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Circuit and District Court Treatment of Vessel and Seaman Status Following Stewart v. Dutra

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Introduction

The definition of "vessel" is significant in maritime law for a number of reasons. It can affect admiralty jurisdiction, documentation requirements, Coast Guard regulations, maritime liens, and perhaps most importantly, the rights of maritime workers as against their employers. The issue of what constitutes a "vessel" for various purposes has been highly litigated in the federal courts and the case law illustrates two different uniformity issues. One is the issue of uniform treatment of legal issues by the Federal Circuits and District Courts. The other is uniform interpretation of a particular word, here "vessel," as the word is used in various contexts. The Supreme Court's decision in *Stewart v. Dutra* seems to have hit on both issues; however, it may have opened up some new areas of debate for the lower federal courts.

Background

The definition of a "vessel" is most often litigated in the context of determining "seamen" status for purposes of either the Jones Act or the Longshore and Harbor Worker's Compensation Act (LHWCA). The Jones Act, 46 U.S.C. § 688, provides maritime employees identifiable as "seamen" a cause of action in tort against their employers in addition to their traditional right to maintenance and cure. The Jones Act does not define "seaman." The LHWCA, 33 U.S.C. § 901 *et seq.*, provides non-"seamen" maritime employees worker's compensation benefits, but does not provide a negligence claim against employers. The LHWCA filled in the gap between state worker's compensation regimes which exclude maritime workers and coverage for "seaman" under the Jones Act, by excluding coverage under the LHWCA for "a master or member of a

crew of any vessel." 33 U.S.C. § 902(3)(G). Courts have found that this exclusion under the LHWCA also provides the definition of "seaman" under the Jones Act. Thus, coverage under the LHWCA and the Jones Act are considered to be mutually exclusive and dependent upon a claimant's status as a "seaman." Because the definition of a "seaman" is "a master or member of a crew of any *vessel*," the definition of vessel has become highly relevant to determining whether an injured maritime employee is entitled to recover under the Jones Act or the LHWCA. Thus, after disparate treatment of the term by the Circuit Courts, the Supreme Court in *Stewart v. Dutra* sought to clarify the definition.

Stewart v. Dutra

In *Stewart v. Dutra Construction Co.*, 125 S. Ct. 1118 (2005), William Stewart brought suit against Dutra as his employer under the Jones Act, and, under an alternate claim for relief, as a third party "vessel" owner under the LHWCA. Recovery under either claim depended upon whether the *Super Scoop* (a dredge used in the "Big Dig" in Boston Harbor) was a "vessel." Dutra sought summary judgment on the Jones Act claim arguing that the *Super Scoop* was not a vessel and that Stewart was therefore not a "seaman." The District Court granted summary judgment, and the First Circuit affirmed, because "the Super Scoop's primary purpose was dredging rather than transportation and because it was stationary at the time of Stewart's injury." *Dutra*, 125 S. Ct. at 1122. Stewart's alternative claim was ultimately denied because the First Circuit agreed that if Dutra was negligent, it was as an employer not a vessel owner. The Supreme Court granted certiorari "to resolve confusion [among the Circuits] over how to determine whether a watercraft is a "vessel" for purposes of the LHWCA." *Dutra*, 125 S. Ct. at 1123.

The Supreme Court held that the definition of a vessel for purposes of the LHWCA, and by implication the Jones Act, is contained in 1 U.S.C. § 3, which states that "[t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* at 1124. In light of this definition, the Supreme Court rejected the notion that vessel status requires a primary purpose of navigation or commerce, or, that the structure must actually be in transit at the time an injury occurs to be deemed a "vessel."[1] *Id.* at 1127. The Supreme Court stated "Section 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose." *Id.* Further, the Court stated "a watercraft need not be in motion to qualify as a vessel under § 3" rejecting the "snapshot" test for "vessel" status. The "snapshot" test would allow Jones Act status to fluctuate depending on an employees' activities at any given moment or whether the vessel was actually moving at the time of an accident. *Id.* at 1128. The "in navigation" requirement often addressed in the context of vessel status, according to the Supreme Court, does not require actual movement at a given time, but rather that there be a practical or theoretical possibility that a given watercraft could be used as a "means of transportation on water." *Id.*

The *Super Scoop* is a dredge which consists of a floating barge used to scoop silt with a clamshell bucket from the ocean floor and onto scows. The *Super Scoop* only has a limited means of self propulsion and requires the aid of a tug to move long distances. Notwithstanding, the *Super Scoop* could move short distances by manipulating its anchors and cables. Applying

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[1] The First Circuit decision in *Stewart v. Dutra* was premised on the holding in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (2d Cir. 1992), which held that for something to be considered a vessel it must be actually "in navigation" at the time of the injury if the primary purpose of the structure is not navigation or commerce.

the § 3 definition of "vessel," the Supreme Court found that the *Super Scoop*, was a "vessel" for purposes of the LHWCA. *Id.*

The Court withheld judgment on whether Stewart was a "seaman" for purposes of the Jones Act. However, the Court acknowledged that,

> [a] maritime worker seeking Jones Act seaman status must also prove that his duties contributed to the vessel's function or mission, and that this connection to the vessel was substantial both in nature and duration. Thus, even though the *Super Scoop* is a 'vessel,' workers injured aboard the *Super Scoop* are eligible for seaman status only if they are 'master[s] or member[s]' of its crew.

