DOCUMENT NO. 715
MAY 5, 1995

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

THE MLA REPORT

Editor

Gordon W. Paulsen of New York

Associate Editor

LeRoy Lambert of New York

Assistant Editor

Matthew A. Marion of New York

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EDITORIAL COMMENT

Probably the "hottest" item to come up at the meeting at the Association to be held in New York on May 5, 1995, is the extensive report of the Carriage of Goods Committee containing and recommending the following proposed Resolution by the Association:

PROPOSED RESOLUTION BY THE COMMITTEE ON THE CARRIAGE OF GOODS OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

WHEREAS, the Maritime Law Association of the United States recognizes the need to revise and update the Carriage of Goods by Sea Act of 1936; and

WHEREAS, members of this Association from various maritime industry sectors have been engaged in a three year effort to find common grounds for agreement on the revision and modernization of the Carriage of Goods by Sea Act; and

WHEREAS, that effort has been successful in providing a draft proposing revision of the Carriage of Goods by Sea Act; and

WHEREAS, the Committee on the Carriage of Goods has, at a special meeting on March 10, 1995, by a majority of those voting, accepted the proposed revisions as put forward in the Final Report of the Ad Hoc Study Group dated February 15, 1995, and recommended that this Association propose that Congress enact such revisions to COGSA, it is

HEREBY RESOLVED, that the Maritime Law Association of the United States joins with other interested maritime groups and recommends and urges that the Congress of the United States of America take the necessary steps to enact these proposed revisions to the Carriage of Goods by Sea Act.

IT IS FURTHER RESOLVED, that the President of the Maritime Law Association of the United States or his delegate is authorized to make known this resolution to the Congress and such other bodies or organizations as the President may consider to be desirable.

The Committee Report and the Dissenting Minority Report, together with separate dissents, have been disseminated to the membership and will not be reproduced here despite the policy of publishing all Committee work products in the MLA Report. The Proceedings of the May 5th meeting, which will be mailed to the membership in due course, will include a full report on the subject.

Gordon W. Paulsen,
Editor

COMMITTEE ON PRACTICE AND PROCEDURE
NEWSLETTER NO. 26, FALL, 1994

Editors: Edward V. Cattell and Kevin P. Smith

RULE B: ATTACHMENT OF FUNDS PREVIOUSLY ATTACHED IN PRIOR CASE ALLOWED

Starboard Venture Shipping, Inc. v. Casinomar Transp., Inc., 1994 A.M.C. 1320 (S.D.N.Y. 1993).

Starboard Venture Shipping, Inc. (Starboard) attached funds, pursuant to Rule B, as security for a pending charter party arbitration. When attached, the funds were held in an escrow account maintained by Casinomar Transportation Inc.'s (Casinomar) attorney. The funds had previously been attached as security, pursuant to 9 U.S.C. §8, for a separate charter party arbitration, to which Starboard was not a party. When attached for the first time, the funds had been on deposit in Casinomar's bank account. With the approval of the court, the funds were transferred to counsel's escrow account prior to the second attachment.

Casinomar moved to vacate the order of attachment on the grounds that the funds were not property belonging to it. Casinomar argued that its interest in the money was merely an *in potentiam* interest, akin to an open letter of credit. The court distinguished this situation from an open letter of credit on the basis that the funds already existed and Casinomar already had an ownership in them.

The court found ample authority for the attachment of previously levied against property. (*In Re People by Beha,* 171 N.E. 572 (N.Y. 1930) (Cardozo, C.J.), *Dunlop v. Paterson Fire Ins. Co.*, 74 N.Y. 145 (1878).

The court acknowledged two significant limitations upon its ability to attach property which has already been levied upon. The court may not attach funds in a court's registry that would prevent a court from disposing of funds in accordance with the purpose for which the funds were deposited and the court may not interfere with the authority of another court by way of the attachment. The court noted that its order of attachment was specifically subordinated to the outcome of the earlier arbitration. Therefore, nothing about the attachment would impinge upon the ability of the

court to distribute the funds in connection with the prior action, and nothing would impugn the authority of that court.

Casinomar was granted counter-security.

RULE C: IN REM CLAIM AGAINST VESSEL AS SECURITY FOR CARGO DAMAGE ARBITRATION ALLOWED WHEN VESSEL OWNER NOT A PARTY TO THE ARBITRATION: IN REM ACTION MAY BE FILED, AND LEFT DORMANT, WHILE VESSEL IS NOT IN JURISDICTION, PENDING VESSEL'S RETURN.

Mitsubishi Corp. v. M/V OINOUSSIAN STRENGTH, No. 92-56 (S.D.N.Y. March 8, 1995) (Martin, J.)(1994 W.L. 74087)

Mitsubishi Corp. commenced arbitration proceedings against Exmar N.V. seeking recovery for damage to a cargo of soy beans carried aboard the M/V OINOUSSIAN STRENGTH, pursuant to a voyage charter party between Exmar and Mitsubishi. The vessel was owned by Strength Shipping Corp. (Strength). Strength time-chartered the vessel to a third party, who in turn sub-chartered the vessel to Exmar.

The *in rem* defendant moved to dismiss on the bases that the *in rem* complaint failed to state a claim upon which relief could be granted, and that the court lacked *in rem* jurisdiction, since the vessel was not present within the jurisdiction when the complaint was filed, and would not be within the jurisdiction in the near future.

The court first acknowledged that the personality of the ship was a correct defendant on a cargo damage claim. It further noted that §8 of the Federal Arbitration Act specifically allowed the plaintiff to seek an *in rem* remedy against the vessel as security, while submitting the underlying claim to arbitration.

The court then held that it was within its discretion to allow an action to remain dormant until such time as the vessel could be arrested upon its return to the waters of the district (citing *Vanol U.S.A., Inc. v. M/T CORONADO,* 663 F. Supp. 79, 82 (S.D.N.Y. 1987)).

AND:

Gary Loftin v. Maritime Overseas Corporation, 1994 A.M.C. 2659 (D. Alaska 1994).

In this case, the plaintiff moved for an extension of time to serve the vessel, asserting that he was having difficulty obtaining information regarding when the vessel would return to Alaska. The court granted the extension for good cause shown.

RULE C/RULE E: LETTER OF UNDERTAKING IS VALID SUBSTITUTE RES UPON WHICH JURISDICTION MAY BE MAINTAINED, AND MAY BE TRANSFERRED FROM ONE DISTRICT TO ANOTHER

Mackensworth v. S.S. AMERICAN MERCHANT, 28 F.3d 246 (2d Cir. 1994).

This case involves a Jones Act claim originally filed by the plaintiff in 1984 in the District of New Jersey. Plaintiff filed an *in personam* claim against U.S. Lines, Inc. and an *in rem* claim against the vessel. The action was stayed pending the bankruptcy of U.S. Lines. Subsequently, Sea Land Services, Inc. obtained the right to purchase the vessel. However, a ship mortgage foreclosure action had been commenced against the vessel in the Northern District of California. The vessel was sold, and the proceeds deposited with the registry of the court. At that time, plaintiff received relief from the bankruptcy stay, and was allowed to intervene in the action pending in the Northern District of California.

When Sea Land acquired the right to purchase the vessel, it also acquired the right to any recovery from the judicial sale. Sea Land's P&I insurer posted a letter of undertaking as security for plaintiff's claim against the remaining proceeds of the judicial sale. The remaining proceeds were then released. Sea Land also moved to transfer the action to the District of New Jersey. Plaintiff insisted that the action should be transferred to the Southern District of New York and the action was so transferred. Contingent upon issuance of the letter of undertaking as the substitute *res.*

Plaintiff then sought to amend to assert a new claim for respiratory injuries. This was denied as time barred. Plaintiff also attempted to appeal the substitution of the *res* and transfer of the action, among other issues. The

Ninth Circuit dismissed for lack of subject matter jurisdiction since no stay of the distribution of the *res* had been obtained and it was now gone.

Thereafter, plaintiff failed to appear for depositions, and the defendant moved for dismissal. In response to the motion to dismiss, plaintiff, proceeding *pro se*, asserted that the Southern District of New York lacked subject matter jurisdiction. Thereupon, the Southern District of New York dismissed the case on that basis.

On appeal, the Court of Appeals for the Second Circuit noted that pursuant to Rule E (5)(a), the funds deposited with the registry of the court after the judicial sale became the substitute *res*. Further, the P&I Club's letter of undertaking, in turn, became the substitute *res*. The letter of undertaking was transferred to the Southern District of New York along with the rest of the file. The substitute *res* having been transferred to the Southern District, the court in fact had subject matter jurisdiction over the subject matter, despite plaintiff's contention. Hence, the Second Circuit reversed.

RULE C: IN REM JURISDICTION OVER ARTIFACTS RAISED FROM WRECK AND QUASI IN REM JURISDICTION OVER WRECK LAYING IN INTERNATIONAL WATERS

John F. Moyer v. The Wreck and Abandoned Vessel Known as the ANDREA DORIA, 1994 A.M.C. 1021 (D.N.J. 1993).

The Italian luxury liner ANDREA DORIA sank in waters 200 miles east of Sandy Hook and 50 miles south of Nantucket Island as the result of a collision occurring in 1956. Divers have visited the wreck since the day after the sinking. Recreational divers have been raising artifacts from the wreck since 1966.

Plaintiff Moyer wished to conduct extensive salvage operations to recover the ship's bell and two large Italian mosaic friezes from inside one of the ship's lounges.

On June 10, 1993, the court issued a warrant to the United States Marshal to arrest the vessel *in rem*. On June 24, 1993, the plaintiff placed a copy of the court's June 10th arrest in a sealed plastic canister, and attached it by cable to the ANDREA DORIA, in the immediate vicinity of his salvage operations. Plaintiff's counsel also sent a copy of the letter and

arrest papers to various charter vessel captains, who had run scheduled diving expeditions to the ANDREA DORIA during the summer of 1993.

The Italian mosaic friezes were recovered, although the ship's bell was not.

The district court noted that the mosaic friezes recovered by the plaintiff were brought within the district, and that the court had *in rem* jurisdiction over these artifacts. Next, relying on *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330, 1978 A.M.C. 1404 (5th Cir. 1978), the court ruled that it could validly exercise *quasi in rem* jurisdiction over the wreck, which did not lay in the territorial waters of New Jersey. The court acknowledged that, usually, courts assert *in rem* jurisdiction only over vessels within the territorial confines of the district. The exception, allowing the court to exercise *quasi in rem* jurisdiction over a wreck not within the district, looks to the future and the reasonable likelihood that a salvage operation will result in other portions of the ship wreck being brought within the district, and thus within the *in rem* jurisdiction of the court.

RULE F: LIMITATION SOUGHT BY FORMER OWNER DENIED

In The Matter of the Complaint of Marine Recreational Opportunities, Inc., 1994 A.M.C. 1288 (2d Cir. 1994).

Marine Recreational Opportunities, Inc. (MRO) purchased a pleasure boat at public auction in May of 1991. Thereafter, the boat was resold to Berman for $41,000.00. Berman's brother, Gerald Berman, was injured in an accident involving the boat, occurring on Long Island Sound in June of 1991. Gerald Berman and his wife brought suit against MRO in New York state court. MRO then filed for limitation pursuant to Rule F, and 46 U.S.C. §183 et seq.

The court noted that the term "owner", as used by the limitation statute, has been given broad meaning. Demise charterers, and other parties exercising some measure of dominion or control over the vessel have been held to be "owners", under the limitation statute. Plaintiff relied upon *In Re Trojan,* 167 F. Supp. 576, 1959 A.M.C. 201 (N.D. Cal. 1958), a case in which the court had allowed a former owner to petition for limitation, despite lacking any control over the vessel at the time of the accident.

The Second Circuit declined to follow *In Re Trojan,* noting that courts have uniformly held that the time of the accident determines "ownership". At the time of the accident MRO lacked any dominion or control over the vessel and, therefore, even given the broad meaning of "owner", they were not entitled to limitation.

RULE F: CLAIMANT NOT ENTITLED TO JURY TRIAL IN LIMITATION ACTION

In Re Complaint of Thomas Barsch, 1994 A.M.C. 1999 (D.N.J. 1993).

Plaintiff Barsch filed a limitation petition following an August 1990 boating accident. At that time, a motor boat owned by Barsch and allegedly chartered to Gerald and Claire Lynch, and operated by Stelios Makrinos, crossed a water skiing line being used by Carl Natriello. Mr. Natriello allegedly sustained injury when he was trapped between the boat and the ski line.

Claimants sought a jury trial, relying on *In re Poling Transportation,* 1992 A.M.C. 1075 (S.D.N.Y. 1991), in which the admiralty court granted a jury to claimants in a limitation case whose state actions were stayed by the monition. Claimants had asserted diversity jurisdiction in their answer to the limitation petition.

In a footnote, the district court rejected claimant's argument that diversity jurisdiction gave rise to a right to a jury trial. The court observed that complete diversity was lacking, and that the sole jurisdictional basis was admiralty jurisdiction. It also relied on the prescription in Rule 38(e), which provides that nothing within the rules "shall be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." Accordingly, the court denied claimants' request for a jury trial. The court went on to state that had claimants wanted a jury trial, they could have requested one in state court under the Savings to Suitor Clause, despite the pendency of this limitation proceeding.

RULE 23: CLASS ACTION NOT PERMITTED IN LIMITATION CASE

Yvonne Clairborne Humphreys v. Hal Antillen N.V., 1994 A.M.C. 1794 (E.D. La. 1994).

The vessel NOORDAM and the vessel M/T YMITOS collided on the high seas on November 6, 1993. The owners of the YMITOS filed a limitation proceeding on November 10, 1993. On November 17, 1993, plaintiff filed a class action petition naming the vessel NOORDAM and her owners as defendants. The owners of the NOORDAM then filed a third party complaint against the owners of the YMITOS. Thereafter, the two cases were consolidated, and the owners of the NOORDAM moved to dismiss the class action petition.

The plaintiff class action petitioner alleged that the filing of the third party complaint against the owners of the YMITOS was in violation of the restraining order issued in the limitation proceeding brought by the owners of the YMITOS.

The court nonetheless dismissed the class action petition, relying upon the Fifth Circuit decision in *Lloyd's Leasing Limited v. Bates,* 902 F.2d 368 (5th Cir. 1990). In *Lloyd's Leasing,* the Fifth Circuit had concluded that when maritime jurisdiction is invoked, and the supplemental rules for certain admiralty and maritime claims become applicable, the supplemental rules supersede the Federal Rules of Civil Procedure to the extent that there are inconsistencies. The district court in *Humphreys* further noted that the policy of the limitation statute, which was to bring all claims before a single court and to bar claims not brought in a timely manner, was best served under Rule F, rather than under Rule 23.

