

## **TUG AND BARGE LIABILITY FALL 2005**

W. BRETT MASON  
BREAZEALE, SACHSE & WILSON  
ONE AMERICAN PLACE, 23<sup>RD</sup> FLOOR  
BATON ROUGE, LOUISIANA 70821  
(225) 318-3175 PHONE  
(225) 381-8029 FAX  
[wbm@bswllp.com](mailto:wbm@bswllp.com)

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*In Re River City Towing Services, Inc.*, 420 F.3d 385 (5<sup>th</sup> Cir. 2005)

A barge owned by River City Towing Services emitted fumes affecting individuals in Baton Rouge and Brusley, Louisiana. A group of plaintiffs filed a class action lawsuit in state court against River City for injuries arising out of the incident. River City filed a limitation action in the United States District Court for the Middle District of Louisiana seeking exoneration or limitation of liability.

The district court set a deadline before which potential claimants were required to file answers to River City's complaint. Notice of the deadline was published in the local paper. Prior to the deadline four plaintiffs filed answers. The attorney for these claimants amended their answer on four separate occasions to add more claimants before the notice date. After the notice date, the attorney for these individuals sought nine more times to amend their answer to add late claimants. The magistrate judge treated the motions to amend their answer as motions for leave to file late claims and denied the motions. The district court entered an order affirming that decision. The claimants appealed.

The Fifth Circuit affirmed the district court ruling and held that because plaintiffs failed to offer an affidavit or other evidence showing their reasons for filing the claims after the notice date, the district court's refusal to permit the late filed claims was not an abuse of discretion.

*In Re Mid-South Towing Co.*, 418 F.3d 526 (5<sup>th</sup> Cir. 2005)

The M/V DIANE OAK, a vessel owned and operated by Teco Barge Line, Inc. allied with a wharf owned by Dow Chemical Company causing severe damage. The M/V DIANE OAK filed a petition for limitation of liability, Dow filed a claim in the limitation action seeking recovery of damages sustained from the allision. The M/V DIANE OAK brought suit against three other vessels on the river that morning, *in rem* and *in personam* claims, against their related interests, alleging that those vessels had so embarrassed her navigation

as to be contributory and proximate causes of the allision and thus deserving of some liability for the damages incurred by Dow.

Following a bench trial solely on the issue of liability, the district court found that the M/V DIANE OAK was solely at fault for the allision. The M/V DIANE OAK appealed contending that the district court (1) erroneously applied a presumption of fault against her; (2) erroneously relied on the “last clear chance” doctrine to excuse negligence on the part of the other vessels; and (3) failed to properly apply controlling principles of proximate causation and comparative fault amongst all of the vessels. The Fifth Circuit affirmed concluding that the district court did not erroneously apply the Oregon presumption of fault, that the district court’s proximate cause analysis did not amount to an application of the discredited “last clear choice” doctrine; and that the district court’s proximate cause findings were not clearly erroneous.

*In Re American Milling Company, Ltd.*, 409 F.3d 1005 (8<sup>th</sup> Cir. 2005)

The M/V ANNE HOLLY, a vessel owned by American Milling, and a tow of fourteen barges were northbound on the Mississippi River beneath the Eads Bridge in St. Louis Missouri when its tow began to experience vibration. As the third tier of barges in the tow passed under the Eads Bridge, the tow stopped its upstream progress entirely and began to move toward the pier on the Missouri side of the bridge’s main channel span. Recognizing that an allision with the pier was imminent, the captain of the M/V ANNE HOLLY attempted to land the tow gently against the pier. On impact the tow broke apart and caused individual barges to top around and float downstream. One of the barges allided with the ADMIRAL, a gambling vessel. The ADMIRAL’s moorings had broken loose and it started to move away from the Missouri shore. The ADMIRAL was ultimately secured and the barges were captured.

