DOCUMENT NO. 816
Fall 2014

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

© 2015 by the Maritime Law Association of the United States

TABLE OF CONTENTS

Editorial Comment 18351

In Memoriam – William R. Dorsey, III 18352

In Memoriam – Donald M. Kennedy 18359

Judge Haight's Remarks Delivered at the 225th Anniversary of the S.D.N.Y 18360

Committee on Carriage of Goods 18366
Cargo Newsletter No. 64 - Fall 2014

Committee on Cruise Lines and Passenger Ships 18382
Vol. 9, No. 2, October 2014

Committee on Fisheries 18408
Fisheries Case Briefs - October 2014

Committee on Marine Ecology and Maritime Criminal Law 18420
Bilge & Barratry - Volume 5, Issue 2, October 2014

Committee on Marine Insurance and General Average 18480
Newsletter - Fall 2014

Committee on Young Lawyers 18502
Vol. 2014-2 October 2014

Table of Cases 18508

EDITORIAL COMMENT

This edition of MLA Report features the remarks by Senior District Court Judge Charles S. Haight, Jr. on November 4, 2014, celebrating the 225th anniversary of the opening of the U.S. District Court for the Southern District of New York, the nation's first federal court. It also contains the newsletters of the Association's Committees that were issued in connection with the Fall Meeting in Philadelphia, PA in October 2014.

In accordance with our practice of honoring members who have materially advanced the work of the Association, we have included remembrances of William R. Dorsey of Baltimore, a past president of the Association, as well as Donald M. Kennedy of New York.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this edition: Corey R. Greenwald of Clyde & Co. US LLP in New York, Patrick J.R. Ward of Hand Arendall LLC in Mobile, Jonathan B. Segarra of Maynard, Cooper & Gale PC in Mobile and Richard L. Beaumont of Tulane University Law School. We appreciate their help. However, we remain responsible for any errors or ambiguities that may have escaped their and our view.

As in the past, we remind readers that articles, case notes and comments published in the MLA Report are for information purposes only, are not intended to be legal advice and are not necessarily the view of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

William R. Dorsey, III

William R. ("Bill") Dorsey, III was born in Baltimore, Maryland on July 21, 1934. He earned a Bachelor of Arts degree in 1956 at the University of Virginia, where he was captain of the tennis team and sports editor of the student newspaper, THE CAVALIER DAILY.

He then entered the Navy and served as the Communications Officer and later Navigator of the USS CHILTON (APA-38), serving in the Mediterranean and in the Caribbean.

After leaving the Navy, Bill attended the University of Virginia School of Law, where he served on the editorial board of the Virginia Law Review, was elected to Omicron Delta Kappa and Order of the Coif, and graduated in 1962.

Bill returned to Baltimore and joined Semmes, Bowen & Semmes, where he would spend his entire legal career. Bill held various posts within the firm and was its Chairman in 1987-1991.

Bill was a consummate maritime lawyer, representing shipyards, pilots, and vessel owners during his career. He and I represented the pilot of the S/S CAPRICORN, which collided with the USCGC BLACKTHORN in Tampa Bay on January 28, 1980, with the loss of the lives of 23 Coast Guard personnel. Bill was a strong advocate for our client before a Marine Board of Investigation conducted jointly by the Coast Guard and the NTSB for over three months in Tampa and in the Coast Guard administrative hearings that followed.

Bill served on the Board of Directors of The Maritime Law Association of the United States, was its Secretary and Vice-President, and in 2000-2002 was its 42nd President. He presided over the 2001 Fall Meeting of the MLA at the Hotel Del Coronado in San Diego, just a little over a month after the tragedy of

September 11, 2001. Bill opened that meeting with an unprecedented Service of Commemoration and Remembrance, which began with Bette Cohen leading the membership of the MLA in three verses of "America the Beautiful." In his remarks, after noting the lives lost and affected by the tragedy, Bill said:

> I know that for many of you it was not easy to attend this meeting, but I truly believe that by just being here, by seeing old friends and meeting new, by doing our business, by sharing a drink or a meal together, we thumb our nose at the terrorists, and we help each other deal with the trauma of September 11.

Bill will be remembered for his affability, his skill as a litigator, and his dedication to his friends and colleagues.

Bill left his wife of almost 58 years, Anne, two sons and a daughter, and six grandchildren.

He is and will be missed.

James W. Bartlett, III

Remembrance

Bill Dorsey's steady land on the helm helped guide the MLA for many years. I relied on his wise council and am grateful as a member of the gang of four that Bill helped fund the Rotterdam Rules effort. I wished that he had lived to see our nation ratify them.

Stephie and I enjoyed the company of Bill and Anne on many pleasant occasions. Bill and I swapped Navy navigator

stories and agreed that navigator was the best job each of us ever had.

We are grateful for the wise and pleasant counsel the MLA has received from both Bill and Anne.

Chester D. Hooper

Remembrance

The MLA recently lost a fine leader, good friend of all the members and a dedicated lawyer. Bill Dorsey, who served as the 42nd President of MLA in the years 2000-20002, had been an extremely active member since his membership began in 1968. He served as Secretary under Past President Chet Hooper and as Second Vice President under the 40th President. In addition to his meritorious work in this Association, he excelled in other facets of the law and had been selected as a member of the American College of Trial Lawyers in 1984.

Bill's early practice succeeded because of his talents and the deft touch of his influential partner past MLA President, David Owen. They seemed to have been made for each other as law partners.

My contact with Bill came through many aspects of MLA and our practice. We were on numerous committees including several arrangement committees. We had great times together. We would play golf as the opportunities were presented and he and I felt that this was another opportunity to practice our bad shots.

These pleasant life activities were good fortune for me to get to know Bill well over 30 plus years. Our friendship continued to develop as the privilege of being able to work on continuing the tradition and the vision as to what the MLA should achieve.

We corresponded and spoke by phone concerning MLA and our other efforts. He was never too busy to help. Also, he set up a board meeting in Baltimore that was spectacular.

Bill was given a present by his wife, Anne, of the opportunity to go to the Fantasy League run by the Baltimore Orioles. So approximately 15 years ago, he checked in, was given a uniform and played under the Orioles tutelage for a week or so. In this process, he was given an authentic baseball card covering his "career" with all of the statistics that great players achieve. He sent one to me and I still have it.

I am told that the baseball card of Honus Wagner is considered the most valuable of all baseball cards, valued in the millions. But that is not necessarily true for you see, Bill's card, along with my grand memories of the time well spent together, in personal visits and valued activities of MLA, are reflected by his card. His characteristics of commitment, good humor, his ability to laugh at himself, his sterling character and a friendship will never end. He will always be my friend. Bill's baseball card is priceless, far more so than Honus Wagner's card and it will ever be so.

James F. Moseley

Remembrance

I am probably the only MLA member who knew Bill since 1972 when I was Senior Maritime Counsel for Bethlehem Steel Co. Bill and his firm, Semmes Bowen and Semmes, were Bethlehem's counsel in Baltimore. I had the privilege of Bill's excellent counsel as one of his clients and at times was in an adversary position when the Semmes firm was engaged in litigation with Bethlehem. We had an excellent relationship as friends, counsel and fellow officers of The Maritime Law Association of the United States. It was my privilege and that of my late wife Patricia to have been friends and at times tennis partners with the Dorsey's at resort meetings.

Bill was my Vice President when I was President of the MLA. I greatly appreciated his counsel and practical advice during our tenure in the late 90's.

Bill and I were very compatible as officers of the MLA. We shared a common experience as naval officers in the 1950's. We always like to tell our sea stories about our adventures.

Bill and Anne were outstanding in their assistance to me and Patti during our days as Vice President and President. He was an extremely gifted lawyer and a great friend to me during those years. Anne was a great friend and of outstanding assistance to Patti who was living with a serious case of rheumatoid arthritis. Both Bill and Anne remained our friends after our respective Presidencies.

The Maritime Bar has lost a great advocate and even more important a great friend and counsel to me. *Ave atque vale,* Bill.

Howard McCormack

Remembrance

The first contact I had with Bill was hearing his hearty laugh, a reflection of the good will and *joie de vivre* that were the foundation for all his interactions with others.

Bill combined the most esoteric subtlety of intellect with unassuming curiosity about the world and sincere interest in others' views. The law was his playground. He would savor a good bull shot while expounding with great exuberance on how differences in civil and common law affected the drafting of international conventions. He was captivated by ideas and would become gleefully enthusiastic about topics that would bore others to tears. I think he and I were the only MLA presidents who were truly fascinated by the law-making process of the IMO, despite its byzantine intricacy and snail-like pace.

Bill found delight in every aspect of life, but when he talked about Anne, a special glow appeared in his eyes. His love and respect for her shined in all his words and actions.

Bill's quick and abundant wit and contagious, warm-hearted smile gave a sparkle to every gathering. On the quiet, though, he was a kind and attentive friend, especially to any friend who was ill or suffering.

Bill is one of the few people I have ever known who truly respected all points of view, despite the unshakable strength of his own beliefs. His memory will always remind me that politics and other contentious matters have no bearing on a person's merit. I admired him greatly and will miss him deeply.

Lizabeth L. Burrell

Remembrance

When I joined the MLA, Bill Dorsey was one of the members that captured my attention. He was active, smart, engaged and always had a friendly smile. It was clear that he certainly enjoyed what he was doing professionally, and very much enjoyed the Maritime Law Association.

I was able to work with Bill on several committee projects, and soon learned that Bill's private side mirrored his public side. He was a positive influence on me, and encouraged me to get more active in the MLA. It was Bill who suggested that I run for office. He mentored me throughout my work with the MLA, and was always a good friend. When I was president, attending various other functions, people would often ask "how's Bill". He made a very positive impression wherever he went.

I shall miss my friend.

Warren J. Marwedel

Remembrance

I shall not cover any of the basics of Bill's life and service to the MLA. That has been so graciously covered by his partner and several other Past Presidents. Rather I would like to briefly report and admire again the generous spirit of mentoring he showed me as I performed various tasks for the MLA then got into the officer chairs. While on the Board of Directors when he was President, and as his resort meeting chair, I got to know Bill's strong leadership capability: decisive and steady, just as he demonstrated after 9/11.