SUITS IN ADMIRALTY ACT/PUBLIC VESSELS ACT: IN PERSONAM ENFORCEMENT OF IN REM CLAIM AGAINST THE UNITED STATES

E.J. Bartells Co. v. Northwest Marine, Inc., 1994 A.M.C. 1057 (W.D.Wash. 1994).

E.J. Bartells Co. (Bartells) was a subcontractor hired by Northwest Marine, Inc. (Northwest) to install insulation and lagging in the fire rooms of the USS STANDLEY. Northwest was the general contractor hired by the U.S. Navy to overhaul the STANDLEY. A dispute arose between Northwest and the United States with regard to the final cost of the overhaul. Bartells brought this claim seeking recovery of $1.4 million dollars in additional fees and costs because of overtime and increased costs.

The United States moved to dismiss Bartells' claims against it on various grounds. The court addressed and decided only one of those grounds for dismissal. The United States argued that by reason of the 1988 redrafting of the Maritime Lien Act, 46 U.S.C. §971 et seq., Bartells could obtain no lien against the STANDLEY.

Bartells relied upon the Suits in Admiralty Act, 46 U.S.C. §§741-52 (S.A.A.) and the Public Vessels Act, 46 U.S.C. §781 et seq. (P.V.A.). Reviewing precedent concerning the S.A.A. and P.V.A., the court concluded that the two acts merely provided a "jurisdictional hook upon which to hang traditionally admiralty claims" (citing *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980)).

The court specifically noted the passage of the Maritime Commercial Instruments and Liens Act (MCILA), 46 U.S.C. §§31301-43, repealing the earlier Maritime Lien Act, 46 U.S.C. §971. Section 31342 grants a maritime lien to persons providing necessaries to a vessel on the order of the owner or person authorized by the owner, and states specifically that "this section does not apply to a public vessel". The court relied upon the legislative history of the MCILA, as embodied in HR Rep. No. 100-918, 100th Cong., 2nd Session 56 (1988, reprinted in 1988 U.S.C.C.A.N. at 6149). The House Report on §31342 stated "this would insure that no claim for maritime liens could be asserted against public vessels."

The court made note of the Eleventh Circuit decision in *Bonanni Ship Supply, Inc. v. United States,* 959 F.2d 1558, 1992 A.M.C. 2165 (11th Cir. 1992), holding that the MCILA permitted *in personam* admiralty actions against the United States in the nature of *in rem* actions. The court rejected the Eleventh Circuit's holding on the issue, based upon perceived Congressional intent. The court held that Congress had eliminated the maritime claim which could hang on the S.A.A. or P.V.A. jurisdictional hook by passing the MCILA. The court, therefore, granted the United States' motion to dismiss.

CONTRA:

St. John Marine v. United States, 1994 A.M.C. 2526 (S.D.N.Y. 1994).

Plaintiff, St. John Marine (St. John), a Greek Corporation, was the owner of the M/V ST. JOHN. St. John time chartered the vessel to Afram Lines International (Afram). The terms of the charter included a lien on subfreights. Thereafter, Afram voyage chartered the ST. JOHN to the

Agency for International Development (AID), an agency of the United States Government, to carry food from the United States to Jordan and Cypress. While on charter to AID, Afram failed to pay charter hire to St. John. On December 19, 1990, St. John notified AID of the lien and Afram's failure to pay. St. John also requested that AID refrain from making payment to Afram, and to hold the money on account for the owners. AID nonetheless paid Afram. AID insisted that they lacked the means to gauge the legal merit of St. John's claim against Afram and lacked the power to determine the true owner of the ST. JOHN.

St. John sued and the United States moved to dismiss. The motion was denied. The United States, relying on 46 U.S.C. §741 of the Suits in Admiralty Act, argued that the sub-freight merely stood in place of the cargo and that the action was in essence an *in rem* action against the cargo. Section 741 states:

> No vessel owned by the United States...and no cargo owned or possessed by the United States...shall...in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions.

The court, however, noted a lien on freight was not a possessory lien, as is a lien on cargo. The court found §742 of the Suits in Admiralty Act to be the pertinent section. This section states:

> In cases where if such vessel were privately owned or operated, or such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding *in personam* may be brought against the United States.

Finally, the United States argued that a lien was an impermissible garnishment, also prohibited by the Suits in Admiralty Act. Relying on *In Re North Atlantic and Gulf Steamship Co.,* 204 F. Supp. at 904, 1963 A.M.C. at 876, the court characterized the lien on sub-freight as "more closely aligned to an assignment of rights then to a garnishment."

Practice and Procedure Editors' Note: Although *St. John Marine* involved a lien against subfreights, and *Bartells* involved a claim against the vessel, there does not seem to be a sound reason for the different results. It seems to the editors that the S.A.A., P.V.A. and MCILA were intended to prohibit the *in rem* remedy of attachment, garnishment or arrest of property of the United States. It does not seem so clear that the MCILA was intended to eliminate a right of recovery from the United States, particularly when read in conjunction with §742 of the S.A.A. One could logically conclude that the language of §742, allowing recovery by appropriate *in personam* action against the United States where such a right of recovery would exist if the vessel or cargo were privately owned, is not inconsistent with Section (b) of MCILA §31342, which states that this section does not apply to public vessels.

SUITS IN ADMIRALTY ACT: SERVICE OF PROCESS "FORTHWITH" IS FOUND TO BE JURISDICTIONAL

U.S. v. Holmberg, 1994 A.M.C. 2543 (5th Cir. 1994).

Plaintiff Holmberg was injured while working as a seaman aboard a vessel owned by the United States through the Maritime Administration, and managed by its general agent, OMI Ship Management, Inc. Service of process was effectuated upon the United States 103 days after the filing of the complaint. The United States moved to dismiss pursuant to the Suits in Admiralty Act, 46 U.S.C. §742, which requires service of process "forthwith". The district court ruled that the S.A.A. service of process provision was superseded by Federal Rule of Civil Procedure 4(j), which requires service within 120 days.

The Fifth Circuit noted that the Suits in Admiralty Act was a limited waiver of sovereign immunity. Therefore, the conditions to such a waiver of sovereign immunity are necessarily jurisdictional in nature. The court further concluded that the "forthwith" service requirement of the S.A.A. involved substantive rights, and could not be superseded by a procedural rule, such as a Federal Rule of Civil Procedure 4(j).

The court, therefore, concluded that service of process in 103 days was not "forthwith", and therefore dismissed the complaint for lack of jurisdiction.

AND:

Jayne v. U.S., 1994 A.M.C. 1003 (S.D. Fla. 1993).

In this case, plaintiff alleged that he was injured while serving on a United States Naval Sea Lift vessel. Plaintiff served the United States attorney for the Southern District of Florida 5 days after filing the complaint. Plaintiff served the Attorney General of the United States some 6 months later. The S.A.A., 46 U.S.C. §742, requires that:

> [The plaintiff] shall forthwith serve a copy of his [complaint] on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States.

Relying on *Libbie v. United States,* 840 F.2d 818, 1988 A.M.C. 2520 (11th Cir. 1988), the court found the service requirements of the S.A.A. to be jurisdictional. The Eleventh Circuit had also found the service requirements of the S.A.A. not to be superseded by the 120 day requirements of Federal Rule of Civil Procedure 4(j). The Eleventh Circuit in *Libbie* did not set a mechanical deadline, but stated that the correct inquiry in the case was whether the service was accomplished with reasonable promptness and dispatch. The *Libbie* court further reasoned that the 120 day time limit of 4(j) could provide guidance, and was an appropriate bench mark.

Plaintiff insisted that service had not been made upon the Attorney General in a timely manner because counsel was not aware that the U.S. attorney for the district as well as the Attorney General were to be served.

The court held that six months delay in serving the Attorney General was not "forthwith" service, and that it could not enlarge the time, pursuant to Rule 4(j), for good cause shown. Finally, even it if could enlarge the time for good cause, it would not find good cause under the facts of this case.

JURISDICTION: APPLICATION OF ADMIRALTY LAW WHEN ADMIRALTY JURISDICTION NOT INVOKED UNDER 9(h); APPLICATION OF 3 YEAR MARITIME LIMITATION PERIOD TO PLEASURE BOAT ACCIDENTS

Phelps v. McClellan, 30 F.3d 658 (6th Cir. 1994).

This case arises from a 1991 collision of two pleasure boats on Lake Chatauqua, in Western New York. Plaintiff Phelps was a Pennsylvania resident. Defendant McClellan was a citizen of Ohio. Phelps commenced suit against McClellan in the Ohio federal court in 1992, more than two years but less than three years after the accident. The district court found that Ohio's two year statute of limitations applied, and dismissed plaintiff's complaint. Plaintiff sought review of the dismissal, alleging, among other things, that the claim came within the court's admiralty jurisdiction, and that the three year admiralty statute of limitations with regards to personal injuries applied. (46 U.S.C. §763a). The court held that the three year statute of limitations in admiralty did not apply because the plaintiff had not correctly invoked admiralty jurisdiction, pursuant to Rule 9(h).

CONTRA:

Mink v. Genmar Indus., Inc., 29 F.3d 1543 (11th Cir. 1994).

Plaintiff Mink was injured while a passenger aboard a 38 foot Wellcraft Scarab. The Scarab was a high performance boat, capable of speeds up to 80 miles an hour. While operating in the Gulf of Mexico at high speed, plaintiff Mink was unable to find a secure position in the boat's cockpit. He could not maintain his balance, and was slammed to the deck. There were no handrails which could be used from the position where he was standing. He suffered a fractured vertebrae, and was rendered a paraplegic.

Mink filed a complaint in Florida state court against the boat's manufacturer, Genmar. Genmar removed the case to federal court on the basis of diversity. The complaint was filed almost four years after the accident.

Defendant Genmar filed a motion to dismiss, alleging that the case was time-barred pursuant to the three year statute of limitations for personal injury in admiralty, 46 U.S.C. §763a. [One presumes that plaintiff sought the application of a more favorable state statute of limitations].

Judge Anderson of the Eleventh Circuit first addressed the question of whether the claim came within admiralty jurisdiction. He concluded that all of plaintiff's claims, including claims for negligent design, negligent manufacture, negligent operation and breach of implied warranty, came within the court's maritime jurisdiction.

Judge Anderson, relying upon *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), and *Romaro v. International Terminal Operating Co.,* 358 U.S. 354 (1959), concluded that substantive maritime law applied. Finally, he held that the three year statute of limitations under 46 U.S.C. §763(a) applied to the exclusion of any state statutes of limitations, including the Florida statute of limitation for breach of implied warranty claims. In doing so, Judge Anderson relied upon the First Circuit's decision in *Butler v. American Trawler Co., Inc.,* 887 F.2d 20 (1st Cir. 1989). Judge Anderson made note of the First Circuit's conclusion in *Butler* that the issue of whether the three year statute of limitation was "substantive" or "procedural" was irrelevant. The First Circuit had found Congressional intent to preclude the operation of different state limitation statutes in respect to maritime torts, and the Eleventh Circuit in *Mink* agreed.

Practice and Procedure Editors' Note: In the opinion of the Editors, the First Circuit and the Eleventh Circuits are correct, and the Sixth Circuit is incorrect. If a claim for personal injury comes within the court's admiralty jurisdiction, substantive maritime law governs, and the three year statute of limitations under 46 U.S.C. §763(a) applies. This is true regardless of whether there are other bases of jurisdiction, such as diversity. Pleading a claim as an admiralty and maritime claim pursuant to Rule 9(h) renders it such a claim for the purposes of Rules 14(c) governing third party practice, 38(e) concerning a party's right to a jury trial, and Rule 81 regarding venue. Rule 9(h) does not give the plaintiff a choice as to the substantive law that will apply, even if the action comes within the court's diversity or federal question jurisdiction.

The Sixth Circuit did note that, although statutes of limitation are characterized as substantive, for purposes of applying state or federal law in accordance with *Erie R.R. Co. v. Tomkins,* 304 U.S. 64 (1938), statutes of limitations are usually characterized as procedural for purposes of a choice of law analysis. Therefore, if one characterizes the statute of limitations as procedural, one could argue that it, like other admiralty procedures, do not apply pursuant to Rule 9(h), when the claim is within the court's jurisdiction on grounds other than admiralty. However, the editors agree with the First and Eleventh Circuits in the conclusion that whether the statute of limitations is procedural or substantive is irrelevant. Courts have long held that admiralty law should be uniform nationwide. It does not make sense

that a pleasure boat accident in New York should be subject to a different statute of limitations than a pleasure boat accident in Florida.

The editors note that on the map of New York state, Lake Chatauqua appears to be a landlocked lake, wholly within the State of New York. Therefore, it is questionable whether substantive maritime law would apply. See *Reeves v. Mobile Dredging and Pumping, Inc.,* 26 F.3d 1247, 1253 (3d Cir. 1994). Thus, the result of the Sixth Circuit may be, in the end, correct, but for the wrong reasons.

JURISDICTION: BODY OF WATER NAVIGABLE INTERSTATE BY RAFTS AND CANOES NOT "NAVIGABLE WATER" FOR PURPOSES OF ADMIRALTY JURISDICTION

Lynch v. McFarland, 808 F. Supp. 559 , 1994 A.M.C. 2407 (W.D. Ky. 1992).

This case arose from a motor boat accident occurring on Lake Cumberland in Kentucky. Although the factual record was not perfectly clear, for purposes of deciding the case, the court concluded that a limited amount of canoeing and rafting occurred along the Big South Fork of the Cumberland River, from Tennessee, into Kentucky and into Lake Cumberland. It noted that a dam separated Lake Cumberland from the Big South Fork of the Cumberland River, and that vessels larger than canoes and rafts generally could not navigate beyond the dam upriver to Tennessee. The court paid homage to the Supreme Court's decision in *The Daniel Ball,* 77 U.S. (10 Wall) 557 (1870), which defined navigable waters as "used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The court also noted that, pursuant to *Finneseth v. Carter,* 712 F.2d 1041 (6th Cir. 1983), an artificial water body, such as a man-made reservoir, is navigable for purposes of conferring admiralty jurisdiction if it is used or capable or susceptible of being used as an interstate highway for commerce.

The court concluded that limited canoe and raft traffic down the Big South Fork of the Cumberland River into Lake Cumberland did not render Lake Cumberland navigable for purposes of conferring admiralty jurisdiction.

JURISDICTION: OPERATION OF JET SKI COMES WITHIN ADMIRALTY LAW, THE RULE OF MILES v. APEX APPLIES

Choat v. Kawasaki Motors Corp., 1994 A.M.C. 2626 (Ala. Sup. Ct. 1994).