American Milling filed a complaint in district court seeking exoneration from or limitation of liability. The captain and crew of the M/V ANNE HOLLY were employed by Winterville Marine Services, Inc. Winterville later joined American Milling in seeking exoneration from or limitation of liability claiming status of owner *pro hac vice* due to the level of control that Winterville exercised over the M/V ANNE HOLLY. President Casino, owner of the ADMIRAL filed a negligence action against the captain of the M/V ANN HOLLY. Winterville, the captain of the M/V ANNE HOLLY and American Milling counterclaimed alleging that President Casino was partially at fault for failing to protect or move the ADMIRAL after past allisions with other vessels at the same mooring location. Various other parties including barge owners and patrons of the casino raised property damage and personal injury claims. The court separated the personal injury claims from the property damage claims and addressed only property damage claims in the ruling on appeal.

Following a “due appraisalment” hearing, the district court set the value of the M/V ANNE HOLLY at \$ 2.2 million dollars. Following a bench trial, the court concluded that the captain of the M/V ANNE HOLLY , although competent and experienced, was negligent on the night in question and at fault for the accident. The district court further found that Winterville was an owner *pro hac vice* due to the level of control that the Winterville crew exercised over the M/V ANNE HOLLY . It also found that the M/V ANNE HOLLY was in good working order, that the captain of the M/V ANNE HOLLY was competent to pilot the vessel, and that neither American Milling nor corporate personnel of Winterville had privity or knowledge regarding the captain’s negligence. Accordingly, the district court found that Winterville and American Milling satisfied their duty under the Act by providing a seaworthy vessel and competent crew and found them entitled to limit their liability. The district court also found President Casino partially at fault and assessed them with 20% liability.

On appeal, American Milling, Winterville and the captain contested the district court’s valuation determination. Winterville and the Captain contested the finding that the Captain was negligent. President Casino contested the district court’s determination that Winterville was an “owner” with standing to seek limited liability and the determination that Winterville and American Milling were entitled to limit their liability. Finally, President Casino contested the district court’s assessment of 20% fault for failing to protect the ADMIRAL.

The Eighth Circuit concluded that Winterville is not entitled to limited liability under the Act, but affirmed the judgments of the district court in all other respects and remanded the case for further proceedings.

*City of Chicago v. M/V MORGAN*, 375 F.3d 563 (7<sup>th</sup> Cir. 2004)

The M/V MORGAN, a tugboat pushing four barges on the Calumet River, experienced a failure of its starboard winch brake causing its crew to lose control of the vessel and allide with the western pier face of the 95<sup>th</sup> Street Bridge in Chicago, Illinois. The impact disabled the bridge, severing eight of its electrical cables. A suit by the City followed.

Following a two day bench trial, the district court found that both parties were responsible for the damages and apportioned fault equally between them since the City had failed to replace a fender system that would have protected the electric cables. The Seventh Circuit affirmed the decision of the district court.

The Seventh Circuit found that the district court properly applied the Oregon presumption to the facts and that the defendants failed to rebut the presumption or exonerate

themselves from liability. It further concluded that the district court was not mistaken in apportioning fault equally between the parties.

*Magnolia Marine Transport Company v. Oklahoma*, 366 F.3d 1153 (10<sup>th</sup> Cir. 2004)

The M/V ROBERT Y. LOVE, a tugboat owned by Magnolia Marine Transport Company collided with the Interstate 40 bridge over the Arkansas River near Webbers Falls, Oklahoma. The captain of the M/V ROBERT Y. LOVE suffered a form of cardiac arrhythmia that caused him to lose consciousness for several minutes as the tug and the two empty barges it was pushing approached the Interstate 40 bridge. While the captain was unconscious the tugboat pushed the barges into the bridge, causing the bridge to collapse into the river. Several vehicles plunged off the damaged overpass. Fourteen people died and five suffered injuries. The subsequent search and rescue, repair, loss of use, and clean-up costs required the State of Oklahoma to expend more than fifty-eight million dollars.

