

The U. S Waterway System: Admiralty and Maritime Practice, Jurisdiction, Liability, and Insurance

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I. Introduction

This paper will focus on the legal issues arising from the multi-state waterway systems of the United States. Those waterway systems generally pass through and cross the borders of most of the fifty states composing the United States, and, for one system, include Canada. The interstate and international character of the systems gives rise to questions concerning political jurisdiction over the waterways, legal jurisdiction, and the application of federal and state law. While the waterways themselves are ordinarily the result of natural geologic forces, the jurisdiction and governance of the waterways has resulted from Constitutional and historical forces, which have given rise to a most interesting and unique legal regime. That legal regime continues to evolve, much like the waterways continue to flow.

II. Description of the Waterway Systems

The United States has been blessed with numerous waterways, both large and small, short and long, navigable and non-navigable. Many of the rivers in the systems connect one with the other, forming what has been described as “systems” for purposes of usage and management. For purposes of this paper, we group all of the waterways into five systems, based on their common usage and interconnectivity.¹

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A. The Mississippi River System

The Mississippi River System is, perhaps, the primary inland waterway system, as it stretches from Minnesota to Louisiana and includes traffic from the Illinois, Missouri, and Ohio River Systems. The Mississippi River is the primary river in that system. The Mississippi River System includes 9,000 miles of navigable waterways, including the Mississippi, Illinois, Missouri, and Ohio Rivers, with twenty-nine locks. The primary commodity transported within that system is coal, followed by food, farm products, and petroleum.

B. The Ohio River Basin System

The Ohio River Basin System covers approximately 2,800 miles of navigable waterway. Coal is the primary commodity, with significant amounts of aggregates, petroleum, grains, and chemicals transported on the system. There are sixty lock and dam facilities maintained by the U. S. Army Corps of Engineers.

C. The Gulf Intracoastal Waterway System

The Gulf Intracoastal Waterway System consists of 1,109 miles of navigable waterway, primarily found on the East and Gulf Coasts of the United States. This waterway system connects with some of the largest deep-water ports along those coasts and includes ten locks maintained by the U. S. Army Corps of Engineers. Petroleum is the largest commodity shipped on that system, followed by chemicals, crude materials, and coal.

D. The Pacific Coast System

The Pacific Coast System is primarily located in the northwestern segment of the United States, and it is composed of the Columbia, Snake, and Willamette Rivers. At 596 navigable miles, it is somewhat different than the other systems in size, and also because it is not connected to any other waterway system, flowing, instead, directly into the Pacific Ocean. There are eight

locks operating on the river and maintained by the U. S. Army Corps of Engineer. Primary commodities transported on the river include food and farm products, petroleum, crude materials, chemicals, and primary manufactured goods.

E. St. Lawrence River Seaway and Great Lakes System

The St. Lawrence River Seaway-Great Lakes System is the longest inland deep-draft navigation system in the world, extending 3,700 kilometers from the Atlantic Ocean to the head of Lake Superior. The seaway begins in Montreal and extends west to the Welland Canal, connecting the lower St. Lawrence to the Great Lakes. Fifteen locks enable vessels to climb from sea level up to Lake Erie. The end result is an efficient, low-cost marine highway which supports the industrial heartland of North America by transporting cargo to and from one hundred commercial ports between North American and overseas destinations. The system functions as a cooperative effort between the Canadian St. Lawrence Seaway Management Corporation and the U. S. St. Lawrence Seaway Development Corporation.²

It is apparent from just this brief description of the five river systems that the total inland waterway system of the United States covers a significant geographic area. The system connects all but nine of the fifty states, with all of the states located east of the Mississippi River having access to the total system as a result of several smaller river systems. The system is international in scope, as it includes the St. Lawrence River Seaway and the Great Lakes. The system offers substantial commercial opportunities for the cost-effective transportation of various commodities and finished products; recreational usage; and, certainly, various other water resources, including municipal and agricultural irrigation, hydropower, flood control, and general regional development. The infrastructure for the system is constructed, operated, and maintained by the United

States Army Corps of Engineers, and marine navigation is ordinarily regulated by the United States Coast Guard.

