that only one of those crewmembers was a deckhand. Subsequent to the depositions, Clinton submitted a supplemental affidavit of its principle owner asserting both crewmembers were deckhands. One of the deposed crewmembers also submitted an affidavit asserting that there were at least two crewmembers assigned to the vessel on each cruise. The District Court rejected the affidavits on the grounds that both contradicted the previous deposition testimony.

The Sixth Circuit acknowledged the general rule that a party may not create a factual issue by the filing of an affidavit after a motion for summary judgment has been filed, which contradicts earlier testimony. Ultimately, the Sixth Circuit found that the affidavits were intended to supplement the record regarding issues that were not addressed in the depositions. The Sixth Circuit felt the affidavits also sought to rectify possible confusion regarding the term "crewmember" as contrasted with "deckhand" as those terms were used in the depositions. Therefore, it was concluded that the affidavits should have been taken into account by the District Court.

Based on these findings, the District Court's award for summary judgment in favor of DeLaCruz was vacated and the District Court was instructed to revisit the issue of (1) the alleged negligence or unseaworthiness of the vessel (i.e. the manning requirements) and (2) the owner's privity and knowledge of the negligence.

In Re: Via Sales and Leasing, Inc., 499 F.Supp.2d 887 (E.D.Mich. 2007)

This case arose from a collision between two pleasure vessels on Lake St. Claire, Michigan. Troop, the owner and operator of a 43-foot Welcraft Cruiser rear-ended a 19-foot Sea Ray Runabout being operated by Kenny. Kenny asserted that while operating her vessel at a slow speed, she looked behind her and saw the hull of Troop's vessel coming up over the stern of her boat. Witnesses corroborated Kenny's assertion indicating that Troop was traveling in the same direction as Kenny's boat but at a much faster speed. The witnesses also indicated that Troop did not sound a warning horn or slow down before plowing into Kenny's boat.

Troop and Via Sales and Leasing, Inc., the owners of the Welcraft Cruiser filed petitions for exoneration from a limitation of liability. Kenny, a claimant in the limitation proceeding, moved the court for summary judgment asserting that Troop was negligent, his negligent caused the collision and that he was therefore not entitled to exoneration or limitation of liability.

According to Kenny, Troop was negligent in failing to maintain a proper lookout, traveling at an unsafe speed, failed to give way when overtaking another vessel and failing to act to avoid a collision. Kenny asserted these failures were violation of the corresponding navigation rules

including Rule 5 (lookout); Rule 6 (safe speed); Rule 7 (risk of collision); Rule 8 (action to avoid collision); Rule 13 (overtaking); and Rule 34 (maneuvering and warning signals). Kenny further asserted that these alleged violations of statutory duties invoke the Pennsylvania Rule whereby Troop would have to show that the accident would have occurred despite the alleged statutory violations.

Troop was unable to present any evidence to support the conclusion that the accident would have occurred despite his failure to maintain a proper lookout. Accordingly, the Court found there was no genuine issue of material fact, and that Troop was negligent as a matter of law.

The second inquiry, as in all limitation matters, was whether the vessel owner had knowledge of the negligence. Here, Troop an owner of the vessel, was driving the boat at the time of the collision so the failure to maintain a proper lookout was his responsibility. The Court acknowledged that in most circumstances, when an owner is aboard and operating a vessel, he will found to have privity and knowledge. Ultimately Troop failed to meet his burden to demonstrate lack of privity or knowledge.

Troop's petition for exoneration or limitation of liability was dismissed with prejudice.

Seventh Circuit

In Re: Illinois Marine Towing, --- F.3d---, 2007 WL 2351232 (7th Cir. Ill. 2007)

This case involved personal injuries and a death to passengers aboard a 17-foot pleasure boat, whose operator was allegedly intoxicated, and crashed into a 200-foot barge being towed by a tug owned by Illinois Marine Towing (IMT). Billy Joe Thomas, an employee of IMT was piloting the tug and barge across the Illinois River at the time of the collision.

The injured boaters filed suit in state court and IMT subsequently filed a petition for exoneration from a limitation of liability in Federal Court. The Claimants jointly moved to modify the limitation stay seeking to resume litigation of their claims in state court. In doing so, the claimants stipulated that the District Court had exclusive jurisdiction over all limitation issues; waived any claim of *res judicata* respecting any limitation of liability issues; agreed that should a judgment be obtained in state court that they would only seek their respective *pro rata* proportional share of the limitation fund; conceded that in no event would they seek any amount beyond the value of the limitation fund as determined by the District Court; and conceded that the District Court had exclusive jurisdiction in determining the value of the limitation fund as long as the claimants had an opportunity to obtain an independent appraisal of the vessel. The District Court granted the claimants motion to lift the stay and proceed in State Court and IMT appealed.

Referencing Lewis v. Lewis and Clark Marine, Inc., 531 U.S. 438 (2001) and other limitation cases, the Seventh Circuit recognized the tension existing between the Limitation Act and the Savings to Suitors Clause, 28 U.S.C.§1333(1). In Lewis, the Supreme Court recognized the potential conflict between these two statutes and found that the District Courts have discretion to retain a limitation action or allow the case to proceed in state court. In sorting these issues out, the

Supreme Court recognized two situations in which a District Court could abstain from invoking its jurisdiction to determine liability and allow claimants to litigate in state court.

The first situation is the "single claimant" exception to concursus. This exception generally recognizes that when a single claim is asserted against a shipowner, there is no need for a concursus and the claimant should be allowed to proceed in state court with the District Court retaining exclusive jurisdiction over the question of limitation of liability. The second exception is the "adequate fund" exception where the amount of the limitation fund exceeds the total amount of the claims asserted against the vessel owner. With an adequate fund situation, the state proceeding could have no possible effect on the petitioner's claim for limited liability.

The claimants asserted that the stipulations they entered into transformed this multiple claim case into a single claim case and therefore the District Court did not err in allowing them to proceed state court. IMT argued that concursus was at the heart of the Limitation Act fostering judicial efficiency by bringing together all potential claimants. Allowing the claimant to proceed in state court would render the applicable federal admiralty rules meaningless by depriving them of the right to seek exoneration and/or limitation. Further, the claimants' stipulations did not prioritize their claims. For these reasons IMT argued the stipulations failed to fall within the single claimant exception.

IMT also argued that Mr. Thomas (IMT's employee and the pilot of the barge) had failed to sign the claimants' stipulations. IMT argued that Mr. Thomas should be considered a claimant because he could potentially bring an indemnification or contribution action against IMT. In the same vein, IMT voiced concerns about the state court finding IMT failed to train Mr. Thomas being raised as *res judicata* in the subsequent limitation proceeding.

The Seventh Circuit found that the primary purpose of the Limitation Act is limitation of liability and not necessary the concurcus aspect of the statute. The District Court correctly concluded the proper stipulations can transform multiple claims into a single claim for purposes of determining liability in state court. The court next turned to the adequacy of the stipulations. The stipulations were found to allow the District Court to retain jurisdiction over all limitation issues while also permitting the claimants to pursue the question of liability in state court.

With regard to the potential for Mr. Thomas to seek indemnification or contribution against IMT, Mr. Thomas had in fact submitted a waiver of claim in the District Court. Under this waiver, Mr. Thomas waived any claim for indemnity, contribution or any other relief against IMT. In the waiver Mr. Thomas did reserve his ability to counter-claim if IMT sought indemnity or contribution against him. The court found this waiver precluded Mr. Thomas from becoming a claimant in either state court or federal court. Thus, Mr. Thomas' failure to sign the stipulations was of no concern. Further, IMT made no indication that it would seek indemnity or contribution for Mr. Thomas and the choice to trigger this reservation was completely within IMT's control.

In conclusion, claimant's stipulations were found adequate to protect IMT's right to seek limitation of liability and to have all limitation issues decided in federal court. Accordingly, the District Court's Order granting the claimants motion to lift the stay was affirmed.

Ninth Circuit

K.D.M.E., Inc., v. Bucci, 2007 WL 2345026 (S.D.Cal. 2007)

Janine Bucci and others were first time boat renters and rented a 16-foot Bayliner with a 50 horsepower motor from K.D.M.E. to tour Mission Bay, California. During the rental process Bucci apparently conveyed her reluctance to rent the boat because no one in the group had boating experience. The attendant at the rental counter apparently quelled Ms. Bucci's concerns by indicating that "if you can drive a car, you can drive a boat". Bucci signed the rental agreement and proceeded to the dock where she received instructions from K.D.M.E.'s dock manager. The dock manager provided instructions on the boat's steering wheel, throttle, life jackets, proper speed of operations and locations to avoid on Mission Bay. The dock manager also apparently advised the group that they could rent an innertube and provided the group with instructions concerning the use of the innertube. The dock manager, however, apparently did not adequately advise the group as to the method of deploying the innertube only instructing them to "just throw it in when you're ready".

While using the innertube, the boaters misdeployed the tow line such that it became wedged between the outboard engine and the mounting bracket, causing the steering to lock. The boat made a sharp u-turn striking the innertube and causing personal injuries.

K.D.M.E. filed a petition for limitation of liability in district court. The district court applied the Limitation Act's procedures and first made an inquiry as to K.D.M.E.'s negligence. The court noted that Bucci had signed a rental agreement where she agreed to hold K.D.M.E. harmless for injury to persons or property whether caused by the negligence of K.D.M.E. or otherwise. Although the exculpatory clause was enforceable with respect to K.D.M.E.'s negligence, the court noted that a party to a maritime contract should not be able to shield itself contractually from gross negligence.

The court found that K.D.M.E. owed Bucci and the other passengers a high duty of care as first time boat renters. The dock manager's instructions with regard to the use of the innertube were found to be an extreme departure from the ordinary standard of care constituting gross negligence.

The court next turned its attention to whether there was privity and knowledge. The court noted that a corporation has imputed knowledge of the negligent acts of its managing officers and supervisory employees. The court found that the dock manager whose responsibilities included "everything that went down on the water on the dock" was a "managing officer" or "supervisory employee" at the time of the incident. Accordingly, K.D.M.E. could not establish by a preponderance of the evidence that the dock manager's gross negligence was beyond its privity and knowledge.

The court next turned its attention to apportioning fault. The court found the boat renters to be 0% at fault and not surprisingly K.D.M.E. 100% at fault for the claimants' injuries. Accordingly, K.D.M.E.'s petition for limitation of liability was denied with prejudice.

In Re: X-TREME Parasail, Inc., 2006 WL 4701815, 2007 AMC 1287 (D. Hawaii 2007)

During a parasailing excursion, Hanenkratt fell overboard and was injured by the vessel's propeller. The vessel was owned by X-treme Parasail (XPI) and was operated by Mr. Longnecker.

XPI filed a petition for limitation of liability in federal court. A claim was presented on behalf of Hanenkratt in the limitation petition. A few months later, suit was filed in state court against Longnecker (the vessel's operator) on behalf of Hanenkratt. Hanenkratt moved to modify the limitation injunction to allow her to name XPI as a defendant in the state court action and to stay the limitation proceeding. In doing so, the claimants entered into the following stipulations:

1) the Federal Court's exclusive jurisdiction to determine limitation issues;
2) the value of the limitation fund was $124,000.00;
3) a waiver of *res judicata* of decisions, rulings or judgments in any other forum;
4) claimants would not seek to enforce a judgment against XPI or anyone that might have an indemnity or contribution claim against XPI that may expose XPI to liability and excessive limitation fund.

Referring to Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 538, 2001 AMC 913 (2001), the court noted that the district courts have the discretion to dissolve an injunction issued in a limitation case and allow state court actions to proceed under the Savings to Suitors Clause, as long as a vessel owners' limitation rights are adequately protected. The court found the stipulations adequately protected XPI's limitation rights.

Although the claimants merely asked the district court to lift its limitation stay, the district court dismissed the limitation action without prejudice. The district court went on to say that once the state court proceeding had been fully and finally adjudicated, XPI was permitted to file another federal action for limitation. The court was kind enough to waive the filing fee and to state that the filing date of the new action would relate back to the original filing date. The district court further required that any refilling be done within 60 days of the conclusion of the state court action.

Eleventh Circuit

Maritime Tug & Barge, Inc. v. Royal Indemnity Company, 228 Fed.Appx. 914, 2007 WL 1202962 (11th Cir. Fla. 2007)

Subsequent to an alleged allision with a bridge under construction, Maritime Tug & Barge filed a petition for exoneration from or limitation of liability almost 20 months after receiving written notice of claim. The district court dismissed Maritime's limitation petition with prejudice finding it untimely. The district court also denied as futile Maritime's motion to amend its complaint to bring a declaratory judgment count.

The Eleventh Circuit affirmed both rulings of the District Court. The Eleventh Circuit went onto say that the dismissal of Maritime's section 185 petition did not address or comment in any way on whether Maritime could assert limitation as an affirmative defense in state court or whether the state court had jurisdiction over a section 183 limitation defense.

In re Ruiz, 494 F.Supp.2d 1339 (S.D.Fla. 2007)

Thirteen-year-old Christopher Ruiz, was driving a 90 horsepower motorboat belonging to limitation petitioner Manuel Ruiz. The younger Ruiz drove over six-year-old Charlie Smith while Smith was snorkeling with family members. Smith received catastrophic and fatal injuries. Christopher Ruiz then struck the Smiths' boat, which sunk as a result.

Members of the Smith family, filed suit in Florida State Court asserting negligent entrustment and negligent supervision against Manuel Ruiz. Manuel Ruiz, as the owner of the 90 horsepower motorboat, filed a limitation action in Federal Court. The Smiths moved to dismiss the limitation action asserting the federal court was without subject matter jurisdiction, as if the state court claims for negligent entrustment and negligent supervision were proved this would establish the necessary privity to preclude limitation of liability.

Relying primarily on Joyce v Joyce, 975 F.2d 379 (7th Cir. 1992) and Suzuki of Orange Park, Inc., v. Shubert, 86 F.3d 1060, 1064 (11th Cir. 1996), the court found that if Manuel Ruiz was negligent in entrusting the boat to Christopher Ruiz, or in supervising the thirteen-year-old, then his actions would necessarily be within his "privity or knowledge" and no limitation of liability would be available. If, on the other hand, the state court action resulted in a finding that there was no negligent entrustment or supervision by Ruiz, then the limitation of liability action would be unnecessary and moot. The Smiths motion to dismiss for lack of subject matter jurisdiction was granted.

In Re: Everglades Island Boat Tours, LLC, 484 F.Supp.2d 1259, 2007 AMC 1440 (M.D.Fla. 2007)

Following an injury to a passenger on a 20-foot airboat, Everglades, the owner of the airboat, filed a petition for limitation of liability in the federal court. The injured passenger filed a claim in limitation action which included a count for loss of companionship/consortium. Everglades moved to strike the claim for loss of consortium asserting federal admiralty law did not recognize such a claim. The passenger argued the entire case should be dismissed for lack of federal jurisdiction asserting the accident did not occur on navigable waters.

The court noted that federal courts are courts of limited jurisdiction. The source of federal admiralty jurisdiction is Article 3, Section 2 of the United States Constitution which extends judicial power to all cases of admiralty and maritime jurisdiction. Congress implemented this jurisdictional grant through 28 U.S.C.§1333(1) which provides that federal district courts have exclusive original jurisdiction of any civil case of admiralty or maritime jurisdiction, saving to suitors all cases, all the remedies to which they are otherwise entitled.

To invoke federal admiralty jurisdiction over a tort claim, the parties must satisfy two conditions: 1) Location, i.e., the tort occurs on navigable waters or an injury suffered on land was

caused by a vessel on navigable waters; and 2) Connection with maritime activity, i.e., a substantial relationship to traditional maritime activity.

The court took judicial notice of the South Florida Water Management District website which provided certain information regarding the waterway in which the accident occurred. It was undisputed that the accident occurred on private property within the Florida Everglades. The claimants argued that the incident did not occur on navigable waters because the deposition testimony clearly established that during the dry season, the area in question was sometimes dry. The claimants further argued that "wetlands", could not be considered navigable waters for the purposes of admiralty jurisdiction.

"Navigable waters" is not a defined term for jurisdictional purposes, and is one of those legal terms which can be problematic. Navigable waters include those waterways which are navigable in fact. Waterways are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce over which trade or travel are or may be conducted in the customary modes of trade and travel on water. The fact that there may be no water during the dry season is not determinative.

The court found that the waterway on which the accident occurred connected via dredged channels and other waterways running all the way to the Gulf of Mexico. Accordingly, the accident occurred on navigable waters.

The claimants further argued that the airboat did not qualify as a vessel under the Limitation Act. The court stated that Section 115 of Title 46 defines "vessel" as having the same meaning provided by Section 3 of Title 1, which states that a vessel "includes every description of watercraft or other artificial contrivents used or capable of being used, as a means of transportation on water." The court concluded an airboat easily qualified within the broad statutory definition of vessel.

As this matter involved navigable waters and a vessel, admiralty jurisdiction existed and therefore, federal maritime law applied. The court held that federal maritime law did not authorize the recovery for loss of society or consortium in personal injury cases. Accordingly, Everglades' motion to strike the claim for consortium was granted and the claim was dismissed.