Id. at 1127. While the Court's decision did not change the remainder of the test for "seaman" status, it arguably broadened and clarified the definition of a "vessel" which is a vital component of determining seaman status.

Federal Case Law Following *Stewart v. Dutra*

I. The First Circuit - *Stewart v. Dutra* on Remand

As expected, the First Circuit on remand held that the *Super Scoop* was a vessel and that William Steward was a "seaman" for purposes of the Jones Act. *Stewart v. Dutra Construction Co., Inc.*, 418 F.3d 32 (1st Cir. 2005). The First Circuit also attempted to resolve any uncertainty as to whether the definition of "vessel" proffered by the Supreme Court applied to the Jones Act even though it was couched in terms of the LHWCA. The First Circuit stated in part:

> Although the certiorari petition's primary focus was on the Jones Act claim, the Stewart Court explained that it had "granted certiorari to resolve confusion over how to determine whether a watercraft is a 'vessel' for purposes of the LHWCA." Closely read, however, the opinion itself clears up any apparent confusion. It notes that the LHWCA and the Jones Act are "complementary regimes that work in tandem" and, hence, that the definition of what constitutes a "vessel" for purposes of either statute is the same. In this sense, then, the LHWCA and the Jones Act are two sides of the same coin. Since a Jones Act claim is at issue here, we concentrate on that side of the coin.

Id. at 1906 (citations omitted). Thus, given that the Supreme Court found the *Super Scoop* to be a "vessel" for purposes of the LHWCA, it must also be a "vessel" for purposes of the Jones Act.

Discussion Points: It is the First Circuit's view that "vessel" status for Jones Act and LHWCA are now both one and the same, is there any doubt that this is the result intended by the Supreme Court? Does *Stewart v. Dutra* support the argument that anytime "vessel" status is an issue in any context, from this point forward, the definition from 1 U.S.C. § 3 will apply? Did the Supreme Court decision succeed in creating both types of uniformity with respect to "vessel" status, i.e. amongst the Circuits and in various contexts?

II. The Western District of Michigan (6th Cir.) – *Arnold v. Luedtke Engineering*

The first lower federal court to address the Supreme Court's ruling in *Stewart v. Dutra* was the Western District of Michigan, in the Sixth Circuit, issuing its opinion only two (2) days after *Stewart*. In *Arnold v. Luedtke Engineering, Co.*, 357 F. Supp. 2d 1019 (W.D. Mich. 2005), Richard Arnold had been employed by Luedtke Engineering for 23 years performing a variety of different maritime related jobs. Arnold's most recent position with Luedtke was as a project foreman for a seawall construction project. Considering only Arnold's most recent assignment, referred to as the "wedge plate phase" of the seawall construction project, the court addressed the "vessel" status of three different structures used by Arnold in performing his job: a floating work raft, a tug boat, and a derrick boat. The Court found that both the tug and the derrick easily had "vessel" status, however held that, under *Stewart v. Dutra*, the floating work raft was not a "vessel."[2] The work raft was a forty (40) by six (6) foot pontoon raft. The raft was used as a platform for Arnold to stand on when he was installing metal plates to the water side of the sea wall. The workers moved the raft around the seawall by hand. *Arnold*, 357 F. Supp. 2d at 1021. The court found that the floating raft was not a "vessel" because "it is not 'practically capable' of transporting anything."

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[2] Arnold did not argue that the connection to the work raft constituted a connection to a vessel. *Arnold*, 357 F. Supp. 2d at 1024. Notwithstanding, the Western District found that it was not.

Ultimately the court decided that Arnold was not a "seaman" because, even though two vessels were involved in the project, and Arnold piloted the tug three to four times a day to move the derrick boat, that connection was not substantial as it took up less than 10% of his total work time on any given day. The court referenced the 30% rule of thumb requirement that in order to be considered a "seaman," a worker must spend at least 30% of his time in service of a vessel. *Id.* at 1025. The court found that Arnold was a land based employee not entitled to a cause of action under the Jones Act.