Magnolia filed a petition for limitation of liability in the United States District Court in Mississippi. Meanwhile the state of Oklahoma filed suit against Magnolia in state court in Oklahoma, which Magnolia removed to federal district court. Thereafter, the Mississippi district court transferred Magnolia's limitation action to federal court in Oklahoma. The state of Oklahoma filed a motion to dismiss the limitation action based on the Eleventh Amendment claiming that it was entitled to sovereign immunity from the limitation proceeding and from the Limitation Act. The district court denied the motion to dismiss. The state of Oklahoma appealed.

The Tenth Circuit affirmed concluding that the State's invocation of sovereign immunity stands the relationship of the parties on its head: it is the State that seeks recovery from Magnolia. Because Magnolia's limitation action does not implicate the State's immunity from suit under the Eleventh Amendment, it held that the district court properly denied the State's motion to dismiss.

*In Re MO Barge Lines, Inc.*, 360 F.3d 885 (8<sup>th</sup> Cir. 2004)

The MISS BELTERRA, a new casino boat heading up the Mississippi River collided with the ELIZABETH ANN, a towboat pushing concrete barges down the river. Confusion contributed heavily to the collision. The district court found that the MISS BELTERRA contributed to the collision by not being far enough to the right descending bank of the river to make the pass. The district court apportioned ninety percent of the fault to Missouri Barge and ten percent to Belterra. Missouri Barge sought - and the district court granted - a limitation of liability to Missouri Barge finding that it lacked knowledge or privity of its captain's negligent piloting.

Belterra appealed arguing that the district court erred in granting Missouri Barge's request to limit its liability. Missouri Barge cross-appealed arguing that the district court misinterpreted Rule 14 and that the district court's finding that the captain of the ELIZABETH ANN made a starboard to starboard passing agreement with the captain of the MISS BELTERRA was clearly erroneous.

The Eighth Circuit affirmed holding that: (1) the district court did not clearly err in finding that the towboat pilot violated Inland Navigation Rule requiring downward vessel on river to propose to approaching vessel manner of passage and initiate maneuvering signals that would be used; and (2) towboat owner lacked privity and knowledge of its pilot's violation of rule governing passage on rivers, as required for limitation of liability.

*Becker v. Poling Transportation Corporation*, 356 F.3d 381 (2<sup>nd</sup> Cir. 2004)

Becker and Jurgens were employed by Poling Transportation Corporation. They were severely burned in a fire that occurred while they were transferring petroleum from the barge CLARA P to a truck that was parked dockside. The CLARA P was owned by Poling but about to be sold. The terms of the sale required the barge to be delivered empty. Poling offered the petroleum free of charge to Metro Terminals Corporation if Metro arranged the pickup. Poling advised Metro that a vacuum truck was needed because the pump on the barge was defunct. Metro asked Ultimate Fuel Transportation, Inc. to pick up the petroleum although it knew that Ultimate did not have a vacuum truck.

On the day of the accident Becker and Jurgens were assigned to first, pump water and second, to pump petroleum from the CLARA P. The Ultimate truck that arrived was not a vacuum truck and Ultimate did not own a vacuum truck. Neither Becker, Jurgens nor the driver of the Ultimate truck had any experience in transferring petroleum from a barge to a truck. Becker, Jurgens and the Ultimate truck driver conferred and decided to use the portable pump that was used earlier in the day to pump the water from the CLARA P. The pump was used to fill the first holding tank on the truck uneventfully. The pump was shut down and the hose was switched to the next compartment. When the pump was restarted, a fire broke out on the CLARA P burning both Becker and Jurgens. There is no real dispute that the fire was caused by the use of the portable pump instead of a vacuum truck.