Gatewood v. Atlantic Sounding Co., Inc., 2007 WL 1526656 (M.D.Fla. 2007)

Gatewood, a seaman, was injured while handling lines aboard a tug off the Coast of Puerto Rico. Gatewood filed a two-count complaint against Atlantic Sounding and Weeks Marine a/k/a Weeks de Puerto Rico. Count I asserted a Jones Act negligence claim and Count II asserted an unseaworthiness cause of action. Gatewood's suit was brought in the United State District Court, Middle District of Florida.

About 7 months later, Weeks de Puerto Puerto Rico filed a complaint for exoneration from or limitation of liability in the district court for the District of Puerto Rico. In its limitation petition Weeks de Puerto Rico asserted that it was the bareboat charterer of the tug upon which Gatewood was injured. The District Court in Puerto Rico entered a default judgment stating that no claims

had been filed in the action on or before the deadline prescribed by the court for the filing of claims. The court ordered and adjudged that no claim having been filed, "default judgment against all persons is hereby entered".

Atlantic Sounding and Weeks Marine, the defendants in the Middle District of Florida action, moved for summary judgment asserting that the default judgment entered in the Puerto Rico limitation action precluded Gatewood from (1) attempting to dispute the ownership of the tug; (2) attempting to dispute his employer at the time of his accident and (3) bringing any claim against any entity, including Atlantic Sounding, Weeks Marine and Weeks de Puerto Rico based on the underlying accident. The defendants argued that the default judgment clearly determined Weeks was the owner *pro hac vice* of the tug and that Gatewood's Jones Act employer was Weeks de Puerto Rico. Accordingly, under the policies and purposes of the Limitation Act, as well as the doctrines of *res judicata* and collateral estoppel, Atlantic Sounding and Weeks Marine were entitled to summary judgment.

Gatewood acknowledged that he was barred from filing a claim against Weeks de Puerto Rico by virtue of the default. He argued, however, that he was not barred from pursuing claims against defendant Weeks Marine and Atlantic Sounding because they were not parties in the Puerto Rican limitation action.

The Middle District of Florida stated that the Jones Act confers upon a seaman the right to sue his employer for negligence resulting in personal injury. The Jones Act provides the only negligence remedy for an employee against his employer. The employer-employee relationship is a question of fact which turns on the degree of control exercised over the crewman. The court held that the Puerto Rico default judgment did not bar Gatewood's Jones Act claim against his alleged employers, Weeks Marine and Atlantic Sounding. First, Weeks Marine and Atlantic Sounding were not parties to the Puerto Rico limitation action and their status as Gatewood's employer was never at issue much less litigated and determined in the limitation action.

Next the court found that Gatewood was not collaterally estopped by the default judgment. The court reasoned that issue preclusion attaches only when "an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment". The same applies to collateral estoppel. Here, the issue of whether Weeks de Puerto Rico supplied the crew to the tug and was Gatewood's employer was never actually litigated and determined by the Puerto Rico District Court. Lastly, the court concluded that there were genuine issues of material fact regarding whether Weeks Marine and Atlantic Sounding were Gatewood's employers.

With regard to Gatewood's unseaworthiness count, the court indicated that such a claim applies *in rem* against the vessel and *in personam* against either the title owner of the vessel or the owner *pro hac vice*. While the District Court in Puerto Rico referenced in its default judgment that Weeks de Puerto Rico was the owner of the tug at issue, the issue of ownership was not actually litigated and determined. Thus, Gatewood was not collaterally estopped from asserting an unseaworthiness claim against Weeks Marine as alleged owner of the tug. The court further found that there existed genuine issues of material fact as to whether Weeks de Puerto Rico was indeed the owner *pro hac vice* of the tug in question. Accordingly, the defendants' motion for summary

judgment was denied. However, the court indicated that it would likely be willing to revisit the issue after the development of a more complete record.

Tassinari v. Key West Water Tours, L.C., 2007 WL 1879172, 2007 U.S. Dist. LEXIS 46490 (S.D. Fla. 2007)

Plaintiffs were injured in a collision between their rental watercraft and another watercraft, both rented by the defendant Key West and during a tour led and organized by the defendant.

Key West as vessel owner argued it was entitled to summary judgment on the following issues: (1) exoneration from liability because there was no evidence of negligence or unseaworthiness; (2) alternatively, limited liability to the value of the watercraft (approx. $ 3,000.00) because it was without privity or knowledge of any negligence or unseaworthiness; (3) Florida statutory law did not apply; and (4) Plaintiff Tassinari's claims were barred by the waiver and "hold harmless" provisions of the rental agreement.

The Plaintiffs argued they were entitled to summary judgment because Key West violated certain Florida State statutes 1) making it unlawful for the owner of a personal watercraft to "authorize or knowingly permit the [watercraft] to be operated by any person who has not received instruction in the safe handling of personal watercraft and 2) requiring the instruction in the safe handling of personal watercraft be delivered by a person who has "successfully completed a boater safety course approved by the National Association of State Boating Law Administrators and this state." The Plaintiffs argued this made Key West negligent per se under the *Pennsylvania* Rule. Plaintiffs further argued that if Key West was negligent per se, then it was not entitled to have its liability limited to the value of the watercraft.

The court held that since Key West violated the pertinent Florida statutes designed to prevent collision, the burden was on Key West to prove it could not have contributed to the accident, which it was unable to do. Since Key West was not completely free of fault, it could not be exonerated from liability. Key West knew, should have known, or could have discovered upon minimal investigation whether Florida's safety laws were being met. Furthermore, the hold harmless and waiver provisions of the rental agreement were unenforceable as against public policy as applied to liability arising out of violation of boater safety statutes.

RECENT DEVELOPMENTS AND TRENDS IN MARITIME PERSONAL INJURY

Sean O’Neil

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

FALL MEETING
SANIBEL HARBOR RESORT & SPA
OCTOBER 24 – 27, 2007

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RECENT DEVELOPMENTS AND TRENDS IN MARITIME PERSONAL INJURY

By: W. Sean O'Neil

I. PUNITIVE DAMAGES

A. U.S. Supreme Court

The U.S. Supreme Court addressed the question of whether a state punitive damages award offends the Constitution's Due Process Clause where the underlying jury instruction requests the jury to punish the defendant for damages to persons not before the Court. The Court found the jury award constituted a "taking" of property from the defendant without due process for the harm caused to non-parties. *Phillip Morris USA v. Williams*, 549 U.S. _____, 127 S.Ct. 1057 (2007).

Williams involved the lung cancer death of a long time smoker of Marlboro cigarettes, Jesse Williams. For over 47 years, Mr. Williams smoked three packs a day, ignoring the large amounts of evidence compiled in that time which documented tobacco's hazardous health effects. After his death from inoperable lung cancer, Williams' widow, Mayola, filed an Oregon state court negligence and deceit lawsuit claiming Phillip Morris knew for 50 years of the potential health risks posed by its product, but failed to inform the public of those risks.

At trial in February 1999, Williams' attorneys argued to the Oregon jury that Phillip Morris' actions were the result of a deliberate, clandestine effort to hide the dangers of smoking

and to dispel the public's concerns by instilling a false impression of serious debate of the dangers of smoking in the scientific community. The jury found Phillip Morris had engaged in negligent and fraudulent practices awarding $821,485 in compensatory damages and punitive damages 97 times that amount while also finding Williams equally at fault in his death. The jury award of $79.5 million in punitive damages was based on a finding that Phillip Morris' actions were systematic and affected a large group of individuals over a 50-year period. The trial judge, while finding the award was within the range of an award by a rational juror based on the evidence, nonetheless found the award excessive under the *Gore* guidelines (*BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996)) and reduced the punitive damage award to $32 million which was 39 times the compensatory damage award.

The trial verdict was appealed by both parties. The Oregon Court of Appeal reversed the trial judge's remittitur and reinstated the $79.5 million award (49 P.3d 824 (Or.Ct.App. 2002)). Upon appeal, the Oregon Supreme Court affirmed. The Supreme Court granted a *writ of certiorari* in 2003 and vacated the Court of Appeal's decision and remanded the case for review in consideration of *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003)(holding restrictions on punitive damages with *dicta* on one to nine times the compensatory damages award as proper). Subsequently, both the Oregon Court of Appeal and Oregon Supreme Court affirmed the award of $79.5 million again. The Oregon Supreme Court concluded that Phillip Morris' "indifference to and reckless disregard for the safety of not just Williams, but of countless other Oregonians" supported the award.

On appeal to the Supreme Court, in a 5-4 decision, said Supreme Court stated "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063. Accordingly, it vacated the Court of Appeals award, and again remanded for further proceedings.

Following the decision, the Supreme Court granted *writs of certiorari* in a number of punitive damage cases involving the form and content of jury instructions addressing the harm to non-parties and reprehensibility. The Supreme Court remanded all such cases with instructions to the lower courts to reconsider the punitive damages awards consistent with the *Williams* opinion. Unfortunately, the Supreme Court failed to provide any concrete example of a correctly formulated charge leaving open additional appeals on the same issue. In one of the recently remanded cases, *White v. Ford Motor Co.* ---F.3d----, 2007 WL 2445952, C.A.9 (Nev.) 2007, the Ninth Circuit reversed and remanded a $52 million punitive damages award with compensatory damages of a little over $2.3 million on the basis of a poorly worded jury instruction on harm to non-parties and reprehensibility.

B. The Ninth Circuit

In *In re Exxon Valdez*, 490 F.3d. 1066 (9th Cir., May 23, 2007), the Ninth Circuit, following a third remand for reconsideration of punitive damages in the lawsuit arising from the 1989 grounding of the EXXON VALDEZ, again addressed the issue of punitive damages in an amended opinion, which oddly begins with the majority's order denying rehearing *en* banc, followed by the two dissenting opinions and then the majority opinion. The majority opinion holds that the prior

punitive damage award of $5 billion, now remitted to $2.5 billion, is correct based on a 5:1 ratio over the $513 million total compensatory damages award. The dissenting opinions voice strong disagreement on vicarious liability for punitive damages in admiralty cases, and it is likely that the case will find its way back to the Supreme Court.

Judge Kozinski's dissent begins by citing to the *Amiable Nancy*, 16 U.S. 546, 558-59 (1818), for the proposition that a ship owner should not be subject to "exemplary damages" for the actions of its "agent" when the owner is "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree." *In re Exxon Valdez*, at 1068. Judge Kozinski discussed the Ninth Circuit's "abrupt change of course" from the *Amiable Nancy*'s protections for a ship owner in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir.1985), where it held, under maritime law, punitive damages are available against a ship owner for the actions of his agent who "was employed in a managerial capacity and was acting in the scope of employment." *Id.* The change was apparently based on the "the reality of modern corporate America"; however, Judge Kozinski points out that "nothing has changed in the relationship between ship owner and captain that would justify importing [punitive damages] into maritime law." *In re Exxon Valdez*, at 1069. Moreover, in the wake of the spill from the EXXON VALDEZ, Exxon acted as a model corporation mitigating damages (which was part of the jury instruction) in spending over $2 billion in clean-up costs, $900 million to restore natural resources and, prior to the original jury verdict, paying compensation to the plaintiffs for most of their damages.

Judge Kozinski ends his dissent with an admonition to all who would sail in "the vast waters of the Ninth Circuit":

> [T]he effects of this opinion are not limited to shippers and docks based in the Ninth Circuit: The shipping business knows no circuit, or even national, boundaries. Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

In re Exxon Valdez at 1071. Exxon filed a *Petition for Certiorari* on August 20, 2007 with its primary arguments based on Judge Kozinski's dissent. Following the case will be very interesting, especially in light of the *Miles v. Apex Marine Corp.*, 111 S.Ct. 371 (1990) case inference (not holding) that punitive damages are "non-compensatory" and unavailable in an admiralty personal injury case.

C. The Eleventh Circuit

In *Atlantic Sounding Co. v. Townsend*, 496 F.3d. 1282, No. 06-13204 (11th Cir., August 23, 2007), the Eleventh Circuit addressed whether punitive damages are recoverable when an employer arbitrarily and capriciously denies maintenance and cure benefits. The appellate court panel, relying on the principle of *stare decisis*, agreed with the District Court's holding that the panel was bound by a prior Eleventh Circuit panel decision, *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), which was decided pre-*Miles*.

In *Atlantic Sounding*, the plaintiff seaman was allegedly injured while working aboard a tug. The employer disputed whether the injury occurred at work, declined to pay maintenance and cure

and filed a declaratory judgment action seeking a determination of their maintenance and cure obligations. The plaintiff seaman then filed his own Jones Act suit including a claim for punitive damages for failure to pay maintenance and cure. He asserted the same claims as counter-claims in the declaratory judgment action. Prior to trial, the employer sought to strike or dismiss the punitive damage claim on the basis of *Miles.*

Since the question of whether recovery of punitive damages in a maintenance and cure action is a question of law, the court reviewed the issue *de novo*. After analyzing *Hines* and *Miles*, the Court concluded that the *Miles* decision was not "clearly on point" as it did not specifically address maintenance and cure. Accordingly, the panel said it was bound by *Hines* and did not have to follow *Miles*.

The opinion and the concurrence appear to be an open invitation for the employer to seek rehearing *en banc* and/or *certiorari* with the Supreme Court. Originally, a motion was made requesting an *en banc* hearing which was summarily denied with the Court stating "[n]o judge in regular service on the court having requested that the court be polled on hearing *en banc*, the motion for hearing *en banc* is DENIED." Within the last month, counsel for *Atlantic Sounding* filed a Motion for Rehearing *En Banc*. At this time the motion is still pending. Accordingly, those practicing in the Eleventh Circuit for the next year or so (assuming rehearing *en banc* is denied or is granted and the panel decision affirmed), should be aware of the possibility for an award for punitive damages for arbitrary and capricious denial of maintenance and cure.

D. The Third Circuit

In the "non-precedential"[1] case, *Kopacz v. Delaware River and Bay Authority*, ____ F.3d. _____, No. 06-3585 (3rd Cir., July 13, 2007), an issue the Third Circuit addressed, among others, was whether an award of prejudgment interest on the maintenance and cure portion of the plaintiff's judgment was appropriate. The Court began by citing to authority that an award of prejudgment interest is left to the discretion of the trial court. However, the court concluded that Kopacz was not entitled to pre-judgment interest since he had already been awarded unpaid maintenance and wages and "[p]rejudgment interest has traditionally been part of the *compensation* due to a plaintiff . . ." To award prejudgment interest on top of the "compensatory" award would be "punitive." *Id.* This statement is perplexing to say the least!

Importantly, the Third Circuit for the first time addressed whether punitive damages could be awarded for an arbitrary and capricious denial of maintenance and cure. The District Court, relying on *Miles* and other Circuit decisions, dismissed the plaintiff's claim on summary judgment. Unlike the Eleventh Circuit in *Atlantic Sounding*, the Third Circuit had no prior precedent to dictate the outcome. While conceding that *Miles* involved a wrongful death action under the general maritime law, the Third Circuit held *Miles* was applicable since maintenance and cure is "a judicially created cause of action without fault." *Id.* Accordingly, the Third Circuit, like the Second, Fifth, Sixth and Ninth Circuits, has now held that punitive damages are not recoverable for the reasonable denial of maintenance and cure.

1 But see FRAP 32.1 discussing the rules to citing of "non-precendtial" cases.

E. The Fifth Circuit

While not directly involving the issue of punitive damages, in *In re: American River Transportation*, 490 F.3d. 351, No. 05-30878 (5th Cir., June 19, 2007 – revised September 5, 2007), the Fifth Circuit addressed whether non-pecuniary damages were recoverable in a maritime wrongful death action brought by the non-dependent parents of a deceased longshoreman. Declining to adopt the holding of the Ninth Circuit in *Sutton v. Earles*, 26 F.3d 903, 914-915 (9th Cir. 1994), the Fifth Circuit instead followed precedent from the Second, Sixth and Eleventh Circuits and continued the trend of eliminating recovery of non-pecuniary damages maritime in wrongful actions.

The case involved the death of longshoreman Jacques Allemand, who in February 2003 was working for American River Transportation Company (ARTCO) as a work-release inmate cleaning barges. Allemand died when he jumped from a barge into the Mississippi River to try to save a co-worker. For the five years prior to his death, Allemand had been incarcerated and therefore had not provided any financial support for his parents. Following his death, his parents filed suit seeking recovery for their loss of society. The Fifth Circuit discussed the evolution of the maritime wrongful death cause of action concluding that on the narrow questions before the court: "whether the *non-dependent* survivors of a deceased *longshoreman or harborworker* may recover for loss of society when the death *occurs in state waters*", such parties were precluded from a recovery. *In re: ARTCO,* at 356 (emphasis in original). To support its holding, the Court relied on prior precedent involving seamen and the twin goals of maritime law: uniformity and providing for the "special solicitude" that admiralty law displays for seamen.

II. RIGHT TO A JURY/NON-JURY TRIAL?

A. The "New" Jones Act

There has been a great deal of discussion both within the MLA and outside regarding the recodification of the Jones Act and the potential impact on a plaintiff's ability to elect to proceed jury/non-jury. The main focus of this discussion has been the wording in 46 U.S.C. §30104 (the "new" Jones Act, formerly commonly referred to as H.R. 1442) which was signed into law by President Bush a year ago on October 6, 2006 (all of you out there still using 46 U.S.C. §688 in your pleadings-be aware!). The text of the statute reads as follows:

> **(a) Cause of action.--**A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.
>
> **(b) Venue.--**An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located.