Discussion Points: Was the court's finding that the floating raft was not a "vessel" consistent with the § 3 definition of vessel and the mandate of the Supreme Court in *Stewart v. Dutra*? Was the raft really not practically capable of transporting anything on water? Doesn't the decision suggest that the raft was used to transport both workers and equipment over water albeit by short distances? If the raft is not a vessel, why not? If the raft were found to be a vessel, did Arnold contribute to its function by standing on it to perform his work? Does the Supreme Court's decision actually achieve uniformity in light of this decision?

III. The Second Circuit – Uzdavines v. Weeks Marine

Last August, the Second Circuit decided *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir. 2005), acknowledging that it held the case in abeyance for over a year pending the Supreme Court's decision in *Stewart v. Dutra*. Frank Uzdavines was employed aboard a "bucket" dredge by Weeks Marine where he was allegedly exposed to asbestos which caused his cancer and subsequent death. Mr. Uzdavines' widow sought death benefits pursuant to the LHWCA. The U.S. Department of Labor, Benefits Review Board concluded that Mr. Uzdavines was not covered under the LHWCA because he *was* a "member of a crew of [a] vessel." *Uzdavines*, 418 F. 3d at 140. Following the Supreme Court's ruling in *Stewart v. Dutra*, the Second Circuit denied the petition for review of the Board decision because the Court agreed that Mr. Uzdavines was a "member of a crew of [a] vessel," a.k.a.. a "seaman."

This case is slightly unusual, because typically "vessel" status is at issue because a plaintiff is trying to establish that he, or the deceased spouse, is a "seaman" and thus covered by

the Jones Act and entitled to sue his employer in tort. Unlike the typical situation, here, Petitioner seeks a determination that her husband was not a "seaman" and that she is therefore entitled to death benefits under the LHWCA. *Id.* at 142. Petitioner conceded that pursuant to *Stewart v. Dutra*, a "bucket" dredge constitutes a vessel, but argued that the vessel was not "in navigation" and that Mr. Uzdavines' connection to it was not substantial in duration and nature. *Id.* at 144. The Second Circuit rejected Petitioner's arguments concluding that the "bucket" dredge was virtually indistinguishable from the *Super Scoop* and that like the *Super Scoop*, the dredge was in active use during the time that Mr. Uzdavines worked aboard the vessel. The Court held that *Stewart* supersedes the prior Second Circuit test requiring navigation to be the primary purpose of a vessel for it to be "in navigation." *Id.* Further, the Second Circuit rejected Petitioner's contention that Mr. Uzdavines' work history should be considered when assessing his connection to the vessel. Mr. Uzdavines had been assigned to the vessel full time for four (4) weeks and his work prior to that according to the Court was irrelevant. *Id.* at 145. Thus, the Second Circuit following *Stewart* found that Petitioner was not entitled to death benefits under the LHWCA.

Discussion Points: In light of the broad definition of "vessel" adopted by the Supreme Court, and the therefore broadened definition of "seaman" status, does it still make sense to have two different regimes for "seaman" and non-"seaman" marine workers? Should brown-water "seamen" be allowed to sue their employers in tort given that many of them are not actually exposed to the "perils of the sea?" Does it make sense that certain brown water "seamen" would have more rights against their employer's than many other non-"seamen" maritime employees performing similar work functions?

IV. The Western District of Louisiana (11th Cir.) – *Cain v. Transocean Offshore*

The Western District of Louisiana, following *Stewart v. Dutra*, found that an oil rig still under construction and undergoing sea trials constitutes a "vessel" in *Cain v. Transocean Offshore Deep Water Drilling, Inc.*, 2005 U.S. Dist. LEXIS 17643 (W.D.La. 2005). Plaintiff Rocky Cain brought claims against his employer pursuant to the Jones Act for injuries he allegedly sustained while working aboard an oil rig stationed in the Gulf of Mexico. *Cain*, 2005 U.S. Dist. LEXIS 17643 at *9. The Court rejected Transocean's argument, based on pre-*Stewart* Fifth Circuit precedent, that the rig was not a "vessel" because it was still under construction. The definition adopted by the Supreme Court was broad enough to include vessels under construction so long as they are capable of navigation. The rig was not only capable of navigation, but it had already been used as a means of transportation. *Id.* at *23. The fact that the rig was still under construction did not preclude a finding that it was a "vessel."

Discussion Points: Is an oil rig more akin to a traditional "vessel" than a barge or a raft? Should any vessel undergoing sea trials be considered a "vessel" under the new definition even if it is not actually used as a means of transportation?