Connie Johnson was killed when she was struck by a Kawasaki jet ski, being operated on Lake Wilson, an impoundment of the Tennessee River. Thomasine Choat brought a wrongful death action against Kawasaki and certain individuals, including the operator. Kawasaki moved for summary judgment and dismissal of plaintiff's claims for punitive damages and damages for loss of society, on the basis that the claim was subject to admiralty jurisdiction, and that the rule of *Miles v. Apex* applied.

Relying upon *Sisson v. Ruby,* 49 U.S. 358, 1990 A.M.C. 1808 (1990) and *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 1982 A.M.C. 2253 (1982), the court stated that a claim would fall within admiralty jurisdiction if the incident was of the type which would potentially affect maritime commerce, and bore a substantial relationship to traditional maritime activity. The court found that a collision between a jet ski and a person could affect maritime commerce in the same way that the collision of two pleasure boats could affect maritime commerce, as found by the Supreme Court in *Foremost.* The court also found a substantial relationship to a traditional maritime activity because operating a pleasure craft has been held to be operating a vessel, which is a traditional maritime activity. [The court also relied upon *Wahlstrom v. Kawasaki Heavy Industries,* Ltd., 4 F.3d 1084, 1994 A.M.C. 13 (2d Cir. 1993) (*See* Practice and Procedure Newsletter 24), where the Second Circuit had come to the same conclusion].

In a lengthy and learned analysis of the right of recovery for wrongful death under maritime law, which bears a remarkable resemblance to the decision of the Second Circuit in *Wahlstrom,* the court concluded that the rule of *Miles v. Apex Marine Corp.,* 498 U.S. 19, 1991 A.M.C. 1 (1990), applied to this case. Further, *Miles v. Apex* precluded damages for loss of society or punitive damages, even in a pleasure boat case not involving a Jones Act seaman.

JURISDICTION: CLAIM AGAINST THE UNITED STATES FOR COSTS ASSOCIATED WITH DETAINING ASYLUM-SEEKING STOWAWAYS MUST BE BROUGHT IN THE UNITED STATES CLAIMS COURT

DIA Navigation Co., Limited v. Pomeroy, 1994 A.M.C. 2092 (3d Cir. 1994).

This case arises from the discovery of four Romanian stowaways aboard DIA's vessel, the SENATOR, en route from Le Havre, France, to Newark, New Jersey. Upon arrival in New Jersey, the four stowaways requested political asylum.

The INS insisted that the carrier was responsible for detaining the stowaways pending their asylum hearings. The stowaways were housed in a hotel on Staten Island under armed guard. One stowaway commenced a hunger strike and threatened suicide. Given the situation, DIA requested that the INS assume custody. INS refused. Furthermore, INS refused to convene a hearing until it received completed asylum applications. Therefore, DIA had to hire a Romanian interpreter to help with the preparation of the forms and assist at the asylum hearings. Ultimately, the asylum requests were granted. DIA incurred expenses amounting to $127,580.00.

DIA brought a claim against the INS pursuant to 28 U.S.C. §2201, alleging that the INS policy of requiring the ocean carrier to bear the cost of detaining the stowaway was unlawful. DIA also sought recovery of the costs incurred in detaining the stowaways.

The U.S. District Court dismissed DIA's claims on their merits. On appeal, the Third Circuit concluded that the dismissal was correct, although the Third Circuit did not reach the merits of the claim, because the district court lacked jurisdiction over the claim. The Third Circuit also held that the INS policy rendering ship owners responsible for the cost of detaining asylum-seeking stowaways was invalid because the INS had failed to comply with the notice and comment procedures of the Administrative Procedure Act in developing the policy. The court also ruled that under the Tucker Act, 28 U.S.C. §1491, a non-tort monetary claim against the United States exceeding $10,000.00 must be brought in the Court of Claims, and not the U.S. District Court.

PRE-JUDGMENT INTEREST: SEVENTH CIRCUIT USES "MARKET RATE" AS A GUIDE; FIFTH CIRCUIT REQUIRES SUPPORTING EVIDENCE WHERE RATE HIGHER THAN JUDGMENT RATE SOUGHT.

Cement Division v. City of Milwaukee, 31 F.3d 581 (7th Cir. 1994).

A vessel owned by the Cement Division of National Gypsum Company broke loose from its mooring, allided with the head wall of its berth and sank to the bottom of Milwaukee harbor. The Cement Division brought suit against the City for damages in the amount of $4.5 million dollars. Allocation of fault was apportioned two-thirds to National Gypsum and

one-third to the City. A consent judgment in favor of the Cement Division against the City in the amount of $1,677,581.00 was eventually entered. The district court refused to award pre-judgment interest based upon the finding of mutual fault, and the fact that the judgment was against a municipality.

The Seventh Circuit reversed the district court, holding that neither a finding of mutual fault nor the defendant's status as a municipality was a bar to the award of pre-judgment interest. The court then addressed the issue of the rate of prejudgment interest. Relying upon *In Re Oil Spill by the AMOCO CADIZ,* 954 F.2d 1279 (7th Cir. 1992), and *Gorenstein Enterprises, Inc. v. Quality Car-U.S.A., Inc.,* 874 F.2d 431 (7th Cir. 1988), the court concluded that the market rate of interest, meaning the average prime rate for the years in question, is the best starting point. Relying upon *AMOCO CADIZ* and *Gorenstein,* the court also found that the creditworthiness of the judgment debtor and the rate of interest a lender would charge the City could be considered. Finally, the circuit court left it to the district court's discretion as to whether compound interest could be awarded.

AND:

Nicole Trahan Limitation Proceeding, 1994 A.M.C. 1253 (5th Cir. 1994).

Plaintiff's LNG carrier had been struck by defendant's tug and several barges. Plaintiff recovered against the defendant in district court. Pre-judgment interest was awarded at the rate prescribed for post-judgment interest under 28 U.S.C. §1961. This rate of interest is lower than the state legal rate.

The circuit court upheld the award of interest at the lower federal rate, instead of the higher Louisiana rate. As the district court had pointed out, the plaintiff offered no evidence that they had borrowed money, or were prevented from paying off loans because of the casualty. Further, neither party was domiciled, incorporated or had its principal place of business in Louisiana.

Practice and Procedure Editors' Note: It is apparent from both of these decisions that counsel must be prepared to present evidence in support of the application of a particular rate of pre-judgment interest. It is also apparent that exactly what evidence must be presented will vary from circuit to circuit. Also note that in the Third Circuit, post-judgment interest is not controlled by 28 U.S.C. §1961 in admiralty cases. Evidence is, therefore, appropriate on the rate of funds post-judgment.

ARBITRATION: SECOND CIRCUIT HOLDS LOF CANNOT BE USED TO COMPEL LONDON ARBITRATION OF PLEASURE BOAT SALVAGE CASE

Jones v. Sea Tow Services Freeport, New York, 30 F.3d 360 (2d Cir. 1994).

In a follow-up to several district court cases previously reported on the interpretation of the LOF London arbitration clause, the Second Circuit Court of Appeals has reversed the Eastern District of New York. The case arose out of salvage services provided by a U.S. salvage corporation to a pleasure yacht owned by American citizens. The salvage was governed by an LOF Agreement which included a London arbitration clause. Suit was filed by the vessel owner against the salvor seeking to declare the arbitration clause unenforceable. The district court held that the Arbitration Act, including Chapter Two thereof, permitted the court to order foreign arbitration of a dispute involving two U.S. citizens where enforcement of the award in a foreign jurisdiction was contemplated, or where there was a significant contact with a foreign jurisdiction. The district court held that the parties' reference to the acknowledged experience of the Committee at Lloyd's to arbitrate a salvage dispute and the fact that the award would be entered in London provided the requisite nexus to the foreign jurisdiction. The court ordered arbitration to proceed in London. An appeal was taken.

The Second Circuit, following the reasoning of *Reinholtz v. Retriever Marine Towing and Salvage,* (S.D. Fla. 1993) and *Brier v. Northstar Marine, Inc.,* (D.N.J. 1992), held that the Arbitration Act precluded enforcement of the LOF provision as to two American citizens. The requisite nexus with a foreign jurisdiction required more than the fact that the parties agreed to arbitrate in that jurisdiction. The entry of an award was not the same as the enforcement of an award. Since the parties were in the United States, any enforcement of the award would take place here, not in London.

Practice and Procedure Editors' Note: The Society of Maritime Arbitrators, New York, has prepared rules for recreational salvage arbitration which provide an expedited procedure for the arbitration of salvage disputes. Included in the new rules is an expedited time frame, arbitration before a single arbitrator, arbitration on the papers without a hearing, and an appeal process for review by a second arbitrator. Copies of the salvage rules may be obtained from the Society.

COMMITTEE ON PRACTICE AND PROCEDURE NEWSLETTER NO. 27, SPRING, 1995

Editors: Edward V. Cattell, Kevin P. Smith and Shannon S. Sanfilippo

JURISDICTION: CLAIMS AGAINST OPERATOR OF CRANE DRIVING PILINGS FROM BARGE FOR FLOODING SUBTERRANEAN TUNNELS BENEATH CHICAGO RIVER WITHIN ADMIRALTY JURISDICTION.

City of Chicago v. Great Lakes Dredge and Dock Co., 63 U.S.L.W. 4154 (February 22, 1995).

On April 13, 1992, the Chicago River poured into a system of subterranean freight tunnels beneath the City of Chicago and beneath the Chicago River. The freight tunnels connected to the basements of many of the large office buildings in the downtown Chicago loop, and the flood virtually shutdown this part of the city for a period of time. The flooding allegedly resulted from a pile driving operation conducted by Great Lakes Dredge and Dock Company from a barge in the Chicago River. Great Lakes sought limitation in the U.S. district court. The complaint filed by Great Lakes sought indemnity and contribution from the City of Chicago, as well. The district court dismissed for lack of admiralty jurisdiction, and the Seventh Circuit reversed. (See Practice and Procedure Newsletter 24). The Supreme Court granted *certiorari*. The parties agreed that jurisdiction over the indemnity and contribution claims hinged on jurisdiction over the claim for limitation.

The Court traced the development of the jurisdictional issue, from the adoption of the Admiralty Extension Act in 1948, continuing with the requirement of a nexus to a traditional maritime activity stated in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 49 (1972), and the refinement of the nexus requirement in *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982) and *Sisson v. Ruby,* 497 U.S. 358 (1990). The Court noted that jurisdiction existed with regard to a collision between two pleasure boats under *Foremost Insurance* because of the disruptive impact such collisions could have on maritime commerce and because of the traditional concern that admiralty law has for navigation.

After the *Foremost* decision, the Supreme Court went on to develop the requirement of a nexus to a traditional maritime activity in *Sisson,* by adding the "general features" test. Thus, the connection to traditional maritime commerce requirement became a two-prong test. After *Sisson,* a court assessing the existence of admiralty jurisdiction must first determine whether the incident has a potentially disruptive impact upon maritime commerce. If so, the court must then decide whether the "general features" of the activity show a substantial relationship to a traditional maritime activity. The court must view the activity at an "intermediate level of possible generality." The events cannot be viewed in a hypergeneral or hyperspecific way.

The Court rejected the City's argument that the negligent act and resulting damage must occur close in time and space. The Court pointed out that traditional principles of proximate cause applied in this regard. The Court rejected the City's "hypergeneralization" of the activity as merely pile driving near a bridge. Finally, the City advocated adoption of the Fifth Circuit's multi-prong test that looks to the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, the impact of the event upon maritime shipping and commerce, the desirability of a uniform national rule and the need for admiralty expertise at trial. The Court rejected the Fifth Circuit multi-prong test as too complicated. In doing so, the Court pointed out that recognition of admiralty jurisdiction did not necessarily preclude state law from being applied, or require a uniform national rule.

The Court held that the pile driving activities of Great Lakes and the alleged weakening of the tunnels beneath the Chicago River had both a potentially disruptive impact upon maritime commerce and, when viewed at the proper level of generality, an adequate nexus to a traditional maritime activity. Given the Admiralty Extension Act, the fact that the harmful result itself occurred on land and not on navigable water did not preclude admiralty jurisdiction.

Justice O'Connor concurred in the result, but wrote separately stating:

> I do not, however, understand the court's opinion to suggest that, having found admiralty jurisdiction over a particular claim against a particular party, a court must then exercise admiralty jurisdiction over all claims and all parties involved in the case.

> Rather, the court should engage in the usual supplemental jurisdiction and impleader inquiries.

Justice Scalia and Justice Thomas concurred in the holding of the Court, but stated that they would reject the multi-factor approach adopted in *Sisson v. Ruby* and replace it with a simple bright line rule by which if the tort occurred on a vessel on navigable waters, the action would come within admiralty jurisdiction. Justices Thomas and Scalia noted that the Supreme Court had visited the admiralty jurisdiction question now three times in ten years, pointing out that defining the "general features" of the activity by viewing the activity in a "intermediate level of possible generality" was vague and created confusion. The test provides little guidance to the lower courts, which are struggling with it.

Practice and Procedure Editors' Note: The "potential disruption of maritime commerce" standard of *Foremost* and *Sisson* reminds one of the Court's application of the commerce clause in testing the constitutional validity of acts of Congress. Just as virtually any activity remotely touching upon transportation can have an affect on interstate commerce, a la *Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964)*, virtually any incident on navigable water causing injury to persons or property, or at very least causing commotion, can have a disruptive impact on maritime commerce. Further, if the participants are clearly engaged in traditional maritime commerce, why must the event be disruptive to confer jurisdiction? Justices Thomas' and Scalia's criticism of the "general features" test rings true. How does one move back and forth along the scale of generality so as to find the correct "intermediate level of possible generality," which brings the activity into proper focus for purposes of determining its relationship to traditional maritime activity. As Justices Thomas and Scalia noted, "It is especially unfortunate that this has occurred in admiralty, an area that once provided a jurisdictional rule almost as clear as the 9th and 10th verses of Genesis: 'and God said, let the waters under the heavens be gathered together into one place and let the dry land appear and it was so. And God called the dry land earth and the gathering together of the waters called he seas: and God saw that it was good.'"

Certainly a bright line rule that does not require a court to determine the correct level of "intermediate generality" would be easier to apply and provide a better guide to the parties. However, one wonders whether the test espoused by Justices Thomas and Scalia might be too narrow. One can conceive of situations where the tortious activity itself did not occur

aboard the vessel, but resulted in harm upon navigable waters. There have certainly been plenty of cases which have come up in the limitation of liability context where it has been held that the actions of managing agents on land caused the maritime casualty on navigable water. Perhaps a better bright line rule would be that admiralty jurisdiction includes all torts occurring on navigable water involving a vessel.

JURISDICTION: NEGLIGENT SUPERVISION OF PASSENGERS DURING DIVING EXPEDITION FROM BOAT NOT WITHIN ADMIRALTY JURISDICTION.