While the recodification was not intended to have any substantive significance, the use of the language "a civil action at law" and "to an action under this section" in reference to FELA, creates a possible conflict with *Panama Railroad Company v. Johnson*, 264 U.S. 375 (1924). A "clean-up" bill to remedy this issue was introduced towards the end of the 109th Congress, but it is still awaiting consideration.

B. Ping-Pong Match Over Jury/Non-Jury Trial

A good analysis of the issues surrounding a seaman's election was provided by Judge Carl J. Barbier of the United States District Court for the Eastern District of Louisiana. Judge Barbier wrote a well-reasoned succinct opinion on the topic in *Green v. GlobalSantaFe Drilling Company*, 2007 WL 2008054 (E.D.La. July 6, 2007) where he discussed a seaman's right under the Jones Act to designate a case as jury/non-jury and the interplay of FRCP 38.

In *Green*, the seaman plaintiff originally sought a non-jury bench trial by "invoking the admiralty jurisdiction of the Court under the Jones Act." A few months later the plaintiff filed an *ex parte* motion seeking to re-designate the case for jury trial which was granted. Discovery began with the parties believing the matter would be tried to a jury. A few months later, the case was transferred to Judge Barbier. Approximately three months before trial, the plaintiff filed another motion -- this time seeking to return the case to the non-jury docket. The defendant opposed.

Judge Barbier discussed prior Fifth Circuit precedent and relied on the rule that the plaintiff is the master of his Complaint. Here, despite the fact that complete diversity existed as recited factually in the Complaint, diversity did not exist at law because the plaintiff failed to allege diversity as a basis for jurisdiction in the Complaint. Accordingly, the defendant had no independent "right" to a jury trial under the Seventh Amendment. The judge correctly distinguished *Johnson v. Penrod Drilling*, 469 F.2d 897 (5th Cir. 1972), where the Fifth Circuit upheld a district court's refusal to allow an amended complaint asserting only admiralty jurisdiction as a back-door to de-designating a jury case.

III. VENUE ISSUES AND *FORUM NON CONVENIENS*

In *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Co.*, 127 S.Ct. 1184 (Mar. 5, 2007). The Supreme Court resolved a circuit split in an admiralty case involving *forum non conveniens*. The issue before the Court was whether a federal court has discretion to dismiss on *forum non conveniens* grounds before first determining whether subject matter and personal jurisdiction exist. *Sinochem* presented compelling facts in favor of *forum non conveniens* dismissal.

In 2003, Sinochem, a Chinese state-owned importer, contracted with a Triorient Trading, Inc., a U.S. company, to purchase steel coils. Triorient then subchartered a vessel from Malaysia International Shipping, a Malaysian company, to transport the coils from Philadelphia to China. A bill of lading for the coils was issued and payment was made by Sinochem via letter of credit. Shortly thereafter, Sinochem sought arrest of the vessel in Chinese admiralty court to preserve a maritime lien for alleged backdating of the bill of lading by Malaysia. The Chinese court ordered the ship arrested and Malaysia appeared to contest jurisdiction with unsuccessful results at the trial and appeal levels in China.

While the jurisdictional litigation was unfolding in China, Malaysia filed suit in federal court in Pennsylvania alleging Sinochem made negligent misrepresentations to the Chinese admiralty court which resulted in delays during the arrest of the vessel. Sinochem sought dismissal of the action on numerous grounds, *inter alia*, lack of personal and subject matter jurisdiction, *forum non conveniens* and international comity. After determining there was admiralty subject matter jurisdiction, the District Court held there was no personal jurisdiction over Sinochem under the Pennsylvania long arm statute; however, limited jurisdictional discovery might result in a basis

for personal jurisdiction. Rather than allowing jurisdictional discovery, the District Court granted dismissal on *forum non conveniens* grounds on the basis that the dispute involved the arrest of a foreign ship in foreign waters by a foreign court.

Malaysia appealed and the Third Circuit reversed finding that *forum non conveniens* could not be used to dismiss the case until both subject matter and personal jurisdiction were determined. The Supreme Court granted *certiorari* to resolve a spilt amongst the circuit courts and held that a federal court has the discretion to dismiss a case on *forum non conveniens* grounds for convenience, fairness and judicial economy before deciding jurisdictional issues. Interestingly, the decision may have been dictated by the specific facts of the case as a prior Supreme Court decision contained *dicta* where the Court said "the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue." *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In reconciling this prior language, the Court chose not to overrule *Gulf Oil*, but rather to factually distinguish the earlier decision.

IV. MAINTENANCE AND CURE

With the costs of medical treatment and health insurance skyrocketing, many Jones Act employers in the Fifth Circuit are increasingly using the *McCorpen* defense as an offensive weapon both against a seaman's maintenance and cure claim and also to establish venue in federal court. In *McCorpen v. Central Gulf SS Corp.*, 396 F.2d 547 (1968), the Supreme Court set forth a three prong test in order for a Jones Act employer to deny payment of maintenance and cure. The employer must show by a preponderance of the evidence 1) that the employee intentionally

misrepresented or concealed a prior illness or injury, 2) that this misrepresentation was a material fact, and 3) that a causal link exists between the present injury and the misrepresentation.

Where the employer does not require a pre-employment physical exam/questionnaire, the rule is that a seaman must disclose a past illness or injuries only when, in the seaman's opinion, the employer would consider it a matter of importance. (The Subjective Test). Where the employer requires a pre-employment physical exam/questionnaire, the rule is that a seaman will not be entitled to maintenance and cure if he fails to disclose a material medical fact, despite being requested to do so, and there is a causal link between the misrepresentation and the present injury. (The Objective Test). The burden of proof in both scenarios is on the employer.

The hydra-headed issues of maintenance and cure surfaced again in *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 178 (5th Cir. 2005), which involved a seaman's suit against his employer under the Jones Act combined with claims for maintenance and cure. After a jury trial, the seaman was awarded damages for maintenance and cure and Jones Act negligence. The defendant appealed contending that the jury erred in finding the seaman had not willfully concealed prior back injuries and that the employer had been unreasonable in withholding maintenance and cure payments. The Fifth Circuit, on rehearing, upheld the Jones Act verdict but reversed the finding that the employer was unreasonable in withholding maintenance and cure benefits because the plaintiff had willfully concealed prior material medical conditions. The facts established that the plaintiff filled out a medical questionnaire and answered that he did not have any prior back injuries. Thus, the Fifth Circuit found there was a causal link since the present injury claimed was a back injury. The Fifth Circuit emphasized that the second prong of the

McCorpen defense, materiality, is highly fact sensitive. The Fifth Circuit also addressed the third prong of the *McCorpen* defense stating that if there is no causal link between the pre-existing concealed material medical condition and the present injury, then maintenance and cure is payable.

In a somewhat unique *McCorpen*-type case, a seaman was awarded damages against his employer for Jones Act negligence and unseaworthiness; however, he was denied maintenance and cure benefits. *Johnson v. Cenac Towing, Inc.*, 468 F.Supp.2d 815 (E.D.La. 2006). Johnson, a tankerman, was injured while carrying a hose aboard a barge which was being towed by a tug owned by his employer. During his pre-employment physical examination, Johnson answered that he did not have any physical or mental condition that would interfere with his job and that he had not had any previous on the job injury. Both denials were misrepresentations. Additionally, on a previous pre-employment medical examination with the same employer, Johnson denied that he had ever hurt his back. The employer's physician x-rayed Johnson's back prior to his starting work and determined Johnson was fit for employment. Nevertheless, at trial, Johnson admitted that he intentionally concealed the earlier injuries including surgeries, hospital visits, etc., fearing that he would not be hired if he truthfully disclosed the same. There was substantial expert testimony about Johnson's injuries (past and present) and about the causal link between the injury and the misrepresentations. He was awarded damages based on Jones Act negligence and unseaworthiness which were reduced by a finding of comparative fault, but, since Johnson had concealed material medical facts linked to his back injury, he forfeited his right to maintenance and cure. In *dicta*, the Fifth Circuit, citing *Brown*, stated the existence of a *McCorpen* defense does not taint the Jones Act claim. Accordingly, while the employer established 1) an intent to conceal, 2) materiality, and 3)

causation, precluding Johnson from an award for maintenance and cure, he was awarded damages for his employer's negligence.

It is clear in the post–*McCorpen* era, the three-pronged determination for denial to pay maintenance and cure is highly fact sensitive from both the perspective of the employer in preparing the examination/questionnaire and of the employee in responding to inquiries and/or lack thereof in a non-questionnaire case. These cases also involve substantial expert testimony relating to the nature and extent of the injury and medical causation is routinely hotly contested.

Interestingly, in the area of marine insurance the concept of *uberrimae fidei* "utmost good faith" exists in filling out an application for marine insurance. In viewing misrepresentations in the insurance context, the burden of proof is on the insurer (like the employer in maintenance and cure) to prove five elements: 1) the nature of the misrepresentation or non-disclosure, 2) the falsity the representation, 3) the reliance on the representation by the insurer, 4) the intent to deceive on the part of the insured in making the misrepresentation, and 5) the materiality of the misrepresentation (i.e. there must be a material misrepresentation willfully made with the design to deceive or defraud which is causally connected to the loss). In both maintenance and cure and marine insurance cases, where the injury or loss is not causally related to the misrepresentation, the plaintiffs prevail.

Due to the potential impact of the fact finder in a Jones Act and maintenance and cure case, jury or non-jury, venue is an important factor. In a case where a defendant is reasonably certain that a seaman will file suit in a plaintiff-friendly federal venue, utilization of a declaratory judgment suit on maintenance and cure is an option. The "first to file rule" applies in federal court.

If a proceeding involving the same parties and the same issues has been later filed (by the seaman) in a *different federal district*, the first action is normally given priority. There is a strong presumption across the federal circuits that favors the forum of the first filed federal suit, but note that a court may decline to follow the "first to file rule" if there are sufficiently compelling circumstances. *Mann Mfg. Inc. v. Hortex, Inc.*, (5th Cir. 1971) 439 F.2d 403.

V. ARBITRATION CLAUSES IN SEAMAN'S EMPLOYMENT CONTRACTS

In *Calix-Chacon v. Global International Marine, Inc.*, 493 F.3d 307 (5th Cir., July 19, 2007 – revised August 22, 2007), the Fifth Circuit Court of Appeals addressed the validity of a forum selection clause in a seaman's employment agreement. In that case, plaintiff, a Honduran native, signed an employment contract arranged through a Honduran crewing agency to work as a seaman aboard a U.S. flagged vessel which at the time of the injury was undergoing repairs in Houma, Louisiana. While working on the vessel, the plaintiff developed a gall bladder problem. He received medical treatment and his gall bladder was removed in Houma. After surgery, the doctors determined the plaintiff had an enlarged heart and needed a heart transplant. Defendant, the seaman's employer, paid for the gall bladder surgery but refused payment for the heart transplant.

Plaintiff filed suit in Houma for maintenance and cure including the heart transplant and ancillary care. Defendant filed a Motion to Dismiss on the basis of the forum selection and choice of law clauses in the employment contract. The district court denied the motion to dismiss and entered judgment ordering the defendant to pay for all care. Defendant appealed.

The Fifth Circuit vacated the district court judgment and remanded asking the District court to address the following: 1) Whether public policy considerations under the Shipowner's Liability

Convention of 1936 rendered the forum selection clause unreasonable; 2) to factually apply the Bremen factor to determine if the plaintiff was deprived of a remedy; 3) to determine if a remedy was deprived under Honduran law; 4) to determine whether the plaintiff under the contract provisions would be deprived of his day in court. The true issue in the case is whether the traditional general maritime law remedy of maintenance and cure guarantees the right of the plaintiff to open access to the court where he was injured. Of interest is the fact that while on appeal, the plaintiff had a successful heart transplant.2

Great Lakes Dredge & Dock Company, L.L.C. v. Larrisquitu, 2007 WL 2330187 (S.D.Tex., August 15, 2007) involved a forum selection clause in an employment contract and three Jones Act cases involving domestic seamen which had been filed in Texas state courts. After an exhaustive opinion, which is worth reading as it discusses in detail the Anti-Injunction Act and related issues of absention, the court held that the enforceability of a forum selection clause in a domestic seaman's employment contract must be determined by the factors outlined in *Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) and its progeny. The court found that the recent opinion by the Fifth Circuit in *Terrebonne v. K-Sea Transportation Co.*, 477 F.3d 271 (5th Cir. 2007)(holding that FELA's venue provision and accompanying case law does not apply to Jones Act suits) called into doubt the earlier opinions of *Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D. Tex. 2004) and *Nunez v. American* Seafoods, 52 P.3d 720 (Alaska 2002) that forum selection agreements are unenforceable in Jones Act claims brought by domestic seaman. Since

2 Author's Note. It is interesting that a number of recently issued opinions in the Fifth Circuit have been "revised" only a few months following the original publication. Perhaps the changes to FRAP 32.1 have something to do with this trend?

Boutte and *Nunez* relied heavily on FELA cases, the court stated "Without the statutory basis on which *Boutte* and *Nunez* relied to find forum-selection agreements involving domestic seamen unenforceable, and with no other statutory or case law basis for finding that such agreements generally offend public policy, the established [Bremen et al.] factors for analyzing such clauses apply." *Id.* at *23.

VI. OTHER INTERESTING CASES

A. Where is the line between the water and the road?

In *Isen v. Sims*, 2006 SCC 41, [2006] 2 S.C.R. 349, the Canadian Supreme court reviewed a case involving personal injuries suffered by a third-party from a snapping bungee cord while the vessel's owner (Isen) was trying to secure the cover on the engine of his 17' pleasure craft. In August 1999, Isen and Sims had just finished a day of recreational boating. The two used a boat ramp to load Isen's pleasure craft on a trailer driving it to a nearby parking lot. While trying to secure a cover over the boat's engine, a bungee cord slipped from Isen's grip striking Sims in the eye. Sims later sued claiming $2M in damages. In an attempt to avoid liability in excess of $1M, Isen sought limitation of liability under the Limitation of Liability for Maritime Claims Convention.

Finding there was a sufficient connection to navigation and shipping, the district court allowed limitation. The Court of Appeals agreed noting that unlike commercial vessels, pleasure craft are routinely removed from the water and there was the resident nexus between navigation and shipping. The Supreme Court, in a "line drawing exercise," held that the crucial inquiry was not where the allegedly negligent activity took place; rather the focus should be on the acts forming

the basis of the negligence claim. Sims' acts had nothing to do with navigation or shipping. They were related to preparation for road travel and should not be distinguished from such. Accordingly, the line between the water and the road is now a little clearer.

B. Where is the line between the water and the road? – Part II

In *Healy Tibbitts Builders, Inc. v. Director, Office of Workers' Compensation Programs*, 444 F.3d 1095 (9th Cir. 2006), the Ninth Circuit Court of Appeals concluded that a construction worker who died when a steel trench shield fell on him during the building of an underground concrete duct for electrical cables near a submarine berth was a "harbor worker" and entitled to LHWCA benefits. The court held that even though the decedent died on land in a trench that was at least 40 feet away from the water's edge, and the decedent admitted he was not a longshoreman, ship repairman, shipbuilder, ship breaker or even engaged in longshoring operations, the definition of "harbor worker" (as advocated by the Director of the OWCP) extends to any worker engaged in the construction of a maritime *facility*.

C. *Park v. Stockstill Boat Rentals, Inc.*, (5th Circuit July 16, 2007), 06-30655

John Park was the captain of the small crewboat MISS SISSY in October 2004. While reaching to open the engine compartment door, Park slipped and fell backward, injuring his back. He sued his employer, Stockstill Boat Rentals, Inc., claiming Jones Act negligence and unseaworthiness. After some negative admissions regarding liability for the slip and fall in his deposition, Park claimed that his employer was liable under the doctrine of *negligence per se* for violating the vessel's Certificate of Inspection by having only one licensed captain (himself)

aboard and in violating 46 U.S.C. 8104(b) – the 12 hour work statute. As Park was the only person aboard, he claimed his employer was liable for his maintaining a watch for 24 hours the day before his fall because he grounded the vessel on a sandbar. Park claimed he needed to stay on watch to make sure the MISS SISSY did not dislodge and drift or collide with a larger ship.

Park's claims were dismissed by the District Court on summary judgment. The Fifth Circuit affirmed holding that while Park may have worked for more than 12 hours in a 24 hour period, his work was not "required" (or even requested) by his employer. Thus, there was no violation of the COI or the work hour statute.

THE END

Great Lakes Dredge & Dock, Co., LLC v. Larrisquitu S.D.Tex.,2007.
Only the Westlaw citation is currently available.
United States District Court,S.D. Texas,Houston Division.
GREAT LAKES DREDGE & DOCK, COMPANY, LLC, Plaintiff,
v.
Julio LARRISQUITU, Defendant.
Great Lakes Dredge & Dock, Company, LLC, Plaintiff,
v.
Facundo Quintanilla, Defendant.
Great Lakes Dredge & Dock, Company, LLC, Plaintiff,
v.
Abel Arredondo, Defendant.
Civil Action Nos. H-06-3489, H-06-3669, H-06-4040.