V. The Eighth Circuit – Bunch v. Canton Marine Towing

The only Circuit other than the Second that has yet sought to follow *Stewart v. Dutra* is the Eighth in *Bunch v. Canton Marine Towing Co., Inc.*, 419 F.3d 868 (8th Cir. 2005). In *Bunch*, the Eighth Circuit found that a cleaning barge moored to the bed of the Missouri river, with spud poles extending through the center of the barge, constitutes a "vessel" and that an employee working aboard the barge as a "barge cleaner" is a "seaman" for purposes of the Jones Act. The cleaning barge had no means of self propulsion and during the course of Plaintiff's employment (242 days) had only been moved one time from one side of the river to the other. Plaintiff was

not actually injured aboard the barge, but rather while on a tug that transported him to and from the barge. Notwithstanding, the Court focused on the status of the barge and whether it was a "vessel," not the status of the tug or Plaintiff's connection to it. The Court found that "vessel" status is not dependent upon self propulsion and that because the barge was capable of transportation over water, evidenced by the fact that it had been moved from one side of the river to the other, the barge was a "vessel." The Eighth Circuit acknowledged that this type of "vessel" touched the outer limits of the Supreme Court's broad definition.

Discussion Points: Does the finding that a "cleaning barge" is a "vessel" seem inconsistent with the court's finding in *Arnold* that a floating raft is not a "vessel?" If this case illustrates the "outer limits" of "vessel" status, what is the cut off point? If the barge had not moved during Plaintiff's employment would it have been deprived of vessel status? Is it appropriate to limit the evaluation of a vessel's status to the duration of Plaintiff's employment? Should the status of a vessel be susceptible to the length of an employee's service?

Conclusion

The Supreme Court weighed-in on the definition of "vessel" purportedly to clear up confusion amongst the Circuits. *Stuart v. Dutra* together with the prior and subsequent Federal Courts' treatment of "vessel" status illustrate the ongoing interplay between the lower federal courts and the Supreme Court in an effort to attain some level of uniformity. As the lower federal courts begin to follow the lead of the Supreme Court, it is clear that while the new definition of "vessel" may be somewhat clearer than some of the definitions used by the various Circuits, there is still plenty of room for debate about what constitutes a "vessel."

Other Recent Cases of Interest

By Kimbley A. Kearney

Supreme Court Holds That The ADA is Applicable to Foreign Vessels

In *Douglas Spector, et al v. Norwegian Cruise Lines, Ltd.*, 125 S.Ct. 2169 (2005), the Supreme Court reversed the U.S. Court of Appeals for the Fifth Circuit and held that Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et. seq.*, is applicable to foreign flag cruise ships operating in U.S. waters.

Facts

Plaintiffs, mostly U.S. residents, are disabled individuals and their companions who purchased tickets from Norwegian Cruise Lines ("NCL") in 1998 or 1999 for roundtrip cruises on either the Norwegian Sea or Norwegian Star. Both of NCL's cruise ships are foreign-flag vessels, which, plaintiffs contended, had physical barriers aboard ship which violated Title III of the ADA. Title III prohibits discrimination in places of public accommodation and public transportation services, and requires covered entities to make "reasonable modifications in policies, practices or procedures to accommodate disabled persons and to remove architectural barriers, and communication barriers that are structural in nature where such removal is readily achievable." *Spector*, 125 S. Ct. at 2170, *citing* 42 U.S.C. § 12181(6)(2)(A).

The trial court dismissed plaintiffs' Title III claims, and the Fifth Circuit affirmed. The Fifth Circuit held that the ADA is inapplicable to foreign vessels because it found no indication, either in the statutory text or in the ADA's extensive legislative history, that Congress specifically intended Title III to apply to foreign-flagged cruise ships. *See Spector v. Norwegian Cruise Line*, 356 F.3d 641 (5th Cir. 2004), 2004 AMC 254.

Analysis

The Supreme Court disagreed. Justice Kennedy, writing for the majority, stated that "[a]lthough the [ADA's] definitions of public accommodation and specified public transportation do not expressly mention cruise ships, there can be no serious doubt that the NCL cruise ships fall within both definitions under conventional principles of interpretation." *Spector*, 125 S. Ct. at 2177. As a general rule of statutory interpretation, United States statutes apply to foreign-flag ships in United States territories. This rule is subject to a narrow exception: "Absent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel." *Id.* The Court stated that it is reasonable to presume that Congress does not intend to interfere with matters that are of concern only to a foreign ship and to the foreign state in which it is registered. However, the Court also stated that it is reasonable to presume that Congress does intend its statutes to apply to entities that are in United States territory that:

> serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States, even if those entities happen to be foreign-flag ships . . . To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled.

Id. at 2178. The Court did not attempt to define the "internal affairs" of a cruise ship with precision, stating that "the guiding principles in determining whether the clear statement rule is triggered are the desire for international comity and the presumed lack of interest by the territorial sovereign in matters that bear no substantial relation to the peace and tranquility of the port." While noting that Title III has its own limitations and qualifications on the extent to which permanent and substantial changes in a ship's architecture and design could be required, the

Court held that Title III is applicable to foreign ships in United States waters to the same extent that it is applicable to American ships in those waters.