Ultimate defaulted and paid and ultimately paid Becker and Jurgens \$250,000.00 each in exchange for the settlement of their claims against Ultimate. Poling filed bankruptcy. Metro was the only defendant to appear at trial. Following a jury trial the jury awarded Becker \$530,000.00 and Jurgens \$505,000.00. The Magistrate Judge entered judgment against Metro for the amount of the verdict with a setoff for the amount of Becker's and Jurgens' settlement with Ultimate. The resulting judgment was in the amount of \$535,000.00

– \$255,000.00 for Becker and \$280,000.00 for Jurgens. Metro appealed. Becker and Jurgens did not. The Second Circuit held that Metro is jointly and severally liable with Ultimate for Becker’s and Jurgens’ injuries. It did not reach the issue of the propriety of the setoff because Becker and Jurgens did not file a cross appeal.

*In Re Campbell Transportation Company, Inc.*, 368 F.Supp.2d 553 (N.D. W.Va. 2005)

The M/V ELIZABETH M and two of the barges in her tow were swept through the gates of the Montgomery Dam and sunk. The accident occurred at approximately Mile 31, Left Descending Bank of the Ohio River, Beaver County, Pennsylvania. The remaining barges carried in the tow sunk shortly upstream of the dam. Four crew members died as a result of the accident and three crew members survived.

Campbell Transportation Company, Inc. filed an action for exoneration or limitation of liability in the United States District Court for the Western District of Pennsylvania. The court transferred the case to the United States District Court for the Northern District of West Virginia. on the grounds that Rule F(9) of the Supplemental Rules dictates that venue lies in the Northern District of West Virginia.

Campbell filed a motion requesting that the case be transferred back to the Western District of Pennsylvania for the convenience of the parties and witnesses and in the interest of justice. Campbell is a Pennsylvania corporation. The M/V ELIZABETH M and the six barges in her tow operated out of Dunlevy, Pennsylvania. At the time of the accident five of the M/V ELIZABETH M crew members resided in the Western District of Pennsylvania, while one resided in Wheeling, West Virginia and one resided in Powhatan Point, Ohio. The district court upon weighing the factors articulated in *Alpha Welding & Fabricating Inc. v. Heller*, 837 F.Supp. 172 (S.D.W.Va. 1993) the granting of the motion to transfer.

*In Re Complaint of Kirby Inland Marine, L.P.*, 365 F.Supp.2d 777 (M.D. La. 2005)

The T/B KIRBY 7304, after having been loaded with cargo, was temporarily moored in tier 5 of the Kirby 225 fleet on the west bank of the Mississippi River near Brusly, Louisiana, while awaiting transport to Deer Park, Texas. Kirby became aware of an alleged leak or escape from the barge and the event was publicized by the news media in East and West Baton Rouge areas. Kirby Inland Marine, L.P. as demise bareboat charterer of the T/B KIRBY 7304, filed a petition for exoneration from or limitation of liability as a result of a leakage. Notice of the limitation action was published in the local newspaper and in two other publications. Several claimants filed claims and two motions for leave to file additional claims were filed and granted by the court allowing individuals to file claims after

the deadline to file claims. Attorneys for the claimants then filed motions for leave to file third and fourth amended claims, which were subsequently denied by the magistrate judge. Claimants appealed the Magistrate's ruling to the district court.

The district court affirmed the Magistrate's ruling finding that the notice given by Kirby was proper and complied with Rule F, and the time provided by the court was adequate under the facts of the case.

*In Re Wepfer Marine, Inc.*, 344 F.Supp.2d 1120 (W.D. Tenn. 2004)

Wepfer Marine, Inc. was the owner of barge ET-715, a steel-hulled river barge that was in the process of being broken up for scrap. Wepfer also owned a deck barge known as the No. 1 crane barge which was used to accommodate a crawler crane in connection with longshoring work on the Mississippi River. The crane barge was positioned at or near mile 725 of the lower Mississippi River alongside a floating dry dock upon which the barge breaking was being conducted by among others, Jose Ramon Gonzalez.

