RECENT DEVELOPMENTS AND TRENDS IN CARGO AND LIMITATION OF LIABILITY

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Developments & Case Summaries in Limitation of Liability and COGSA

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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. *MN* 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.

COOSA gave the court jurisdiction. Under COOSA, 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 COOSA'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 COOSA, the court found that Star bore the burden of proving they diligently preserved the clean top. National Starch was entitled to damages subject to COOSA's $500 per package limit.

Second Circuit

Ferrostaal, Inc. v. *MN* **TUPUNGATO, 230 Fed.Appx.ll (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 ofNew York in consolidated cargo damage cases brought under COOSA, 46 U.S.C. § 30701 note. Ferrostaal sought to recover for alleged rust damage and physical damage to steel coils carried on the vessel *MN* 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 COOSA, 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 COOSA. 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 COOSA, 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 *MN* 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 oflading. 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. *MN* 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, SA. v. MIV 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 ofwhat 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 tum 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 carnage.

The issue in this case is whether an NVOCC or other non-rail carriers were entitled to the benefit of the COOSA package limitation under the parties' contracts. COOSA refers to "unreasonable deviation" without defining the term or clarifying its relationship to COOSA'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 COOSA 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. *AlP* 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.

MN 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 oflaw 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) COOSA only applied to the transit and ceased to apply when the goods were unloaded. Accordingly, the COOSA 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. *MN* **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 *MN* 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 *MN* 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. *MN* **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 oflimitations.

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 COOSA 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 COOSA 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 COOSA'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 COOSA, including the package limitation, beyond the "tackle to tackle" period did not conflict with COOSA; (2) the contractual extension of the COOSA 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, UO and Kamdar. The parties filed cross-motions for summary judgment.

APL argued that UO 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. UO and Kamdar asked the court for summary judgment, arguing they were COOSA 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 COOSA §1303(6). APL asked for summary judgment on the issue of liability and damages, arguing that the bill of lading was valid under COOSA because UO 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. UO 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 COOSA because it did not impose strict liability on a shipper in spite of the carrier's own negligence. The court found UO 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. *MN* Cougar Ace, 2007 WL 2344934 (D.Or. 2007)

In an *in rem* admiralty action, Mazda brought a claim against MIV 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 oflading 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 COSOA, 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 COSOA and COSOA 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 COSOA 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 COOSA 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 COOSA'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, COOSA 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 oflading 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 *FN* 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 *FN* 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 ofthe 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 ofNew 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 stem 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 *MN* Astro Libra collided with a Moran assist tug, the John Turecamo, while attempting to berth in Philadelphia. The docking pilot aboard *MN* Astro Libra, Thomas Sullivan, was provided contractually by Moran Towing Corporation. The owners of *MN* 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 *MN* 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. *MN* **Bill Dyer, 2007 WL 674348 (W.D.Pa.. 2007)**

On January 21, 2003, while employed by Mon River Towing as a deckhand on the *MN* 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 *MN* CSS Chicora was underway on the Mississippi with the barge OU701 in tow. The barge struck a stationary vessel, the *MN* Navious Star. Philadelphia Point Fleet, owners of *MN* Chicora, filed for limitation of liability. After the owners of *MN* 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 *MN* 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 pnv1ty 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 ofthe 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 ofthe 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 ofthe 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 Welcra:ft 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 stem 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 hom or slow down before plowing into Kenny's boat.

Troop and Via Sales and Leasing, Inc., the owners of the Welcra:ft 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 oflaw.

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 ofliability was dismissed with prejudice.

Seventh Circuit

In Re: Illinois Marine Towing, --- F.3d---, 2007 WL 2351232 (ih 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 ofliability 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, 1.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 ofbeing 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) PlaintiffTassinari'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 ifKey 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.