Moreover, he and Anne were always so very kind to Forrest and me, encouraging us as we came along behind them to take leadership positions in our beloved MLA. With time all things shall pass, but never our memories of these wonderful days with these wonderful people.

We thank them for their existence, and the privilege to have known and worked with them. Rest gently, Bill.

Robert B. Parrish

IN MEMORIAM

Donald M. Kennedy

Donald M. Kennedy passed away on October 16, 2014. He was born on November 4, 1932, in Brooklyn, and spent his early childhood, from age 3 to 14, at St. Charles Hospital, which was a residential hospital for children who had contracted polio. He graduated from Brooklyn Law School in 1959 and was admitted to the Bar in 1960. From 1960 to 1967, Don worked for Atlantic Mutual Insurance Company. He was a proud member of the U.S. Wheelchair Basketball team that gold medaled in the 1964 Tokyo Paralympic Games. In 1967, Don became an associate with the firm of Donovan Maloof & Walsh, later known as Donovan Maloof Walsh & Kennedy. He and Jack Lillis then founded their own firm in 1986 under the name Kennedy & Lillis, now known as Kennedy Lillis Schmidt & English. In 1994, he was honored as Insurance Person of the Year by the Marine Claims and Recovery Forum. He was a Proctor member of The Maritime Law Association of the United States since 1967. Don actively participated in the Association's work, especially its meetings and events, co-chairing the 1986 meeting in Hawaii and chairing the 1993 meeting in Bermuda. He loved the camaraderie of the MLA, and all the legal dialogue with his fellow members. Don was an excellent cargo lawyer, highly respected by both the plaintiff and defendant cargo bar. We miss Don's insight, his sense of humor, sense of proportion and ability to sing DANNY BOY late at night at MLA meetings.

Mr. Kennedy is survived by his wife of 56 years, Cecilia, and many nieces and nephews. He was predeceased by two brothers, Eugene and James; and a sister, Jacquelyn.

John T. Lillis, Jr.

S.D.N.Y. 225th ANNIVERSARY

[Editors' note: The U.S. District Court for the Southern District of New York celebrated its 225th anniversary on November 4, 2014. The Southern District was the first federal court to sit in the United States; it is about three months older than the Supreme Court of the United States. The admiralty jurisdiction of the Southern District was emphasized in the 225th anniversary ceremony. In a procession into the ceremonial courtroom, the Chief Marshal of the court followed by past presidents of the MLA from New York carried the silver oar of the admiralty. The silver oar was cast in 1725 for the Vice Admiralty Court of the Provence of New York.

Judge Haight explained the admiralty history of the court in the following remarks, which he delivered at the ceremony.]

Charles S. Haight, Jr.
Senior United States District Judge, S.D.N.Y.
November 14, 2014

Chief Judge Preska, judicial colleagues, distinguished co-celebrants of this anniversary:

If we could be transported in time back to the first Tuesday of November, 1789, and attend the first session of this Court before Judge Duane, and at its conclusion we left Judge Duane's courtroom, possibly a more modest space than this one, and ventured out into the streets and among the buildings of lower Manhattan as they existed in 1789, the world would seem to be a completely different place from what it is now.

But if on November 3, 1789 we left Judge Duane's courtroom, went to a Manhattan Island pier, and boarded a ship which cast off her lines, set sail, and steered a 90 degree course toward Europe, then in several hours the surrounding world would seem to be just the same then as it is now, as the land disappears astern and we find ourselves on the vast and trackless Atlantic Ocean, our property and lives dependent upon the seaworthiness of

the vessel carrying us and the skill of the mariners directing her navigation.

Then, just as now, human fortunes were governed by the general maritime law, also called admiralty. When this Court began 225 years ago, there were, just as now, admiralty courts, admiralty judges, and admiralty lawyers. In an opinion in 1815, Justice Story wrote: "The admiralty is a court of very high antiquity, with a strong probability of its existence in the reign of Richard the First, since the Laws of Oleron, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the law of the admiralty." Justice Story might have noted that maritime laws were also traceable to the ancient Rhodians and Phoenicians, well before Richard the First's reign in the 12th century. So it is not surprising that when this Court opened for business 225 years ago, it was largely limited in its jurisdiction to maritime cases, and remained so for the next hundred years, a century which, as Judge Rakoff pointed out in his recent review of a history of the Court, saw the expansion of the nation's maritime commerce and its increased concentration in the Port of New York. While today the judges of the Court deal with issues of civil and criminal law that Judge Duane could never have dreamt of, maritime cases continue to be an important percentage of those filed. In 1999, when Chief Judge Charles Brieant addressed the centennial celebration of the Maritime Law Association of the United States, he reported that in 1998, 748 maritime cases were filed in the Southern District of New York, 7% of the civil cases filed.

In its earliest days, Addison Browne was this Court's first great admiralty judge. There have been others. In 1909, District Judge Learned Hand came to the Court and remained until 1924, when he left to do something else somewhere else. The fascination of admiralty law has the power to attract previously untutored converts, as District Judge Hand's career illustrates. Professor Gerald Gunther's biography of Learned Hand describes Hand's achievement of becoming "the nation's most eminent" admiralty judge as "remarkable because he came to the bench without any background in maritime law." "Nor," Gunther writes, "except for

occasional childhood ventures on a small sailboat near an uncle's hotel in New London, Connecticut, did he have any exposure to seafaring skills to help him adjudicate controversies over accidents on navigable waters. Yet Hand quickly mastered the intricacies. The best illustration of his skills are found in his decisions in numerous ship-collision cases."

Had he still been with us, District Judge Hand might have brought those skills to bear when in 1956 the passenger ships *Andrea Doria* and *Stockholm* , each on a voyage between New York and Europe, collided in the Atlantic. The shipowners, Italian Line and Swedish America Line, sued each other in this Court. The consolidated case was assigned to District Judge Lawrence Walsh, who appointed four special masters to preside over six weeks of depositions in this City, at the conclusion of which the universe of involved marine insurers got together in London and settled the entire case and all third-party claims. Judge Walsh signed the order closing all the cases before any trial, to the relief of the shipowners and their insurers, and the discomfiture of the entire admiralty bar of this Court. One can never predict when a federal district court will be transformed into an admiralty court by a disaster at sea.

Each district judge sitting here today is an admiralty judge, or by the spinning of the assignment wheel will become one. We inherit the mantles of Addison Browne and Learned Hand, not through specialized judicial merit or shiphandling skill, but because it is our responsibility. And the responsibility endures. Since there will always be ships carrying passengers and cargoes, there will always be admiralty and maritime cases in this Court. Ships, passengers and cargoes have changed from those during the Court's earlier days. Ships are larger – the newest container ships are so long and so broad that they cannot fit in any United States port and can only trade between European and Oriental ports. Cargoes today are carried in containers above deck on container ships, rather than being loaded into and discharged from the holds of smaller vessels by stevedores. Passengers today are more likely to be successful people embarking in comfort from New York on cruise ships, rather than sailing in the straightened circumstances

of steerage to New York from Europe, hoping to succeed in a new country.

These changes are wrought by the evolving nature of the international shipping industry. The legal problems generated by the complexities of that industry also evolve. Judges of this Court become versed in the mysteries of the traditional maritime remedy of attachment as utilized in an age of electronic transfer of funds; we adjudicate the rights and responsibilities of parties to global maritime contracts of charterparty and the arbitration clauses in them; we draw the sometimes elusive lines of admiralty jurisdiction over commercial disputes; we divine the meaning of incomprehensible policies of marine insurance; and we try a case without a jury if it falls within the admiralty jurisdiction.

But whatever changes in industry practice may be reflected in contemporary maritime law, the admiralty judges of today, like their predecessors 225 years ago, will fashion and apply the rule of law to the human consequences when a peril of the sea becomes a reality. The ships of today may be immense and largely automated, but officers and mates still stand watches, on the bridge or in the engine room; the age-old responsibilities of a seaman lookout have not been entirely supplanted by radar; the navigation rules of the road still constitute mankind's effort to avoid or reduce the risk of collision; fire at sea retains its ancient terror; the world's coastlines are alert to the risk of widespread pollution by oil from a stricken tank vessel; marine salvors maintain a watchful presence; loss of or damage to cargo, injury to or death of a crew member or passenger on board a ship, remain commonplace occurrences. Admiralty cases will always arise from time to time because, unlike temporal practices that maritime industries may alter, the perils of the sea are eternal. "Protect me, Lord," goes the traditional mariner's prayer, "for Thy sea is so great and my boat is so small." That prayer resonates today, even though some boats are so large they cannot fit into any American port, because however large or automated a ship may be, the world's oceans, which cover two-thirds of the planet and seem to be covering more each day, are greater still, and their fury, when aroused, is not

deterred by human technology. Of necessity, this Court has always been a great admiralty court. It will remain so.

I close these remarks with the observation that the eternal nature of perils of the seas, and the antiquity of admiralty law, combine to explain the object that was produced and paraded at the beginning of this ceremony: the Silver Oar of the Admiralty. This oar was crafted in about 1725 by Charles LeRoux, a noted Colonial silversmith. It served as the symbol of authority of the Vice-Admiralty Court of the Province of New York, a colonial court created by the English Governor General in 1678. After the American Revolution the oar passed into private ownership, but it was obtained and presented to this Court in 1941 by a group of admiralty lawyers headed by Charles Burlingham.

Traditionally, when a Judge of the Court was sitting in an admiralty case, the marshal or bailiff would precede the Judge into the courtroom, bearing a silver oar and waving it over the Judge until he was seated. The oar was then placed in a cradle below the Judge's bench, where it rested throughout the session of the Court. We have not performed that ritual in this Court for many years, but in 1999 Sir David Steel, a Judge of the High Court of Admiralty in Great Britain, told our Maritime Law Association on the occasion of its centenary that a great silver oar sat in his court whenever he was hearing an admiralty civil action. That oar was made in about 1660, following the restoration of the monarchy in the form of King Charles II. There is nothing new about the concept of admiralty law.