III. Admiralty and Maritime Law and the Waterway Systems

A. Subject Matter Jurisdiction of Federal and State Courts

The political structure of the United States consists of a federal government and fifty state governments bound together by the United States Constitution. Prior to the Constitution, it was recognized that admiralty courts had jurisdiction over maritime matters. That jurisdiction was subsequently codified in Article III, Section 2, Clause 1, the “Admiralty Clause,” of the Constitution, which mandates that “(a) all Cases of admiralty and maritime Jurisdiction ‘are within the judicial power of the United States.’” Additionally, Article I, Section 8, Clause 3, the “Commerce Clause,” of the Constitution provides that Congress shall have the power “To regulate commerce with foreign Nations, and among the several states.” The Supremacy Clause of the Constitution (Article VI, Section 2) makes the constitutional acts of Congress “the supreme law of the land,” and the United States Supreme Court, early on, recognized the primacy of admiralty and maritime law under the Constitution as necessary for uniformity and consistency, which would not be the case if the law was subject to regulation by the states.³ Subsequent to the ratification of the Constitution, Congress granted admiralty jurisdiction to the federal courts in the Judiciary Act of 1789.⁴

Federal courts in the United States, sitting in admiralty, have jurisdiction over maritime activity occurring on all waters, whether or not they are connected to any oceans, which are used or are capable of being used in interstate or foreign commerce, either in their natural state or which are possible to make navigable with a reasonable expenditure. In *THE DANIEL BALL*,⁵ the Supreme Court defined “navigable waters of the United States” as those that “form in the

ordinary condition by themselves, or by united way of the waters, a continued highway over which commerce is or may be carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water.” It is in that definition that admiralty and maritime jurisdiction is exercised over the waterway systems in the United States.

With admiralty jurisdiction comes the application of substantive admiralty law.⁶ The courts have recognized that the federal system requires uniformity of substantive law in maritime matters. The application of federal maritime substantive law is such that even nonadmiralty courts must apply it on matters directly affecting marine commerce or which involve the “characteristic features” of maritime law.⁷

The application of federal maritime substantive law is important, and examples may be found, *inter alia*, in the following types of cases:

- Cases involving the *in rem* or *quasi in rem* admiralty procedures found in the Admiralty Maritime Rules of the Federal Rules of Civil Procedure, such as vessel seizures under Rule C, Rule B garnishment actions, limitation-of-liability actions, etc.;
- Commercial activities that involve the use of navigable waterways;⁸
- Recreational boating activities, including the operation and maintenance of recreational vessels when those vessels are to be used on navigable waters;⁹
- Maritime contracts which concern commerce on the sea, relate to commerce or navigation on navigable waters, or concern maritime employment;¹⁰
- Contracts to repair or reconstruct vessels after they have already been placed in service;¹¹
- Contracts for the purchase of a vessel which include a charter obligation, because the charter obligation would be subject to admiralty jurisdiction;¹²
- Passenger contracts of carriage;¹³
- Seamen’s wage disputes;¹⁴
- A general agency agreement for providing husbanding services to a vessel;¹⁵

- Wharfage and on-land storage, so long as the vessels are not withdrawn from navigation;¹⁶
- Contracts for offshore oil exploration;¹⁷
- Storage which is incidental to the marine transportation of cargo;¹⁸
- Marine insurance contracts [more will be said on this later in this paper];
- Contractual salvage claims;¹⁹
- Providing necessities to a vessel, whether subject to the Federal Maritime Lien Act or not;²⁰
- Maritime torts, which are torts that occur on navigable waters and have some nexus with traditional maritime activities;²¹
- Casualties involving pleasure craft when the casualty arises out of the operation of a recreational boat on navigable waters;²²
- Injuries sustained by federal longshore and harbor workers;
- Casualties to commercial divers;²³
- Shore-side activities impacting vessel navigation;
- Injuries to water skiers;²⁴
- Pollution claims;²⁵
- Ship-caused injury occurring ashore;²⁶
- Deaths on the high seas, as extended by the Death on the High Seas Act, 46 U.S.C. App. § 761; and
- Product liabilities claims based on negligence or strict liability in tort.²⁷

There are also numerous federal statutes governing many aspects of maritime commerce and activity, many of which impact the waterways system.

While the application of substantive admiralty law comes with the availability of admiralty and maritime jurisdiction, an interesting feature of the United States federal system is that state

law may also be available as a basis for judicial decision-making where federal maritime law is incomplete and does not preempt regulation of the issue.²⁸ This issue of the application of state law over maritime activities can be problematic. In dealing with the issue, the courts have developed the doctrine of “federal preemption” to limit the application of state law in maritime matters, but that doctrine does not necessarily lead to a well-defined demarcation between the two bodies of law, leaving the states “a wide scope” of possible involvement.²⁹ Thus, the line between the importance of national uniformity in maritime law and the respect for state interests implied in our federal system is not always easily drawn.