In The Matter of Kanoa, Inc. d/b/a Body Glove, Inc., No. 94-00216 (D. Haw. November 29, 1994).

This case is factually similar to *Tancredi v. Dive Macai Charters*, 823 F. Supp. 778 (D. Haw. 1993), which was reported in *Practice and Procedure Newsletter No. 25*. (See MLA Report No. 712, dated October 31, 1994, at 10061.) In both cases, claimant's decedent was involved in a diving expedition operated from a boat on which the decedent was a passenger. In *Kanoa, Inc.*, the decedent became separated from the group during the dive, surfaced too quickly, and died of pulmonary over-expansion syndrome. In both *Tancredi and Kanoa, Inc.*, it was alleged that those supervising the dive failed to do so properly.

In both cases the claimants cited the Third Circuit's decision in *Sinclair v. Soniform*, 935 F.2d 599 (3rd Cir. 1991). *Sinclair* involved a death during a commercial diving expedition. In both *Tancredi and Kanoa, Inc.*, the district court in Hawaii distinguished *Sinclair* on the basis that the tort in *Sinclair* was the failure of the crew transporting the diver to and from the site to detect the symptoms of his decompression sickness and to administer treatment promptly. In *Kanoa, Inc.*, as in *Tancredi*, the district court concluded that the tortious conduct did not fall within admiralty jurisdiction. In *Kanoa, Inc.*, the court stated that the claimant's relationship to Kanoa, Inc. at the time of the accident was not that of passenger to common carrier, but rather student to instructor. The instrumentality involved was the self-contained underwater breathing apparatus and not the boat. Oddly enough, the court in *Kanoa, Inc.* noted that the dive master provided instruction to the claimant, a novice, on the way to the dive site, presumably aboard the vessel. Nonetheless, the claimants in *Kanoa, Inc.* and *Tancredi* were not "passengers", as was the claimant in *Sinclair*, and, therefore, the second prong of the *Sisson* test was not satisfied because the

general features of the activity did not bear a significant relationship to traditional maritime activities.

Practice and Procedure Editors' Note: As set forth in the commentary concerning the *Tancredi* decision in *Practice and Procedure Newsletter No. 25,* drawing a distinction between the facts of *Tancredi and Kanoa, Inc.* from those in Sinclair on the basis that the victims in *Tancredi and Kanoa, Inc.* did not survive long enough to be brought back aboard the boat, while the victim in *Sinclair* did, seems rather tenuous. Certainly, something bad happened to the victim in *Sinclair* while he was in the water or he would not have had decompression sickness when he got back aboard the boat.

This seems to be a good example of a lower court struggling with the vague standard of *Sisson* and having difficulty finding the correct level of "intermediate generality" by which to judge the activity. Certainly, there are times when diving is a traditional maritime activity, such as underwater construction, vessel repair, and obviously, salvage. It also seems odd that the court in *Kanoa, Inc.* noted that the decedent received his "briefing" on the boat while proceeding to the dive site. It would, therefore, appear that the negligent supervision of the dive occurred both on a vessel and in the water away from the vessel. Activities such as diving expeditions are difficult to dissect with any degree of precision so as to determine whether the negligent conduct occurred wholly or partly on the boat or in the water. Nor does there seem to be any good reason for doing so. Instead, the better rule would seem to be that a vessel operator owes a duty of care to his clients, as passengers, from the time they step aboard the vessel, until they step back onto dry land.

JURISDICTION: VESSEL IN DRY DOCK IS UPON NAVIGABLE WATERS AND SUBJECT TO MARITIME JURISDICTION.

In Re Sea Vessel, Inc., as owners of the M/V SEA LYON V, 23 F.3d 345, 1994 A.M.C. 2736 (11th Cir. 1994).

The M/V SEA LYON V was placed in dry dock in Miami for the replacement of steel side plates in the forward one third of the vessel, as well as tank bulkheads and swash plates. Although the parties differed as to whether this was routine maintenance or not, the work was apparently scheduled in advance. A fire broke out during welding and two ship yard

employees were killed. Thereafter, the owners, Sea Vessel, Inc., filed for limitation in the U.S. district court.

The claimants moved to dismiss for lack of admiralty jurisdiction. The presiding magistrate recommended dismissal, and the district court adopted the recommendation. The Eleventh Circuit reversed.

The claimants relied upon a line of cases holding that a dry dock was not a vessel but an extension of land. They reasoned that a vessel on an extension of land was on land and not on navigable water.

Claimants' argument necessarily ignored the rulings of the Supreme Court in *The Robert W. Parsons,* 191 U.S. 17 (1903), and *The Steamship JEFFERSON,* 215 U.S. 130 (1909), two cases in which it had been held that a vessel in dry dock was upon the water. The claimants also challenged jurisdiction on the basis that the activity did not meet the nexus test of *Sisson v. Ruby* with regard to the potential disruption to maritime commerce. The court held that the case at bar was indistinguishable from *Sisson.* Both involved a fire aboard a vessel. The court further held that routine maintenance to a vessel was substantially related to traditional maritime activity.

Practice and Procedure Editors' Note: Prior to *Foremost Insurance* and *Sisson* and arguably, even after *Executive Jet,* there would have been no need to evaluate the potential for disruption upon maritime commerce or the relationship to traditional maritime activity. Unless one reads *Foremost* and *Sisson* to overrule the *Robert W. Parsons* and *The Steamship JEFFERSON,* it seems that the inquiry should have ended at the locality test. It would appear that the first part of the two-prong *Sisson* nexus test, which inquires whether the activity has a potentially disruptive effect on maritime commerce, was created for evaluating cases that did not bear an obvious relationship to traditional maritime commerce in the first place. If routine repair of a cargo-carrying commercial vessel is not substantially related to traditional maritime activity, one wonders what is. Therefore, the editors again wonder why an activity which is clearly related to traditional maritime commerce must have a disruptive effect on maritime commerce to come within admiralty tort jurisdiction. Suppose that, instead of a fire, a death resulted from a worker falling through an open hatch. Would the event be disruptive of maritime commerce and, if not, would the event lack a sufficient nexus to traditional maritime activity?

ADMIRALTY JURISDICTION/CHOICE OF LAW
STATE LAW PREEMPTION

In Re Ballard Shipping, 1994 A.M.C. 2705 (1st Cir. 1994).

This case arises from the grounding of the M/V WORLD PRODIGY in Narragansett Bay in June of 1989, which resulted in a significant oil spill. The owners and operators sought limitation in the U.S. district court and a group of shellfish dealers who suffered economic losses filed claims. The harm suffered by the shellfish dealers was purely economic and recovery of damages for such harm would normally be prohibited by *Robbins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303 (1927). However, the claimants argued that the Rhode Island Environmental Injury Compensation Act applied to the exclusion of *Robbins Dry Dock.*

The district court held for the vessel interests, dismissing the claim for economic damages. The First Circuit reversed, noting: "discerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence." *In Re Ballard Shipping,* 1994 A.M.C. at 2706. The court went on to note the title of a work by Professor Currie on the topic, which was *"Federalism and Admiralty: The Devil's Own Mess"*, 1960 Sup. Ct. Rev. 158.

Under *Southern Pacific v. Jensen,* 244 U.S. 205 (1917), state legislation is invalid "if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law, or interferes with proper harmony and unity of that law in its international and interstate relations." Only very recently did the Supreme Court define the "characteristic feature" referred to in the *Southern Pacific* decision. In *American Dredging Co. v. Miller,* 510 U.S. ____, 1994 A.M.C. 913 (1994), the Court held that a characteristic feature was a rule which either originated in admiralty or has exclusive application there. 1994 A.M.C. at 918. The First Circuit in *Ballard Shipping* was quick to note that the rule in *Robbins Dry Dock,* announced by Justice Holmes, did not originate in maritime law and had no exclusive application in maritime disputes.

The third prong of the *Jensen* test was found by the First Circuit to be more difficult to apply. In the opinion of the court, the decisions of the Supreme Court in *Kossick v. United Fruit Co.,* 365 U.S. 731, 1961 A.M.C. 833, and *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 444

(1960), require a balancing of state and federal interests in the given area. The court held that although the federal interest in uniformity with regard to damages was no small interest, the interests of those Rhode Island citizens whose economic interests could be so badly harmed by a major oil spill was greater.

Practice and Procedure Editors' Note: This decision and *Calhoun v. Yamaha* (see discussion below) represent a disturbing trend and may only be the tip of the iceberg. Given the extremely narrow reading of *Southern Pacific v. Jensen* set forth in *American Dredging,* and followed in *Calhoun and Ballard Shipping,* it would seem that a large portion of the federal common law of admiralty will now be replaced by the law of the particular states in which future actions are brought and decided. Many of the rules of law applied in admiralty, although judge-made rules, do not originate in admiralty and do not have exclusive application in admiralty. This, coupled with the fact that the Third Circuit and First Circuit no longer construe admiralty jurisdiction as requiring significant national uniformity, leaves open the possibility of applying state law in more and more cases which many admiralty practitioners would have presumed to be governed by uniform admiralty common law principles.

Thanh Long v. Highlands Ins. Co., 1995 A.M.C. 203 (5th Cir. 1994).

This case involved the sinking of the shrimp troller BIG TOM. The owner sought coverage for the loss under the Inchmaree Clause of the Hull Policy. The Inchmaree Clause specifically provided coverage for operational negligence committed by the master, engineer or pilot. The plaintiff sought to apply the state law of Louisiana to the interpretation of the Inchmaree Clause. Under Louisiana law, implied warranties in insurance policies are prohibited.

The Fifth Circuit held that under *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 1955 A.M.C. 467 (1955), state law is to be applied, except where it is displaced by admiralty law. The Fifth Circuit went on to hold that there is entrenched federal precedent on the interpretation of Inchmaree clauses identical or similar to the one involved in this case. Therefore federal admiralty law, as it relates to the interpretation to Inchmaree Clauses, applied.

Practice & Procedure Editors' Note: Score one for uniformity.

Powers v. Bayliner, 1995 A.M.C. 449 (W.D.Mich. 1994).

This case arose from the capsizing of a sailboat in Lake Michigan which resulted in four deaths. Michigan law does not recognize strict product liability. Defendant Bayliner sought to exclude the strict liability claim in plaintiff's complaint and to apply Michigan law.

The district court pointed out that the Supreme Court had adopted strict products liability in admiralty in *East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 1986 A.M.C. 2027 (1986). In holding that the federal admiralty law of products liability applied to the exclusion of state law, the court stated:

> That admiralty courts draw partially from state law in formulating a uniform general maritime law does not mean that they are bound to apply the law of the forum state or of the state adjacent to the navigable waters in which the cause of action arose ... This court sits in admiralty jurisdiction and plaintiffs' claims have been pleaded under general maritime law. The court is thus obligated to apply maritime law. To the extent that Michigan law is in conflict with general maritime law, it must be disregarded.

Practice and Procedure Editors' Note: Score two for uniformity — keep count, they are rare. See below.

ADMIRALTY JURISDICTION: CLAIM AGAINST YAMAHA FOR DEATH ON JET SKI IN THE TERRITORIAL WATERS GOVERNED BY STATE LAW

Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 1995 A.M.C. 1 (3d Cir. 1994).

In July of 1989 while vacationing in Puerto Rico, Natalie Calhoun, the twelve year old decedent, rented a Yamaha Wave Jammer. While riding the Wave Jammer, Natalie slammed into a vessel anchored near the hotel and was killed. Her parents individually and in their capacities as administrator of her estate sued Yamaha seeking recovery under the Pennsylvania Wrongful Death statute, 42 Pa. Cons. Stat. Ann. §8301 (1982 & Supp. 1994) and the Pennsylvania Survival statute, 42 Pa. Cons. Stat. Ann. §8302 (1982). In the complaint, the Calhouns sought damages for loss of

future earnings, loss of society, loss of support and services, and funeral expenses as well as punitive damages.

Yamaha moved for partial summary judgment asserting that the damages recoverable on the action were governed by federal admiralty law. As a result, the plaintiffs were not entitled to loss of future wages, loss of society, loss of support and services' or punitive damages following the Supreme Court's decision in *Miles v. Apex.* The district court held that admiralty law governed the Calhouns' wrongful death and survival actions; that the general maritime wrongful death cause of action recognized in *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, (1970), displaced the Pennsylvania Wrongful Death and Survival statutes and that any remedy was thus governed by admiralty law; and that under federal common law lost future wages and punitive damages cannot be awarded but that loss of society and loss of support and services were compensable. Both defendants moved for interlocutory appeal on the issue of whether the plaintiff could recover damages for the loss of Natalie's society. The plaintiffs requested that the appeal also cover the question of whether future earnings and punitive damages are recoverable, which request was granted.

Citing *Wilburn Boat,* the Third Circuit stated that state law can, and often does, provide the relevant rule of decision in admiralty cases. Whether state law may provide a decision in an admiralty case depends on whether the state rule conflicts with the substantive principles of federal admiralty law. The Third Circuit recognized that determining whether federal maritime law conflicts with and thus displaces state law has proven to be extremely difficult. However, the Third Circuit went on to state that "in our view, however, the maritime preemption doctrine is not significantly different from the preemption doctrine applicable to non-maritime contexts." *Calhoun,* 40 F.3d at 629. In its view, in the absence of an express statement by Congress, implied preemption occurs either where Congress intended the federal law occupy the field or where there is an actual conflict between the state and federal law such that compliance with both is impossible, or the state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress. *Id.*

The court noted that in admiralty law there is a requirement that there be a clear conflict before state laws are preempted. *Calhoun,* 40 F.3d at 630 (citing *Askew,* 411 U.S. at 341). In the Third Circuit's view, as long as the different substantive admiralty rules articulated in federal statutes and

under the common law are not frustrated by the application of state law, state law should apply. Thus, the Third Circuit traced the development of federal remedies for maritime death starting with *The Harrisburg* and completing its analysis with *Miles v. Apex.* The Third Circuit stressed the language in *Miles* dealing with the *Moragne* decision and noted that *Miles* showed no great hostility to the operation of state statutes in providing rules and decision in admiralty cases. *Id.* at 636. The court noted that following *Moragne,* there was a trend in the courts to cut back on plaintiff's rights in maritime actions and a general weakness in the principle of uniformity. In the Third Circuit's opinion although many courts give lip service to the idea that maritime law should be uniform, in fact their decisions are counter to this assertion. Since neither the Jones Act nor DOSHA applied in this case, there was no federal rule that explicitly precluded the operation of state wrongful death or survival statutes. Furthermore, since state survival statutes were not obstacles to the accomplishment and execution of the policies of the federal maritime law, the court concluded that Pennsylvania law applied.