After *Spector*, an "application-by-application use of the internal affairs clear statement rule" must be employed to determine whether a particular physical barrier, policy or practice aboard a cruise ship runs afoul of Title III. 125 S.Ct. at 2181. The Court concluded that this approach is consistent with the manner in which it has long interpreted the "clear statement" rule. *Id.* Thus, on a case by case basis, a Court should examine the physical barrier, practice or policy complained of and determine whether requiring a change for the benefit of disabled persons might interfere with the internal affairs of foreign ships. The Court stated:

> "A permanent and significant modification to the ship's physical structure goes to fundamental issues of ship design and construction, and it might be impossible for a ship to comply with all the requirements different jurisdictions might impose." *Id.*

The Court cautioned that, in many situations, it may not be necessary to resort to the clear statement rule when determining the applicability of Title III to a cruise ship. The Court pointed out that Title III does not require barrier removal unless it is "easily accomplishable and able to be carried out without much difficulty or expense." *Id* at 2180, *citing* 42 U.S.C. § 12181(9). Under Title III, the "readily achievable" determination must take into account "the impact . . . upon the operation of the facility." *Id.* citing 42 U.S.C. § 12181(9)(B). The Court pointed out that barrier removal that would bring a vessel into non-compliance with the International Convention for the Safety of Life at Sea, or any other international regulation would have a substantial effect on operation, "and thus would not be 'readily achievable.'" *Id.* The "readily achievable" determined under Title III must also take into account a modification's effect on shipboard safety. Modifications are not required "if it would pose a direct threat to the health or safety of others." *Id.* at 2181.

Ninth Circuit Revisits Enforceability of Forum Selection Clause

In *Kukje Hwajae Insurance Co., Ltd. v. M/V Hyundai Liberty, et al.*, 408 F.3d 1250, 2005 AMC 1550 (9th Cir. 2005), the U.S. Court of Appeals for the Ninth Circuit ruled that the forum selection clause in a carrier's bill of lading is accepted by the non-signing cargo owner when the owner brings suit against the carrier for breach of the bill of lading.

The Ninth Circuit previously handed down a decision in this case in *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 2002 AMC 1998 (9th Cir. 2002). The Supreme Court granted a petition for writ of certiorari, vacated judgment, and remanded the case to the Ninth Circuit for further consideration in light of its decision in *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004). On remand, the Ninth Circuit determined that there was "a completely separate, preserved, and properly argued route by which [it reached] the same answer to the . . . question [as to] the binding effect of the forum-selection clause." *Kukje Hwajae Ins. Co.*, 408 F.3d at 1252, 2005 AMC at 1551. Therefore, it concluded that *Kirby* would not disturb its prior holding.

Doosan Corporation, a Korean manufacturer of machinery contracted with Glory Express, a non-vessel operating common carrier (NVOCC), to ship a lathe from Korea to California on the vessel the *Hyundai Liberty*. Glory Express issued three bills of lading to cover the shipment. Each bill of lading identified Doosan as the shipper and the *Hyundai Liberty* as the "Exporting Carrier." "The Glory Express bills of lading contain a forum selection clause requiring that all suits relating to the carriage of goods covered by the bills of lading to be brought in the federal courts in New York." *Id.* Glory Express did not seek to enforce that clause in this case.

Glory Express then contracted with Hyundai Merchant Marine Company to ship the lathe on the *Hyundai Liberty*. Hyundai Merchant Marine in turn contracted with Streamline Shippers Association to ship the lathe. Hyundai Merchant Marine issued a bill of lading identifying Streamline as the shipper. This bill of lading contained a forum selection clause stating that "any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea." *Id.* at 1552.

Plaintiff, the subrogated insurer of Doosan, initiated this action after the lathe was damaged during the sea voyage, allegedly resulting in more than $200,000 in damages. *Id.* Plaintiff brought the action in personam against Glory Express and *in rem* against the *Hyundai Liberty*. Plaintiff and Hyundai filed cross-motions for summary judgment on the issue of the vessel's *in rem* liability. *Id.* at 1553. The court denied both motions and dismissed the case. This appeal followed.

On appeal, the Court was presented with two issues: 1) whether Plaintiff is bound by the forum selection clause in the Hyundai bill of lading; and 2) whether the liability limitations contained in the Glory Express bills of lading met the "fair opportunity requirement" of the Carriage of Goods by Sea Act (COGSA) under 46 U.S.C. app. §1304(5). Ultimately, the court held that the Plaintiff accepted the Hyundai bill of lading by suing on it, therefore the Korean forum-selection clause could be applied to the Plaintiff's *in rem* action. Additionally, Glory Express was entitled to take advantage of the limitation of liability under COGSA.