In dealing with the federal-versus-state interests in applying federal admiralty and maritime law, some courts apply a balancing test. By applying the balancing test, courts seek to determine if there is an established federal rule of maritime law which cannot be supplanted by a conflicting state law, or to determine if a state has a substantial interest in the subject at issue, which takes precedence over the doctrine of uniformity. This leads to a case-by-case analysis, with a careful weighing of both state and federal interests. Examples of courts finding that state law may govern certain maritime activities are as follows:

- Contracts for purchase and sale of vessel;³⁰
- A state may apply its employment anti-discrimination legislation to a ship owner’s headquarters in the state, because such application would not compromise uniformity of the admiralty system;³¹
- Contracts preliminary to navigation;³²
- A state law allowing recovery of economic loss may be available;³³
- Federal substantive law does not conflict with state statutory remedies for sexual harassment;³⁴
- State legislation providing for strict liability for pollution by hazardous substances can apply to marine pollution;³⁵

- There is an assumption of nonpreemption of state regulation when a state regulates health and safety matters that fall within the state’s police powers;
- Nonmaritime activities, such as the construction of bridges, piers, and other structures, on navigable waters not subject to maritime jurisdiction, and state law applies;³⁶
- Police powers reserved in the U. S. Constitution may be used to regulate conduct for the public welfare;³⁷
- Federal water pollution statutes expressly provide that their application does not preempt application of state law;
- Where there is no recognized general maritime law on an issue, and the matter does not require national uniformity, state law may be applied;³⁸
- Certain forfeitures of maritime property under state law have been allowed,³⁹ and
- State regulation regarding inspection regulation of vessels in the interest of safety has also been permitted.⁴⁰

The courts in maritime cases have also drawn the distinction between national and local interests by adhering to a “maritime but local” doctrine, where the courts recognized that while there are some maritime interests involved in a matter, the case is nevertheless local, and, therefore, the principles of national uniformity do not apply, and state law governed exclusively.⁴¹ Many of these cases have come up in the context of maritime workers’ and state workers’ compensation legislation.⁴² There is also a recognized “twilight zone” when a case may fall either within the exclusive maritime jurisdiction or exclusive state jurisdiction. This, again, has generally been raised in issues dealing with seamen’s remedies, including those available through state workmen’s compensation remedies.

In addition to cases where state regulations or statutes are determined to conflict with established federal maritime law, Congress may also preempt state law by legislation passed within its powers under the U. S. Constitution. There are two categories of this type of preemption:

- “Field preemption,” which occurs if Congress explicitly or impliedly states that a federal law will exclusively regulate the field; and
- “Conflict preemption,” which provides that federal law will preempt state law when it actually conflicts with that federal law.

It is easy to see from the many examples that while the courts have applied substantive maritime law to matters arising within the scope of federal maritime jurisdiction, the federal nature of the United States has also allowed for other more local governmental entities to impact on maritime interests where federal law does not preempt the local interests.

Two other features arising out of the federal-local issue are the concept of “savings to suitors” and the concept of case removal. 28 U.S.C. § 1333 contains what is commonly referred to as the “savings to suitors” clause, which permits a plaintiff to file his maritime case in a state court if that state court has jurisdiction over both the parties and the subject matter. The state courts still must apply substantive federal maritime law, but may also apply state law if maritime law is incomplete and does not preempt federal regulations or statutes.

While the plaintiff does have leeway as to its choice of forum under the “savings to suitors” clause, a defendant also has the right to remove a case filed in state court to a federal court, pursuant to 28 U.S.C. § 1441, if the case is one within the “original jurisdiction” of the United States District Courts. This is subject to the caveat that an action filed in state court cannot be removed to federal court on grounds only that it is within admiralty jurisdiction, unless it also has an independent basis for federal jurisdiction, such as diversity of citizenship of the parties or that the cause of action involves a federal question.⁴³ As a result, maritime litigants may find themselves litigating maritime issues in state courts, which are not always the most informed and expeditious venues for handling such cases and, in the case of personal-injury actions, generally favor injured plaintiffs.

B. Marine Insurance

Marine insurance encompasses many different forms of policies, including protection and indemnity coverage, hull coverage, open marine cargo policies, pollution coverages, and a comprehensive marine general liability policy, which includes coverages for marine and nonmarine liabilities. All of these types of policies are available for usage by insureds doing business on the waterways.