It is appropriate that this Court's Silver Oar of the Admiralty be displayed during this ceremony, which recalls among other subjects this Court's history as an admiralty court. The fife and drum music is stilled. The pageantry is finished. The Oar of the Admiralty lies before us. I invite you to consider the shape and the stillness of the Admiralty Oar: the beauty of its utilitarian simplicity. The oar has never changed. You sit in your ship, grasp the oar's handle, place its blade in the water, pull, and the ship moves through the water: so humankind has been progressing over the waters since the beginning of recorded time. There is

something eternal about the oar. It is wholly fitting that this oar is a symbol of the law of the sea, and of this Court, sitting as an admiralty court *en banc* for these few moments on a November afternoon.

For the sea itself is eternally fascinating, and so are ships and those who go down to the sea in ships, who by their daring or distress, courage or cowardice, foresight or foolishness, triumphs or tragedies of navigation, give employment to admiralty judges and lawyers, thereby generating that equally fascinating body of law that we call admiralty.

Chief Judge, I have completed my voyage. I am grateful for this opportunity to return to my home port.

COMMITTEE ON CARRIAGE OF GOODS

Editor: Michael J. Ryan
Associate Editors: Edward C. Radzik
David L. Mazaroli

CARGO NEWSLETTER NO. 64

Fall 2014

CARMACK CAN BE THE ONLY GAME IN TOWN….

Certain Underwriters at Interest at Lloyds of London v. United Parcel Serv. of Am., Inc., 762 F.3d 332, 2014 AMC 2274 (3d Cir. 2014)

Twenty seven shipments of coins and special metals went missing ("lost or stolen") while in the custody of defendant. Defendant never located any of the missing packages which were alleged to be worth $150,000.

The subrogated underwriters brought suit in federal court asserting state law claims against defendant which included breach of contract, negligence, negligent supervision of employees and "true [and] fraudulent conversion." The subrogated underwriters premised subject matter jurisdiction solely on complete diversity of the parties; not bringing any claims based upon federal law.

The district court dismissed the underwriter's amended complaint for failure to state a claim upon which relief could be granted, holding that the Carmack Amendment preempted all of the underwriters' state law claims. The district court further held an exception, that Carmack's liability limitation did not apply when the carrier committed a true conversion of the goods, did not support an action based on state law but rather abrogated the limitation of liability for causes of action brought under the Carmack Amendment itself. Because the underwriters only brought state law claims, the district court held that the exception did not save their complaint. It is also noted that the subrogated

underwriters failed to plead a true and fraudulent conversion claim with the particularity demanded by Federal Rule of Civil Procedure 9(b). The subrogated underwriters appealed.

The Third Circuit, considered two issues to be involved: First, whether the Carmack Amendment preempts the underwriters' state law claims; and second, whether the "true conversion" exception is an exception to the Carmack Amendment's preemptive scope, or to the Amendment's limitation on carrier liability.

The court set forth a detailed account of the Carmack Amendment's operation and history:

> For over one hundred years, the Supreme Court has consistently held that the Carmack Amendment has completely occupied the field of interstate shipping. "Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. " (citing cases); and further,
>
> The Court of Appeals has also unanimously held that the Carmack Amendment "preempts all state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments." (*Citing* cases of the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.)

Certain Underwriters at Interest at Lloyds of London, 762 F.3d at 335-36, 2014 AMC at 2278-79 (3d Cir. 2014)

The court further noted it had already held, in passing, that state law breach of contract and negligence claims brought against a carrier for loss of or damage to goods are preempted. The court reaffirmed such holding and concluded that state law conversion claims are likewise preempted.

The court then addressed underwriters' argument that a claim for common law conversion should be permitted to proceed because of the "true conversion" exception. The court went on to hold "that the true conversion exemption does not detract from the Carmack Amendment's preemptive force and is an exception only to its liability limiting provisions".

The court found for a "conversion" to be a "true conversion", the carrier must have appropriated the property "for its own use or gain." The exception does not apply "where the conversion is by third parties or even by its own employees." Referring to *Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 21(1923), the court found "the Supreme Court could not have been clearer: the Carmack Amendment preempts state law conversion actions."

While the "true conversion" exception might vitiate the liability limiting provision of the Carmack Amendment, the court found it had no application to the case at issue.

> Underwriters brought only state law claims, which are preempted. They did not bring any claim under the Carmack Amendment, nor do they seek remand to add a Carmack Claim. Even if UPS did convert their shipments for its own use, their only remedy would have been to seek relief under the Carmack Amendment and then attempt to vitiate the Amendment's limit on liability by claiming that UPS engaged in true conversion. But the

> Underwriters "[a]s masters of the complaint…chose not to do so."

Certain Underwriters at Interest at Lloyds of London, 762 F.3d at 338, 2014 AMC at 2282-83 (3d Cir. 2014)

The circuit court affirmed the district court's order dismissing the complaint for failure to state a claim.

FREIGHT FORWARDER DIGS OUT FROM UNDER SANDY…

Allianz Global Corporate & Specialty v. MSC "Moneterey", 2014 AMC 2946, 2014 WL 4631891 (S.D.N.Y. Sept. 16, 2014)

A shipment of perfume products was carried from Italy to Port Newark Container Terminal in New Jersey and discharged on or about October 27, 2012. Hurricane Sandy arrived two days later and the shipment was damaged (along with others) while situated on the terminal. **[Editors' note:** This action is one of 15 involving damage to cargo destroyed at that terminal during Hurricane Sandy, which actions were consolidated.]

The interested cargo underwriter brought suit naming the vessel, its owner, agent, terminal operator and, included the freight forwarder.

The freight forwarder moved to dismiss for failure to state a claim pursuant to FRCP 12(b)(6). The court noted that to survive a motion to dismiss, the complaint must contain sufficient factual matter, to "state a claim for relief that is plausible on its face" and that factual matter is sufficient if it "allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged."

In reviewing a motion pursuant to FRCP 12(b)(6), the court stated it must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor; however, it need not credit legal conclusions couched as factual

statements or threadbare recitals of the elements of a cause of action, supported by merely conclusory statements.

With respect to a negligence count against the forwarder, the plaintiff alleged that the forwarder failed to exercise proper care, custody and control of the subject cargo and did not timely arrange for the transport of the consignment away from the terminal and did not arrange for delivery and/or pickup of the cargo to the ultimate consignee after its discharge.

The court noted a freight forwarder's responsibilities are ordinarily "rather limited." In the maritime context, "[f]reight forwarders generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers, such as vessels, truckers, stevedores or warehouses which are directly involved in transporting the cargo."

"There is a 'well settled legal distinction between forwarders and carriers'; the former merely arrange for transport, the latter do the 'heavy lifting. '" A freight forwarder is liable for loss or damaged goods only for its own negligence.

The court found the plaintiff's bare allegations failed to raise a right to relief above the speculative level. Although the allegation was made that the forwarder did not exercise proper care in selecting the carrier, no support was provided for this allegation. Similarly, plaintiff's contention that the forwarder "provided freight forwarding services" did not allow for a reasonable inference that the forwarder assumed the degree of responsibility for the cargo that the plaintiff's negligence claim demanded, or that it would even have been in a position to undertake the precautions plaintiff suggests it should have undertaken.

The court found the complaint's lack of factual detail surrounding the nature of the forwarder's services to be fatal to the plaintiff's claim. It therefore dismissed the negligent count.

As to a breach of bailment count, the court stated to establish a bailment under New York law, plaintiff must show

intent to create a bailment, delivery of possession of the bailed items, and acceptance of the items by the bailee. The court found plaintiff's breach of bailment claim also lacking in factual support. The allegation that the forwarder was a bailee was a legal conclusion and no where did the plaintiff set forth any facts which would support a reasonable inference that a bailment relationship existed.

The court dismissed the amended complaint without prejudice to filing a motion to amend supported by proper factual allegations consistent with Rule 11 of the Federal Rules of Civil Procedure.

COURT FINDS FIRE STATUTE AND COGSA DEFENSE STILL INERTED…

Oilmar Co., Ltd v. Energy Transport Ltd and P.T. Cabot Indonesia, No. 3:03-CV-1121 (JCH) (D. Conn. Oct. 6, 2014)

On June 13, 2013, the panel of arbitrators rendered a partial final liability award (2 to 1) in favor of claimants. Phase 2 of the arbitration concerned the quantum of damages, which, in addition to monetary claims with respect loss of cargo, included other expenses including experts' fees and legal expenses on attorneys' fees. The final award (unanimous) incorporated the partial final award on liability.

Owner moved to vacate the final award before the United States District Court for the District of Connecticut. Funds had been attached under Rule B in that court and were still retained by it. The arbitration hearings were held in New York pursuant to an order issued by the United States District Court for the Southern District of New York. The court, *sua sponte*, considered the questions of subject matter jurisdiction and venue. It found that it had subject matter jurisdiction. The attachment existing in the Connecticut court was essential to the award (representing approximately 75% of the award).

The court also noted the charterer had moved to confirm the award in the proceeding. The court concluded that venue, if it was not proper in the District of Connecticut, had been waived by the charterer having sought relief from the court.

The court went on to consider the principal issue of manifest disregard, owner arguing that the panel failed to properly consider whether the shore based managers had "actual fault or privity" with any act of negligence which caused the casualty, but instead conducted a "due diligence" analysis. It also asserted the panel relied on "speculative, unreliable evidence and an impermissibility loose chain of causation analysis."

The court considered "design or neglect of the owner" under the Fire Statute and "actual fault or privity" under the COGSA fire exemption were functionally equivalent.

In the panel's view, the managers' failures in supervision were a "proximate cause of the explosion and fire" on the vessel, thus depriving the owner of the protections against liability created by the Fire Statute and COGSA fire exemption. The court found nothing within the panel's decision to suggest that it improperly applied the Fire Statute and COGSA's fire exemption to the question of the owner's liability, nor did it reflect any errors "so obvious [as to] be instantly perceived as such."