In reaching this determination, the court looked first to the survival statutes and noted that neither Congress nor admiralty law has provided any rule of decision in this area as neither the Jones Act nor DOSHA applied, and the *Miles* court had specifically refused to address whether state survival statutes could apply in certain cases. Furthermore, the fact that *Miles* explicitly excluded damages for future lost wages was of no import to the Third Circuit because *Miles* involved a seaman and Yamaha had not demonstrated that Congress intended the limitation on damages in the Jones Act to extend beyond seamen. In reaching this decision, the Third Circuit rejected the Second Circuit's decision in *Walhstrom v. Kawaski Heavy Industries Ltd.,* 4 F.3d 1084, 1093 (2d Cir. 1993).

Similarly, the Third Circuit held that Pennsylvania's wrongful death statutes could apply as they did not conflict with federal admiralty law. Although the Third Circuit recognized that *Moragne* provides a wrongful death remedy, the court stated that the precise contours of that remedy are not fully defined. *Id.* at 639. As a result, the court rejected Yamaha's argument that *Moragne* displaces all state wrongful death statutes and that in consideration of the importance of uniformity in admiralty law, federal maritime law should be preeminent over state law. Since the *Moragne* decision left open a number of questions about remedies, the Third Circuit felt that application of state remedies remained permissible as long as these remedies did not conflict with settled maritime principles. After ana-

lyzing the Supreme Court's decision in *Tallentire,* where the Supreme Court stated that in enacting §7 of DOSHA Congress intended to preserve concurrent state jurisdiction for maritime deaths within state territorial waters, the court held that there was no Congressional intent to preclude the operation of wrongful death statutes. Thus, in the court's view, state wrongful death statutes provided the rule of decision when recreational boaters were killed in territorial waters. *Id.* at 643. The court remanded the case to the district court to decide whether Pennsylvania or Puerto Rico law applied.

RULE B: ATTACHMENT TO SECURE PAYMENT OF JUDGMENT CURRENTLY ON APPEAL IN STATE COURT VALID.

Oil Transport Co. S.A. v. Hinton Oil Transport, 1994 A.M.C. 2817 (S.D.Tex. 1994).

Oil Transport Co. S.A. sought to recover charter hire from Hinton Oil. Oil Transport had proceeded to judgment in a Florida state court and Hinton had filed an appeal. Thereafter, Oil Transport attached money in the hands of a garnishee pursuant to Rule B, which had been awarded to Hinton by way of a New York arbitration.

Hinton argued that the money in the hands of the garnishee could not be attached because the judgment in state court had been stayed pending appeal and, therefore, was not final. The court ruled that the attachment could be made to secure the potential final judgment of the Florida court, even when the plaintiff's primary objective was not to secure jurisdiction over the defendant, but simply to secure payment of a judgment. However, the lien against the arbitration award by counsel, who represented Hinton in the arbitration, was given priority over all other claims, including the claim of Oil Transport.

RULE C: RULE E: HIGH IN CUSTODIA LEGIS COSTS AWARDED WHEN ALTERNATIVES UNAVAILABLE AND COSTS NOT CHALLENGED DURING PENDENCY OF ARREST

Taylor v. Egg Harbor Hull, ex Stormy Pettel, 1995 A.M.C. 582 (D. N.J. 1994).

The plaintiff was a salvor who re-floated a 42 foot Egg Harbor Yacht from the Brigantine shoals off Atlantic City, New Jersey in October of 1990. The captain of the stranded yacht had signed an LOF salvage agreement. Thereafter, an *in rem* action was commenced against the vessel and it was arrested, for purposes of securing plaintiff's salvage lien. Typically, when a yacht is arrested, a marina is appointed substitute custodian and is allowed to charge its usual storage fees, plus other expenses incurred in protecting the property as costs *in custodia legis*. In this instance, the court signed an order appointing a professional guard service to take possession of the boat and act as substitute custodian. Such arrangements are typically used when large commercial vessels, whose crews must stay aboard, are taken into custody. Plaintiff offered testimony that the appointment of a guard service was necessary because the yacht had suffered some damage when grounded on the Brigantine Shoals and represented a pollution risk. As a result, plaintiff was unable to find a marina willing to serve as substitute custodian.

Claimant Maryland National Bank challenged the award of $31,000.00, representing the guard services fees, as costs *in custodia legis*. Maryland National Bank presented expert testimony to the effect that professional guard services are almost never used as substitute custodians for a yacht, because the costs of such services are prohibitive.

In allowing the fees of the guard service to be recovered as costs *in custodia legis*, the court made special note of the fact that Maryland National Bank had been put on notice of the arrest from its inception and had been asked to post a letter of undertaking to secure the yacht's release. The court further noted that Maryland National Bank was on notice of the costs associated with the guard service serving as substitute custodian, but did not challenge the appointment of the guard service as substitute custodian, or the fees charged by the guard service during the time that the guard service was in possession. The court held that because Maryland National Bank was on notice of the arrest and the appointment of the substitute custodian, did not post a letter of undertaking and did not challenge the appointment of the substitute custodian, they were estopped from challenging the award of the fees at a later time.

RULE C: ARREST: DISTRICT COURT WILL ORDER RELEASE OF THE VESSEL WHEN IT CANNOT BE HELD SAFELY.

Triton Container International Ltd. v. Compania Anonima Venezolana de Navegacion, 1995 A.M.C. 162 (D. Guam 1994).

Defendant's vessel, the CERRO BOLIVAR was arrested in Guam in October of 1994. On October 4th, typhoon conditions were threatening the harbor. Typhoon condition 2 weather was expected and, if realized, all moored vessels in the harbor were expected to be ordered to clear the harbor. Hours before such an order was anticipated, the U.S. district court was asked to determine whether the vessels should be released to the owner's custody, or whether a receiver could be appointed.

The court made note of the potential harm the large bulk carrying vessel such as the CERRO BOLIVAR could cause if it broke loose from its moorings, including the environmental harm resulting should oil be released. The court further cited the liability that the court itself could incur were it to maintain the arrest with the vessel in the custody of a receiver. The court concluded that it was best to release the vessel to its captain and its owners and allow their judgment to control the operation of the vessel. The arrest was, therefore, vacated.

RULE C: ARREST: IN REM JURISDICTION BY CONSENT VALID ONLY WHEN CLAIM OF OWNER IS FILED.

Lee v. Pearcy Marine, Inc., 1994 A.M.C. 2827 (S.D.Tex. 1994).

Plaintiff sought to recover wages from the bareboat charter of a vessel that he had served on. His complaint apparently named the vessel itself, *in rem* and the bareboat charterer, Pearcy Marine, Inc. Thereafter, Pearcy Marine, Inc. became insolvent, entered bankruptcy and was discharged. Plaintiff sought to recover a judgment *in rem* against the vessel itself. The vessel's owners intervened for the limited purpose of contesting *in rem* jurisdiction over the vessel. The vessel's owners noted that the vessel had never been served with process pursuant to Rule C.

Plaintiff contended that the vessel had voluntarily consented to jurisdiction by way of the answer to the complaint filed on behalf of the vessel.

The answer was filed on behalf of the "defendants". The "defendants" were not specifically identified. At a hearing, it was ascertained that counsel who had filed the answer on behalf of the "defendants" was not representing the owners of the vessel at the time.

The district court made note of the Fifth Circuit's decision in *Cactus Pipe and Supply v. M/V MONTMARTRE,* 756 F.2d 1103, 1985 A.M.C. 2150 (5th Cir. 1985). In *Cactus Pipe,* the Fifth Circuit had held that the filing of a verified claim by a vessel owner pursuant to Rule C(6) without

reservation or objection to *in rem* jurisdiction constituted a valid consent to *in rem* jurisdiction. The court also noted that under *Cactus Pipe,* a party is only entitled to file an answer on behalf of the vessel if a claim has been filed by the vessel's owner.

The district court concluded that the answer in this case had been filed by the charterer, Pearcy Marine, Inc. Pearcy could only consent to *in rem* jurisdiction over the vessel to the extent of its interest in the vessel. Thus, the charterer could not consent to jurisdiction over the owner's interest in the vessel. The court also concluded that the answer filed on behalf of the vessel could not be a valid consent to jurisdiction because, no claim of owner having been filed, the answer itself on behalf of the vessel was not valid.

The court seems to stop short of holding that an answer filed on behalf of the vessel by an owner cannot be a valid consent to jurisdiction. However, a claim of owner without proper reservations constitutes consent to *in rem* jurisdiction in its own right.

RULE F LIMITATION: DOCTRINE OF RECOUPMENT REJECTED WHEN PLAINTIFF FAILED TO FILE CLAIM AND DEFAULT ENTERED UNDER LIMITATION AGAINST THOSE NOT FILING CLAIMS.

Waterman Steamship Corp. v. Chubb Group of Ins. Cos., 1995 A.M.C. 313 (E.D.La. 1994).

This case arose from a fire aboard the STONEWALL JACKSON, which was bareboat chartered and operated by Waterman Steamship. Waterman filed a petition for limitation in April of 1991. An order was entered requiring all persons claiming damages related to the fire to make proof of those claims by July 17, 1991. In October of 1991, the default of all claims not timely filed was ordered. In September of 1992 certain underwriters and Uniroyal Goodrich Tire Company sought to file particular average claims and answers in the limitation proceeding *nunc pro tunc.* The claims were dismissed, and no appeal was taken. Thereafter, the limitation action was settled.

In February of 1994, Waterman filed an action to recover general average contributions from various cargo underwriters, including some of the underwriters who filed claims late in the limitation proceeding. The underwriters asserted counterclaims for fire damage to cargo of the type they sought to assert in the limitation action.

The district court noted that in the Fifth Circuit, the doctrine of recoupment allows a defendant to deduct from plaintiff's recovery all just allowances or demands accruing to the defendants with respect to the same contracts or transactions. Because recoupment is considered a defense, it can be asserted and the deductions from plaintiff's claims can be made, despite the passing of the one year statute of limitations under COGSA.

Nonetheless, the court held that recoupment did not apply when the defendants have been defaulted in a limitation proceeding on the same claims that they now wish to recoup.

RULE F: FAILURE TO POST BOND IN AMOUNT EQUAL TO OWNER'S INTEREST IN VESSEL WITHIN SIX MONTHS FOLLOWING NOTICE OF CLAIM WAS NOT JURISDICTIONAL.

Guey v. Gulf Ins. Co., 46 F.3d 478 (5th Cir. 1995).

In July 1992, a boat owned by Patricia Guey and operated by Louis Butz collided with another boat operated by Scott Helmer. A passenger on that boat, Michael Penn, was severely injured and filed suit against Guey and Butz in state court under 28 U.S.C. §1333, alleging negligent entrustment and owner responsibility. Two months later Guey brought a limitation of liability action under 46 U.S.C. §185, but did not post security equal to her interest in the vessel as required by §185, as Ms. Guey felt her interest in the vessel was zero dollars since the amount owed on the boat exceeded its value. Guey then filed a cross-claim against Gulf Insurance Company, which provided insurance coverage on the boat, arguing that Gulf should post any necessary security for the limitation action. In July of 1993, the district court ordered Gulf to provide security for the limitation action, which they did on July 12, 1993. Shirley Perkins who had brought suit on behalf of the injured passenger, Michael Penn, filed a motion for summary judgment to dismiss Guey's limitation action on grounds that the plaintiff, through Gulf, had failed to post security within six months of the notice of claim, as required by 46 U.S.C. §185. The district court denied the motion for summary judgment.

In affirming the district court's Order, the Fifth Circuit held that Rule F(1) and 46 U.S.C. §185 do not as a matter of jurisdiction, require the posting of a bond within six months. The Fifth Circuit noted that neither Rule F nor §185 by its express terms mandates simultaneously filing a

complaint and posting security. Instead, the rule and the statute require only that the complaint be filed within six months following the notice of claim. Additionally, the Fifth Circuit relied on *Black Diamond S.S. Corp. v. Robert Stewart and Sons, Ltd.*, 336 U.S. 86 (1949). The primary question answered by the Supreme Court in *Black Diamond* was whether the limitation of liability statute permitted a concursus of all claims against a vessel when the vessel owner did not concede that the total claims against the vessel exceeded the value of the vessel and, consequently, had posted a bond in an amount less than the value of the vessel. The Supreme Court held that Black Diamond was entitled to a concursus notwithstanding that the total claims exceeded the value of the vessel, and that an inadequate bond was not a jurisdictional defect under §185. Although not directly on point, the Fifth Circuit held that the discussion in *Black Diamond* of whether the posting of a bond was a jurisdictional defect was sufficient to deny the motion for summary judgment.

Additionally, the Fifth Circuit noted that although summary judgment was not appropriate in this case, in some cases the district court may dismiss such proceedings if a bond is not filed promptly.

FED. R. CIV. P. 45 SUBPOENAS: GOVERNMENT DEPARTMENTS ARE NOT AUTHORIZED TO MAKE REGULATIONS UNDER WHICH THEY CAN REFUSE TO COMPLY WITH REQUESTS TO GIVE EVIDENCE.

Exxon Shipping Co. v. United States Dept. of the Interior, 34 F.3d 774, 1995 A.M.C. 754 (9th Cir. 1994).

This case was an offshoot of the EXXON VALDEZ oil spill litigation. Exxon issued notices of depositions and subpoenas to federal employees who worked for federal agencies in connection with the oil spill litigation. Exxon claimed that these employees, through their work with the federal government, had obtained information central to the underlying litigation. The information sought from them included the extent of the damage to Alaska's natural resources, including bird and animal populations, as a result of the spill.

The government did not comply with the discovery requests and did not file motions to quash. Instead, the agencies simply instructed certain employees not to submit to depositions. Two other employees appeared at depositions and gave testimony on certain topics, but were instructed not to answer questions on other matters.

Exxon filed a complaint in a separate action, alleging that the government's refusal to provide the requested discovery violated the Federal Rules of Civil Procedure and the U.S. Constitution.

In declining to provide documents or testimony, the relevant agencies invoked regulations promulgated under 5 U.S.C. §301. The government also relied upon *United States Ex Rel Touhy v. Ragen,* 340 U.S. 462, 1951 A.M.C. 1044 (1951). In *Touhy,* the Supreme Court ruled that an FBI agent could not be held in contempt for refusing to obey a subpoena *duces tecum* when the Attorney General, acting pursuant to valid federal regulations governing the release of official documents, had ordered him to refuse to comply. However, in *Touhy,* the Supreme Court specifically refused to reach the question of whether the agency had the power to withhold evidence from a court without a specific claim of privilege.