Hyundai argued that the district court erred by not enforcing the forum-selection clause at the outset of the litigation and the court of appeals agreed. Plaintiff's complaint cited to all applicable bills of lading throughout the entire argument. The Ninth Circuit has held "that a

cargo owner accepts a bill of lading to which it is not a signatory by bringing suit on it." *Id.* at 1554. The court found that "by the express terms of the complaint, Plaintiff accepted the *Hyundai* bill of lading by suing on it." *Id.* The court applied the Korean forum-selection clause to Plaintiff's *in rem* action and stated that the district court erred when it failed to enforce the forum-selection clause at the outset of the litigation.

The court next turned to the issue whether the liability limitations in the Glory Express bills of lading met COGSA's "fair opportunity requirement." Previously, in *Vision Air Flight Serv. Inc. v. M/V Nat'l Pride*, 155 F.3d 1165, 1999 AMC 1168 (9th Cir. 1998), the Ninth Circuit identified circumstances under which a carrier is entitled to the benefit of that limitation of liability. It held:

> A carrier may limit its liability under COGSA only if the shipper is given a "fair opportunity" to opt for a higher liability by paying a correspondingly greater charge. The carrier has the initial burden of producing prima facie evidence showing that it provided notice to the shipper that it could pay a higher rate and opt for higher liability. The carrier satisfies this initial burden by legibly reciting the terms of 46 U.S.C. App. §1304(5) or language to the same effect in the bill of lading. The burden then shifts to the shipper to prove it was denied such an opportunity.

Kukje, 2005 AMC at 1556 (*quoting Vision Air*, 1999 AMC at 1171). Plaintiff argued that Glory Express "cannot avail itself of the COGSA limitations on liability because the Glory Express bills do not comply with the fair opportunity requirement." *Id.*

The Glory Express bills of lading contain the following provision:

> The Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per shipping unit or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500 per package or shipping unit shall have been declared in writing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra charge paid.

Id. The court held that this provision in the Glory Express bill of lading meets the requirements of COGSA. The passage explicitly limits Glory Express' liability and informs the shipper that it can opt for higher liability by declaring the value of the goods and by paying an extra charge - two things that Doosan did not do in this instance. As it did in *Vision* Air, the court rejected Plaintiff's argument that reference to "shipping unit" invalidated the limitation clause because "it does not echo the statutory phrase 'freight unit.'" *Id.* at 1557. The court stated:

> Whether or not the bill of lading 'mislabeled' or 'misbundled' freight units, it nonetheless gave [the plaintiff] notice that [the carrier]'s liability was limited and invited [the plaintiff] to opt for a higher liability by paying a correspondingly greater freight charge. This is all COGSA requires.

Id. (*quoting Vision Air*, 1999 AMC at 1174). Because the plaintiff only argued that Glory Express failed to establish a *prima facie* case of "fair opportunity," and did not attempt to show actual denial of opportunity to declare a higher value, the Ninth Circuit affirmed the District Court's holding that the Glory Express bills of lading complied with the "fair opportunity" requirement of COSGA.

Attorney's Fees May Not be Awarded in an In Rem Action to Enforce a Salvage Lien

In *Offshore Marine Towing, Inc. v. MR23*, 412 F.3d 1254, 2005 AMC 1800 (11th Cir. 2005), Offshore Marine Towing ("OMT") filed an *in rem* action against the motor vessel MR23, and an *in personam* action against Cherif Ayouty ("Ayouty"), the vessel owner, after OMT towed the vessel but was not paid. Ayouty, who was not subject to personal jurisdiction in Florida, entered a limited appearance to defend the vessel without subjecting himself to in personam jurisdiction. The district court referred the case to arbitration and the arbitrator found that OMT was entitled to recover $ 15,852 for towing the vessel and had incurred $ 29,314 in attorney's fees and costs to prosecute its claim. The district court refused to award the towing

company attorney's fees because it found that the company was not entitled to recover those fees in an admiralty action. The district court also ruled that the issue of attorney's fees was not submitted to the arbitrator and modified the arbitration award given to Offshore Marine.

Two issues were raised on appeal: 1) whether attorney's fees may be awarded to a salvor in an *in rem* action against the vessel; and 2) whether the district court acted with authority under the Federal Arbitration Act when it modified the award in favor of the salvor to exclude attorney's fees and expenses. *Id.* at 1254-55. The Eleventh Circuit affirmed the decision of the district court holding that attorneys' fees are not part of a salvage lien that may be awarded in an *in rem* action and the matter of the attorney's fees was not submitted to the arbitrator.