Aug. 15, 2007.

James T. Brown, Glenn R. Legge, Legge Farrow Kimmitt and McGrath, Robert L. Klawetter, Eastham Watson Dale & Forney, Houston, TX, for Plaintiff.
Cortlan Howard Maddux, John Stevenson & Associates, P.C., Jeffrey L. Raizner, James Michael Yakovsky, Michael P. Doyle, Patrick Mason Dennis, Doyle Raizner LLP, Houston, TX, for Defendant.

MEMORANDUM AND OPINION
LEE H. ROSENTHAL, United States District Judge.
***1** In these three federal suits, Great Lakes Dredge & Dock Company, LLC (" Great Lakes") seek declaratory judgments relating to three underlying state-court suits filed under the **Jones Act**, 46 U.S.C. § 30104.[FN1] The plaintiffs in the state-court actions (the " seamen-plaintiffs"), sued their employer, Great Lakes, in the South Texas counties where they reside. In those state-court actions, the seamen-plaintiffs alleged that they were injured while working for Great Lakes aboard its vessels. The venue of those state-court suits is inconsistent with forum-selection agreements that Great Lakes required the seamen-plaintiffs to sign. In these federal actions, Great Lakes seeks declaratory and injunctive relief to enforce the forum-selection agreements.

FN1. Congress codified and renumbered the provisions of the federal maritime code under Title 46, effective October 6, 2006. The **Jones Act**, which used to appear at 46 U.S.C. app. § 688, is now at 46 U.S.C. § 30104. *See* Pub.L. No. 109-304, § 6(c), 120 Stat. 1510 (2006).

The seamen-plaintiffs have moved to dismiss the three federal suits under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that this court should abstain from exercising jurisdiction and that the forum-selection agreements are unenforceable as a matter of law. The parties have submitted briefing on the motions and this court heard argument on July 13, 2007. Because the threshold legal issues presented in the three motions to dismiss are identical, this Memorandum and Opinion addresses them together.[FN2]

FN2. Civil Action No. 4:06-cv-3489, Docket Entry No. 4; Civil Action No. 4:06-cv-3669, Docket Entry No. 7; Civil Action No. 4:06-cv-4040, Docket Entry No. 5.

Based on a careful review of the motions, the responses, and replies; the parties' submissions; the arguments of counsel; the record; and the applicable law, this court denies Quintanilla's and Arredondo's motions to dismiss. This court denies in part Larrisquitu's motion to dismiss and converts his remaining argument that the forum-selection agreement is unenforceable as to him because it was procured by overreaching into a motion for summary judgment. The reasons are set out below.

I. Background

Julio Larrisquitu, Facundo Quintanilla, and Abel Arredondo, the seamen-plaintiffs, were injured in 2006 while working as crew members on three Great Lakes vessels. Each had signed " Employee Acceptance of Forum Selection" agreements. The agreements state that " any claim for personal, emotional, physical, or economic injury ... shall ... be filed, at the option of the employee" in specified courts in the state where the employee resides, in the state where the accident occurred, or in DuPage County, Illinois, where Great Lakes has its principal place of business. The forum-selection agreements designate the state and federal courts in which the employee may bring suit in each of twenty-six states.

The forum-selection agreements designate the Harris County state district courts as the permissible Texas state court and the federal district courts in the Southern District of Texas, Houston Division, as the permissible Texas federal court. Another provision requires that disputes about the validity of the forum-selection agreement itself must be filed in one of the specified federal courts. " Any dispute regarding the enforceability of the terms and provisions of this ' Employee Acceptance of Forum Selection' shall be resolved through litigation initiated only in a United States District Court listed in Paragraph 4(c) above." The forum-selection agreements were provided to each seaman-plaintiff in both English and Spanish. Each seaman-plaintiff signed the agreement before beginning to work for Great Lakes.

***2** On September 25, 2006, Larrisquitu sued Great Lakes in Cameron County, Texas, seeking damages under the **Jones Act** for work-related injuries.[FN3] On August 31, 2006, Quintanilla sued Great Lakes in Starr County, Texas. [FN4] On September 20, 2006, Arredondo sued Great Lakes in Hidalgo County, Texas.[FN5] Both state and federal courts have jurisdiction over **Jones Act** suits.[FN6] *See* *Magnolia Marine Transp. Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir.1992).

FN3. *Julio Larrisquitu v. Great Lakes Dredge & Dock Co.*, Cause No.2006-09-4380-C, in the 197th District Court of Cameron County, Texas.

FN4. *Facundo Quintanilla v. Great Lakes Dredge & Dock Co.*, Cause No. CD-06-311, in the 381st District Court of Starr County, Texas.

FN5. *Abel Arredondo v. Great Lakes Dredge & Dock Co.*, Cause No. C-2216-06-A, in the 92nd District Court of Hidalgo County, Texas.

FN6. The savings to suitors clause provides: " The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

Great Lakes appeared in the state-court cases and filed these federal suits to challenge the seamen-plaintiffs' venue choices. On November 6, 2006, Great Lakes filed the *Larrisquitu* suit in federal court and filed an objection to venue in Larrisquitu's state-court suit. On November 19, 2006, Great Lakes sued Quintanilla in this court; on the following day, Great Lakes moved to transfer venue in Quintanilla's state-court suit. Great Lakes sued Arredondo in this court on December 21, 2006 and filed an objection to venue in Arredondo's Hidalgo County suit the same day.[FN7]

FN7. In addition, on January 17, 2007, Great Lakes moved the Texas state panel on multidistrict litigation to consolidate several related state-court **Jones Act** suits, including the *Larrisquitu*, *Quintanilla*, and *Arredondo* cases.

In these federal cases, Great Lakes seeks a declaratory judgment that the seamen-plaintiffs' **Jones Act** claims may only be brought in one of the state or federal courts designated in the forum-selection agreements; a declaratory judgment that the seamen-plaintiffs are in breach of the forum-selection agreements; an injunction prohibiting the state-court actions from proceeding; and a declaratory judgment that the seamen-plaintiffs may dismiss their **Jones Act** claims without prejudice to refiling in a venue allowed by the forum-selection agreements. Great Lakes also seeks the court costs and attorneys' fees it incurred in bringing these federal actions.

The seamen-plaintiffs have moved to dismiss each of the federal suits. They argue that this court should abstain from exercising jurisdiction and that the forum-selection agreements are unenforceable as a matter of law. Each issue is addressed below.

II. The Applicable Legal Standards

Federal Rule of Civil Procedure 12(b)(1) governs challenges to a court's subject matter jurisdiction. " A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir.1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir.1996)). " Courts may dismiss for lack of subject matter jurisdiction on any one of three bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts

plus the court's resolution of disputed facts." *Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir.1986) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981)). The plaintiff bears the burden of demonstrating that subject matter jurisdiction exists. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir.1981). When examining a factual challenge to subject matter jurisdiction under Rule 12(b)(1), which does not implicate the merits of plaintiff's cause of action, the district court has substantial authority " to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1261 (11th Cir.1997).

***3** Rule 12(b)(6) allows dismissal if a plaintiff fails " to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b) (6). The Supreme Court recently clarified the standards that apply to a motion to dismiss for failure to state a claim. In *Bell Atlantic Corp. v. Twombly*, ---U.S. ----, ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007), the Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires " a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A court must not dismiss a complaint for failure to state a claim unless the plaintiff has failed to plead " enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S.Ct. at 1974; *see also Erickson v. Pardus*, ---U.S. ----, ----, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). Although material allegations in the complaint must be accepted as true and construed in the light most favorable to the nonmoving party, a court is not required to accept conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.

When a plaintiff's complaint must be dismissed for failure to state a claim, the plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir.2002) (" [D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."). A plaintiff need not be allowed an opportunity to amend a complaint if " allegations of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. ServWell Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986); *see also Great Plains Trust Co.*, 313 F.3d at 329; *Jacquez v. R.K. Procunier*, 801 F.2d 789, 792 (5th Cir.1996).

III. The Anti-Injunction Act and Abstention

A. The Seamen-Plaintiffs' Motion to Dismiss the Claim for an Injunction (And Declaratory Judgment) Against the State-Court Proceedings: The Anti-Injunction Act

Great Lakes seeks an injunction preventing the state suits from proceeding in venues outside those designated by the forum-selection agreements. The Anti-Injunction Act states that " [a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. " The Act, on its face, is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting state courts to proceed in an orderly fashion to finally determine the controversy." *Fulford v. Transp. Servs. Co.*, 412 F.3d 609, 613 (5th Cir.2005) (internal citations and quotation marks omitted).

***4** The exceptions to the Anti-Injunction Act are narrowly construed. " [A]ny injunction against state court proceedings ... must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). Great Lakes correctly does not contend that the first exception to the Anti-Injunction Act applies; Congress has not expressly authorized injunctions against state-court claims under the **Jones Act**. *See* 46 U.S.C. § 30104; *see also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-47, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) (analyzing the Anti-Injunction Act's application to the plaintiff's **Jones Act** claims and stating that the first exception does not apply). Nor does Great Lakes contend that the third exception, allowing a court to issue an injunction " to protect or effectuate its

judgments," applies. This " relitigation" exception allows a federal court to prevent state-court litigation of an issue previously presented to and decided by the federal court. The exception " is founded in the well-recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo,* 486 U.S. at 147. This exception does not apply here because there has been no prior federal litigation among these parties or those in privity with them about the forum-selection agreements at issue.

Great Lakes does contend, however, that the second exception to the Anti-Injunction Act applies. The second exception allows a court to issue an injunction when " necessary in aid of its jurisdiction." Great Lakes argues that the " in aid of jurisdiction" exception, in combination with the All Writs Act, 28 U.S.C. § 1651(a), provides this court the authority to enter " narrowly tailored orders" enjoining the state-court suits. *See Newby v. Enron Corp.,* 302 F.3d 295, 302 (5th Cir.2002).

The " necessary in aid of jurisdiction" exception is designed to " prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atl. Coast Line R.R.,* 398 U.S. at 295. The " necessary in aid of jurisdiction" exception generally applies when a case is removed from state to federal court and the state-court case continues to proceed, or when a federal court first acquires jurisdiction over real property and a state court also asserts jurisdiction over the same property. *See Mitchum v. Foster,* 407 U.S. 225, 234-37, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972); *Texas v. United States,* 837 F.2d 184, 186 n. 4 (5th Cir.1988) (" In cases decided under this exception, courts have interpreted the language narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatens to dispose of property that forms the basis for federal *in rem* jurisdiction, or where the state proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case. In no event may the ' aid of jurisdiction' exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision.").

***5** The All Writs Act provides that federal courts may " issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). " The Act contains the same language as the second of the three exceptions in the Anti-Injunction Act, and the parallel ' necessary in aid of jurisdiction' language is construed similarly in both the All Writs Act and the Anti-Injunction Act." *Newby,* 302 F.3d at 302 (citing *In re Diet Drugs,* 282 F.3d 220, 239 (3d Cir.2002); *Winkler v. Eli Lilly & Co.,* 101 F.3d 1196, 1203 (7th Cir.1996); *In re Baldwin-United Corp.,* 770 F.2d 328, 335 (2d Cir.1985)).

Great Lakes argues that the state-court suits will interfere with this court's exercise of its jurisdiction to decide whether the forum-selection agreements are enforceable. Because the forum-selection agreements state that any disputes about their enforceability are to be decided in one of the designated federal courts, Great Lakes contends that without an injunction to prevent the state courts from deciding this issue, this federal court will not be able to do so, making the parties' forum-selection agreement meaningless. Great Lakes relies on the Fifth Circuit's holding in *Newby* to support its argument that this court has the authority to enjoin the pending state-court **Jones Act** suits. *Newby* involved overlapping class action suits proceeding simultaneously in federal and state courts. The district court presiding over the federal suits enjoined a law firm from filing suits in state court on behalf of many of the same plaintiffs proceeding in the federal court, but did not enjoin all aspects of ongoing state proceedings. Instead, the federal district court enjoined the law firm from seeking a particular type of *ex parte* relief in the state courts. The district court enjoined the law firm from filing-without the federal court's permission-such state-court actions that had the effect of disrupting the ongoing federal class actions. The Fifth Circuit upheld the district court's ability to enjoin " lawyers properly before it from engaging in vexatious and needlessly harassing maneuvers that challenged judicial efforts to maintain the cooperative approach essential to preserving fair processes in the complex suit in federal court." *Newby,* 302 F.3d at 301. However, the Fifth Circuit was not asked to approve a federal court's general injunction against pending state-court actions, which is what Great Lakes asks here. Nor did the Fifth Circuit hold that a state court asked to decide the same issue pending before a federal court provides sufficient basis for an injunction against that state-court proceeding. *Newby,* 302 F.3d at 302-04 (" We do not question the filing of suits tailored to avoid federal jurisdiction. Nor do we countenance any preemptive federal dominion.

The parallel exercise of state and federal judicial power is inherent in our government of dual sovereignty."). *Newby* does not support the application of the " necessary in aid of jurisdiction" exception to the Anti-Injunction Act that Great Lakes seeks here.

***6** The Fifth Circuit's holding in *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir.1992), provides further guidance on the limited application of this exception to the Act. In federal court, Royal Insurance had obtained a declaratory judgment that its policy did not cover federal securities claims brought by numerous investors against the insured, Quinn-L. Following the no-coverage determination in the federal declaratory judgment action, the investors and Quinn-L agreed to dismiss the federal securities lawsuit. Shortly after final judgment was entered in the federal declaratory judgment suit and the claims were dismissed in the underlying federal securities action, the investors brought suit in state court against Quinn-L based on the same events and conduct at issue in the federal securities action. *Id.* at 1290. Royal Insurance refused to defend Quinn-L in the state-court suit. The investors obtained a $741 million default judgment. Quinn-L assigned its claims against Royal Insurance to the investors. They sued Royal Insurance in Cameron County, Texas state court, seeking damages based on Royal Insurance's refusal to defend Quinn-L in the earlier state-court suit. A few days later, the investors brought another action in Cameron County state court, seeking a declaration of coverage for the $741 million default judgment. Royal Insurance sued the investors in federal court and sought to enjoin the Cameron County suits. Royal Insurance argued that both the relitigation exception and the " necessary in aid of jurisdiction" exception to the Anti-Injunction Act applied. The federal district court agreed, stating that " absent injunctive relief the Court will likely lose the ability to decide this case (filed well before either [Cameron County] Action) and may well have its prior Judgments (which are inextricably intertwined with the present action) nullified by contrary state court decrees." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 759 F.Supp. 1216, 1235 (N.D.Tex.1990). The Fifth Circuit reversed in part and held that the " necessary in aid of jurisdiction" exception did not apply. The state-court suits did not pose a threat to " the district court's continuing jurisdiction to decide the post-declaratory judgment claims;" the possibility that the state court could decide the issue first was not enough to invoke the " necessary in aid of jurisdiction" exception. *Quinn-L Capital*, 960 F.2d at 1299. The district court could enjoin the relitigation of issues that had actually been determined in the federal declaratory judgment, but could not enjoin the litigation of all related claims and issues without exceeding the Anti-Injunction Act's limits. *Id.*

Similarly, in the present case, the state-court suits do not threaten this federal court's ability or authority to decide issues raised in both state and federal cases. *See Atl. Coast Line R.R.*, 398 U.S. at 295. The state-court actions do not impair this court's " flexibility and authority" to decide whether the forum-selection agreements are valid and enforceable. The circumstances that generally fall under the second exception to the Anti-Injunction Act-continued state-court litigation after removal or competing jurisdiction over real property-are not present here. Because the exceptions to the Anti-Injunction Act do not apply, this court cannot enjoin the state-court suits. Great Lakes's application for an injunction against the continuing prosecution of the state-court actions is dismissed.

***7** Great Lakes also seeks a declaratory judgment that the seamen-plaintiffs may only bring their **Jones Act** suits in a venue provided in the parties' forum-selection agreements. This would have the effect of enjoining the state-court suits from proceeding. The Fifth Circuit held in *Tex. Employers' Ins. Assoc. v. Jackson*, 862 F.2d 491, 506 (5th Cir.1988) (en banc), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989), that if the Anti-Injunction Act bars a federal court from issuing an injunction, the issuance of a declaratory judgment that would have the same effect is also barred. *See also Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 802 (5th Cir.), *cert. denied*, 530 U.S. 1274, 120 S.Ct. 2740, 147 L.Ed.2d 1005 (2000). To allow a claim for a declaratory judgment that a state-court action cannot proceed, when the Anti-Injunction Act bars a claim for an injunction against that state-court action, would reduce the Act " to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand." *Jackson*, 862 F.2d at 505.