The Ninth Circuit distinguished the present case from *Touhy* on the basis that this was not a contempt proceeding against the employees who refused to appear, but a separate complaint filed against the governmental agencies themselves. The court went on to trace the history of 5 U.S.C. §301, which reads in pertinent part:

> The head of an executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use and preservation of its records, papers and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The statute had originally been drafted as a housekeeping statute, enacted in 1789 to "help General Washington get his administration under way by spelling out the authority for executive officials to set up offices and file government documents." The last sentence of the act was added in 1958 specifically because Congress felt that the language of the statute had been twisted for the purpose of withholding information from the public. The court held that 5 U.S.C. §301 did not provide authority to government agencies to instruct their employees not to comply with subpoenas.

The government next argued that under principles of sovereign immunity, its employees could not be forced to give evidence. The government relied upon *Boron Oil Co. v. Downie,* 873 F.2d 67 (4th Cir. 1989). However, in *Downie,* the Fourth Circuit had held that a state court was pre-

cluded by the doctrine of sovereign immunity from subpoenaing federal officials, as was a federal court that gained limited jurisdiction on removal. The court held that such limitations under *Downie* did not apply when a federal court exercised it subpoena power against federal officials.

Finally, the government argued that it had a valid interest in conserving its resources, and in minimizing governmental involvement in controversial matters unrelated to governmental business. The circuit court held that the district court had more than adequate discretion under the Federal Rules of Civil Procedure to prevent the burdensome or over-broad use of subpoenas.

EXTRAORDINARY RELIEF: USE OF INJUNCTION TO PROHIBIT TRANSFER OF FUNDS PENDING OUTCOME OF PLAINTIFF'S CLAIM SUBJECT TO LONDON ARBITRATION.

Alvenas Shipping Co. v. Delta Petroleum, 1995 A.M.C. 143 (S.D.N.Y. 1994).

Plaintiff Alvenas chartered the MT HALIFAX to defendant Delta in November of 1990. Delta subchartered the HALIFAX to Flota Petrolera Ecuatoriana (FLOPEC). Disputes arose under both charters. The charter dispute between Delta and FLOPEC went to New York arbitration and an award was made to Delta. The proceeds of the arbitration were paid to FLOPEC's counsel. Alvenas demanded arbitration on its claims against Delta in London, pursuant to the terms of the charter party. Delta wished to resolve Alvenas' claims against it by way of the New York arbitration already pending against FLOPEC. Thereafter, Mr. Milonas of Delta had a telephone conversation with Mr. Crawford of Alvenas. Although the exact content of the conversation was disputed, Alvenas' alleges Mr. Milonas advised Mr. Crawford that Delta's only source of funds to pay Alvenas' claims were the funds recovered against FLOPEC in the New York arbitration. Delta did not deny this statement.

Alvenas commenced an action in the Southern District of New York, seeking a temporary restraining order preventing FLOPEC's counsel from distributing the money owed to Delta under the New York arbitration award and a preliminary injunction preventing such distribution of the funds until the outcome of the London arbitration. Thereafter, FLOPEC and its counsel filed an interpleader complaint, seeking to have the funds deposited in the registry of the court.

Substantial discovery was conducted and it was determined that although Delta had an office in New York, Delta was essentially a shell corporation operated by a parent corporation by the name of Ionian. Delta shared space with its parent corporation and had no employees of its own. Delta showed negative taxable income in years 1986, 1988, 1989, 1990 and 1991. At the end of 1992, Delta had assets in the amount of $477,740.00, $406,737.00 of which was attributable to the arbitration award against FLOPEC. It also became apparent that Delta had essentially ceased doing business. Delta had been set up to charter in and charter out the vessel HALIFAX and another vessel, the WHITE SEA. After the redelivery of these two vessels, Delta had had no further charter business.

The court noted that as a general rule, irreparable harm is not present when plaintiff has a claim for money damages alone. The court also noted that under §7502(c) of the New York CPLR (Civil Practice Law and Rules), incorporated by way of Federal Rule of Civil Procedure 64, the court was permitted to order an attachment or an injunction in aid of an arbitration where it appeared that an award might be rendered ineffectual without such provisional remedies.

Based upon its finding that Alvenas would probably not be able to recover against Delta if Delta divested itself of the funds owed to it by way of the award against FLOPEC, the court granted the preliminary injunction. FLOPEC's counsel was ordered to transfer the funds to Delta's counsel, who in turn was ordered to keep the funds until such time as the London arbitration between Alvenas and Delta was resolved.

Practice and Procedure Editors' Note: The injunction obtained in this case was a creative way of obtaining security for arbitration when an attachment under Rule B was not possible due to the defendant's presence within the district. This is analogous to a "MAREVA" injunction.

SHIP MORTGAGE ACT: SURVIVAL OF MORTGAGE LIEN WHEN VESSEL IS TRANSFERRED TO INNOCENT PURCHASER BY WAY OF FRAUDULENT TITLE.

Maryland National Bank v. M/Y MADAM CHAPEL, 1995 A.M.C. 850 (9th Cir. 1995).

The district court's decision in this case, which has now been reversed, was given extensive coverage by many commentators. John Chapel originally purchased the yacht MADAM CHAPEL with a loan from Key Financial Services, Inc. Key eventually recorded a ship mortgage on the

vessel's title, which was documented in the Port of New York. While the documentation application was pending, Mr. Chapel obtained a Certificate of Title from the state of New York. The title did not show Key's security interest. Chapel then sold the vessel to Jose Santiago and conveyed title to him by endorsing the reverse side of the New York title. At about the same, Key assigned its interest in the loan and mortgage to Maryland National Bank. Neither Key nor Maryland National Bank had knowledge of the Certificate of Title issued by the State of New York, or its transfer to Mr. Santiago.

Santiago then re-documented the vessel under a new official number in St. Louis. The documentation was based upon the New York Certificate of Title. Santiago represented that the builder's certificate had been lost. Santiago then sold the boat to Jones.

In September of 1989, Chapel defaulted on the Maryland National Bank loan, and Jones sold the boat to Mike and Susan Spartman, taking back a preferred ship mortgage. The preferred ship mortgage of Jones was recorded on the vessel's title in St. Louis. Thereafter, Maryland National Bank commenced an action to foreclose its mortgage.

Jones filed a claim as mortgagee. He argued that Maryland National Bank's mortgage was invalid because it was not recorded against the complete chain of title. He further argued that Maryland National Bank's mortgage should be equitably subordinated because Maryland National Bank left documentation in Mr. Chapel's hands which allowed him to begin a second federal documentation, unrelated to the first. Jones contended that Maryland National Bank should have obtained the builder's certificate and state title from Mr. Chapel.

The Ninth Circuit relied upon the decision of *In Re Alberto,* 823 F.2d 717, 1987 A.M.C. 2409 (3d Cir. 1987), holding that once a vessel has been federally documented, the validity of a security interest is determined by federal law. The court further noted that nothing in the Ship Mortgage Act required state registration as a prerequisite to a valid ship mortgage. Maryland National Bank's mortgage was not, therefore, invalid because it did not cover the New York chain of title which led to the second federal documentation.

The Ninth Circuit also rejected the equitable subrogation argument. It noted that equitable subrogation was not usually applied against a party whose conduct is alleged to be merely negligent. Maryland National

Bank's failure to control the state titling process was simply not conduct rising to the level necessary to support a claim for equitable subrogation.

Finally, Jones insisted that Maryland National Bank's mortgage was invalid because the vessel's official number was never marked on the vessel. A Certificate of Marking was filed, although falsely, by Mr. Chapel. The court held that the Ship Mortgage Act did not require the mortgagee to insure that the vessel was actually marked, but merely required that the Certificate of Marking be filed. Thus, Maryland National Bank's ship mortgage should have been given priority.

Practice and Procedure Editors' Note: This case clearly illustrates the pernicious effects of the duplicative state registration/title and federal documentation laws. Until state registration/title fully replaces federal documentation, including preferred mortgage maritime lien status, state titling of federally documented yachts should be precluded.

LIMITATION OF LIABILITY: ANOTHER EXCEPTION EXISTS IN THE FIFTH CIRCUIT PERMITTING RELIEF FROM THE STAY ASIDE FROM THE SINGLE CLAIMANT/INADEQUATE FUND EXCEPTION OR THE MULTIPLE CLAIMANT/ADEQUATE FUND EXCEPTION.

Texaco, Inc. v. Williams, 47 F.3d 765 (5th Cir. 1995).

In 1993, a fire and explosion occurred on the T/B BUSTER LEE, a barge owned by Texaco, Inc. and bareboat chartered by Texaco Exploration and Production, Inc. (TEPI). Two employees, Ellender and Williams, were injured. Ellender filed a Jones Act claim in Louisiana state court. Texaco and TEPI filed a complaint in federal court seeking exoneration from or limitation of liability. The district court issued an order staying Ellender's state court action and restraining Williams from filing a similar state claim. The claimants answered the limitation complaint and sought damages in excess of $8,000,000.00. Texaco claimed the vessel was worth $125,000.00. The claimant's filed a motion seeking to lift the stay and pursue their rights under the Savings-to-Suitors clause, 28 U.S.C. §1333. The district court denied the motion.

In reversing the district court the Fifth Circuit recognized that there is an inherent conflict between the exclusive jurisdiction vested in admiralty courts by the Limitation of Liability Act, 46 U.S.C. §183 et seq., and the common law remedies embodied in the Savings-to-Suitors Act of 28 U.S.C. §1333. Usually, when a shipowner invokes the Limitation of Lia-

bility Act, a federal court will stay all other proceedings against the shipowner until the liability issues are resolved. Two exceptions are recognized: (1) the Single Claim/Inadequate Fund situation and (2) the Multiple Claim/Adequate Fund situation. Both exceptions stem from Supreme Court cases and are based on the fact that the state proceedings would have no possible effect on the petitioner's claim for limited liability. Using this same rationale, the Fifth Circuit in prior decisions had held that under proper stipulations, claimants may proceed outside a limitation action. For example, in *Magnolia Marine Transport v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992), multiple claimants sought to recover damages in excess of the Limitation Fund pursuant to their savings-to-suitors clause rights. The Fifth Circuit stated: "even in multiple claimant cases, admiralty courts still should allow state court claims to proceed under proper stipulations." *Magnolia,* 964 F.2d at 1576. The court also cited *Odeco Oil and Gas Company v. Bonnette,* 4 F.3d 401 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 1370 (1994), wherein the court stated that if claimants seek to take advantage of their savings-to-suitors clause remedies in state court, the court must allow this choice if the shipowner's rights to limitation are protected by stipulations.

Texaco argued that the stay should not be lifted because there were only two exceptions to lifting the stay, the Single Claim/Inadequate Fund exception and the Multiple Claim/Adequate Fund exception. Thus, Texaco argued that only if a claimant proves it meets one of these exceptions can the claimant enter into a stipulation to protect the shipowner's rights. Texaco argued that entering into a stipulation does not in and of itself create an exception. The Fifth Circuit disagreed and stated that if claimants stipulate that the federal court has exclusive jurisdiction over limitation issues and that claimants will not seek to enforce an award in excess of the limitation fund, the claimants may proceed outside the limitation action. The court noted that it had some reservations concerning the breadth of this exception and correctness of condoning a multiplicity of lawsuits, some of which will be duplicative, but conceded that they were bound by Fifth Circuit law.

COMMITTEE ON MARITIME ARBITRATION NEWSLETTER NO. 13

Editors: David A. Nourse and Richard E. Repetto

Within the first three months of 1995, the U.S. Supreme Court decided two cases under the U.S. Arbitration Act, 9 U.S.C. §§ 1 *et seq.* In both cases the Court broadened the application of the Act in areas in which state law had limited arbitration and the powers of arbitrators.

SUPREME COURT CONSTRUES SECTION 2 OF THE ACT AS EXTENDING ITS REACH TO THE LIMITS OF CONGRESS' COMMERCE CLAUSE POWER AND REAFFIRMS THE PRINCIPLE THAT THE ACT PRE-EMPTS STATE STATUTES WHICH INVALIDATE ARBITRATION AGREEMENTS

In *Allied-Bruce Terminix Companies, Inc. v. Dobson,* ____ U.S. ____, 115 S.Ct. 834 (1995), a lifetime "termite protection plan", guaranteed by Terminix International Company, provided for arbitration of any controversy or claim arising out of the contract. The Dobsons, who had bought a house subject to the "termite protection plan", found the house infested and brought suit in Alabama state court for damages. Terminix International and Allied-Bruce, its local franchise operation, sought a stay pending arbitration, but the stay was denied on the basis of an Alabama statute making pre-dispute arbitration agreements invalid and "unenforceable." The Supreme Court of Alabama upheld the denial of a stay on the grounds that there was insufficient connection between the termite contract and interstate commerce and, as the parties had "contemplated" a primarily local transaction, the U.S. Arbitration Act ("Act") did not apply.

In reversing the Supreme Court of Alabama, the U.S. Supreme Court first noted that the basic purpose of the Act had been to overcome the refusal of the courts, going back to "ancient times", to enforce arbitration agreements. Second, while it had originally been considered that the Act "represented an exercise of Congress' Article III power to 'ordain and establish' federal courts", 115 S.Ct. at 838, the Court had held in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 405 (1967), that the Act "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" While the Act was "substantive" rather than "procedural" in nature, "nonetheless, the

Act applied in diversity cases because Congress had so intended." 115 S.Ct. at 838.

The issue of whether Congress had intended the Act also to apply in state courts had been decided in *Southland Corp. v. Keating,* 465 U.S. 1, 15-16 (1984), in which the Court had held that the Act pre-empted state law and the state courts could not apply state statutes invalidating arbitration. However, as twenty state attorneys general had joined the respondents in urging the Court to overrule *Southland,* the Court proceeded to consider whether the language of the Act concerning interstate commerce "nevertheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its anti-arbitration law or policy." 115 S.Ct. at 839.

Section 2 of the Act states that a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Court concluded that the words "involving commerce" in §2 were broader than "in commerce" and, therefore, covered more than persons or activities within the flow of commerce. Indeed, these words were "the functional equivalent" of "affecting commerce", the phrase which "normally signals a congressional intent to exercise its Commerce Clause powers to the full." *Id.* To describe the reach of the Act "expansively as coinciding with that of the Commerce Clause" was consistent with prior decisions and also "consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms." *Id.* at 840.

Section 2's words "evidencing a transaction involving commerce" were also broad, posing a question as to whether the Act was applicable if the transaction in fact involved interstate commerce or had merely contemplated interstate commerce. The Court concluded that the "commerce in fact " construction was more faithful to the statute than "contemplation of the parties" and that the Act should be read "as insisting that the 'transaction' in fact 'involve' interstate commerce, even if the parties did not contemplate an interstate commerce connection." 115 S.Ct. at 843. In the case at hand it was undisputed that the transaction in fact involved interstate commerce as the termite-treating and house-repairing material used by the termite companies had come from outside Alabama.