> Accepting the Panel's factual findings as accurate, the Court cannot hold that the casual (sic) connection between Antares' failure of oversight and the explosion and fire was 'so tenuous…that what is claimed to be consequence is only fortuity.'

The court did not find that the panel's conclusion was "speculative". Dealing with owner's argument that the panel relied on hearsay testimony, the court noted: "[i]t is well settled that arbitrators are not required to adhere to the Federal Rules of

Evidence, including its proscription against admitting hearsay evidence. (citation omitted) . . . (arbitrators 'need not follow all the niceties observed by the federal courts.')."

The court stated it was not empowered to "review the weight the arbitration panel accorded conflicting evidence…,[or] question the credibility findings of the arbitrator." (Citation omitted).

The court denied owner's motion to vacate the final arbitration award and granted charterer's motion to confirm the final award. The charterer's request for attorneys' fees was denied.

PANEL STICKS TO STANDARD FORMULA….

In the Matter of the Arbitration between Hess Corporation and Dorado Tanker Pool, Inc., S.M.A. No. 4236 (Arb at N.Y. 2014) (Berg, O'Brien and Monaghan)

Jet fuel and #2 heating oil were loaded aboard the vessel for transportation from St. Croix to Bayonne for further discharge orders. During loading, a portion of #2 oil was erroneously transferred into the jet fuel cargo. The supplier refused to take the contaminated product back ashore and insisted the vessel go forward. Following the apparent contamination, voyage orders were revised and the vessel directed to proceed to New York harbor for further cargo sampling. It was discharged into barges which in turn delivered the product ashore into shore tanks. From those tanks, the product was subsequently moved about through a myriad of barge transfers, product blends and sales in an attempt to mitigate damages. The damaged product was ultimately disposed of some three months later.

Although the time chartered owner denied responsibility at the outset, it ultimately admitted liability but argued that the charterer suffered no monetary loss because of the contamination. The charterer claimed damages representing the difference between the sound market value of the jet parcel when loaded and its damaged market value at destination. It also claimed damages

for downgrading of preexisting inventory in a shore tank by the introduction of the contaminated cargo and expenses for ancillary losses, including additional inspection costs, spill taxes, tank usage and extra barge costs. The time chartered owner counterclaimed for outstanding demurrage and shifting expenses.

The charterer contended it was entitled to damages based on the difference between the sound and damaged market values of the jet product as of the arrival at New York harbor. The time chartered owner contended the charterer suffered no loss from contamination because the jet fuel purchased was sold as jet fuel at the same grade. It also argued that there was a more appropriate alternative to the fair market value test, i.e. to calculate damages based upon the incidental costs incurred by the reconditioning of the goods.

The panel considered two issues; namely: (1) whether the charterer reasonably mitigated its damages and (2) which measure of damage to employ.

The panel found the charterer had taken reasonable steps to mitigate the loss involved and then addressed the appropriate measure of damage for the product involved. It found the difference between the fair market value of the cargo at its destination in the condition in which it should have arrived and the fair market value in the condition in which it actually did arrive was the measure of damage to be used. It found there were no "special reasons" which qualified under the narrow exception to the market value standard. The panel noted all of the product involved was not fully restored to its former condition and thus, the fact that part of the cargo might later have been sold at or above damaged value was irrelevant. It found the fair market value rule to be the most accurate means to assess the market loss due to the contamination of the jet fuel.

The panel went on to address various additional claims presented, including attorneys and legal costs. It found the time chartered owner liable to pay $963,805.98 for damages with

allowance of $223,815.27 toward legal fees and costs and an allowance of $4,400 towards arbitrators' fees.

The panel concluded that the time chartered owners' claim for demurrage and shifting expenses were issues arising under the charter party, in spite of charterer's argument that they were not within the scope of the proceedings. It found the charterer liable for such in the amount of $57,004.23 with interest thereon.

[Editors' note: A petition to confirm and a motion to vacate the final award were filed in the U.S. District Court for the Southern District of New York. On March 4, 2015, the district court granted Hess' petition to confirm and denied Dorado's motion to vacate. *Hess Corp. v. Dorado Tanker Pool, Inc.*, No. 14 CIV. 6412 NRB, 2015 WL 915294 (S.D.N.Y. Mar. 4, 2015)].

SOMPO SAGA; SECOND CIRCUIT SEGMENT….

Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co., 762 F.3d 165, 2014 AMC 1817 (2d Cir. 2014)

The district court dismissed plaintiffs' claims, enforcing a "covenant not to sue" contained in the actual carrier's bill of lading. It found a claim brought on the basis of assignment to be valid and not subject to the clause requiring suit to be brought only against the carrier and not against any servant, agents or subcontractors. (See Cargo Newsletter No. 61.)

Upon appeal to the Second Circuit Court of Appeals, the court found the NVOCC acts as an agent to bind the shipper to the actual carrier's bill of lading, including the clause involved (referring to *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 2004 AMC 2705(2004)), the facts of which it found strikingly similar to those before it.

It found the clause did not violate COGSA, not exonerating the carrier from any suit by cargo claimants. It did not exonerate the carrier's subcontractor from any suit by the carrier claiming indemnity. It merely exonerated the railroad from direct suit by

the cargo claimants. The court affirmed the decision to enforce the covenant not to sue clause.

As to the claim based upon an assignment, the court considered the arguments raised by the railroad on appeal were not timely, not having been raised before.

The court affirmed that judgment against the railroad.

FORWARDER ESCAPES ON DISCLOSED AGENCY….

Mediterranean Shipping Co. (USA) Inc. v. Am. Cargo Shipping Lines, Inc., No. 13-CV-6357 ER, 2014 WL 4449796 (S.D.N.Y. Sept. 10, 2014)

The ocean carrier brought suit against a freight forwarder for breach of contract, alleging that the forwarder commissioned it to transport several shipments of cargo. The shipments were transported to destination but were not picked up on time. The ocean carrier sought reimbursement of charges it allegedly incurred due to a failure to ensure that the cargo was timely picked up.

The defendant forwarder moved to partially dismiss the amended complaint. The carrier alleged that since the forwarder is a "merchant", as that term was defined in the terms and conditions in the bills of lading, and since a merchant is obligated to ensure the cargo is picked up on time, the forwarder was liable for any charges incurred.

The forwarder asked the court to dismiss the amended complaint with respect to three bills of lading which identified the forwarder defendant as "agent". It argued that, because the principals were disclosed, it did not fall within the definition of "merchant" and was not liable for the demurrage claimed.

The booking confirmations with respect to the three shipments involved did not disclose any agency relationship of the

forwarder; however, the forwarder was identified as “agent” in the issued bills of lading.

The carrier argued that the contracts became final when the booking confirmations were issued and, since the forwarder did not disclose its principals on the booking confirmations, the forwarder should be held responsible for the charges incurred. (referring to *CMA-CGM (Canada) Inc., v. World Shippers Consultants, Ltd.*, 921 F. Supp. 2d 1 (E.D.N.Y. 2013).

The court distinguished that case, noting the booking agreements involved incorporated the full terms and conditions of the bills of lading, which in turn imposed joint and several liability on that defendant by virtue of its status as a “merchant”.

In other words, the incorporation of the terms and conditions into the booking confirmations rendered the latter independent contracts for the purpose of imposing the payment obligations at issue; thus they were final contracts for purpose of the agency determination.

The court went on to state it did not read the case for the proposition that all booking confirmations are final contracts, but merely for the proposition that the specific ones at issue in that case were. In the case before it, there was no clear reference to the terms and conditions of the bill of lading so as to fully incorporate them into the confirmations. The only reference to terms and conditions was to inform that a new bill of lading format had been implemented, with the suggestion that the terms be read, as some of the clauses may have been changed. Nothing in the language incorporated the standard form of bill of lading or its terms and conditions in the booking confirmation itself. While the terms and conditions are mentioned, there was no operative language effecting an incorporation by reference.

The court considered the contractual obligations giving rise to the instant lawsuit were set out only in the bills of lading. Since the forwarder disclosed its principals on the three bills of lading at

issue, it was acting as an agent for its disclosed principals with respect to the transactions governed by those bills.

The court went on to consider the issue where an agent clearly manifests an intention to bind itself instead of, or in addition to its principal, then the agent would be bound by the terms of the contract, even if it were acting as an agent for a disclosed principal. It found the allegations in the amended complaint were insufficient to state a plausible claim under this exception, as the allegation was simply that the freight forwarder was liable because it is "the shipper or acting on behalf of the shipper" and thus is a "merchant under the terms and conditions of the bill[s] of lading."

The carrier argued that the freight forwarder fell within the definition of "merchant" because it acted on behalf of the person owning, entitled to or claiming the possession of the goods or of the bill of lading. The court noted this argument was contained in the motion papers and found it could not be used to cure deficiencies in the pleadings. The theory did not appear in the amended complaint.

Without a plausible claim that the bills of lading even purported to impose liabilities on the defendant, it followed that the carrier failed to plausibly allege that the forwarder clearly manifested any intent to be independently bound under the bills of lading.

The court granted the motion for partial dismissal as to the three bills of lading at issue; however, the dismissal was without prejudice to the extent that it was based on deficiencies in the pleadings. The court allowed additional time for the carrier to file a second amendment complaint if it wished.

YOU LIKE TOMAYTOS, I LIKE TOMAHTOS….

Yuzhny Zavod Metall Profil LLC v. Eems Beheerder B – the M/V EEMS SOLAR; English High Court, Queen's Bench Division,

18379

Admiralty Court: Jervis K, Q.C., the Admiralty Registrar: 5 June 2013

Receivers brought a claim against the owners of the vessel for damages to a cargo of coils of pre-painted aluzinc steel sheets. The damage occurred when the stow had shifted in heavy weather during the voyage of Xingang, China to Novorossiysk, Russia. The receivers alleged that the damage was caused by the unseaworthiness of the vessel, in that she had not been properly equipped with additional lashing material and also that the crew failed to tend and care for the cargo during the voyage. Alternatively, receivers alleged the cargo damage was due to poor stowage and owners were contractually responsible for this.