Generally speaking, marine insurance contracts are within admiralty jurisdiction.⁴⁴ However, for there to be admiralty jurisdiction, the insurance must involve a maritime interest, such as a vessel cargo or other such interests. The object of the coverage must have a “genuinely salty flavor” for the policy to fall within maritime jurisdiction.⁴⁵ When there are both maritime and nonmaritime elements, and they are inseparable one from the other, a court sitting in admiralty may adjudicate the matter through the extent of the maritime interest.⁴⁶ Otherwise, state substantive law may be used to interpret or apply coverages in nonmaritime aspects of such disputes.⁴⁷

C. Regulating the Waterways

Supervision, operation, maintenance, and regulation of the waterways are generally the responsibilities of the federal government. The U. S. Army Corps of Engineers is tasked with the construction, operation, and maintenance of the waterways’ infrastructure, such as locks and dams, navigation channels, and other related infrastructure. Commercial barge shippers and other waterway users receive significant support through federal funding for operational costs, capital expenditures, and major rehabilitation of the waterways. The Water Resources Development Act of 1986 provides that expenditures for construction and major rehabilitation projects on the inland waterways are co-shared on a 50/50 basis between the federal government and commercial users through the Inland Waterways Trust Fund (“IWTF”). Operations and maintenance

costs for the inland waterways are a 100% federal responsibility. The IWTF is supported by a 20¢-per-gallon tax on commercial barge fuel. Future financing for the inland waterways system is the subject of an ongoing debate in Washington.⁴⁸

The United States Coast Guard (“USCG”) is tasked with regulating the operation of vessels on the waterway system. The USCG discharges its responsibilities through authority granted to it by federal statutes and regulations, which allow it to set compliance standards for the design, construction, and safety features of vessels; documentation and registration of vessels; determine and enforce the rules of navigation and operation; inspect vessels for compliance; engage in a comprehensive monitoring of vessel operations on the waterways; and promulgate and enforce safety regulations on vessel operators. On a day-to-day basis, users of the water systems interact with the USCG on a regular basis.

Finally, the Environmental Protection Agency (“EPA”) is charged with seeing that the waterways are kept in compliance with the federal environmental regulations and statutes. On certain issues where there is dual jurisdiction from both the USCG and the EPA (such as for vessel general permits and ballast water issues), the USCG and the EPA try to work together to develop a consistent interpretation and application of the laws to provide a level of certainty to users of the waterway systems.

IV. Summary and Conclusion

This paper has attempted to describe some of the physical aspects of the U. S. waterways system and the challenges it presents for admiralty and maritime practice, jurisdiction, liability, and insurance. While the law recognizes the primacy and need for uniformity of admiralty and maritime law as it applies to the navigable waterways, the federal system of the United States also allows for an intersection of law and interests between the federal government and the indi-

vidual states. Concepts such as uniformity, preemption, and maritime-but-local come into play to determine issues of maritime practice, jurisdiction, liability, and insurance. Those doctrines and the applicable law in general continue to evolve, balancing the need for uniformity with the demands of the federal political structure of the United States.

¹For extensive details on the types of commodities transported on the rivers, types of facilities, and economic impact, see, e.g., *An Overview of the U. S. Inland Waterway System*, IWR Report 05-WETS-R-12 (11-1-2005), U. S. Army Corps of Engineers; and *The U. S. Waterway System-Transportation Facts & Information*, U. S. Army Corps of Engineers, November 2012. This section borrows extensively from those publications.

²For more detail, see the Annual Report 2011-2012, “Delivering Economic Value,” published by The St. Lawrence Seaway Management Corporation.

³*THE LOTTAWANNA*, 88 U.S. 558, 575 (1875).

⁴The current codification of admiralty jurisdiction is found in 28 U.S.C. § 1333.

⁵77 U.S. 557, 563 [retro], 2000 AMC 2106 (1871).

⁶*East River S.S. Co. v. Transamerica DeLaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986).

⁷*Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205 (1917); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 1942 AMC 1645 (1942); *Panama Ry. Co. v. Johnson*, 264 U.S. 375, 1924 AMC 551 (1924); *Oil Workers v. Mobile Oil Corp.*, 426 U.S. 407 (1976).

⁸*State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

⁹*Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 1982 AMC 2253 (1982).

¹⁰*Norfolk Southern Railway Company v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14; 2004 AMC 2705, 125 S. Ct. 385 (2004); *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 1982 AMC 2541 (2nd Cir. 1982).

¹¹*North Pacific S.S. Co. v. Hall Brothers Ship Building*, 249 U.S. 119 (1919).

¹²*The Ada*, 250 F. 194 (2nd Cir. 1918).

¹³*The Moses Taylor*, 71 U.S. 411 (1867).

¹⁴*Fuller v. Golden Age Fisheries, Inc.*, 14 F.3d 1405, 1994 AMC 1275 (9th Cir. 1994).

¹⁵*Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 1991 AMC 1817 (1991).