Fifth Circuit cases since *Jackson* support this court's conclusion that Great Lakes cannot obtain by declaratory judgment the relief precluded by the Anti-Injunction Act. In *Travelers Insurance Co. v. Louisiana Farm Bureau Federation*, 996 F.2d 774

(5th Cir.1993), the Fifth Circuit recognized " a very small class of highly distinguishable cases which are exceptions" to the *Jackson* rule. *Id.* at 776. The insurer in that case faced the possibility of multiple suits against it in various courts in Louisiana and Mississippi (nineteen when the federal suit was filed) and sought a declaratory judgment in federal court on coverage. The state actions were at the initial pleadings stage. The federal declaratory judgment action had been on file for some time and the parties had conducted discovery, making the case " ripe for summary judgment." *Id.* The appellate court held that " this case falls outside the broad parameters of *Jackson"* and that the federal declaratory judgment action could proceed. *Id.* at 778. In *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877 (5th Cir.1993), decided a few months after *Travelers*, the Fifth Circuit held that *Jackson* does not require abstention when the federal declaratory judgment suit is filed substantially before the related state suit, significant proceedings have taken place in the federal suit, and the federal suit has neither the purpose nor effect of overruling a previous state-court ruling. *Id.* at 886.

Here, unlike *Travelers* and *Quinn-L Capital*, the federal suits were filed one to two months after the state actions. The same venue issues arise in both the federal and state suits, and the Anti-Injunction Act would prohibit this court from enjoining the state proceedings. Under *Jackson* and related authority, this court is precluded from granting a declaratory judgment that the seamen-plaintiffs may only bring their **Jones Act** suits in a venue provided in the forum-selection agreements. For the reasons explained below, however, this does not preclude Great Lakes from proceeding with its claim for a declaratory judgment that the forum-selection agreements are enforceable and that the seamen-plaintiffs breached those agreements by filing their state-court suits in Cameron, Starr, and Hidalgo Counties rather than in state or federal courts in Harris County, Texas.

***8** The seamen-plaintiffs' motions to dismiss Great Lakes's claims for an injunction against the state-court suits and a declaratory judgment that the state-court suits may not proceed are granted.

B. The Seamen-Plaintiffs' Motion to Dismiss Great Lakes's Breach of Contract Claims: Abstention

Great Lakes seeks a declaratory judgment that the seamen-plaintiffs are in breach of the parties' forum-selection agreements. In addition to declaratory relief, Great Lakes seeks damages for the breach, including the court costs and attorneys' fees incurred in the federal litigation to enforce the agreements. The seamen-plaintiffs move to dismiss on the basis of abstention, citing *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). In response, Great Lakes argues that *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), applies. Under *Brillhart*, courts have broad discretion to abstain; under *Colorado River*, federal courts may abstain in favor of parallel state-court actions only under " exceptional circumstances."

Brillhart abstention applies " [w]hen a district court is considering abstaining from exercising jurisdiction over a declaratory judgment action." *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 950 (5th Cir.1994). " In contrast, when actions involve coercive relief the trial court must apply the standards enunciated by the Court in *Colorado River." Id.* at 951. " Coercive relief" includes injunctions as well as damages. " When a party seeks both injunctive and declaratory relief, the appropriateness of abstention must be assessed according to the doctrine of *Colorado River;* the only potential exception to this general rule arises when a party's request for injunctive relief is either frivolous or is made solely to avoid application of the *Brillhart* standard." *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 649-50 (5th Cir.2000) (citing *PPG Indus., Inc. v. Continental Oil Co.*, 478 F.2d 674, 679 (5th Cir.1973)).[FN8]

FN8. The circuits use different tests to determine whether to apply *Brillhart* or *Colorado River* to cases involving both declaratory and coercive relief. In some circuits, including the Fifth, *Colorado River* applies whenever an action includes claims for declaratory relief and nonfrivolous claims for coercive relief. *See Kelly Inv., Inc. v. Continental Common Corp.*, 315 F.3d 494, 497 n. 4 (5th Cir.2002); *see also Village of Westfield v. Welch's*, 170 F.3d 116, 124 n. 5 (2d Cir.1999). In other circuits, *Colorado River* applies if the claims for relief other than a declaratory judgment can exist independently of the declaratory

judgment claims. *See United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1112-13 (9th Cir.2001). The Fourth Circuit suggests that *Colorado River* applies in any " mixed" complaint scenario. *See Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 211 (4th Cir.2006). Another view looks to the " heart of the action" to determine which abstention doctrine should apply. *See, e.g., ITT Indus., Inc. v. Pac. Employers Ins. Co.*, 427 F.Supp.2d 552, 555-56 (E.D.Pa.2006). Under this standard, if the outcome of the claims for relief other than declaratory judgment hinges on the outcome of the declaratory judgment claims, the *Brillhart* standard governs; otherwise, the *Colorado River* standard controls. *See Lexington Ins. Co. v. Rolison*, 434 F.Supp.2d 1228, 1236 (S.D.Ala.2006).

The Anti-Injunction Act requires dismissal of Great Lakes's claim for an injunction. Great Lakes's remaining claims seek a declaratory judgment as to the validity of the forum-selection agreements and damages in the form of the fees and costs incurred in litigating that issue in federal court. The damages claim does not require the application of *Colorado River;* " boiler plate requests for costs and attorney's fees" do not qualify as a request for " coercive relief" that trigger *Colorado River* analysis. *See Trent v. Nat'l City Bank of Indiana*, 145 F. App'x 896, 898 n. 3 (5th Cir.2005) (unpublished opinion). " To rule otherwise would essentially swallow the entire *Brillhart* doctrine since most complaints contain" such claims for fees and costs. *Id.* Because Great Lakes's remaining claims are only for declaratory relief, fees, and costs, it appears that *Brillhart* applies. Out of an abundance of caution, however, the motions to dismiss are also analyzed under *Colorado River*.

1. Abstention under *Brillhart*

***9** *Brillhart* abstention applies " [w]hen a district court is considering abstaining from exercising jurisdiction over a declaratory judgment action." *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 950 (5th Cir.1994). Under *Brillhart,* a district court " should ascertain whether the questions in controversy between the parties to the federal suit ... can be better settled in the proceeding pending in the state court." *Brillhart*, 316 U.S. at 494; *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 389 (5th Cir.2003).

The Federal Declaratory Judgment Act provides that " [i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Although the permissive word " may" in section 2201(a) gives a district court more discretion to decline a declaratory judgment action than other kinds of actions, that discretion is limited. *See Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 390 (5th Cir.2001); *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590 (5th Cir.1994); *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 778 (5th Cir.1993). In deciding whether to retain or dismiss a federal declaratory judgment action, a district court " must determine: (1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether to exercise its discretion to decide or dismiss the action." *Sherwin-Williams Co.*, 343 F.3d at 387 (citing *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir.2000)). As to the last factor, the Fifth Circuit has identified seven nonexclusive factors that a district court must consider in exercising its discretion to retain or dismiss a declaratory judgment action:
(1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
(2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
(3) whether the plaintiff engaged in forum shopping in bringing the suit;
(4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
(5) whether the federal court is a convenient forum for the parties and witnesses;
(6) whether retaining the lawsuit would serve the purposes of judicial economy; and
(7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

St. Paul Insurance Co. v. Trejo, 39 F.3d 585, 590-91 (5th Cir.1994); *see also Sherwin-Williams Co.*, 343 F.3d at 388 (same); *Vulcan Materials Co.*, 238 F.3d at 390 (same). These " seven Trejo factors ... must be considered on the record before a discretionary,

nonmerits dismissal of a declaratory judgment action occurs." *Vulcan Materials Co.*, 238 F.3d at 390. These seven factors address three broad considerations: federalism, fairness and improper forum shopping, and efficiency. *Sherwin-Williams Co.*, 343 F.3d at 390-91. The three parts of the *Sherwin-Williams* test, incorporating the seven *Trejo* factors, are addressed below.

a. Justiciability

***10** A declaratory judgment action is justiciable if " a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Venator Group Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir.2003). In the underlying **Jones Act** suits, the seamen-plaintiffs seek damages for injuries sustained while working for Great Lakes. In the federal suits, Great Lakes seeks to enforce the parties' forum-selection agreements. This venue controversy presents a justiciable issue.

b. Authority to Grant Relief

Under the second part of the *Sherwin-Williams* test, the court must determine whether it has the authority to grant declaratory relief. " [A] district court does not have authority to consider the merits of a declaratory judgment action when: (1) the declaratory defendant previously filed a cause of action in state court; (2) the state case involved the same issues as those in the federal court; and (3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act, 28 U.S.C. § 2283." *Sherwin-Williams Co.*, 343 F.3d at 388 n. 1 (citing *Travelers Ins. Co.*, 996 F.2d at 776).

As to the timing of the lawsuits, the first of these factors, the state-court actions were filed between one and two months before Great Lakes filed its federal suits. This first factor suggests that the court lacks authority to grant Great Lakes's requested declaratory relief.

The second factor addresses the issues raised. The state and federal actions both raise the issue of the enforceability of the parties' forum-selection agreements. In the state cases, Great Lakes objects to venue and has moved to transfer based on the parties' forum-selection agreements. In the federal cases, Great Lakes seeks to enforce the forum-selection agreements. Great Lakes also seeks a declaratory judgment in federal court that the seamen-plaintiffs have breached the forum-selection agreements by filing suit in Cameron, Starr, and Hidalgo Counties. To decide whether Great Lakes is entitled to a declaratory judgment, this court must decide the same issue that is before the state courts: whether the forum-selection agreements are valid and enforceable. Like the first factor, the second factor of the *Sherwin-Williams* inquiry supports the contention that this court lacks the authority to grant the declaratory relief that Great Lakes seeks.

The third factor requires an analysis of whether the Anti-Injunction Act precludes the federal court from enjoining the state court suits. As analyzed above, the Act precludes this court from issuing an injunction against the continued litigation of the state-court actions and from issuing a declaratory judgment that the state-court suits cannot continue. The Anti-Injunction Act does not, however, prevent this court from issuing a declaratory judgment as to whether the seamen-plaintiffs breached their forum-selection agreements or that the seamen-plaintiffs have the right to dismiss their **Jones Act** claims without prejudice to refiling in a venue designated in those agreements. *See* 28 U.S.C. § 2283. The third factor requires a finding that this court does have the authority to grant the declaratory relief that Great Lakes seeks.

c. Discretion: The Trejo Factors

***11** Under the third part of the *Sherwin-Williams* test to determine whether a court should retain or dismiss a federal declaratory judgment action, the court must consider the seven *Trejo* factors. These factors do not warrant dismissing Great Lakes's remaining claims.

The first and seventh *Trejo* factors address the " proper allocation of decision-making between state and federal courts." *Sherwin-Williams*, 343 F.3d at 390-92. Under the first factor, a court examines whether there is a pending state action in which all the matters in controversy may be fully litigated. Under the seventh factor, a court looks at whether the federal court must construe a state judicial decree. In the present cases, although the state and federal court suits involve the same issues relating to the forum-selection agreements, the state courts have not yet decided the issue and this court is not required to construe a state-court decree. While the federalism factors weigh slightly in favor of dismissal, " [t]he parallel exercise of state and federal power is

inherent in our government of dual sovereignty." *Newby*, 302 F.3d at 302-04. The weight of the federalism factors is not great.

The second, third, and fourth *Trejo* factors address fairness. The court analyzes whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant, whether the plaintiff engaged in forum shopping, and whether there will be inequities by allowing the declaratory plaintiff to gain precedence in time or to change forums. *Sherwin-Williams*, 343 F.3d at 390-91. Fairness " distinguishes between legitimate and improper reasons for forum selection." *Id.* Great Lakes did not file the federal actions in anticipation of the state-court suits; rather, the federal cases were filed one to two months after the state cases. Nor has Great Lakes engaged in improper forum shopping in bringing these suits, which it filed in a court specified in its forum-selection agreements with the seamen-plaintiffs, in the state where they reside. Finally, there are no inequities in allowing Great Lakes to ask a federal court to determine venue. Great Lakes and the seamen-plaintiffs agreed that any dispute concerning the validity of the forum-selection agreements would be resolved in federal court. The seamen-plaintiffs still have the benefit of the savings-to-suitors clause. In addition, as Great Lakes points out, it is not attempting to litigate the **Jones Act** claims in federal court. *See Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 219 (5th Cir.1998). Great Lakes is asking this court to determine the validity of the forum-selection agreements, not to rule on the personal injury claims. The fairness considerations do not weigh in favor of dismissal.

The fifth and sixth *Trejo* factors address the efficiency concern of convenience and the desire to avoid " duplicative or piecemeal litigation where possible." *Sherwin-Williams*, 343 F.3d at 390-91. This court must consider whether the federal court is a convenient forum for the parties and witnesses, and whether retaining the lawsuit would serve the purposes of judicial economy. As to the first factor, nothing in the record indicates that state courts in Starr, Cameron, or Hidalgo Counties, or state or federal courts in Harris County, are significantly inconvenient to any party. The other efficiency concern, judicial economy, does not favor dismissal of the federal actions. Great Lakes has objected to venue in the state courts and in this court. Unlike these federal actions, the state-court suits also involve **Jones Act** claims. A decision on the enforceability of the forum-selection agreements will resolve where the substantive **Jones Act** claims will be decided. The efficiency concerns do not favor dismissal.

***12** In summary, the *Trejo* factors do not favor dismissal of Great Lakes's claims for declaratory judgment as to the enforceability of the forum-selection agreements. Under the analysis articulated in *Sherwin-Williams*, *Brillhart* does not require this court to abstain from deciding the enforceability of the forum-selection agreements.

The motions to dismiss are also analyzed under *Colorado River;* the result is the same.

2. Abstention under *Colorado River*

" As a general rule, federal courts have a ' virtually unflagging obligation' to exercise their jurisdiction in proper cases." *Colorado River*, 424 U.S. at 817. " This obligation does not evaporate simply because there is a pending state court action involving the same subject matter." *Id.* at 813-14. Federal courts may abstain from deciding an action to preserve " traditional principles of equity, comity, and federalism." *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1189 (5th Cir.1988); *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1142 (8th Cir.1990). Whether a federal court should abstain from hearing an action under one of the abstention doctrines is in the court's discretion. *See Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 395 n. 7 (5th Cir.2006) (quoting *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 652 (5th Cir.2002)).

" [T]he potential for conflict" between a federal action and a parallel state action, standing alone, does not " justify staying of the exercise of federal jurisdiction" under the *Colorado River* abstention doctrine. *Colorado River*, 424 U.S. at 816. As the Supreme Court explained,

Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. This difference in general approach between state-federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.

Id. at 817 (citations omitted). Rather than simply considering potential " conflict" between state and federal litigation, " [t]he policies underlying *Colorado River* abstention are ' considerations of " [w]ise judicial administration," giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.*

As the Supreme Court also explained, " [g]iven this obligation [to exercise jurisdiction given to federal courts], and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention [under previously recognized doctrines]." *Id.* at 818; *see also* *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc.*, 48 F.3d 294, 298 n. 4 (8th Cir.1995) (" Because the policy underlying *Colorado River* abstention is judicial efficiency, this doctrine is substantially narrower than are the doctrines of *Pullman, Younger* and *Burford* abstention, which are based on ' weightier' constitutional concerns."). A federal court may abstain to conserve federal judicial resources only in " exceptional circumstances." *Colorado River*, 424 U.S. at 813. Those " exceptional circumstances" must be such that " ' repair to the State court would clearly serve an important countervailing interest.' " *Moses H. Cone Mem. Hosp. v. Mercury Constr.*, 460 U.S. 1, 14, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (quoting *Colorado River*, 424 U.S. at 813).

***13** *Colorado River* abstention applies only if there are parallel state and federal court proceedings. *See Brown*, 462 F.3d at 395 n. 7; *Dittmer v. County of Suffolk*, 146 F.3d 113, 118 (2d Cir.1998) (" The principles of *Colorado River* are to be applied only in situations ' involving the contemporaneous exercise of concurrent jurisdictions.' "). Suits are parallel if they " involv[e] the same parties and the same issues." *Republic Bank Dallas, Nat'l Ass'n v. McIntosh*, 828 F.2d 1120, 1121 (5th Cir.1987) (quoting *PPG Indus., Inc. v. Cont'l Oil Co.*, 478 F.2d 674, 682 (5th Cir.1973)); *see Brown*, 462 F.3d at 395 n. 7 (quoting *Kirkbride v. Cont'l Cas. Co.*, 933 F.2d 729, 734 (9th Cir.1991)). Mere " commonality of subject matter does not amount to the ' contemporary exercise of concurrent jurisdictions.' " *See Dittmer*, 146 F.3d at 118. Most courts define " parallelism" for purposes of *Colorado River* abstention in terms of " substantially the same parties" litigating " substantially the same issues." *See, e.g., Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir.2000); *McIntosh*, 828 F.2d at 1121; *Allen v. Bd. of Educ., Unified Sch. Dist. 436*, 68 F.3d 401, 402 (10th Cir.1995); *New Beckley Mining Corp. v. Int'l Union, UMWA*, 946 F.2d 1072, 1073 (4th Cir.1991), *cert. denied*, 503 U.S. 971, 112 S.Ct. 1587, 118 L.Ed.2d 306 (1992); *Day v. Union Mines, Inc.*, 862 F.2d 652, 655 (7th Cir.1988).