On the date of the accident, Gonzalez was employed as a welder, barge breaker and barge repairman by Robinson Maintenance, Inc., the company performing the barge breaking. Gonzalez was seriously injured while in the process of breaking the barge ET-715. Gonzalez and his wife filed suit in the Circuit Court of Shelby County, Tennessee for injuries and damages arising out of the incident. Wepfer filed suit in the United States District Court for the Western District of Tennessee pursuant to the Limitation of Liability Act as to both the river barge and the crane barge. The Gonzalezes and Robinson's insurer, Liberty Mutual Insurance Company, which paid compensation and medical expenses to Gonzalez under Robinson's Longshore and Harbor Workers' Compensation Act policy, filed claims in the limitation action against Wepfer.

Claimants, Liberty Mutual Insurance Company and the Gonzalezes moved to dismiss the proceedings on two grounds: (1) lack of admiralty jurisdiction based on the barge ET-715 status and (2) the untimeliness of Wepfer's petition.

The district court determined that the ET-715 had been permanently removed from navigation and was being cut up for scrap at the time the injury occurred and was therefore a "dead ship" and outside the scope of admiralty jurisdiction. Accordingly, the district court granted the motion as to the barge ET-715. The motion did not seek to dismiss the limitation action with respect to the crane barge and it is properly before the court.

The district court also held that the limitation action was filed timely. It found that an April 5, 2002 letter to Wepfer from counsel for Gonzalez stating:

Please be advised that I have been retained to pursue a Longshoreman and Harbor Worker's Act case as a result of the injuries received by Jose Ramon Gonzalez while working within the course and scope of his duties on March 13, 2002. By copy of this letter, I am notifying Liberty Mutual of my representation.

did not provide notice sufficient to trigger the running of the six month statutory period within which to initiate a limitation action. The letter stated that Gonzalez was represented by counsel and that he was pursuing a LHWCA claim based on injuries received on the job on a certain date. The letter had no details of the incident or the injuries suffered, the vessel upon which the injury occurred, or whether the vessel was owned by Wepfer. Nor did the letter inform Wepfer that it was to blame for the injury or that he intended to seek damages therefor. The letter also did not contain information notifying Wepfer that the claim could exceed the value of the vessel that it owned and that was subject to limitation. The district court found that Wepfer did not receive proper written notice until Mr. Gonzalez filed a complaint in state court and that Wepfer's petition for limitation was timely.

*In Re Taira Lynn Marine Ltd No. 5, L.L.C.*, 349 F.Supp.2d 1026 (W.D. La. 2004)

The M/V MR. BARRY and its tow, the T/B KIRBY 31801, allided with the Louisa swing bridge in St. Mary Parish, Louisiana. The allision occurred close to mile 134 on the Intracoastal Waterway near Cypremore Point, Louisiana. T/B KIRBY 31801 was owned by Kirby Inland Marine, L.P. and the M/V MR. BARRY was owned and operated by Taira Lyn Marine, Inc. The cargo on board the barge consisted of a gaseous cargo mixture of propylene/propane. This gaseous mixture was discharged into the atmosphere as a result of the allision. The Louisiana State Police Hazardous Materials Division ordered a mandatory evacuation of all businesses and residences with a certain radius of the Louisa swing bridge. Cypremore Point is basically an island in southwest, Louisiana which is home to residents and serves as secondary residences for many people in southwestern, Louisiana. The Louisa swing bridge is the only means of ingress and egress from the Cypremore Point Island. The allision resulted in the decapitation of the local business economy for a couple of days.

Taira Lynn Marine filed a limitation action in the United States District Court for the Western District of Louisiana in which several hundred claims were filed. Kirby, Tiara Lynn Marine and the State of Louisiana Department of Transportation and Development filed motions for partial summary judgment on the seeking dismissal of economic loss claims, CERCLA claims and claims under the Oil Pollution Act of 1990. The district court denied

the motions concluding that the claimants had a right of action to recover economic losses and that the OPA 90 and CERCLA claims were not ripe for summary judgment.