Under the Federal Arbitration Act, a district court must compel arbitration of all claims that are subject to arbitration. *See, Am. Express Fin. Advisors, Inc. v. Makarewicz*, 122 F.3d 936, 940 (11th Cir. 1997). OMT argued that the order of the district court compelling arbitration included attorney's fees because the contract between OMT and Ayouty required arbitration and the district court ordered that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Offshore Marine*, 412 F.3d at 1256. OMT's argument failed because a district court cannot compel arbitration on an issue not before it. The only question before the district court was the value of the salvage lien, not attorney's fees. *Id.* The Eleventh Circuit held that "because attorney's fees were not part of the salvage lien, the district court did not submit the issue of attorney's fees to the arbitrator. The district court correctly found that the award of attorney's fees was not a matter submitted to the arbitrator." *Id.*

Generally, attorney's fees are not awarded in admiralty cases. *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir. 1990). Although there are some exceptions, this case did not involve any recognized exception to the general rule that attorney's fees are not awarded

in admiralty cases. The district court ruled, and the Court of Appeals agreed, that *Bradford Marine, Inc. v. M/V "Sea Falcon,"* 64 F.3d 585 (11th Cir. 1995), was controlling authority. In *Bradford*, the Eleventh Circuit held that "attorneys fees could not be collected in an *in rem* action to enforce a maritime lien for necessaries." *Bradford Marine*, 64 F.3d at 588. The court further held that "the attorney's fees in this case are properly charged against the Sea *Falcon in rem* . . . only if the fees . . . were (1) necessaries and (2) provided to the Sea Falcon. *Id.* at 589. Because the attorney's fees were not necessaries provided to the Sea Falcon, the court held that the attorneys' fees could not be assessed in the *in rem* action. *Id.*

The Eleventh Circuit stated:

> A maritime action *in rem* for salvage, including contract salvage, is also a suit to enforce a lien. 46 U.S.C. § 31301 (5)(F). Because the attorneys' fees incurred in the litigation and arbitration were not part of the value of the salvage lien against the vessel, they could not properly be recovered in an action in rem.

Offshore Marine, 412 F.3d. at 1257. The calculation of an arbitration award is specific to the facts of each case and compensation is given as a reward "for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property." *The Blackwall*, 77 U.S. (10 Wall.) 1, 14, 2002 AMC 1816 (1869). The court in *The Blackwall* set out six factors related to the salvor's skill and risk in the calculation of the a salvage award. Those six factors are: 1) the labor expended by the salvors in rendering the salvage service; 2) the promptitude, skill, and energy displayed in rendering the service and saving the property; 3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; 4) the risk incurred by the salvors in securing the property from the impending peril; 5) the value of the property saved; and 6) the degree of danger from which the property was rescued. *The Blackwall*, 77 U.S. (10 Wall.) at 14. Attorney's fees do not fit into any of the *Blackwall* factors. In fact, "attorney's fees arise in the

enforcement of a salvage lien; attorney's fees are not part of the lien itself. *Offshore Marine*, 412 F.3d at 1257.

Second Circuit Recognizes Admiralty Jurisdiction Over Insurance Policies which are Primarily "Maritime" in Nature

In *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 2005 AMC 1747, 413 F.3d 307 (2nd Cir. 2005), the Second Circuit reversed a district court's conclusion that an insurance coverage action did not sound in admiralty. The Second Circuit ruled that a policy providing commercial general liability (CGL) including Shipowners legal liability (SLL) coverages to several named insureds engaged in various "maritime support" roles is primarily maritime and therefore within federal admiralty jurisdiction.

Facts

Milton Rivera was a tank cleaner in New York Harbor. While climbing out of the tank on an oil barge, he fell backwards down into the tank, hitting the steel deck below. He was injured and subsequently brought a lawsuit in state court against his employer, the barge owner, and the company that hired him for this particular job, Clean Water of New York, Inc. The insurer's successor in interest, Folksamerica Reinsurance Company, subsequently filed a declaratory judgment action in federal court invoking admiralty jurisdiction and seeking a ruling that it had no obligation to defend or indemnify Clean Water under the CGL policy. The CGL policy also included a Shiprepairers' Legal Liability (SRLL) section. Folksamerica argued that the policy was a maritime contract. Clean Water disagreed.

Analysis

The lower court concluded that the CGL policy was not marine insurance and did not have a purely or wholly maritime character. *See Folksamerica Reinsurance Co.*, 281 F. Supp. 2d 530, 533-34, 2003 AMC 2344, 2345 (E.D.N.Y. 2003). The lower court held that CGL coverage

was insurance used by many businesses to cover day-to-day business operations, and that any maritime risks under the policy were "merely incidental." 2003 AMC 2348. The district court compared the policy to more traditional hull, cargo, and protection and indemnity coverages. *Id.* On appeal, the Second Circuit disagreed.

The Second Circuit court conducted a threshold inquiry into the subject matter of the underlying dispute, which it noted was not done by the district court. This inquiry showed that the parties' dispute concerned an insurance claim based on a ship maintenance-related injury sustained by a ship oil tank cleaner aboard an oceangoing vessel in navigable waters. The court confirmed that the business of ship maintenance has long been recognized as maritime in nature and, therefore, an insurance claim arising out of an onboard injury has a connection to maritime commerce and implicates admiralty and maritime jurisdiction.