If state and federal suits are parallel, the federal court must then evaluate whether there are " exceptional circumstances" that make abstention appropriate. The Supreme Court has identified the following factors to guide the analysis:
(1) whether there is a *res* over which one court has established jurisdiction;
(2) the inconvenience of the federal forum;
(3) whether maintaining separate actions may result in piecemeal litigation;
(4) which case has priority-not simply looking at which case was filed first; rather, focusing on the relative progress made in each case;
(5) whether state or federal law controls; and
(6) the adequacy of the state forum to protect the federal plaintiff's rights.

The first four factors are explicitly identified in *Colorado River*, 424 U.S. at 818. The Court added the fifth and sixth factors in *Moses H. Cone*, 460 U.S. at 23, 26.

The Supreme Court has cautioned that " [t]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case." *Moses H. Cone*, 460 U.S. at 16. These factors are " to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand." *Id.* at 21. In examining these factors, " the balance [is] heavily weighted in favor of the exercise of jurisdiction." *Id.* at 16. As the Court explained:
We emphasize that our task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist " exceptional" circumstances, the " clearest of justifications," that can suffice under *Colorado River* to justify the surrender of that jurisdiction.

***14** *Id.* at 25-26.

The threshold issue-whether the cases are parallel-and the *Colorado River* factors are analyzed below.

a. Parallel Cases

The threshold issue is whether the state-court cases and these federal suits are " parallel." The Fifth Circuit has noted that " a mincing insistence on precise identity" of parties and issues is not required to find that cases are parallel. *McIntosh*, 828 F.2d at 1121; *see also Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 700 (7th Cir.1992); *MidTexas Int'l Ctr., Inc. v. Myronowicz*, No. 3:05-cv-1957, 2006 WL 2285581, at *2 (N.D.Tex. Aug.9, 2006). The central inquiry is whether there is a substantial likelihood that the state litigation will dispose of all claims presented in the federal case. *TruServ Corp. v. Flegles, Inc.*, 419 F.3d 584, 592 (7th Cir.2005); *Rowley v. Wilson*, No. 05-30189, 2006 WL 2233221, at *1 (5th Cir. Aug.4, 2006) (unpublished opinion) (holding that suits were not parallel for *Colorado River* abstention purposes because some defendants were in the federal case and not present in the state suit, and in the federal case, the plaintiff asserted claims against those defendants not asserted in the state suit). " [A]ny doubt regarding the parallel nature of the [state-court] suit should be resolved in favor of exercising jurisdiction." *TruServ Corp.*, 419 F.3d at 592.

Great Lakes seeks a determination as to the validity of the forum-selection agreements in both the state and federal suits. The state-court suits also-indeed, primarily-raise the **Jones Act** claims. Although the state suits involve issues that are not present in the federal cases, it is clear that the state-court litigation will dispose of all the claims presented in the federal cases. *See id.* The suits appear to be parallel.

b. The Colorado River Factors

Under the first *Colorado River* factor, federal-court abstention may be appropriate if a state court first exercises jurisdiction over real property. *Colorado River*, 424 U.S. at 818 (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964)). Neither the state nor federal suits involve disputes over real property. The first factor does not weigh in favor of abstention.

The second factor examines whether there is " any contention that the federal forum [is] any less convenient to the parties than the state forum." *Moses H. Cone*, 460 U.S. at 19. Relevant factors are where the suits are pending, where the evidence or witnesses are located, and the availability of compulsory process. *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir.1988). The state-court suits are pending in South Texas, in the same district in which this court is located, approximately 350 miles away. The witnesses who would be subject to compulsory process in the state-court actions would also be subject to the subpoena powers of this court. *See* Fed. R. Civ. P. 45(c)(3)(a) (allowing a federal court to command a subpoenaed party to " travel from any place within the state in which the trial is held"). The second factor does not weigh in favor of dismissal.

***15** The third factor represents the consideration that was " paramount in *Colorado River* itself:" the " danger of piecemeal litigation." *Moses H. Cone*, 460 U.S. at 19. " The prevention of duplicative litigation is not a factor to be considered in an abstention determination." *Evanston Ins. Co.*, 844 F.2d at 1192. *" Duplicative* litigation, wasteful though it may be, is a necessary cost of our nation's maintenance of two separate and distinct judicial systems possessed of frequently overlapping jurisdiction. The real concern at the heart of [this factor] is the avoidance of *piecemeal* litigation, and the concomitant danger of inconsistent rulings with respect to a piece of property." *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 650-51 (5th Cir.2000). This factor does not weigh in favor of abstention.

Under the fourth factor, which examines which case has priority, the order in which jurisdiction was obtained " ' should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.' " *Evanston Ins. Co.*, 844 F.2d at 1190 (quoting *Moses H. Cone*, 460 U.S. at 21). The state and federal suits in the cases at hand appear to have progressed along similar paths. Motions to dismiss are pending in both the state and federal cases. There is no indication that discovery has begun in the state-court cases. This factor does not weigh in favor of abstention.

The fifth factor asks whether and to what extent federal law provides the rule of decision on the merits. " The absence of a federal law issue does not counsel in favor of abstention .... The presence of a federal law issue ' must always be a major

consideration weighing against surrender [of jurisdiction],' but the presence of state law issues weighs in favor of surrender only in rare circumstances." *Evanston Ins. Co.*, 844 F.2d at 1193 (quoting *Moses H. Cone*, 460 U.S. at 26). Federal maritime law governs both the seamen-plaintiffs' **Jones Act** claims and the federal-court challenges to the enforceability of the forum-selection agreements. *See Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir.1997). The fifth factor weighs in favor of retaining jurisdiction.

The sixth factor asks whether the state-court action will adequately protect the rights of the federal-court plaintiff, Great Lakes. This factor " can only be a neutral factor or one that weighs against, not for, abstention. A party who could find adequate protection in state court is not thereby deprived of its right to the federal forum, and may still pursue the action there since there is no ban on parallel proceedings." *Evanston Ins. Co. .*, 844 F.2d at 1193. The state courts are competent to determine the enforceability of the parties' forum-selection agreements. The sixth factor does not weigh in favor of abstention.

In summary, the state and federal suits appear to be parallel and none of the *Colorado River* factors weighs in favor of abstention. This case does not present " exceptional circumstances" that warrant abstention under *Colorado River*. The motions to abstain are denied as to Great Lakes's claims for a declaratory judgment that the seamen-plaintiffs breached the parties' forum-selection agreements and that those plaintiffs have the right to dismiss their current state-court suits without prejudice to refiling in a venue provided in the forum-selection agreements.

IV. The Validity of the Forum-Selection Agreements

***16** The seamen-plaintiffs argue that the agreements are unenforceable against domestic seamen asserting **Jones Act** claims. The seamen-plaintiffs primarily rely on two cases holding that in **Jones Act** cases involving domestic seamen, forum-selection agreements are unenforceable as against public policy. The two cases are *Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D.Tex.2004), and *Nunez v. Am. Seafoods*, 52 P.3d 720 (Alaska 2002). Great Lakes responds that a recent Fifth Circuit case, *Terrebonne v. K-Sea Transportation Corp.*, 477 F.3d 271, 280-86 (5th Cir.2007), has undercut the basis for the holdings in *Boutte* and *Nunez*. One of the seamen-plaintiffs, Larrisquitu, also argues that he signed his forum-selection agreement under circumstances that make it unenforceable. Larrisquitu asserts that although the agreement was presented to him in Spanish as well as in English, he is functionally illiterate in Spanish. Because that challenge rests on matters outside the pleadings, Larrisquitu's motion to dismiss is converted to one for summary judgment. The public-policy challenge to the agreements may be resolved on the basis of the motions to dismiss.

A. The Seamen-Plaintiffs' Challenge to the Forum-Selection Agreements

The seamen-plaintiffs recognize that forum-selection clauses are presumptively valid and enforced unless they are unreasonable, the result of overreaching or fraud, or against public policy. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) (citing *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (" A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.")); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir.1997) (" The Supreme Court has consistently held forum-selection and choice-of-law clauses presumptively valid."); *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 220 n. 16 (5th Cir.1998) (" [A] valid forum selection clause is given controlling weight in all but most exceptional cases."); *Calix-Chacon v. Global Int'l Marine, Inc.*, --- F.3d ----, 2007 WL 2056505, at *2-5 (5th Cir. July 19, 2007) (same). An opposing party may show that enforcement would be unreasonable. *Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir.1995).

The parties do not dispute that the forum-selection agreements must be signed for an individual to work on vessels operating in nonunion areas. The agreements are entitled " Employee Acceptance of Forum Selection" and state, in part, that " [t]he following terms are conditions of the Employee's employment with Great Lakes Dredge & Dock Company, and, by executing below, the Employee acknowledges his acceptance of these conditions of employment. Employee acknowledges that he/she has been offered continued employment on the

condition that he/she shall agree to the conditions set forth herein as they shall apply to the Employee's employment with Great Lakes Dredge & Dock Company .... " (Civil Action No. 4:06-cv-3489, Docket Entry No. 1, Ex. A). The forum-selection agreements are a condition of employment and form part of the seamen-plaintiffs' employment contracts. *See Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 392 (5th Cir.2003) (holding that an employer's letter informing seamen-employees of a new mandatory arbitration policy was an unenforceable arbitration agreement under the Federal Arbitration Act's exemption under Section 1, which applies to arbitration agreements in seamen's employment contracts); *cf. Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 278-80 (5th Cir.2007) (holding that a postinjury agreement to arbitrate was not part of a seaman's employment contract and not subject to the Federal Arbitration Act's Section 1 exemption); *Garza Nunez v. Weeks Marine, Inc.*, No. 06:3777, 2007 WL 496855, at *3 (E.D.La. Feb.13, 2007) (same, and noting that " [n]o language exists in the contract itself that indicates the Plaintiff's acceptance of the agreement as a condition of his continued employment, nor does it otherwise modify the Plaintiff's employment status or alter the terms of his employment.").

***17** In *Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D.Tex.2004), the court held on public policy grounds that forum-selection clauses are unenforceable in **Jones Act** suits brought by domestic seamen against their domestic employers. The *Boutte* court recognized the cases holding that forum-selection clauses were presumptively valid, but distinguished them on the ground that they involved foreign seamen suing foreign employers for personal injuries. The *Boutte* court held that in these cases, the international context made it more important to enforce a forum-selection clause than in cases involving domestic litigants. The *Boutte* court held that this " international flavor" that characterized suits such as *Marinechance*, 143 F.3d 216, which enforced forum-selection agreements between Filipino seamen and their Cypriot employer requiring suit in the Philippines, was absent from **Jones Act** cases filed by domestic seamen against domestic employers.

The *Boutte* court identified the statutory and case law basis for this public policy making forum selection agreements unenforceable in **Jones Act** cases filed by domestic seamen as the venue provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, and the case law construing those provisions. The *Boutte* court assumed that the FELA venue provisions applied to **Jones Act** cases. Because the Supreme Court had held in *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949), that forum-selection clauses in FELA cases were unenforceable as a matter of law, the *Boutte* court held that forum-selection clauses were also unenforceable in **Jones Act** suits. *Boutte*, 346 F.Supp.2d at 932.

The **Jones Act** states:
A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104(a). In *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958), the Supreme Court held that the **Jones Act** incorporates not only the FELA statutes but also its " entirely judicially developed doctrine of liability." *Kernan*, 355 U.S. at 439; *see also Pure Oil Co. v. Suarez*, 346 F.2d 890, 892 (5th Cir.1965) (" Instead of devising separate standards to be applied in personal injury suits by seamen Congress adopted the expedient of incorporating by reference the more detailed provisions which govern the liability of railroads to their employees."), *aff'd on other grounds*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966).

The FELA provides a cause of action to railroad workers injured by their employer's negligence, prohibits employers from contractually exempting themselves from FELA, and has a venue provision that allows an injured worker to bring suit in the district where his employer resides, where the cause of action arose, or where his employer does business at the time the claim arose. 45 U.S.C. §§ 55, 56. In *Boyd*, the Supreme Court held that a forum-selection clause between a railroad employee and his railroad employer was invalid. The forum-selection clause in that case required the employee to waive his right to bring suit in any forum other than where he lived or where the injury occurred. *Boyd*, 338 U.S. at 266. The Court held that the FELA provided railroad employees a " substantial right" to select the forum

for suit, and it reasoned that enforcing the forum-selection clause would have the effect of enabling the employer contractually to exempt itself from liability (in specific venues, at least), which is prohibited under section 55 of that Act. *Id.* at 265 (" We hold that petitioner's right to bring suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of [section 55]."). Because the forum-selection clause would have the effect of exempting the employer from liability in particular venues, the Court declared the clause " void." *Id.*

***18** The district court in *Boutte,* " finding itself at sea" without clear guidance on the enforceability of forum-selection clauses in **Jones Act** cases involving domestic seamen and employers, held that because the FELA venue provisions applied, such forum-selection clauses were unenforceable under *Kernan* and *Boyd*. *Boutte,* 346 F.Supp.2d at 932. The *Boutte* court reached this result notwithstanding the presumption under *Bremen* that forum-selection clauses are valid and enforceable. *Boutte,* 346 F.Supp.2d at 932.

In *Nunez v. American Seafoods,* 52 P.3d at 721, the court reached a similar result, relying on reasoning similar to *Boutte*. In *Nunez,* a domestic seaman who sustained injuries while working aboard his employer's vessel had signed an employment contract with a clause specifying the federal district court in Washington State as the venue for litigating disputes. The seaman sued in the Alaska Superior Court. On appeal from the Superior Court's dismissal enforcing the forum-selection clause, the Alaska Supreme Court reversed. Finding that Congress intended the **Jones Act** to modify the substantive rules of maritime law, the Alaska Supreme Court distinguished *Bremen* and *Carnival Cruise Lines* as products of general maritime law, not of " maritime law as modified by the **Jones Act**, which incorporates FELA." *Nunez,* 52 P.3d 723. Because the **Jones Act** " effectively places an injured seaman ... in the shoes of an injured FELA worker," the Alaska Supreme Court found that FELA's prohibition of forum-selection agreements, as articulated by the Supreme Court in *Boyd,* applied to suits brought under the **Jones Act**. *Id.* at 722.

Since *Boutte* and *Nunez* were decided, the Fifth Circuit has decided *Terrebonne,* 477 F.3d 271, which undercuts a significant part of the basis for their holdings. In *Terrebonne,* a domestic seaman suffered a hernia injury while working aboard the defendant's ship. The parties partially settled the personal injury claim. As part of the settlement, the plaintiff agreed to arbitrate any remaining disputes, including any **Jones Act** claims, in New York. After a recurrence of his hernia, the plaintiff filed a **Jones Act** suit in a Texas federal court. In response to a motion to dismiss, the plaintiff argued that the arbitration clause was unenforceable in part because under *Boyd,* forum-selection clauses are unenforceable in **Jones Act** suits. *Id.* at 275. On appeal, the Fifth Circuit held that, contrary to the assumption the court made in *Boutte,* the FELA's venue provision and accompanying case law (including the case law prohibiting forum-selection clauses) did not apply to **Jones Act** suits. Because the **Jones Act** has its own venue provision, which states that " [a]n action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located," 46 U.S.C. § 30104(b), the Fifth Circuit found that the **Jones Act** cannot be interpreted as incorporating FELA's venue provision.

***19** The Fifth Circuit based its analysis in *Terrebonne* on an earlier opinion, *Pure Oil Co. v. Suarez,* 346 F.2d 890 (5th Cir.1965), which addressed the relationship of the venue provisions in the FELA and the **Jones Act**:
... Congress has seen fit to impose different venue requirements in **Jones Act** cases. To now hold that the venue requirements under the Federal Employers' Liability Act are controlling would negate the plain language of [the **Jones Act**]." *Rodriquez v. United Fruit Co.,* 236 F.Supp. 680, 682 (E.D.Va.1964). We are not persuaded to hold otherwise merely because the two other provisions of [the FELA] have been held applicable in **Jones Act** cases. Neither of the subjects covered by those provisions is dealt with specifically in the **Jones Act**, and they would thus be fairly covered by the general reference to the FELA. *See Panama R. Co. v. Johnson,* 264 U.S. 375, 392, 44 S.Ct. 391, 68 L.Ed. 748 (1924).

Pure Oil Co., 346 F.2d at 892. In *Terrebonne,* the court stated that " [b]ecause under our decision in *Pure Oil Co.,* the venue provisions of ... the FELA are inapplicable to **Jones Act** cases, it necessarily follows that nothing in [FELA's venue provision] is applicable to **Jones Act** venue." As a result, the court concluded, neither *Boyd* nor the FELA's venue statute could apply to determine whether the arbitration clause at issue was enforceable. 477 F.3d at 282-83; *see also Edah v. Trident Seafoods Corp.,*

No. 2:06-cv-554, 2007 WL 781899, at *2-3 (S.D.Ohio March 12, 2007) (finding the FELA's prohibition on forum-selection agreements inapplicable to **Jones Act** suits); *Garza Nunez v. Weeks Marine, Inc.*, No. 06-3777, 2007 WL 496855, at *6 (E.D.La. Feb.13, 2007) (holding that Boyd and the FELA do not preclude enforcement of a **Jones Act** seaman's postinjury arbitration agreement).