Justice O'Connor concurred with Justice Breyer's majority opinion on the ground that, although she had dissented from *Southland Corp. v. Keating* and continued to believe that Congress had never intended the Act to apply in state courts, more than ten years had passed since the decision "and parties have undoubtedly made contracts in reliance on the Court's interpretation of the Act in the interim." Although "persuaded by consideration of *stare decisis,* which we have said 'have special force in the area of statutory interpretation ...' to acquiesce in today's judgment", she noted tartly:

> Today's decision caps this Court's efforts to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation. *** It now remains for Congress to correct this interpretation if it wishes to preserve state autonomy in state courts.

115 S.Ct. at 844. Justice Scalia and Justice Thomas each dissented and each joined in the other's dissent. Both would have overruled *Southland Corp. v. Keating,* as requested by the respondents and the twenty state attorneys general.

SUPREME COURT UPHOLDS PUNITIVE DAMAGE AWARD IN SECURITIES ARBITRATION DESPITE NEW YORK CHOICE-OF-LAW CLAUSE IN CONTRACT

The conflict within the circuit courts concerning the enforceability of awards for punitive damages respecting contracts subject to New York law, discussed in our prior Newsletters Nos. 4, 6 and 7A, has at last reached the Supreme Court. However, as the Court's decision is rather narrow, the question probably has not been fully resolved.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.,* ____ U.S. ____, 115 S.Ct. 1212 (1995), the contract governing the Mastrobuonos' securities trading account was Shearson's standard-form "Client's Agreement." Clause 13 provided in its first sentence that the entire agreement was governed by the laws of the State of New York and provided in its second sentence that any controversy arising out of the contract was to be settled by arbitration "in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York

Stock Exchange and/or the American Stock Exchange." There was no mention of claims for punitive damages in the contract.

The Mastrobuonos having claimed that Shearson mishandled their account, an NASD arbitration panel awarded both compensatory damages of $159,327 and punitive damages of $400,000 against Shearson. Shearson paid the compensatory damages but moved to vacate the award of punitive damages. The U.S. District Court for the Northern District of Illinois granted the motion and the Seventh Circuit affirmed, both acting on the ground that the New York Court of Appeals had held in *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976), that arbitrators do not have the power to award punitive damages, which are limited to judicial tribunals.

Noting its decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, ... so too may they specify by contract the rules under which that arbitration will be conducted."), the Court proceeded to consider "what the contract has to say about the arbitrability of petitioners' claim for punitive damages." 115 S.Ct. at 1216.

The Court did not find the choice-of-law provision, standing alone, to be "an unequivocal exclusion of punitive damages claims." *Id.* at 1217. On the other hand, the arbitration provision "strongly implies that an arbitral award of punitive damages is appropriate", particularly as it authorized arbitration in accordance with the NASD rules and the NASD Code of Arbitration Procedure indicated that the arbitrators might award "damages and other relief." *Id.* at 1218. In addition, a manual provided to NASD arbitrators stated that "Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy. " *Id.* Thus, concluded the Court, the juxtaposition of the choice-of-law clause with the arbitration clause merely "introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.*

Given an ambiguity in the scope of the arbitration clause, *Volt* required that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in

favor of arbitration." 489 U.S. at 476. In addition, two principles of contract interpretation came into play.

The first, "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it", was to be applied against the claim of Shearson, as the ambiguous Clause 13 was a term of its "Client's Agreement". The second, "that a document should be read to give effect to all its provisions and to render them consistent with each other", indicated that:

> the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts could apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.

Id. at 1219.

The Court concluded that the Seventh Circuit had misinterpreted the parties' agreement and, accordingly, reversed its judgment. Justice Thomas dissented on the ground that the choice-of-law provision in the Shearson "Client's Agreement" could not be distinguished from the one which had been enforced by the Court in *Volt.*

No doubt we will see punitive damages clauses drafted more carefully in the future!

COMMITTEE ON RECREATIONAL BOATING NEWSLETTER, SPRING 1995*

Editor: Thomas A. Russell**

Foreign Arbitration Clause in Salvage Agreement May Not be Enforced Absent Reasonable Relationship With the Foreign State

In *Jones v. Sea Tow Services Freeport, New York, Inc.*, 30 F.3d 360 (2d Cir. 1994), the Second Circuit voided a foreign arbitration clause contained in a Lloyd's Open Form Salvage Agreement.

Charles and Clara Jones owned the *MISS JADE II*, a thirty-foot pleasure boat, which sustained serious damage en route to Connecticut. They requested assistance from Sea Tow Services Freeport to aid in the recovery of their vessel, which was adrift offshore. Before the vessel was towed to her home port, the couple was asked to sign a Lloyd's Open Form Salvage Agreement, which they did. The agreement included a provision for arbitration in London to determine the proper amount of the salvage award to be given Sea Tow under English law.

The district court held that the arbitration provision against the owners of *MISS JADE II* was enforceable. On appeal, the Second Circuit reversed, holding that despite the Lloyds Open form being most widely used form of salvage contract in the world, the arbitration provision was unenforceable in domestic salvage cases. The court found that no relation existed with England sufficient to invoke the jurisdiction sought by Sea Tow, since neither party was an English citizen, the salvage operation took place in United States waters, and the agreement itself was signed on-shore in the United States. Additionally, the court found that neither party had contemplated the enforcement of an award in England, where Charles and Clara Jones held no assets.

Furthermore, the Second Circuit adopted the view that salvage awards should not be based on fixed percentages but, rather, should reflect in

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*The Chairman of the Committee on Recreational Boating is Michael B. McCauley.

**Craig S. English, Richard J. Nikas, William R. Hoffman, Brian D. Wallace, and William H. Welte contributed to this Newsletter.

descending order of importance: the degree of danger from which the property was rescued; the value of the property salved; the risk incurred in saving the property from impending peril; the promptitude and skill displayed by the salvor; the value of the property employed by the salvor and the danger to which it was exposed; and the labor expended in rendering the salvage service.

[See also the discussion above at 10141.]

Third Circuit Rules that State Law Governs the Allowance of Damages to the Estate and Survivors of a Twelve Year Old Child Killed in a Jet Ski Accident

Calhoun v. Yamaha Motor Corp. 40 F.3d 622, 1995 AMC 1 (3d Cir. 1994), involves the death of a twelve year old child as a result of a recreational boating accident which occurred when the Yamaha "Wave Jammer" she was riding collided with a vessel anchored in the waters adjacent to the Puerto Rico hotel where she was vacationing with her parents. The family's permanent residence was located in Pennsylvania. The child's estate and her parents brought suit under the Pennsylvania wrongful death and survival statutes seeking lost future earnings, support and services, society, funeral expenses and punitive damages.

The federal district court determined that federal maritime law applied and rejected the claims for lost or future earnings and punitive damages, but allowed the claims for loss of society, support, and services.

On appeal, the Third Circuit reversed, holding that state law applied because "there is no federal substantive policy with which state wrongful death or survival statutes conflict." The court remanded the case to the trial judge to determine whether the laws of Pennsylvania or Puerto Rico should be applied under the circumstances.

[See also the discussion above at 10135.]

Eleventh Circuit Rejects Plaintiff's Attempts to Avoid the Uniform Three Year Statute for Maritime Torts

In *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543 (11th Cir. 1994), plaintiff George Mink was a passenger on a 38-foot pleasure boat being operated at a high rate of speed in the Gulf of Mexico off Sarasota, Flor-

ida. Mink, standing behind the driver, could not maintain his balance, and slammed onto the deck, crushing a vertebra. The injury rendered him a paraplegic.

More than three years later, Mink sued the boat's manufacturer, alleging a design defect due to the lack of an accessible handrail on the boat. He attempted to avoid the three-year statute of limitations for maritime torts, 46 U.S.C. §763a, by contesting maritime jurisdiction, and by characterizing his claim as grounded in contract under Florida warranty law.

The court had no difficulty finding that the alleged tort met the situs and nexus tests required for maritime jurisdiction. Even though the design defect had occurred on land, the situs test was satisfied because the injury itself had occurred on navigable waters. The nexus test, requiring a substantial relationship to traditional maritime activity, was met under the Supreme Court's decision in *Sisson v. Ruby*, 497 U.S. 358 (1990), because only the general features of the accident need have the potential for disrupting maritime commerce.

In rejecting Mink's attempts to characterize his claim as a breach of contract action under Florida warranty law (in order to obtain a longer statute of limitations), the court emphasized the need for uniform standards to govern cases of maritime jurisdiction. The court observed that in enacting 46 U.S.C. §763a, Congress had intended to replace the former federal practice of applying local statutes of limitations under the doctrine of laches with a uniform three-year statute. The court reasoned that if the plaintiff could avoid the uniform statute of limitations simply by re-casting his action as a state law contract claim, the federal interest in uniformity would not be served.

[See also the discussion above at 10138.]

Sailing Group Owed Duty to Amateur Sailing Recruits

Plaintiffs' decedents, James McAleer and Thomas Lebel, were killed along with seventeen other persons when the tallship which they were sailing sank in hurricane force winds while participating in a race of tallships from Bermuda to Nova Scotia. The vessel, which carried a permanent crew employed by defendant American Sail Training Association ("ASTA"), had served as the training ship for the decedents, as well as for

others who were recruited by the defendant to serve onboard during the race.

In *McAleer v. Smith,* No. 88-05441 (D. R.I. August 16, 1994), the court found that ASTA, as a non-profit organization that placed amateur sailors on vessels and provided them with instruction, owed a duty to the trainees to exercise reasonable care in choosing and approving the vessels on which they sailed. In so holding, the court rejected defendant's agreement that it should be treated like a travel agency, and, as such, should not be held responsible for injuries sustained by clients during their travels. The court reasoned that ASTA had a more extensive relationship with the sail trainees than does a travel agency with a client, more like that of a placement agency with a client. Hence, the court found that ASTA owed the trainees a duty to exercise reasonable care to ensure they were placed onboard seaworthy vessels.

Nevertheless, the court concluded that ASTA had acted prudently to reduce the risks to which the sail trainees were exposed, and had thus fulfilled the duty owed to them.

Alabama Supreme Court Reviews Admiralty Jurisdiction and Maritime Death Damages Recoverable by Non-dependent Parents

On July 15, 1991, eighteen year-old Connie Johnson and a friend were relaxing on inflatable floats approximately 50 feet from the shore of a slough in Wilson Lake, an impoundment of the Tennessee River. In the same area, Michael Fields, a thirteen year-old boy, was operating a Kawasaki "Jet Ski." Fields made a number of passes attempting to splash the girls, but on one pass accidentally struck Johnson in the head. She fell from her float, disappeared beneath the surface, and died. At the time of her death, she was unmarried and had no dependents.

In April of 1992, the decedent's mother, Thomasine Choat, filed a wrongful death action against Kawasaki, alleging negligence and other violations of the Alabama Extended Manufacturers Liability doctrine. Kawasaki moved for summary judgment, contending the claims were subject to admiralty jurisdiction, and that under the general maritime law, non-dependents may not recover non-pecuniary damages such as loss of society or punitive damages. The trial court entered summary judgment in favor of Kawasaki, and plaintiff appealed.

Two issues were brought before the Supreme Court of Alabama in *Choat v. Kawasaki Motors Corp.*, 1994 AMC 2626 (1994): first, whether maritime law applied to the case, and if so, whether it allowed for the recovery of non-pecuniary and punitive damages.

The Alabama Supreme Court held "if federal courts could properly exercise admiralty jurisdiction, we must apply the substantive body of maritime law." (citing, *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3rd 1084 (2d Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1060 (1994)). The court then reviewed the requirements for admiralty jurisdiction, and found that a fatal collision on navigable waters does potentially affect maritime commerce.

The court devoted considerable attention to whether a "jet ski" is a "vessel" under maritime law. Finding that it was a "vessel," the court held that operating a vessel is a traditional maritime activity, and that maritime law would govern plaintiff's claims. With regard to the remedy, Choat contended the general maritime law allows recovery for loss of society, punitive damages, and funeral expenses. Kawasaki argued that punitive damages and damages for loss of society are "non-pecuniary" and, therefore, are not recoverable by non-dependents under the general maritime law. The court examined the history of maritime wrongful death damages, reviewing in detail the U.S. Supreme Court decisions in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). To the extent the lower court's decision had denied recovery for funeral expenses incurred by Choat, the Alabama Supreme Court reversed the grant of summary judgment. It did, however, affirm the trial court to the extent it had denied recovery for loss of society and punitive damages.

[See also the discussion above of 10138.]

Owner of Defective Boat Can Pursue Consequential Damages Against Manufacturer Despite a Disclaimer in Written Warranty

In *Cole v. Sea Ray Boats Inc.*, 32 Cal. Rptr. 2d 431 (Cal. Ct. App. 1994), a California appellate court held that a manufacturer's express warranty disclaiming any liability for incidental or consequential damages was ineffective under California law. The disclaimer did not preclude the

plaintiff from seeking such damages in connection with a defective boat that the consumer had previously elected to accept.

The case arose when plaintiff purchased a new 24-foot boat manufactured by defendant Sea Ray Boats. Soon after taking delivery, the vessel began to show numerous flaws including several leaks and a sagging deck. The Sea Ray dealer attempted repairs on more than a dozen occasions, but failed to correct the defects.

Cole brought suit seeking, among other claims, incidental and consequential damages for breach of warranty. Sea Ray's express warranty disclaimed any liability for incidental or consequential damages. Based on this, the trial court granted Sea Ray's motion *in limine* to exclude evidence that Cole had incurred such damages, from which Cole appealed.

The California Court of Appeals found that §1790.1 of the Song-Beverly Consumer Warranty Act applied, which states in relevant part: "Any waiver by the buyer of consumer goods of the provisions of this chapter ... shall be deemed contrary to public policy and shall be unenforceable and void." Despite attempts by Sea Ray to invoke sections of the Commercial Code which allow for waiver of such damages, the court held that the state legislature had intended to preclude manufacturers from disclaiming such damages in express warranties. Accordingly, the court found the motion *in limine* to have been improperly granted, and remanded the matter to the Superior Court.

Manufacturer Found Not Liable to Purchaser Under Maritime Law for Economic Damages to Yacht

In 1989 Richard and Marion Lewinter purchased a used 61-foot yacht from a private party for recreational use. The yacht had been manufactured by Genmar Industries. While at sea, the yacht experienced catastrophic hull failure, allegedly caused by defective lamination, which necessitated costly repairs ashore.