The Second Circuit felt that the Supreme Court's recent decision in *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004), suggested a shift in analysis. Under *Kirby*, the relevant inquiry is not whether the non-maritime obligations are incidental, but rather, whether the primary object of the contract is maritime. The Second Circuit reasoned that the policy was, in fact, primarily concerned with maritime objectives, even though there were some incidental non-marine elements. The Court found that there is nothing intrinsically "shore side" about a CGL policy.

Even though the CGL policy excluded various maritime risks, it insured against others. The Second Circuit held that certain CGL risks were in fact marine in nature. The ultimate inquiry for the court was whether the policy "reach[es] maritime risks." 2005 AMC at 1766. Considering the CGL and SLL coverage together, the court concluded that the policy was marine

in nature. Thus, the CGL policy was determined to be a maritime contract and the federal court had admiralty jurisdiction to hear the insurance coverage dispute.

Maintenance and Cure Denied Where Plaintiff Willfully Concealed Pre-Existing Back Trouble

In *Rickey Brown v. Parker Drilling Offshore Corporation*, 410 F.3d 166, 2003 AMC 1405 (5th Cir. 2005), the U.S. Fifth Circuit Court of Appeals held that a Jones Act employer may deny maintenance and cure benefits to an injured seaman when the employer can establish that the seaman intentionally concealed a preexisting medical condition.

Facts

The Plaintiff, Rickey Brown was hired by Parker Drilling Offshore Corporation ("Parker") to work as a floorhand. On a medical questionnaire, Brown was asked whether he had "Past or Present Back and Neck Trouble." Brown answered no. Based partly on this representation Brown was hired by Parker in August, 2000.

Actually, Brown had injured his back in 1998 as a result of a lifting accident. About ten months later, Brown applied to work for LeTourneau, Inc. as a seaman. When filling out LeTourneau's medical questionnaire, Mr. Brown checked "no" when asked whether he had ever suffered from back trouble. In May of 2000, Brown alleged that he injured his back while at work for LeTourneau. After the alleged accident, Brown was terminated for "falsely reporting an on-the-job accident, filing a false accident claim and failing to disclose his 1998 back injury on LeTourneau's medical questionnaire." Approximately two months after being fired by LeTourneau, Brown was hired by Parker.

On April 20, 2001, Brown reported that he experienced back pain while pulling slips out of the master bushings of the rotary table aboard Parker's ship. While investigating the accident, Parker came to believe that Brown's alleged back injury was not sustained aboard Parker's ship

and that Brown had intentionally concealed his prior back injuries. Parker subsequently withheld payment of Brown's maintenance and cure benefits. Brown filed suit against Parker, seeking maintenance and cure and personal injury damages. The jury returned a verdict in favor of Brown awarding him benefits and damages.

Analysis

On appeal, the Fifth Circuit vacated the jury's verdict. The court found that the jury clearly erred when it found that the Plaintiff had not willfully concealed his medical condition. A Jones Act employer is also allowed to rely on certain legal defenses to deny these claims, such as an injured seaman willfully concealing a preexisting medical condition from his employer. The court stated that in order to establish "willful concealment" by an employee, an employer must show that: 1) the claimant intentionally misrepresented or concealed medical facts; 2) the non-disclosed facts were material to the employer's decision to hire the claimant; and 3) a connection exists between the withheld information and the injury complained of in the lawsuit. The court found that Parker was able to make this three-pronged showing.

First, Parker established that Brown had been treated for back injuries on two prior occasions before he completed the medical questionnaire for Parker. Moreover, Brown had been fired from LeTourneau for filing a false accident report, falsely reporting an on-the-job injury and denying that he had suffered from prior "back trouble" on LeTourneau's medical questionnaire and misstated during his deposition that he did not seek medical care while working for LeTourneau. On appeal, Brown offered two explanations for failure to disclose his prior medical condition. He first contended that the question at issue on Parker's medical questionnaire was a compound and, therefore, unfair question. He further contended that he did not understand the meaning of "trouble." The Fifth Circuit rejected both of Brown's excuses.

Parker also established materiality and causality at trial, the other two elements of the willful concealment test. The court found that Parker based its decision to hire Brown in part on whether he had past or present back and neck trouble. Therefore, the information was material.

Next, the court concluded that the requisite causal link is established if the preexisting injury and the new injury are located in the same part of the body. Because it was found that Brown's injuries were in the part of the lumbar spine, "the causal link between the concealed information and the new injury was established at trial." *Id.* at 176.

The Fifth Circuit ultimately held that the jury's finding that the Plaintiff did not intentionally conceal his prior back injuries was a clear error. The court vacated the jury's verdict and dismissed the matter with prejudice.