The seamen-plaintiffs argue that *Terrebonne* is distinguishable because it dealt with an arbitration clause in a settlement agreement, not a forum-selection clause in an employment contract. This distinction was important to the Fifth Circuit in its analysis of the arguments as to the arbitration agreement's validity under the Federal Arbitration Act (FAA). The FAA exempts from compelled judicial enforcement arbitration agreements in contracts for the employment of seamen, railroad employees, and other workers engaged in interstate commerce. *See Terrebonne*, 477 F.3d at 278. Because the arbitration agreement was in a settlement agreement, rather than in an employment contract, the Fifth Circuit found that the FAA did not apply to make the arbitration agreement unenforceable. *Id.* at 280. This argument does not apply to a forum-selection clause, which is not subject to the FAA.[FN9]

> FN9. An arbitration provision in a seaman's employment agreement is unenforceable under the FAA. A federal court must compel arbitration if " a maritime transaction or contract evidencing a transaction involving commerce" contains a written arbitration agreement. 9 U.S.C. § 2. Section 1 of the FAA specifically excludes employment contracts of seamen and railroad employees. *Id.*, § 1; *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 394 (5th Cir.2003). If the arbitration clause at issue in *Terrebonne* had been in an employment agreement, it would have been unenforceable.

However, the plaintiff in *Terrebonne* also attacked the arbitration agreement by arguing that it was unenforceable under the **Jones Act** because that Act incorporated the FELA venue provisions and related case law invalidating forum-selection clauses. In analyzing this independent argument, the Fifth Circuit did not focus on the fact that the case involved an arbitration rather than a forum-selection agreement. To the contrary, the Fifth Circuit directly addressed the broader argument raised by the plaintiff in *Terrebonne*-that the **Jones Act** incorporates the FELA-and found this argument unpersuasive in light of the court's prior analysis of the **Jones Act's** venue provisions in *Pure Oil*. *See Terrebonne*, 477 F.3d at 282.

***20** The *Terrebonne* court was not confronted with a forum-selection agreement. The court did not expressly address whether its holding as to the enforceability of arbitration agreements would apply to forum-selection agreements. But the fact that *Terrebonne* involved an arbitration rather than a forum-selection agreement does not affect the clear holding that the FELA venue provisions do not apply in **Jones Act** cases, as the courts in *Boutte* and *Nunez* assumed. *Terrebonne* eliminates the statutory basis for the result in *Boutte* and *Nunez*-that the FELA venue provisions are incorporated into the **Jones Act** and make forum-selection clauses in **Jones Act** cases unenforceable. The *Boutte* court identified the FELA venue provisions incorporated into the **Jones Act** as the public policy exception to the presumptive validity of forum-selection clauses.

If the FELA venue provisions are not incorporated into the **Jones Act**, is there another basis to find a public policy against enforcing forum-selection agreements against domestic seamen asserting **Jones Act** claims? The *Boutte* court identified the generally protected status of domestic seamen asserting **Jones Act** cases, but this was not enough in *Boutte* to make the forum-selection clause unenforceable. To the contrary, the court in *Boutte* relied on the incorporation of the FELA venue provisions and case law making forum-selection agreements unenforceable under those provisions. The general protection afforded to domestic seamen does not provide a sufficient basis for invaliding the forum-selection agreements. *Terrebonne* demonstrates that the protected status of domestic seamen does not exempt seamen from being bound by contracts that limit the tribunals for resolving claims, including claims under the **Jones Act**. *Terrebonne* involved a domestic seaman asserting a **Jones Act** claim. The court held that arbitration clauses (other than in an employment agreement) are enforceable against such plaintiffs. *Terrebonne*, 477 F.3d at 285. The existence of section 1 of the FAA does not support a general public policy against enforcing arbitration or forum-selection agreements against domestic seamen. Section 1 of the FAA by its terms applies to all workers in foreign and interstate commerce, making no distinction between foreign and domestic workers.

9 U.S.C. § 1.

The court in *Boutte* noted that the general presumption in favor of forum-selection clauses applied to maritime cases, not **Jones Act** cases. *Boutte*, 346 F.Supp.2d at 926. Although the Supreme Court was sitting in admiralty when it held that forum-selection clauses are presumptively enforceable in *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), courts have extended this principle to cases beyond the admiralty context of *Bremen*. *See, e.g.*, *Servewell Plumbing, LLC v. Fed. Ins. Co.*, 439 F.3d 786, 789-92 (8th Cir.2006) (finding that, " [u]nder Bremen, ' forum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid' "); *Am. Soda, LLP v. U.S. Filter Wastewater Group*, 428 F.3d 921 (10th Cir.2005) (determining that enforcement of a forum selection clause is " fair and reasonable" because " [t]here is certainly nothing in the record before us to show that ' enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or overreaching' ") (citing *Bremen*, 407 U.S. at 15); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298-99 (5th Cir.2004) (enforcing a forum-selection clause in a suit for overtime pay because the plaintiffs failed to provide evidence that the clause " placed an unreasonable burden on any of them individually" such that the clause would prevent them " from vindicating any of their statutory rights"); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 389 (1st Cir.2001) (holding that, under *Bremen*, a forum-selection clause is enforceable unless enforcement is unjust or unreasonable, or if the clause is invalid for such reasons as fraud or overreaching, and that enforcement of a clause " printed clearly in plain language in a contract of reasonable length" was not unreasonable); *Spradlin v. Lear Siegler Mgmt. Servs. Co., Inc.*, 926 F.2d 865, 867-68 (9th Cir.1991) (applying the *Bremen* framework of analysis and finding the clause at issue to be enforceable because plaintiff employee failed to offer evidence of unreasonableness or fraud).

***21** In *Boutte*, the court emphasized that there were public policy reasons to support enforcing forum-selection agreements in cases involving foreign seamen asserting **Jones Act** claims, reasons absent from cases involving domestic seamen. The Fifth Circuit has clearly recognized the enforceability of forum-selection agreements in cases involving foreign seamen. *See Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221 (5th Cir.1998); *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir.2002). In *Marinechance*, the Fifth Circuit upheld a forum-selection clause in a Filipo seaman's employment contract that required the seaman to litigate in the Philippines rather than in Louisiana state-court. In *MacPhail*, 302 F.3d at 276, the Fifth Circuit reversed a district court's ruling invalidating a forum-selection clause in a postaccident release and held that requiring a foreign seaman to litigate his **Jones Act** claim in Australia was reasonable and enforceable. The cases do not, however, limit the enforceability of forum-selection agreements to international disputes. Rather, the presumption of validity applies to cases involving domestic litigants. *See Cont'l Ins. Co. v. M/V ORSULA*, 354 F.3d 603, 607 (7th Cir.2003) (in a case involving a domestic plaintiff, stating that " [i]n admiralty cases, forum-selection clauses ' are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances" and finding that the district court properly dismissed a suit filed outside the forum selected in the agreement); *cf. Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298-99 (5th Cir.2004) (enforcing a forum-selection clause in a suit for overtime pay involving domestic litigants because the plaintiffs failed to provide evidence that the clause " placed an unreasonable burden on any of them individually" such that the clause would prevent them " from vindicating any of their statutory rights"); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 389 (1st Cir.2001) (holding that in a suit involving domestic litigants, a forum-selection clause is enforceable unless enforcement is unjust or unreasonable, or if the clause is invalid for such reasons as fraud or overreaching, and that enforcement of a clause " printed clearly in plain language" in an employment contract " of reasonable length" was not unreasonable); *Spradlin v. Lear Siegler Mgmt. Servs. Co., Inc.*, 926 F.2d 865, 867-68 (9th Cir.1991) (applying the *Bremen* framework and finding a forum-selection clause in an employment agreement to be enforceable because plaintiff employee failed to offer evidence of unreasonableness or fraud). Although there may be added public policy reasons for enforcing forum-selection agreements in international disputes, that does not equate to public policy reasons *against* enforcing such agreements in domestic disputes.

The court in *Terrebonne* noted that the FAA itself

represents a strong public policy in favor of enforcing arbitration agreements. *Terrebonne*, 477 F.3d at 285. The seamen-plaintiffs argue that this public policy support is absent in cases involving forum-selection agreements. Public policy may be reflected in case law as well as a statute. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Intern.*, 861 F.2d 665, 673 (1988) (" In addition to state statutes and federal regulations, case law also helps define public policy."). Cases reflect a strong public policy in favor of forum-selection agreements. *See Bremen*, 407 U.S. at 10 (finding that forum-selection clauses are " prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ' unreasonable' under the circumstances"); *see also Scherk*, 417 U.S. at 519 (affirming *Bremen* 's holding); *Mitsui*, 111 F.3d at 35 (interpreting *Bremen* as holding that the presumption of a forum-selection clause's validity may be overcome " only by a showing that the clause results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court"). Additionally, the courts have recognized that arbitration clauses and forum-selection clauses have important elements in common. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (stating that an arbitration clause is a " kind of forum-selection clause"); *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir.1997) (noting that foreign arbitration clauses are a subset of foreign forum-selection clauses in general). It is somewhat anomalous to argue that the public policy of protecting seamen prohibits enforcing forum-selection clauses but allows arbitration clauses (at least those not contained in employment agreements). Forum-selection clauses limit the courts in which a seaman may file his case but do not otherwise oust the seaman from the judicial system. Arbitration agreements, by contrast, deprive a seaman of the ability to have his case heard by a court at all.

***22** One other factor the court in *Boutte* relied on to invalidate the forum-selection agreement in that case is missing in the present case. The court in *Boutte* emphasized that the forum-selection agreement that the seaman-plaintiff had signed in that case was invalid under Louisiana law, where the seaman wanted to sue. In the present case, the seamen-plaintiffs similarly argue that under Texas law, the forum-selection agreement is unenforceable. Until recently, Texas courts and federal courts used different analyses to determine the enforceability of mandatory forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-14 (Tex.App.-Houston [1st Dist.] 2005, no pet.). However, the Supreme Court of Texas recently adopted the federal standard for analyzing such clauses. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex.2005); *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557, 558-59 (Tex.2004); *In re AIU Ins. Co.*, 148 S.W.3d 109, 111-14 (Tex.2004); *Phoenix Network Techs. (Europe), Ltd.*, 177 S.W.3d at 614. Even before Texas adopted the federal standard for determining the enforceability of forum-selection clauses, the Texas courts looked to federal law in determining the validity of forum-selection clauses in maritime actions. *See Stobaugh v. Norwegian Cruise Line, Ltd.*, 5 S.W.3d 232, 234-36 (Tex.App.-Houston [14th Dist.] 1999, pet. denied) (applying federal maritime law to a suit involving a forum-selection clause in a cruise-line passenger ticket). Although the Texas legislature recently enacted a mandatory venue provision applicable in all **Jones Act** cases brought within the State, that statute does not apply to suits filed before its effective date, May 24, 2007. *See* Tex. Civ. Prac. & Rem.Code § 15.0181 (Historical and Statutory Notes).[FN10] Nor is it clear that this venue provision would trump Texas's policy of presuming forum-selection clauses valid. *See Holten*, 168 S.W.3d at 793; *In re Autonation, Inc.*, --- S.W.3d ----, 2007 WL 1861341, at *3-4 (Tex. June 29, 2007). The forum-selection agreements in the present cases are not invalid under Texas law. This distinguishes the present case from *Boutte* and removes another basis for finding the forum-selection agreement unenforceable.

> FN10. Section 15.0181 provides, in relevant part:
> Except as provided by this section, a suit brought under the **Jones Act** shall be brought:
> (1) in the county where the defendant's principal office in this state is located;
> (2) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; or
> (3) in the county where the plaintiff resided at the time the cause of action accrued.
> Tex. Civ. Prac. & Rem.Code § 15.0181(c).

In summary, *Terrebonne* removed the statutory underpinning for the holding in *Boutte* and *Nunez* that forum-selection agreements are unenforceable in

Jones Act claims brought by domestic seamen. The seamen-plaintiffs in the present case have not identified another basis for a public policy making the forum-selection agreements in this case unenforceable. Although *Marinechance* and related cases do involve foreign seamen, the enforceability of the forum-selection clauses in those cases does not turn on whether the seamen were domestic or foreign. Instead, the issues are whether the forum-selection agreements were unreasonable or the product of fraud or overreaching, or void as against public policy. Applying the factors identified in *Bremen, Carnival Cruise Lines*, and the *Marinechance* line of cases shows that the forum-selection agreements at issue here are reasonable. The forum-selection agreements allow the seamen-plaintiffs to select from a number of alternative venues. The agreements allow a seaman-plaintiff to sue in the specified state or federal court in the state where the plaintiff resides or the accident occurred. Suit may also be brought in the Circuit Court for DuPage County, Illinois, where Great Lakes has its principal place of business. (Civil Action No. 4:06-cv-3489, Docket Entry No. 1, Ex. 1). The agreements do not eliminate the plaintiff's ability to bring suit in state court as opposed to federal court. Rather, the agreements prescribe particular state-and federal-court venues where suit may be brought. In the present case, the venues available under the forum-selection agreements are the state or federal courts in Harris County, Texas. This location is not so far from the South Texas counties where the seamen-plaintiffs chose to file suit, nor so inconvenient for witnesses, nor so removed from sources of evidence, as to be unreasonable. *See* *MacPhail*, 302 F.3d at 278.

***23** Without the statutory basis on which *Boutte* and *Nunez* relied to find forum-selection agreements involving domestic seamen unenforceable, and with no other statutory or case law basis for finding that such agreements generally offend public policy, the established factors for analyzing such clauses apply. That analysis shows no basis for invalidating the agreements as against public policy. Based on the applicable authority and this record, this court does not find a principled basis on which to conclude that the forum-selection agreements in these cases are unenforceable as a matter of law.

One of the seamen-plaintiffs, Julio Larrisquitu, has alleged that the agreement he signed is unenforceable because it resulted from overreaching. He has submitted affidavits explaining that he is illiterate in Spanish and could not read what he signed. Because these materials require this court to examine matters outside the pleadings and attached documents, this aspect of the motion to dismiss must be converted into one for summary judgment. Larrisquitu has until September 28, 2007 to expand the record relating to his argument that the forum-selection agreement is unenforceable because it resulted from overreaching; Great Lakes has until October 19, 2007 to respond.

IV. Conclusion

Quintanilla's and Arredondo's motions to dismiss are denied. Great Lakes's claims for injunctive relief prohibiting the state suits from proceeding and for a declaration that the seamen-plaintiffs may only bring suit in a forum provided in the forum-selection agreements are dismissed with prejudice. Larrisquitu's motion to dismiss is denied in part and his remaining argument that the forum-selection agreement is unenforceable as to him because it was procured by overreaching is converted into a motion for summary judgment. Discovery limited to that issue is to be conducted by September 28, 2007. Larrisquitu may supplement the summary judgment record no later than October 19, 2007. Great Lakes's response is due by November 9, 2007.

S.D.Tex.,2007.
Great Lakes Dredge & Dock, Co., LLC v. Larrisquitu
Slip Copy, 2007 WL 2330187 (S.D.Tex.)

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Mr. Block is a shareholder and a member of the firm's Executive Committee. With over 20 years experience as a trial lawyer in four state jurisdictions, he concentrates his litigation practice on a variety of commercial, personal injury, product liability, transportation, customs, regulatory, employment and other matters. He has represented numerous local and national corporations and partnerships, commercial property owners and managers, transportation companies and consumers, asbestos defendants, fishing enterprises, tech industry companies and many others.

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Moscow's Pushkin Institute, Certificate, 1983

Publications

Mr. Block is a prolific writer and lecturer. He has authored numerous articles as the West Coast editor of ForwarderLaw (an internet-based repository of legal resources of interest to the shipping community), and co-editor of the Motor column of ATLP Highlights. His writings are combined into Betts, Patterson & Mines' bimonthly transportation newsletter "Surf & Turf," which is available electronically. Mr. Block is a frequent contributor to The Transportation Lawyer (published by the Transportation Lawyers Association), and he penned KOOPERATIV (Winston 1997), a novel set in Russia reflecting his business and legal experiences there.

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Biography

Michael G. Chalos
Chalos, O'Connor & Duffy, LLP

Michael G. Chalos is a senior partner of Chalos, O'Connor & Duffy, LLP, a New York firm specializing in maritime and environmental law. He is a 1970 graduate of the State University of New York, Maritime College at Fort Schuyler. Upon graduation Mr. Chalos received a Bachelor of Science degree in Marine Transportation and a Third Mate's license in the United States Merchant Marine. Mr. Chalos attended Fordham University, School of Law from which he graduated in 1975 with a Juris Doctor degree.

In addition to his traditional maritime practice, Mr. Chalos has represented a number of clients involved in high profile civil and criminal environmental litigation, including the successful defense of the Masters of the EXXON VALDEZ and SELENDANG AYU, as well as, numerous United States and foreign based corporations, shipowners, managers/operators and crewmembers who were the subjects of criminal investigations by the United States Government. As such, Mr. Chalos has developed a particular expertise in defending and resolving oil pollution, Marpol and the Act for the Prevention of Pollution from Ships (APPS) violations and other environmental claims. In this regard,

he frequently interacts with governmental entities involved in the enforcement of environmental regulations, such as the Department of Justice, the Environmental Protection Agency, the United States Coast Guard, Federal and State Trustees, and the Oil Spill Liability Trust Fund, and various state departments of environment.