In *Lewinter v. Genmar Industries, Inc.*, 32 Cal. Rptr. 2d 305 (Cal. Ct. App. 1994), a California appellate court upheld a lower court's decision finding that since the action against the manufacturer was within admiralty jurisdiction, maritime law would control, including the bar against recovery under a products liability theory where the only injury was economic loss to the vessel. The court rejected plaintiff's arguments and found admiralty jurisdiction existed by virtue of the "locality" and "nexus " tests. In determining whether a significant relationship to maritime activity existed, the court assessed the tendency of the particular activity to disrupt com-

mercial maritime activity and found that the presence of a severely damaged vessel on navigable waters had an obvious impact upon maritime commerce.

The court then applied the maritime law limitation on recovery of damages recognized in *East River S.S. Corp. v. Transamerican Delaval,* 476 U.S. 858 (1986). In *East River,* the United States Supreme Court held that under maritime law when a product injures only itself, the court has little reason for imposing a tort duty, and will limit the injured parties to their contractual remedies. Importantly, the *Lewinter* court refused to limit *East River* and held that the doctrine was equally applicable to commercial and consumer transactions.

Court Finds Navigation of Pleasure Boat to be a Traditional Maritime Activity Absent Evidence to the Contrary

In *Polly v. Estate of Carlson,* 859 F. Supp. 270 (E.D. Mich. 1994), the issue presented was whether admiralty jurisdiction governed the case. The case arose from a fishing trip in July of 1993, during which the plaintiff and defendant set out in defendant's fishing boat for Lake St. Clair in Michigan. Authorities later recovered the bodies of both individuals clad only in swimwear some distance away from the vessel, whose engine was still running.

The widow of the plaintiff argued against maritime jurisdiction because the accident involved a pleasure boat engaged in recreational activity. The court stated that admiralty jurisdiction would be found "when a potential hazard to maritime commerce arises out of an activity that bears substantial relationship to traditional maritime activity." Applying the principles stated in *Sisson v. Ruby,* 497 U.S. 358 (1990), the court followed the U.S. Supreme Court's two-step inquiry by considering whether the potential hazard would present a likely disruption of maritime commercial activity, and whether it bore a substantial relationship to a traditional maritime activity.

Under the first inquiry, the court found that since both decedents ended up overboard, and the vessel floated unmanned in navigable waters for more than a day, the resulting rescue operations were likely to disrupt maritime commercial activity. The court found that a more difficult issue arose as to the second inquiry, i.e., whether a substantial relationship existed between the activity giving rise to the incident and a traditional maritime activity.

The court reviewed various cases discussing activities which did not give rise to maritime jurisdiction, such as those involving aquatic recreational activities. Since no eyewitness testimony was offered, the precise activity in which the decedents were engaged was not disclosed. Ultimately, the court found that absent evidence to the contrary, the relevant activity was the navigation of the vessel from her berth to Lake St. Clair. Following the well-settled rule that navigation is a traditional maritime activity, the court found admiralty jurisdiction existed.

Ninth Circuit Declines to Follow Decisions of the Second, Fifth and Sixth Circuits Establishing Uniform Recoveries for Maritime Wrongful Deaths

In *Sutton v. Earles,* 26 F.3d 903 (9th Cir. 1994), the Ninth Circuit reviewed the damages awarded to four survivors and the representatives of five deceased victims as a result of an allision between a pleasure vessel and a Navy mooring buoy. In Sutton, the Ninth Circuit declined to follow the Second, Fifth and Sixth Circuits, and instead affirmed the district court's award of substantial damages for loss of society to the non-dependent parents of the decedents.

The Second, Fifth and Sixth Circuits, in the interest of uniformity, had previously held that non-dependent parents could not recover damages for loss of society under the general maritime law. These circuits had reasoned that it was inequitable to permit non-dependent representatives to recover loss of society damages when such damages were not permitted in seamen's cases.

In contrast, the Ninth Circuit held that since neither the Jones Act nor DOHSA applied to the boating deaths, the parents would be permitted to recover loss of society damages as in the Supreme Court's decision of *Sealand Services v. Gaudet,* 414 U.S. 573 (1974), a case involving the death of a longshoreman. The Ninth Circuit found that recovery of loss of society damages was not foreclosed by the Supreme Court's decision in *Miles v. Apex Marine,* 498 U.S. 19 (1990), which appeared to limit *Gaudet* to its facts. This issue will eventually have to be resolved by the Supreme Court.

Sutton also addressed the discretionary function exception, which, when applicable, shields the United States from negligent planning and policy decisions.

COMMITTEE ON CARRIAGE OF GOODS
CARGO NEWSLETTER NO. 28

Editors: Michael J. Ryan and Richard E. Repetto

HOT DOG TURNS INTO WIENER

Thirteen cartons of ladies apparel were filched outside Bergdorf Goodman before being delivered. The driver was told to wait outside. He parked the truck, went across the street for a hot dog and then sat on a stoop across the street from the truck. While he was munching on the hot dog, the truck was opened and the goods removed.

Plaintiff sued the trucker and the freight forwarder who engaged the trucker. The freight forwarder arranged for transportation of the goods, including local transportation, after arrival by sea and clearance by customs. There had been a number of transactions between plaintiff and the forwarder in the past. When the transportation was completed the forwarder would submit an invoice to plaintiff which contained a clause limiting liability to $50 per shipment.

Noting an "on-going commercial relationship involving numerous transactions" between the trucker and forwarder and between the forwarder and the plaintiff governed by invoices containing a $50 limitation, the court stated that although an opportunity to declare a higher value was given, no higher value was stated. The court found the limitation of liability binding on the plaintiff even though the forwarder did not send an invoice for the particular transaction and the trucker's invoice was not sent until seven days after the incident.

The court also found the limitation imposed by the trucker on the freight forwarder was binding upon the plaintiff on the basis that a freight forwarder had the authority, as agent for the plaintiff, to enter into "a usual and customary shipping contract which limits the carrier's liability" (citations omitted). The liability of the forwarder and trucker were limited to $50 each.

Maklihon Mfg. Corp., Air-City Inc. v. Absolute Trucking, Inc., No. 92-32396 (N.Y. Sup. Ct. November 29, 1994) (Lobis, J.).

TRANSPARENCIES DISAPPEAR

Plaintiff, a frequent user of United Parcel Service, delivered a package of photographic transparencies for transportation to Houston, Texas. The pickup record and UPS's tariff included a provision limiting liability to $100 unless a higher value was declared. The plaintiff did not declare a particular value for the shipment. The package was lost.

The court granted defendant's motion limiting its liability to $100. The court noted the package limitation had been approved under federal law by the Interstate Commerce Commission and under New York law. A value in excess of $100 was not declared, and there was no allegation that the carrier had appropriated the property for its own use or profit.

Plaintiff argued that the limitation did not apply because the alleged negligence did not take place in the course of transportation. The court, however, rejected this argument, stating that the words "in the course of transportation", as used in the tariff, and the wording in the "pick-up record", clearly refer to anything that happens between the time the defendant picked up the goods and the time they were delivered. If the goods were damaged, for example, while they were in defendant's warehouse, that would also be "in the course of transportation."

Index Stock Photography, Inc. v. United Parcel Service Corp., (N.Y. Sup. Ct. March 16, 1995) (Cahn, J.).

ONE YEAR IS ONE YEAR

A shipment of 806 cartons of jackets was sent from Karachi, Pakistan to New York. Two duplicate original bills of lading were issued. The plaintiff/consignee paid for the jackets through a letter of credit; however, the bank did not receive both bills. One original was received by the bank against payment and then passed on to the consignee, who agreed to this arrangement. The consignee, although it knew there was another original, did not inquire about it or try to obtain it.

When the goods arrived, they did not have full customs documentation for clearance and were delivered into "General Order." At that time, the consignee did not pay the freight charges but did pay some storage charges. The consignee was aware of the location of the goods, which remained in the General Order warehouse for some 18 months.

About this time, the second original bill of lading was presented and the outstanding freight charges paid. The goods were then released from the General Order warehouse and exported overseas.

The ocean carrier moved to dismiss the complaint against it on the basis that the suit for non-delivery was time-barred, not having been brought within one year from the time of delivery. The court agreed, finding plaintiff had ample notice of the one year limitation period, given that it held the bill of lading.

R. R. F. Industries, Inc. v. American President Lines, Inc., No. 93-116072 (N.Y. Sup. Ct. August 5, 1994) (Gammerman, J.).

SERVICE OUT - 40 LOVE

The district court had granted a motion for partial summary judgment limiting the liability of the carrier and the stevedore to $500 for damage to a yacht which was dropped during unloading. The action was brought by the subrogated underwriter and yacht owner.

On appeal to the Ninth Circuit, the underwriter and yacht owner claimed the bill of lading was issued after the yacht had been loaded. Thus, there was insufficient notice of the limitation. The court noted a course of dealing between the carrier and yacht owner using identical bills of lading and found that the bill had afforded a fair opportunity to avoid the limitation. Referring to decisions in various courts, the court noted that limitations have been given application when the bill of lading was issued subsequent to loading and sailing. The "actual" notice courts have required to find a fair opportunity is not that the bill of lading must be in the shipper's hands before the cargo is loaded on the vessel, but rather that the bill of lading clearly state the $500 limitation and the method for avoiding it. The court also noted that the shipper could have inquired and secured a copy of the bill of lading before shipping although the actual bill was not issued until the yacht had been placed on board.

Responding to plaintiff's argument that a service contract did not afford a fair opportunity to avoid the limitation (since it contained only one specific freight rate and, arguably, did not offer an opportunity to declare a higher value and pay a higher rate), the Ninth Circuit found that the service contract had explicitly provided that the bill of lading determined the

terms and conditions of an individual shipment and that the bill of lading prevailed over the service contract if a conflict arose.

The court found that the stevedore was also entitled to the limitation and rejected an argument that the limitation was disproportionate to the damages involved.

Royal Ins. Co. v. Sealand Service Inc., No. 93-1576 (9th Cir. March 21, 1995).

FROG LEGS KEEP CARRIER HOPPING

The district court had previously ruled that the plaintiff, a subrogated underwriter, was barred from recovering damages because the importation of the frog legs violated the Endangered Species Act. The court found after trial that the frog legs were in good condition when delivered to the carrier and were damaged by the carrier's failure to provide adequate refrigeration en route.

On re-argument, the trial court noted that the importer had in fact complied with the applicable importation requirements and reversed its ruling that the frog legs were imported in violation of the Endangered Species Act.

The court went on to consider damages. The carrier argued that plaintiff had failed to establish the sound market value and salvage value of the frog legs. The court found that an FDA import alert did not raise a presumption of contamination against all frog legs covered by the alert or the shipment involved. The court found the invoice price plus the insurance premium represented the market value of the undamaged cargo, noting that the carrier, aside from proffering evidence about the import alert, introduced no other rebuttal evidence. As to the market value of damaged goods, the court noted that a plaintiff may prove damage by testimony of a surveyor familiar with market conditions.

On the question of pre-judgment interest, while the court noted that pre-judgment interest generally is awarded from the date the destroyed or lost goods should have delivered, its purpose was to compensate the injured party for the loss and delay in receiving payment. In this case, only the subrogated insurer sued based on the loss it had sustained when it paid the

claim of its insured. The court found the subrogated underwriter was entitled to interest from the date it paid the claim.

Insurance Co. North America v. S/S CAPE CHARLES, 1995 AMC 894 (S.D.N.Y. 1994) (Stanton, J.) (see related decision in MLA Report, October 31, 1994, at 10079).

SURVEY ALLOWANCE PROVES TO BE 100 PROOF

The Ninth Circuit Court of Appeals upheld depreciation allowances set forth in survey reports as sufficient proof of the fair market value of damaged fruit to support damages awarded under the Carriage of Goods by Sea Act ("COGSA").

Proof of damages, in the court's view, need not include evidence of the actual market price obtained for the fruit on the open market. The fruit had not been re-conditioned and no direct evidence was introduced by the ocean carrier that the depreciation allowances were wrong or inaccurate.

American Home Assur. Co. v. American Pres. Lines, Ltd., No. 93-16941 (9th Cir. December 30, 1994).

SOUNDINGS FROM ABROAD

The Argentine Court of Appeals considered a case where one crate from a shipment of 18 crates was damaged. As a result of the damage to one crate, the other 17 crates of machinery, which relied upon the command console contained in the damaged crate, were rendered useless.

The Argentine Court of Appeals took a literal reading on the limitation provision of the Hague Rules and refused to apply, by analogy, the Hague-Visby Rules or Warsaw Convention.

The court found that the loss in value of the 17 crates was a consequence of the damage to the most important part of the machinery, and not of the damage caused by the carriage itself. The carrier's liability was calculated on the basis of the single crate damaged by the carriage and not on the basis of the total shipment of 18.

Antartida v. Capitan (THE PAOLO O), Uniform Law Review, decision dated October 23, 1987.

RAILROAD BUILDER NOT ON TIME

A railroad builder brought suit against a time-charterer for damage to its cargo. A letter from the charterer's president to the builder stated that the vessel had finished discharging and sailed on a particular date; however, according to documents issued by the Port of Authority, the cargo in question had been completely discharged on an earlier date.

The Court of Appeals for the Fifth Circuit found that the one year limitation period under COGSA commenced on the date the cargo was completely discharged, not on the date the vessel left the delivery port.

Mendes Jr. Int'l Co. v. M/V SOKAI MARU, No. 94-20228 (5th Cir. January 26, 1995).

SO LET IT BE WRITTEN - THEN IT MAY BE DONE

This case involved damage to a shipment of wine. The stevedore was sued by the ocean carrier. The carrier settled with the cargo underwriter who had brought suit against it and sought indemnification from the stevedore for its settlement.

The court found that proof of potential liability was a sufficient basis for the indemnity action and noted the stevedore did not dispute that the settlement was reasonable or that it had been offered the opportunity to assume responsibility for defense of the action.

The court went on to consider the carrier's indemnity action for the stevedore's alleged breach of its implied warranty of workmanlike service. The stevedore argued that the services of another contractor were used with respect to hooking up, maintaining, and monitoring the temperatures of the reefer containers. The court noted the specific language of the contract between the carrier and stevedore which provided that the stevedore assumed no responsibility for maintaining the temperatures or condition of cargos in reefer containers, and would not be liable for any temperature changes or resulting claims.

While noting that disclaimers of implied warranties of workmanlike service are disfavored and strictly construed, the court found: "it is not the warranty of workmanlike service that is disclaimed." The agreement provided that the stevedore would not be responsible for the maintenance and

the monitoring of cargos in refrigerated containers. "Since Universal was not obligated to perform such a service, it was, *a fortiori,* not required to perform the service in a workmanlike manner." The court found the stevedore was not required under its contract to monitor or maintain the temperature of the reefer container and its failure to do so did not violate any provisions, implied or otherwise.

U.S. Fire Ins. Co. v. United Arab Shipping Co., No. 91-3872 (S.D.N.Y. January 19, 1995) (Leisure, J.).

Associate Editor:
David L. Mazaroli