The cargo was shipped under a Congenbill 1994 bill of lading. The bill of lading contractually incorporated both the Hague Rules of 1924 and a Gencon 1994 charterparty that the owners had entered into with a third party charterer (not made a party to the proceeding).

The Hague Rules provide that the carrier shall "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Clause 5 of the incorporated charterparty provided that the cargo was to be "loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers, free of any risk, liability and expense whatsoever to the owners." The cargo had been stowed by stevedores appointed by the charterers (in some haste). The admiralty registrar, before whom the matter was heard, held that the damage was due to poor stowage in that locking coils were not used. He further held the vessel was not unseaworthy nor had the crew failed to properly care for the cargo during the voyage.

As to whether the owners were responsible for the poor stowage, receivers argued that Clause 5 did not make any sense in the context of the bill of lading that regulated the rights between the parties; that incorporation of Clause 5 did not make sense in that there were no reasons why the receivers should take on the

responsibility for loading operations of which it had no control; and a contractual carrier remains responsible to a consignee/bill of lading holder for damages arising from inadequacy of the stow, even if responsibility had passed to the charterers of the vessel.

Owners argued that Clause 5 was validly incorporated into the contract of carriage and that its effect was to transfer responsibility for loading and stowage away from the owners and to the charterers.

The registrar held a transfer of responsibility to a third party was sufficient and that there was no need to manipulate the language so as to read the word "charterers" in Clause 5 as "shippers" and/or "receivers". citing *GH Renton v. Palmyra Trading Corporation* [1957] AC 149 and *The Jordan II* [2013] 2 Lloyd's Rep. 87.

As to whether the owners retained any residual responsibility for the acts of that third party, Clause 5 expressly provided, by the words "free of any risk, liability and expense whatsoever to the Owners", that the owners were not to be liable for the third party's acts.

The court held Clause 5 was validity incorporated into the bill of lading contract and that this was effective to transfer responsibility for stowing the cargo away from the owners. This transfer of responsibility was effective notwithstanding the incorporation of Article III Rule 8 (fn 1) of the Hague Rules into the contract of carriage.

This meant that the owners had a complete defense, subject only to the question whether they or their agents had intervened in the stowage, such that the damage was attributable to their intervention. The court held that there was no evidence that the stowage plan which was provided by the stevedores at loading had contributed to improper stowage.

[Editors' note: The above summary was abstracted from the case note of David Martin-Clark

(http://www.onlinedmc.co.uk/index.php?) which was based on a note prepared by Neil Henderson, Barrister at Stones Chambers, London who appeared for owners in the case.

Reference is made to Cargo Newsletter No. 60; *Man Ferrostaal, Inc. v. M/V Akili*, 704 F.3d 77, 2013 AMC 113 (2d Cir. 2012), (MLA Report, Doc. No. 808 at 17195).

In that case, the Second Circuit found the vessel liable in *rem* for cargo damage resulting from poor stowage based upon "ratification" by the vessel of the provisions of a voyage charter party. The charter party contained a Clause Paramount incorporating the Hague Visby-Rules. It also contained a free-in-and-out provision that stated the handling of the cargo was to be "free of risk…to the vessel." The circuit court held that the voyage charter party's Clause Paramount contractually incorporated the Hague-Visby-Rules, which prohibited a carrier from contracting for a waiver of its obligations to the cargo, i.e., stowage. Thus, the court held the "free of risk" provision was invalid and the vessel liable.]

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

Chair: Carol L. Finkelhoffe
Editors: Suzanne B. Vazquez
Michaell Ceja

NEWSLETTER

Volume 9, Number 2, October, 2014

THE CURRENT STATE OF THE MARITIME LABOR CONVENTION 2006

André M. Picciurro, Esq.,
Kaye Rose & Partners

I. Background

The Maritime Labor Convention, 2006 ("MLC") is a comprehensive treaty which updates and consolidates more than 65 international labor standards adopted since 1920. The MLC's regulations and standards impose a variety of duties and obligations on shipowners and member states (both flag and port states) to ensure decent working and living conditions of seafarers aboard ships.

The requirements of the MLC are organized by title (e.g., Title 1 governs "Minimum requirements for seafarers to work on a ship"). Each title includes specific regulations (e.g., Regulation 1.2 governs "Medical Certificates"). In turn, each regulation includes both mandatory standards (Part A), and guidelines for due consideration in implementing the regulation (Part B). The remaining Titles are organized as follows:

Title 2 - Conditions of employment, which addresses employment agreements, wages, hours of work and rest, leave entitlement, repatriation, compensation in the event of loss of a

ship, manning levels, career and skill development, and seafarer employment opportunities;

Title 3 - Accommodation, recreational facilities, food and catering, which addresses standards for accommodation, recreational facilities, and food and catering;

Title 4 - Health protection, medical care, welfare and social security protection, which addresses medical care, shipowner's liability, health and safety and accident prevention, access to shore welfare facilities, and social security; and

Title 5 - Compliance and enforcement, which addresses flag state responsibilities, port state responsibilities, and labor supply responsibilities.

II. Ratification

By its terms, the MLC became effective on August 20, 2013, 12 months after both of the following conditions were met: (1) countries representing 33% of the world's gross tonnage ratified the MLC; and (2) 30 countries ratified the MLC. On August 20, 2012, both the Philippines and Russia ratified the MLC, pushing the number over 30 (and 33% of the world's gross tonnage had already been achieved in 2009).

Presently, 64 countries have ratified the MLC. This number does not include Overseas Territories of member states to which the MLC may be applicable. For instance, the UK ratified the MLC on August 7, 2013 but the MLC was not applicable to its Overseas Territories until the UK complied with its own internal procedures governing the extension of international treaties to its Overseas Territories. This is partly because the MLC's provisions become immediately effective for the Overseas Territories once extended, and the ratifying country must ensure its Overseas Territory can already comply with the MLC's provisions (unlike new ratifying countries which have 12 months after ratification before the MLC requirements become effective).

The U.S. has not ratified the MLC. However, on February 11, 2013, the U.S. Coast Guard published a draft Navigation and Vessel Inspection Circular ("NVIC") setting forth proposed policies and procedures regarding the inspection of U.S. vessels for voluntary compliance with MLC 2006. *See* http://www.gpo.gov/fdsys/pkg/FR-2013-02-11/pdf/2013-02956.pdf.

The primary purpose of the NVIC is to assist U.S. vessels in avoiding port State control actions in foreign ports of countries that have ratified the MLC 2006 by providing for a voluntary inspection program mechanism for U.S.-flag vessels resulting in the issuance of a Statement of Voluntary Compliance, Maritime Labour Convention ("SOVC-MLC"). This is because the MLC contains a "no more favourable treatment" provision requiring port states to effectively treat vessels from non-MLC ratifying countries the same as vessels from MLC-ratifying countries. So, effectively, if a vessel is traveling to a port in a country that has ratified the MLC, it is subject to port state control actions.

III. Who Does the MLC Apply To?

MLC 2006 applies to commercial (publicly or privately owned) vessels of 500 gross tons or more engaged on international voyages whose flag states have ratified the MLC. They must demonstrate compliance with the requirements of MLC 2006 by maintaining a Maritime Labour Certificate, with an annexed Declaration of Maritime Labour Compliance ("DMLC") issued by its flag administration. A copy of this certification must be maintained onboard the vessel at all times. Failure to maintain this certification will expose those vessels to potential port state control actions.

The MLC is designed to ensure safe working and living conditions to "seafarers" aboard vessels subject to the MLC. The MLC broadly defines "seafarer" as "any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies." (Article II.1(f))

The MLC does, however, permit ratifying countries to exempt certain categories of workers from the definition of seafarer. Article II(3) of the MLC states, "In the event of doubt as to whether any categories of persons are to be regarded as seafarers for the purpose of this Convention, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned with this question."

The International Labour Organization's ("ILO") "Resolution concerning information on occupational groups" provides the following criteria to assist flag states in determining whether categories of persons are seafarers for purposes of the MLC:

(i) the duration of the stay on board of the persons concerned;

(ii) the frequency of periods of work spent on board;

(iii) the location of the person's principal place of work;

(iv) the purpose of the person's work on board; [and]

(v) the protection that would normally be available to the persons concerned with regard to their labour and social conditions to ensure they are comparable to that provided for under the Convention.

The ILO provided some examples of categories of workers which may not be seafarers, including: scientists, researchers, divers, specialist offshore technicians (whose work is not part of "the routine business of the ship"); harbor pilots, inspectors or superintendents (whose "key specialist functions" are not part of "the routine business of the ship"); and guest entertainers, repair technicians, surveyors or portworkers (whose work aboard ship is "occasional and short term," with a "principal place of employment being onshore").

IV. What's Been Happening Since The MLC Centered Into Force

A. Port State Control Actions

Under the MLC, the Maritime Labour Certificate and the DMLC constitute prima facie evidence that the ship is compliant with the relevant MLC requirements, and the inspection by a port state receiving a vessel should be limited to a review of those documents. However, to the extent MLC inspections are part of a more comprehensive inspection to ensure compliance with other international maritime certificates, the port state control officer ("PSCO") may be in a position to observe the working and living conditions on the ship and, if any discrepancies are noted, perform or order a more detailed inspection.

On September 3, 2013, within two weeks of the MLC becoming effective, the Danish Maritime Authority detained a Liberia-flagged offshore supply vessel, having observed that the crew had employment contracts that were not MLC compliant. The vessel was detained for 24 hours until the issue was resolved. This is believed to be the first MLC-related vessel detention. Within the first month of the MLC's effective date, 6 other ships were detained for MLC-related issues by the following port states: Canada (2 ships), the Russian Federation, and Spain (3 ships). The detained ships were flagged in Cyprus (2 ships), the Netherlands, Panama (2 ships) and Tanzania.