Mr. Chalos has authored a number of articles on the criminalization of maritime accidents in the United States and other maritime nations, as well as, articles relating to investigations and prosecutions by United States authorities of the by-passing of oily water separators and waste oil management systems. Mr. Chalos has also authored several Environmental Management Systems/Compliance Programs, which are currently in use as part of settlement agreements reached with governmental authorities of pending investigations. He is a frequent lecturer on these topics to industry groups, governmental bodies, law students, and environmental groups. Mr. Chalos is the current Chairman of the US Maritime Law Association’s ad hoc Committee on Environmental Crimes.

Mr. Chalos is admitted to the practice of law in the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, the Court

of Appeals for the First, Second, Third, Fifth, Sixth and Ninth Circuits and, the Supreme Court of the United States.

Biography

Virginia M. Hernandez Covington
United States District Judge
Middle District of Florida

Virginia M. Hernandez Covington graduated *cum laude* with a Bachelor of Science degree from the University of Tampa in 1976 from where she also received the degree of Master of Business Administration in 1977. Judge Covington then attended Georgetown University Law Center, where she served as an editor of THE TAX LAWYER law review and received her Juris Doctor degree in 1980.

Judge Covington began her career as a trial attorney for the Federal Trade Commission and thereafter became an Assistant State Attorney for Hillsborough County, Florida. In 1983, Judge Covington joined the United States Attorney's Office for the Middle District of Florida, where in addition to her criminal and civil workload, she served as Chief of the Asset Forfeiture Section. On September 25, 2001, Judge Covington was appointed to Florida's Second District Court of Appeal by Governor Jeb Bush. She served on that court until receiving her commission as a United States District Judge on September 10, 2004.

Judge Covington is most proud of her three children–Michael, a recent graduate of Stetson University College of Law, Laura, a senior at Florida State University, and Stephen, a junior at the University of Florida.

Bryant E. Gardner

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Bryant Gardner is an associate in Winston & Strawn's Washington, D.C. office who concentrates his practice in admiralty and maritime government relations, transactions, and litigation. Mr. Gardner's experience includes federal government contracts counseling and litigation, environmental crimes defense, fleet refinancing, LNG terminal development, newbuild financing and delivery, cargo litigation, Federal Maritime Commission litigation, maritime products liability litigation, and extensive representation of maritime clients before Congress, the U.S. Coast Guard, the U.S. Maritime Administration, the U.S. Environmental Protection Agency, the U.S. Customs Service, and other agencies.

Mr. Gardner received a B.A. in political economy, *summa cum laude*, Phi Beta Kappa, from Tulane University in 1996. He received a J.D., *cum laude*, from Tulane Law School in 2000, where he was editor in chief for the *Tulane Maritime Law Journal*. He is a member of the Board of Governors of the Propeller Club of the United States, Port of Washington; the Maritime Law Association of the United States; the Connecticut Maritime Association; and the Maritime Administrative Bar Association. Mr. Gardner is admitted to practice in the District of Columbia and Massachusetts.

Biography

P. Michael Leahy
Moseley, Prichard, Parrish, Knight & Jones

Michael Leahy is a partner in the law firm of Moseley, Prichard, Parrish, Knight & Jones and primarily practices in the field of civil litigation with particular emphasis on maritime matters and insurance defense.

Mr. Leahy served as a deck officer in the U. S. Merchant Marine for six years aboard various vessels, including container, break-bulk and tank vessels. He also served six years in the United States Navy Reserve. Following completion of law school, he worked for five years with a Scandinavian P&I Club managing marine casualties including collisions and pollution matters.

Mr. Leahy received a B.S. Degree in Nautical Science from the United States Merchant Marine Academy at Kings Point, New York in 1998 and his J.D. degree from the University of Akron School of Law in 1997.

DAVID T. MALOOF

Education:

Dave was raised on Long Island and attended Chaminade High School, its leading catholic high school, where he graduated near the top of his class and captained two sports teams. As middle linebacker on the football team under the legendary coach George Toop, Dave's claim to fame was blocking kicks, principally with his helmet, as he was too slow to get his arms up; Dave won two games for the team blocking punts and extra points. Dave's passion lead him to be selected to lead the team in prayer before games. Unbeknownst to the team, Dave mainly prayed that he would start to get his arms up.

Later, at Columbia College, Dave was elected Student Council Chairman, the highest position in student government. He was also the "voice" of Columbia football and basketball on the campus television station, and founded a non-profit bookstore. At graduation Dave received both the Alumni Prize (voted by the Class of 1980 to its most faithful and deserving member) and the Pullman Award (awarded by the Student Government to the Class' most outstanding member). He also received the Milch Prize (awarded by the faculty to the outstanding member of the Junior Class), the Willen Prize (for the best history or political science essay) and the State Farm Exceptional Student Fellowship (awarded to 15 students in national competition). Dave also was selected to Columbia's most prestigious private society, where he led a successful effort to finally include women.

Dave graduated *magna cum laude* and *phi beta kappa* from Columbia in 1980. He earned a B.A. degree with a History major and an English minor. He received his J.D. in 1983 from the University of Virginia School of Law. Dave was also a finalist in the New York State competition for the Rhodes Scholarship and an intern in the Office of the Chief Justice of the United States Supreme Court, then the Honorable Warren Burger.

Journalism:

After school, Dave worked as an investigative television reporter, seen on WNET-13, and specialized in uncovering corruption and waste in government. Over a two-year period, he prepared over twenty separate investigative reports concerning the New Jersey Division of Motor Vehicles which lead to the convening of a special session of the state legislature, an investigation by the state legislature, an investigation by the State Commission of Investigation, a criminal investigation and finally the revamping of the entire system of distributing licenses in New Jersey. As a result of his reports, a century old practice of using political patronage to award government contracts in New Jersey was ended.

His investigative work was the subject of many laudatory articles including a feature in The New Jersey Reporter. He received prestigious television journalism awards from the Associated Press, the Society of Professional Journalists, and

the New Jersey Bar Association. He also worked for NBC (WVIR - Virginia) and for WSMW (Worchester), and in print journalism.

Law:

Today, Dave is senior partner in Maloof Browne & Eagan LLC, a small international law firm in New York.

He is known worldwide as among the most effective advocates for the rights of shippers and their insurers for justice in international commercial disputes. He and his two partners have been involved in some of the most high profile commercial transportation casualties of the last 20 years (M.V. Elma Tres; M.V. APL China; M.V. Hual Europe) and their work has led to recoveries in excess of $100 million. Admiralty, rail and trucking law has been widely made more equitable through their efforts and creation of leading precedents, including the landmark decision in *Sompo Insurance Co. of America v. Union Pacific Railroad Co*, 456 F.3d 54 (2d Cir 2006). Dave's winning percentage at trial is over 80%. He is AV rated by Martindale-Hubbell, the highest rating in the United States legal field for both skill and integrity. Selected in 2006 as one of New York's "Super-Lawyers," his work was profiled in the magazine The American Shipper, August 1998. He has been quoted on legal issues of The New York Times (2004) and The Journal of Commerce (2006). He has also published a variety of scholarly articles including in The Journal of Maritime Law and Commerce (2003), The Maritime Advocate (2004), and The New York Law Journal (2005). He has lectured on transportation law issues worldwide: including in Beijing, Singapore, Manila, Tokyo, London and been honored to address national conventions in Shanghai (Chinese Maritime Law Association), Australia (Maritime Law Association of Australia and New Zealand) and in the United States, including the national conventions of the Technology Asset Protection Association, the National Cargo Security Council, and the Transportation Consumer Protection Council.

Dave has been qualified and testified as an expert on U.S. marine insurance law in Tokyo District Court. He is a member, Proctor Status, Maritime Law Association of the United States. For ten years his firm has run an annual conference in New York on trends in transportation law, bringing in speakers from around the world.

Dave resides in Darien, Connecticut where he is married to an attorney, Jean Sweeney, and has two children Julia (age 13) and Daniel (age 11). He serves on the Board of St. John Catholic Church, where he organizes the Men's Ministry. He is active in Darien's local government, and has long coached YMCA basketball.

He also sits in the first row on the goal line at New York Jets football games, and recently appeared in the centerfold of their yearbook. And so, after all these years, he still finds himself having to pray before football games.

Biography
Joseph Poux
United States Department of Justice
Environmental Crimes Section

Joe Poux has been with the Environmental Crimes Section at the Department of Justice since 2001. Much of his practice has been in the area of vessel pollution.

As an Instructor, Mr. Poux has participated in training efforts involving the United States Coast Guard, the Environmental Protection Agency, and the United States Attorneys' Offices across the country.

Mr. Poux has participated and spoken at vessel pollution conferences in Canada and Taiwan as well.

Biography

TOM S. RUE
Johnstone, Adams, Bailey, Gordon & Harris, L.L.C.

Mr. Rue is a member of Johnstone, Adams, Bailey, Gordon & Harris, L.L.C. where he has practiced his entire legal career. He received a B.A., *cum laude*, in Political Science from The University of the South in 1968 and a J.D. from the University of Alabama School of Law in 1974. He served on the Editorial Board of the Alabama Law Review in 1972-1974. He is the Immediate Past President of The Maritime Law Association of the United States. He is a Titulary member of the Comité Maritime International, a member of the Advisory Board of the Tulane Admiralty Law Institute and the Planning Committee, and was the John W. Sims Distinguished Admiralty Practitioner in Residence at the Tulane University School of Law in 2002. He is a member of the Southeastern Admiralty Law Institute (Board of Governors 1983-1985) and the Federation of Defense and Corporate Counsel (Chair, Maritime Law Section 1997-1998). He chaired the Subcommittee on Collision of the Committee of Admiralty and Maritime Litigation in the ABA Section of Litigation (1983) and chaired the Admiralty and Maritime Law Committee of the Torts and Insurance Practice Section (1991-1992). He has been named to The Best Lawyers in America for maritime law and commercial litigation.

BIOGRAPHICAL SKETCH

Greg E. Summy

Greg E. Summy is General Solicitor with Norfolk Southern Corporation, Norfolk, VA. Previously he served as Associate General Counsel with North American Van Lines and Corporate Counsel with Lee Way Motor Freight. Mr. Summy received a B. A. in History from the University of Oklahoma in 1974 and a J. D. from the University of Oklahoma in 1977, where he was elected to the Order of the Coif. He is admitted to the Bars of Oklahoma (1977), Indiana (1985 – inactive) and Virginia (1994), and is Immediate Past President of the Transportation Lawyers Association. Since coming to Norfolk Southern in 1994, Mr. Summy has provided advice and counsel to the Intermodal Department of NS, and provides assistance on a daily basis in the area of transportation contracts. In addition, he has been active in numerous industry task forces dealing with the issue of roadability of intermodal equipment, and presently serves as an Alternate member of the Executive Committee of the Uniform Intermodal Interchange Agreement, which is administered by the Intermodal Association of North America.

HANSON BRIDGETT
MARCUS VLAHOS RUDY, LLP

William D. Taylor, Partner

Transportation Practice Group; Business Section; Litigation Section; Government Relations Practice Group

Based in our Sacramento Office

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Education: University of California, Hastings College of the Law (J.D., 1971);

California State University, Chico (A.B., 1968)

William D. Taylor maintains both a transactional and litigation business practice, representing all types of business ventures, primarily privately owned. Among other industry interests, Bill has a significant and diverse clientele, serving all aspects of the transportation industry throughout the United States, as well as global markets. As such, Bill is well-versed in all areas of domestic and international logistics law and policy, including extensive contractual arrangements between the various participants central to the movement of products in intrastate, interstate and foreign commerce. Whether in transportation or any other enterprise, Bill has represented corporate clients in asset and equity-based mergers and acquisitions, restructurings, successorship planning and implementation, and discreet and complex contract strategies and negotiations, as well as day-to-day counseling and assisting business clients in their interactions with internal and external legal requirements. Bill is regularly called upon to address industry associations regarding contract issues and solutions, as well as related litigation strategies.

Bill is a past president of the Transportation Lawyers Association and the founder and senior partner of the firm's Transportation and Logistics Group. He is active in the management of Hanson Bridgett's Sacramento office.

Summary of Practice Experience

- Business formation strategies and implementation of founder's business plans and goals
- Shareholder disputes and resolution of associated business conflicts
- Managing stock and/or asset transfers from origin to closing
- Providing advice and counsel to both emerging and mature companies regarding the legal consequences and implications of internal and external management initiatives
- Negotiation and preparation of complex transportation contracts, including comprehensive logistics management and distribution agreements, bills of lading, direct and third-party transportation arrangements, leases and owner-operator related documents;
- Domestic and cross-border transportation, logistics and related supply-chain management planning and structures, including NAFTA compliance and implementation;
- Employment law and independent contractor/employment disputes, overtime, and other transportation employee status issues;
- Loss and damage claims representation; insurance coverage analysis; claims processing/negotiation and litigation;
- International trade, including customs, export licensing, letters of credit, and other foreign trade documentation and processing;
- Antitrust law: counseling and advocacy, as well as unfair trade and business practices in a deregulated environment
- Freight invoice collection issues;
- Federal and state regulatory compliance and audits of services related to transportation activities, including U.S. Department of Transportation and the Surface Transportation Board, as well as various state tax and licensing jurisdictions; and,
- Criminal and civil defense of federal and state enforcement actions against companies and their employees for safety and hazardous materials violations.

Other Academic Distinctions
Associate Professor, Golden Gate University, Graduate School of Management and Logistics (1988-1998); Associate Professor, Graduate School of Business and Management, San Jose State University (1998–present); Certified AAA Mediator and Arbitrator

Speaking Engagements
Lorman, "Transportation and Logistics Law" (Jan. 2004; Jan. 2006)
CEB, "Buying and Selling Small Business" (2003; 2005)
Numerous Industry Presentations

Professional Affiliations
Sacramento County Bar Association; Bar Association of San Francisco; Transportation Lawyers Association (Executive Committee, 1988-present; President 1995-1996); American Trucking Association (Transportation Loss Prevention and Security Council, Legal/Legislative Committee); Conference of Public Utilities Counsel Conference of Freight Counsel; Association for Transportation Law, Logistics and Policy; American Bar Association (Transportation and Insurance Practice); Trucking Industry Defense Association;

Honors
Martindale Hubbell AV Rating
Northern California SuperLawyers, *San Francisco Magazine* (2006 & 2004)
TLA Distinguished Service Award (1995)
TLA Lifetime Achievement Award (2006)

Eric L. Zalud

Transportation and Logistics

Trial

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ERIC L. ZALUD is a partner with and Chair of the firm's Trial Practice Group and heads the Transportation and Logistics Practice Group. He is also the First Vice President of the Transportation Lawyers Association (TLA). Mr. Zalud is a member of the Ohio Foreign Commerce Association; the Association of Transportation Law, Logistics and Policy; The Traffic Club of Cleveland; The Trucking Law Subcommittee of the American Bar Association; The Transportation Consumer Protection Council; the Conference of Freight Counsel; the Transportation Loss Prevention & Security Council; The Transportation Intermediaries Association; The National Tank Truck Carriers; The Association of Transportation Law Professionals; and a regular attendee at the Air Transport Association freight claims seminar. He is also a member of the Defense Research Institute, Trucking Law Subcommittee; the Air Forwarders Association; and the Customs Brokers Roundtable.

He has litigated or arbitrated matters in 23 states, before state and federal trial and appellate courts in various jurisdictions, and before the Surface Transportation Board and the United States Olympic Committee. Mr. Zalud serves on the TLA's committees on freight claims, motor carrier transportation, litigation, logistics and e-commerce. He received the TLA's Distinguished Service Award for 2001.

Mr. Zalud has experience in Warsaw Convention litigation matters, Carmack Amendment litigation, COGSA litigation, PUCO dealings, NHTSA matters, and DOT and Surface Transportation Board matters. He also has general experience in air and surface freight disputes, freight intermediary issues and litigation, private fleet formation, truck sale and purchase issues, freight undercharge and over length disputes, admiralty litigation, freight loss and damage litigation, motor carrier casualty and personal injury work, regulatory and registration issues, driver leasing issues, and general regulatory compliance matters.

Mr. Zalud is a frequent speaker at industry seminars and has authored numerous articles on freight intermediary liability, carrier liability, broker defaults, shipper liability, freight loss and damage, improper loading and contractual liability. He also has experience in preparing and litigating transportation contracts.

In the course of his transportation-related legal work over the years, Mr. Zalud has cultivated a diverse coterie of transportation industry experts across the country. These experts provide him with regular formal and informal

consultation. This ongoing consult gives him valuable industry perspectives on the matters in which he is involved. It also serves as a helpful complement

to his legal experience in these matters.

Mr. Zalud received his A.B. *cum laude* from Miami University and earned his J.D. in 1985 from Vanderbilt University, where he was associate editor of the Vanderbilt Journal of Transnational Law.

He also attended courses on Public International Law at the International Court of Justice in Den Haag, The Netherlands. Mr. Zalud speaks Spanish and Portuguese. He is also licensed to practice in Indiana.