¹⁶*Selame Associates, Inc. v. Holiday Inns, Inc.*, 451 F. Supp. 412 (D. Mass. 1978); *Medema v. Gumbos' Marina Corp.*, 1983 AMC 1611 (N.D. Ill. 1982).

¹⁷*Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986).

¹⁸*Horizon Insurance Co. v. Kinsman Marine Transit Co.*, 256 F. Supp. 9, 1966 AMC 257 (1965).

¹⁹*Cope v. Vallete Dry-Dock Co.*, 119 U.S. 625 [retro], 2002 AMC 2694 (1887); *Broere v. \$2,133*, 72 F. Supp. 115, 1948 AMC 1056 (E.D.N.Y. 1947); *Tidewater Salvage, Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304; 1982 AMC 719 (9th Cir. 1980).

²⁰*Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 2002 AMC 2248 (9th Cir. 2002); 46 U.S.C. § 31301, *et seq.*

²¹80 ALR F. 105.

²²*Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 1982 AMC 2253 (1982); *Sisson v. Ruby*, 497 U.S. 358, 1990 AMC 1801 (1990).

²³*Sinclair v. Soniform*, 935 F.2d 599 (3rd Cir. 1991).

²⁴*O'Quinn v. Signa Property & Casualty*, 2002 AMC 2459 (Fl. Cir. Ct. 2002).

²⁵*Union Oil Co. v. Oppen*, 501 F.2d 558, 1975 AMC 416 (9th Cir. 1974).

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- ²⁶The Admiralty Jurisdiction Extension Act, 46 U.S.C. Appendix § 740; *Young v. Players Lake Charles, LLC*, 47 F. Supp. 2d 832, 1999 AMC 2529 (7th Dist. Tex. 1999).
- ²⁷*East River S.S. Corp. v. Transamerica DeLaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986).
- ²⁸*Tungus v. Skovgaard*, 358 U.S. 588, 1959 AMC 813 (1959); *Wilburn Boat Co. v. Fireman's Fund Insurance*, 348 U.S. 310, 1955 AMC 467 (1955).
- ²⁹*Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373; 1959 AMC 832 (1959).
- ³⁰*Kossick v. United Fruit Co.*, 365 U.S. 731, 1961 AMC 833 (1961).
- ³¹*Morgan v. Tyson Seafood Group, Inc.*, 1998 AMC 1185 (W.D. Wash. 1997).
- ³²*Shipping Financial Services Corp. v. Drakos*, 140 F.3d 129, 1998 AMC 1578 (2nd Cir. 1998).
- ³³*Kodiak Island Borough v. Exxon Corp.*, 991 P. 2d 757 (Alaska 1999).
- ³⁴*Hoddevik v. Arctic Alaska Fisheries Corp.*, 975 P. 2d 563, 94 W.N. App. 268 (W.N. App. 1999).
- ³⁵*Paul v. All Alaskan Seafoods, Inc.*, 106 W.N. App. 406, 202 AMC 991, 25 P. 3d 1040 (W.N. App. 2001).
- ³⁶*W. R. Grace & Co. v. Department of Labor and Industries*, 178 Wash. 4, 33 P. 2d 659 (1934).
- ³⁷*Askew v. American Waterway Operators, Inc.*, 411 U.S. 325, 1973 AMC 811 (1973).
- ³⁸*Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955).
- ³⁹*Hendry v. Moore*, 318 U.S. 133, 1940 AMC 1392 (1942); *State of Alaska v. F/V Baranoff*, 677 P. 2d 1245 (AK 1984).
- ⁴⁰*United States v. Locke*, 529 U.S. 89, 2000 AMC 913 (2000); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 1937 AMC 1490 (1937).
- ⁴¹*Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).
- ⁴²*Pacific Merchant Shipping Association v. Aubry*, 918 F.2d 1409, 1991 AMC 2797 (9th Cir. 1990).
- ⁴³*Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959).
- ⁴⁴*New England Mutual v. Dunham*, 78 U.S. 1 [retro], 1997 AMC 2394 (1870).
- ⁴⁵*Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 281 F. Supp. 2d 530, 2003 AMC 2344 (E.D.N.Y. 2003).
- ⁴⁶*Flota Maritima Browing de Cuba v. Snobl*, 363 F.2d 733, 735; 1966 AMC 1999, 2003 (4th Cir. 1966).
- ⁴⁷*Angelina Casualty Co. v. Exxon Corp. USA, Inc.*, 876 F.2d 40 (5th Cir. 1989).
- ⁴⁸"Inland Waterways: Recent Proposals and Issues for Congress," Congressional Research Service 7-5700, May 3, 2013, prepared for members and committees of Congress.