According to a recent Classification Society DNV GL, 160 vessels were detained due to serious MLC violations within the first year of its becoming effective. The most common grounds were:

- Records of rest;
- Seafarers' Employment Agreement;

- Fitness for duty – work and rest hours; Manning specified by the minimum safe manning document; and

- Wages.

Most MLC-related detentions were made by the port state authorities in Australia, China, Spain, Russia, and Bulgaria. Both Australia and Denmark have prohibited specific vessels from entering ports within Australia and the EU, respectively, for three months for repeat violations.

B. First Special Tripartite Committee Meeting

Article XIII of the MLC created a Special Tripartite Committee which includes two representatives nominated by the government of each member state and representatives of shipowners and seafarers to address amendments to the MLC. (Any member's government or any group of shipowners or seafarers appointed to the Committee may propose amendments to the Director General of the ILO and, if such proposal meets MLC requirements, it is communicated to the MLC members who then have three months to comment. Then, the Committee holds a meeting and can adopt the amendment if: (1) at least half of the MLC ratifying members are present; (2) 2/3 vote for the amendment; and (3) such 2/3 majority includes ½ of the governments, ½ of the shipowners, and ½ of the seafarers present at the meeting. The amendment must then be approved by a 2/3 vote of the delegates at the next session of the Conference. All ratifying members are then notified of the approved amendment and have from one to two years to formally disagree. If not more than 40% of the ratifying members representing 40% of the world's gross tonnage disagree, the amendment is accepted and becomes effective six months later.)

The first meeting of the Special Tripartite Committee meeting was held in April of this year to discuss amendments regarding: (1) member states maintaining a system of financial security to account for repatriation of seafarers who were

"abandoned"; (2) shipowners to maintain a system of financial security (social security scheme, insurance, fund, or similar arrangement) to cover contractual claims for death, injury or disability due to occupational illness or injury.

C. Meeting of Experts on Occupational Safety & Health

Between October 13-17, 2014, the MLC will convene a meeting of experts to consider guidelines for implementing the occupational safety and health provisions of the MLC. The group will consist of 18 experts (six nominated by the Employers' group of the Governing Body, six experts nominated by the Workers' group of the Governing Body, and six experts nominated by Argentina, Australia, Germany, Philippines, South Africa, and United Kingdom). The guidelines are intended to be a practical resource to flag states when implementing the MLC's occupational safety and health regulations (Regulations 4.3, 3.1, and 1.1. and related Codes) into their national laws.

The relevant national laws, collective bargaining agreements, or other MLC-implementing measures should still be viewed as the authoritative statement of the requirements in the flag state. The draft guidelines cover a broad range of occupational safety and health topics, including risk assessment, training, noise, lighting, radiation, temperatures, chemicals, drugs and alcohol, and reporting, to name just a few. The draft guidelines can be accessed at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_304809.pdf.

D. U.S. Litigation

To date, only one court has dealt with the MLC since its effective date. In *Quiroz v. MSC Mediterranean Shipping Co. S.A.*, 522 F. App'x 655 (11th Cir. 2013), plaintiff seaman, who worked aboard a cruise ship, opposed a motion to compel arbitration due to a clause in his employment agreement; he "challenged the formation of the contract to arbitrate on the

grounds that it violated the Seaman's Articles of Agreement Convention, the Maritime Labor Convention, and Panamanian law by denying him the opportunity 'to examine and review the terms and conditions of the arbitration provisions and ... to seek counsel to advise him with respect to [those] terms and conditions.'"

Plaintiff referred to Title 2, Regulation 2.1.2 of the MLC which states: "Seafarers' employment agreements shall be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing." He also relied on Standard A2.1(b) which states: "seafarers signing a seafarer's employment agreement shall be given an opportunity to examine and seek advice on the agreement before signing, as well as such other facilities as are necessary to ensure that they have freely entered into an agreement with sufficient understanding of their rights and responsibilities." The Eleventh Circuit rejected Quiroz' argument that, to compel arbitration, the agreement must be "validly formed" in compliance with the Maritime Labour Convention. The court found that the limited jurisdictional inquiry prescribed by the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, the district court had only to confirm that there was an agreement in writing in compliance with such Convention, and not the MLC or other conventions/laws.

V. Conclusion

As the MLC becomes effective in more ratifying countries, we expect more MLC-related detentions and litigation. Updates to this presentation of the current state of the MLC will surely be in order.

COURT REFUSES TO ENFORCE PHILIPPINE ARBITRATION AWARD TO SEAMAN ON BASIS THAT THE FAILURE TO APPLY U.S. LAW VIOLATED U.S. PUBLIC POLICY

Paul T. Hofmann, Esq.,
Hofmann & Schweitzer

Aggarao v. MOL Ship Mgmt. Co., No. CIV. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014)

Plaintiff is a Filipino seaman paralyzed on August 13, 2008 while in service to the M/V ASIAN SPIRIT, a car carrier bearing the Liberian flag, which was owned and operated by World Car Carriers, Inc., a Liberian corporation. At the time of the incident, the ship was operating under time charter to Nissan Motor Car Carrier Co., a Japanese company. Plaintiff's employer, MOL Ship Management Co., also a Japanese company, hired plaintiff through a Filipino manning agency, by contract subject to the Philippines Overseas Employment Agency (POEA) regulations, which have been judicially recognized as being incorporated by reference into Filipino seamen's contracts. World Car admitted it was "responsible for maintaining the vessel in class and keeping it in a thoroughly efficient state in hull, machinery and equipment for its service under the time charter party, and it (was) responsible for navigation of the vessel, acts of (its) crew and all other matters relating to the running of the ship." Plaintiff was injured when the vessel was sailing in Chesapeake Bay towards Baltimore Harbor. A truck upon which was mounted deck lifting equipment backed into the plaintiff squashing him against a steel pillar of the ship.

With respect to his employment with MOL, plaintiff's contract incorporated the POEA "Standard Terms and Conditions", one of which required an arbitration of "all claims and disputes" arising from his employment. The U.S. District Court in Baltimore dismissed the case in its entirety, held the arbitration clause enforceable, and ordered arbitration to proceed even against the owner and time-charter non-signatories under the "equitable estoppel" doctrine. It denied plaintiff's motion for a preliminary

injunction to compel maintenance and cure, finding that it, too, was a dispute covered by the arbitration "agreement." Plaintiff appealed all rulings to the United States Court of Appeals for the Fourth Circuit. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 2012 AMC 781 (4th Cir. 2012)

The Fourth Circuit agreed that all of plaintiff's claims had to be arbitrated in the Philippines against all parties, but reversed the dismissal and held the district court was to maintain jurisdiction, stay the proceedings, and provide the parties a forum to determine whether any award should be enforced. It also held that Mr. Aggarao had rights to maintenance and cure, and that even though the underlying disputes regarding maintenance and cure had to be arbitrated, the district court was directed to determine the motion for a preliminary injunction to compel provision of medical care and maintenance and to insure that the reference to the Philippines would not be a "hollow formality," and that the court should ensure that the parties remained in status quo. For reasons not quite clear to plaintiff, the district court never reached the request for a preliminary injunction, and upon the issuance of the arbitration award in the Philippines, discussed below, held that the motion was "moot."

Pursuant to the Fourth Circuit's upholding of the district court's directive requiring arbitration, arbitration proceedings were held in the Philippines in 2013. The arbitrator held that plaintiff's only remedy was under the disability compensation system under Philippine law. She rejected any U.S. general maritime law claims and held plaintiff was not entitled to maintenance and cure because, by refusing to be repatriated (because he was afraid he would be left to die) he forfeited any claim under the contract to medical benefits. The arbitrator held that general maritime law maintenance and cure is not recognized in the Philippines. Further, it held that because a company-appointed doctor declared him to be permanently disabled, the defendants by law had no more obligation to pay for his medical care. The arbitrator also held that the Philippines did not recognize joint and several liability, and thus plaintiff was not entitled to separate claims against the ship owner and the time-charterer, even though they were not

signatories to the contract of employment and were not domiciliaries of the Philippines.

Plaintiff then moved the district court to vacate the award or determine it to be unenforceable under several defenses within the New York Convention on the Enforcement of Foreign Arbitral Awards. In its decision issued on August 7, 2014, the court first performed a *Lauritzen/Rhoditis* analysis to determine which country's law should apply to the litigation. *Aggarao v. MOL Ship Mgmt. Co.*, No. CIV. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014). Primarily on the grounds that the flag of the ship was Liberian, and Liberia's maritime law expressly adopts U.S. general maritime law as its own, the court held that U.S. law applied to the controversies.

The court then accepted the argument that the award violated the principal of "prospective waiver" found within *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*, 473 U.S. 614 (1985) and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995). It found that by refusing to apply U.S. law, the arbitration award violated U.S. public policy, and thus it found the award unenforceable, although it did not have the authority to vacate the award.

As to the owner of the vessel, it held that plaintiff properly stated a cause of action for unseaworthiness which could proceed without limitation by the POEA regulations. **[Editors' note:** This is a similar holding to that in *Razo v. Nordic Empress Shipping Ltd.*, No. CIV A 07-CV-05745SDW, 2008 WL 2902184, at *1 (D.N.J. July 24, 2008) *aff'd*, 362 F. App'x 243 (3d Cir. 2009)) but which the district court chose not to cite. There, the Third Circuit held under similar circumstances a non-signatory shipowner was not entitled to compel a Filipino seaman to arbitrate his unseaworthiness claims against the ship.] Similarly, the district court held that the claims for negligence against the time charterer under the general maritime law could also proceed.

As to the maintenance and cure claim, citing *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962), and the Fourth

Circuit's earlier decision in this matter, the court held that plaintiff was entitled to maintenance and cure, noting his long and current medical history of many issues related to his injuries on the ship.

The court cited favorably the recent decision in *Asignacion v. Schiffahrts*, 2014 AMC 713, 2014 WL 632177 (E.D. La. Feb. 10, 2014), which has similar facts and holding. That case is on appeal to the Fifth Circuit.

Defendants have indicated that they are considering an appeal of the *Aggarao* decision.

ARTICLES OF INTEREST

The Tulane Maritime Law Journal recently published two articles of interest:

Justice Thomas A. Dickerson, *The Cruise Passenger's Rights and Remedies 2014: The Costa Concordia Disaster: One Year Later, Many More Incidents Both on Board Megaships and During Risky Shore Excursions*, 38 Tul. Mar. L.J. 515 (2014)

Robert D. Peltz, *Adrift at Sea-the Duty of Passing Ships to Rescue Stranded Seafarers,* 38 Tul. Mar. L.J. 363 (2014)

Both articles are authoritative and excellent research tools. A complete copy of each article has been posted to the Passenger and Cruise Line Committee website.

UPDATE ON THE LAW

Robert D. Peltz, Esq.,
The Peltz Law Firm

Discovery

Davanzo v. Carnival Cruise Lines, 2014 AMC 1361, 2014 WL 1385729 (S.D. Fla. April 9, 2014)

The court denied the plaintiff passenger's motion to have her attorney present during a compulsory defense exam or to have either a videographer or stenographer record the proceedings on the grounds that such activities would be too disruptive. Nevertheless, recognizing that a dispute might arise at trial over the specific information provided by the plaintiff to the defendant's medical expert, the court allowed an audio recording of the exam.

Experts

Torres v. Carnival Corp., No. 12-CV-23370-JLK, 2014 WL 3548456 (S.D. Fla. July 17, 2014)

The court excluded a passenger's human factors expert in a case based upon a trip over a threshold, which was covered by a rug or mat on the grounds that the opinions regarding the difficulty in appreciating the hazard due to lighting conditions, insufficient warnings and features of the area were not the type of issues for which expert testimony would be helpful to the jury. The court reasoned that "walking is something almost all individuals understand" and that as a result the expert's "testimony unnecessarily complicates the case." Four days later the court granted the cruise line's motion for summary judgment. See case description under Passengers: Trips & Falls, below. This same district court judge entered a similar exclusionary order on identical grounds which was overturned in the often cited opinion of *Rosenfeld v. Oceania Cruises, Inc.,* 654 F.3d 1190, 2011 AMC 2838 (11th Cir. 2011).

Rescue

Barlow v. Liberty Mar. Corp., 746 F.3d 518, 2014 AMC 866 (2d Cir. 2014)

In a departure from other circuits which have considered the issue, the Second Circuit Court of Appeals concluded that a plaintiff may be guilty of comparative negligence during the course of a rescue for failing to exercise reasonable care. Other circuits have held that under the maritime rescue doctrine, a would-be rescuer, faced with an emergency, can only be held comparatively negligent for injuries resulting from his rescue attempt, if his conduct was reckless and wanton. *See, e.g., Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1985 AMC 2914 (4th Cir. 1985); *Grigsby v. Coastal Marine Serv. of Tex., Inc*., 412 F.2d 1011, 1969 AMC 1513 (5th Cir. 1969); *Wharf v. Burlington N.R. Co.,* 60 F.3d 631 (9th Cir. 1995). In the often cited justification for the majority rule, the Fourth Circuit explained:

> of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property. (*citations omitted)* The best traditions of seafaring men demand that we honor attempts to rescue, unless the rescuer acts beyond the bounds that even the exigencies of the moment would allow. The wanton and reckless standard reflects the value society places upon rescue as much as any desire to avoid a total defeat of recovery under common law. Law must encourage an environment where human instinct is not insular but responds to the plight of another in peril.

Furka, 755 F.2d at 1089, 1985 AMC at 2918.

State Statutes

Royal Caribbean Cruises, Ltd. v. Cox, 137 So. 3d 1157, 2014 AMC 1919 (Fla. Dist. Ct. App. 2014) review dismissed, 145 So. 3d 822 (Fla. 2014)

Recognizing that the overwhelming weight of federal authority has refused to apply fee shifting offer of judgment statutes to cases governed by maritime law, Florida's Third District Court of Appeal receded from its earlier older contrary decision in *Royal Caribbean Corp. v. Modesto*, 614 So.2d 517 (Fla. Dist. Ct. App. 1992). The court's rejection of the applicability of Florida Statutes §769.79 to maritime cases is particularly significant, since it is the state appellate court governing Miami-Dade County, which is the home of Carnival, Royal Caribbean, Celebrity, Norwegian, Regent and Oceania Cruise Lines.

For other opinions rejecting the application of the fee provisions of Florida's offer of judgment statute to maritime cases, see *Garan, Inc. v. M/V Aivik*, 907 F. Supp. 397, 1995 AMC 2657 (S.D. Fla. 1995); *Tai–Pan, Inc. v. Keith Marine, Inc.*, 1997 AMC 2447, 1997 WL 714898 (M.D. Fla. May 13, 1997); *Tampa Port Auth. v. M/V Duchess,* 65 F. Supp. 2d 1279 (M.D. Fla.) *amended*, 65 F. Supp. 2d 1299 (M.D. Fla. 1997) *aff'd,* 184 F.3d 822 (11th Cir. 1999). Cases rejecting the application of other state's similar statutes include: *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 2003 AMC 1839 (5th Cir. 2003)(Texas fee statute inapplicable to maritime contract dispute); *Southworth Mach. Co. v. F/V COREY PRIDE*, 994 F.2d 37, 1993 AMC 2261 (1st Cir. 1993)(fee provisions of Massachusetts unfair trade practice law in applicable in maritime contract dispute); *Sosebee v. Rath*, 893 F.2d 54, 1990 AMC 1601 (3d Cir. 1990)(Virgin Island fee shifting statute for prevailing party could not be applied in maritime personal injury action); *Misener Marine Const., Inc. v. Norfolk Dredging Co.*, 594 F.3d 832, 2010 AMC 250 (11th Cir. 2010) (Georgia Prompt Pay Act provisions could not give rise to award of attorney's fees in maritime contract action).

PASSENGERS

ADA

Seco v. NCL (Bahamas), Ltd., 588 F. App'x 863 (11th Cir. 2014)

In an unpublished decision, the Eleventh Circuit Court of Appeals upheld the dismissal of a passenger's suit for injunctive relief against a cruise line for alleged violations of the Americans with Disability Act (ADA). The passenger, who required the use of a wheelchair, alleged that he was deprived of the full enjoyment of his cruise due to the lack of handicapped-accessible exterior cabins with balconies or window views as a result of the use of doors that were not ADA-compliant, because they required excessive force to open. The district court granted defendant cruise line's motion for dismissal and plaintiff appealed.

On review, the court held that plaintiff lacked standing to challenge the availability of handicapped-accessible exterior cabins, because he failed to allege that he suffered from a disability or condition such as claustrophobia that is affected by the absence of balconies or window views. The court also held that plaintiff's claim with regard to the doors was not cognizable because it was subject to compulsory arbitration under the passenger ticket contract.

Forum Selection Clauses

Lieberman v. Carnival Cruise Lines, No. CIV. A. 13-4716 JLL, 2014 WL 3906066 (D.N.J. Aug. 7, 2014)

Where a terminally ill passenger was so seriously injured during the course of a "last vacation" that she could not travel to Florida for the purpose of maintaining a lawsuit as required under the ticket's forum selection clause, the court denied the carrier's motion to dismiss and its accompanying motion to transfer, which had been brought under the provisions of 28 U.S.C. §1404 (a). Although recognizing the passenger's "heavy burden of proof" under Shute to set aside a valid forum selection clause, the court

concluded that this burden had been met where the plaintiff's severe health problems would result in her being denied her day in court by requiring her to litigate in a distant forum. *See also Veverka v. Royal Caribbean Cruises Ltd.*, No. 12-CV-03070 ES, 2012 WL 6204911 (D.N.J. Dec. 11, 2012).

Jurisdiction Over Excursion Operators

Aronson v. Celebrity Cruises, Inc., 30 F.Supp.3d 1379 (S.D. Fla. 2014) and *Carmouche v. Carnival Corp.,* 36 F. Supp. 3d 1335 (S.D. Fla. 2014)

In each case the district court concluded that neither specific nor general jurisdiction existed under Florida's long arm statutes over a foreign tour excursion operator in a personal suit by a passenger injured during the course of a cruise with a Miami based carrier. Each judge concluded that specific jurisdiction could not exist for injuries occurring outside of Florida in the absence of evidence showing that the defendant was doing business in the state.

Both judges likewise held that the facts that the excursion operators entered into contracts with carriers in Florida, relied upon the carriers to advertise their businesses, sold tickets to their excursions on their ships and web sites, purchased liability insurance in Florida for their operations and periodically came into the state for business functions were insufficient to establish general jurisdiction.

Ash v. Royal Caribbean Cruises Ltd., 2014 AMC 1564, 2014 WL 2480612 (S.D. Fla. June 3, 2014)

In a case of potentially very significant future importance, the court concluded that even though it did not have personal jurisdiction over an excursion operator for claims arising out of an injury to a cruise ship passenger occurring outside of Florida, the passenger could successfully pursue a Rule B Attachment against funds owed (and to be owed) to the tour company by cruise lines located in Miami. In light of decisions like *Aronson* and

Carmouche above, which have surprisingly refused to find personal jurisdiction over foreign excursion operators, despite the exclusive role of Florida cruise lines in advertising and selling tickets for such excursions to their passengers, *Ash* may provide an alternative avenue for suing such excursion companies in the United States.

Loss of Consortium

Shore v. Magical Cruise Co., No. 6:14-CV-358-ORL-31, 2014 WL 3687100 (M.D. Fla. July 24, 2014)

For the purposes of ruling upon a motion to dismiss, the district court accepted a passenger's argument that the U.S. Supreme Court's opinion in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009) may have invalidated the Eleventh Circuit's earlier decisions in *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993,* 121 F.3d 1421, 1997 AMC 2962 (11th Cir. 1997) and *Lollie v. Brown Marine Serv., Inc*., 995 F.2d 1565, 1993 AMC 2947 (11th Cir. 1993), which had prohibited loss of consortium claims. These earlier cases had concluded that such claims were barred under the rationale of *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990), even though they involved non-seafarers.

Under the subsequent rationale expressed in *Townsend*, the plaintiff contended that he should be allowed to pursue a loss of consortium claim, since the general maritime law recognized such causes of action for passengers prior to the adoption of the Jones Act, which did not demonstrate any intent to preclude such claims in suits by non-seamen. Recognizing the existence of conflict on this issue, the court denied the motion to dismiss, but noted that the matter could be raised again on summary judgment. *See also Levi v. NCL (Bahamas) Ltd.*, No. 13-21898 (S.D. Fla. July 24, 2013)(order denying motion to dismiss); *Ordonez v. NCL (Bahamas) Ltd.*, No. 13-24262 (S.D. Fla. Jan. 8, 2014)(order denying motion to dismiss). For a more detailed discussion of these and related issues, see Peltz, Robert D., *Circuit Courts Gone*

Wild: Restoring Rationality to the Interpretation of Miles, 26 USF Mar.L.J.49 (2013-14).

Sexual Assaults

Burdeaux v. Royal Caribbean Cruises, Ltd., No. 11-22798-CIV, 2012 WL 3202948, at *1 (S.D. Fla. Aug. 3, 2012) *aff'd*, 562 F. App'x 932 (11th Cir. 2014)

The Eleventh Circuit affirmed the entry of a summary judgment against a female passenger, who was sexually assaulted during a port visit in Cozumel by a jewelry vendor she came across while shopping in an "approved" area designated by the cruise line. The vendor, who was not specifically mentioned in the shopping map prepared by the cruise line, took the passenger to another location outside of the approved area for the claimed purpose of seeing some other jewelry in a store he had located there, where he participated in a gang rape of her.

Although reiterating the principle that "a cruise line has a duty to warn its passengers 'of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit,'" the court concluded that the plaintiff had failed to produce sufficient evidence to create a question of fact on the issue of whether the cruise line knew or should have known of the danger of sexual assault to its passengers in the approved shopping area of Cozumel. In rejecting the plaintiff's proffered evidence, the court took a much narrower view of the sufficiency of such evidence than it has taken in negligent security cases outside of the cruise ship context. *See, e.g., Meyers v. Ramada Hotel Operating Co.*, 833 F.2d 1521 (11th Cir. 1987)(summary judgment reversed in sexual assault case at a hotel where the plaintiff produced evidence of different types of other violent crimes in the vicinity).

Trips, Slips & Falls

In two diametrically conflicting opinions by different judges in the Southern District of Florida, one granted a summary judgment against a passenger who tripped over a threshold and the

other denied a virtually identical motion. *Cf. Torres v. Carnival Corp.*, No. 12-CV-23370-JLK, 2014 WL 3667763 (S.D. Fla. July 22, 2014) (granting summary judgment where passenger tripped over threshold "obscured" by rug or mat) with *Bonilla v. Seven Seas Cruises S. De R.L., LLC*, 2015 AMC 221, 2014 WL 4056550 (S. D. Fla. Aug. 14, 2014) (holding a question of fact was created where a passenger twisted her foot on a threshold despite a lack of prior accidents, concluding that the ship owner had notice of the condition since it had existed from the time the vessel was built years earlier).

Frasca v. NCL (Bahamas) Ltd., No. 12-20662-CIV-GOODMAN, 2014 WL 1385806 (S.D. Fla. Apr. 9, 2014)

The district court granted the cruise line's motion for summary judgment where the passenger slipped and fell on an outside deck which was wet. At various times throughout the course of the case, the plaintiff raised four different theories to explain how the deck became wet, each time abandoning the preceding explanation. In granting the defendant's motion, the court relied in part upon the fact that the plaintiff never amended his complaint to set forth any of the subsequent alternative theories, which were expressed at various times in different discovery. The court also granted the motion on the stated basis that a deck which is slippery when wet is an open and obvious condition as a matter of law.

Esanu v. Oceana Cruises, Inc., No. 1:13-CV-22772-UU, 2014 WL 4954401 (S.D. Fla. May 5, 2014)

The court denied the cruise line's motion for summary judgment in a passenger's suit for injuries sustained where he slipped and fell on an exterior deck made slippery by rainwater. The court concluded that the cruise line's recognition of the need to post signs warning of the slippery nature of the deck when wet was sufficient to create a question of fact on the issue of its notice of a dangerous condition. The posting of the signs at the time of the accident did not make the condition open and obvious, since a

question of fact existed as to whether the signs were sufficient to warn the passenger of the hazard.

Merideth v. Carnival Corp., No. 13-CIV-23931, 2014 WL 4817478 (S.D. Fla. Aug. 18, 2014)

Where a passenger slipped and fell while stepping from a carpeted area to a tile floor surface, but did not know what caused her to fall, the court nevertheless denied the cruise line's motion for summary judgment where plaintiff's counsel developed testimony from crew members that the ship had problems with condensation in the general area requiring continued mopping of the floor and the placement of warning cones. The court concluded that the ship's knowledge of the need to periodically mop the area and to place warning cones, was sufficient to create a question of fact on the issue of its notice of a potentially dangerous condition.

SEAMEN

Arbitration

Aggarao v. MOL Ship Mgmt. Co., No. CIV. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014) and *Asignacion v. Schiffahrts*, 2014 AMC 713, 2014 WL 632177 (E.D. La. Feb. 10, 2014)

In two cases of tremendous significance, separate district courts refused to enforce arbitration awards based upon the application of foreign law in seamen's cases on the grounds that they violated public policy. Although numerous circuit courts have held that that public policy attacks on arbitration clauses calling for the application of foreign law in seaman's employment contracts could not be raised prior to arbitration, there were previously no reported decisions from the subsequent enforcement stage in which this issue was determined.

As a result there had previously been tremendous uncertainty over the issue of whether seamen could successfully be deprived of their Jones Act remedies by their employers in such

arbitration proceedings. Although not ending this debate, this uncertainty has been significantly lessened by these decisions in which the district courts in each of these cases concluded that where U.S. maritime law was applicable under the *Lauritzen-Larsen* factors, arbitration awards based purely upon foreign law, violated public policy and were therefore unenforceable.

Pysarenko v. Carnival Corp., No. 14-20010-CIV, 2014 WL 1745048 (S.D. Fla. Apr. 30, 2014) *aff'd*, 581 F. App'x 844 (11th Cir. 2014)

In yet another case from the Southern District of Florida upholding the validity of arbitration clauses in seamen's contracts, the court concluded that neither the Supreme Court's decisions in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009)(recognizing the seaman's right to recover punitive damages in maintenance and cure cases under general maritime law) nor *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) were applicable to afford seamen the right to have their Jones Act claims heard in U.S. courts before juries. The court further concluded that under the Eleventh Circuit's opinion in *Lindo v. NCL (Bahamas), Ltd.,* 652 F.3d 1257, 2012 AMC 409 (11th Cir. 2011) challenges to arbitration agreements based upon unconscionability and public policy arguments could only be raised later at the award enforcement stage of the proceedings.

Young v. Norwegian Seafarers' Union, 138 So. 3d 1189 (Fla. Dist. Ct. App. 2014)

In an effort to avoid the arbitration provisions contained in their employment contracts with their cruise line employer, members of the Norwegian Seafarer's Union ("NSU") filed a class action complaint against the Union seeking a declaratory decree that the NSU did not have the authority to represent them under general Florida contract and agency law, thereby invalidating their collective bargaining agreement. In affirming the dismissal of the complaint, the appellate court relied upon prior federal opinions, which had refused to hear similar complaints brought under federal legal theories on the grounds that they involved labor disputes

between foreign vessels and foreign crews to which U.S. law was inapplicable. *See, e.g., Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 2013 AMC 740 (11th Cir. 2013). The Florida court ruled that the same principles precluded that application of state law to such disputes.

Jones Act: Excessive Work

Skye v. Maersk Line Corp., 751 F.3d 1262, 2014 AMC 1257 (11th Cir. 2014)

The Eleventh Circuit Court of Appeal reversed a substantial verdict awarded to a seaman who suffered from left ventricular hypertrophy, which the evidence established was caused by his excessive work hours and his resulting erratic sleep schedule. Even though his working conditions produced a physical cardiac injury, the court concluded that under *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 1994 AMC 2113 (1994), "the Jones Act does not allow a seaman to recover for injuries caused by work-related stress because work-related stress is not a 'physical peril.'"

Maintenance and Cure

Ramirez v. Carolina Dream, Inc., 760 F.3d 119, 2015 AMC 57 (1st Cir. 2014)

The court reiterated the well-established principle that a seaman, who is suffering from a non-disabling asymptomatic pre-existing condition (in this case aplastic anemia) is entitled to maintenance and cure where it first manifests itself during his employment, although it is not caused by his employment.

Punitive Damages

McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014)

In the Committee's April 2014 Newsletter, it was reported that the Fifth Circuit had construed the Supreme Court's opinion in

Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 2009 AMC 1521 (2009) as overturning prior circuit decisions, which had relied upon the so-called "*Miles* philosophy" broadly to pre-empt general maritime remedies in reliance upon the Jones Act and or DOHSA, even where neither statute was applicable. *See McBride v. Estis Well Services, L.L.C.,* 731 F.3d 505, 2013 AMC 2409 (5th Cir. 2013). In that particular case, the court concluded that the estate of a deceased seaman and two injured seamen could therefore recover punitive damages under a general maritime unseaworthiness claim, even though precluded under the Jones Act, since such claims had been recognized prior to the Act's passage and were not expressly preempted by it.

In an *en banc* opinion, a deeply divided Fifth Circuit granted a rehearing and withdrew the panel's opinion. The *en banc* majority ignored the admonition of *Townsend* against giving *Miles* such a broad implied preemptive effect and instead concluded that *Miles* precludes the recovery of all noneconomic damages in all seamen's cases for either personal injury or wrongful death, whether brought under the Jones Act, DOHSA or general maritime law. Rejecting the plaintiffs' argument that punitive damages were not noneconomic damages, the court affirmed the trial court's action striking the claims.

Removal

As discussed in more detail in the Committee's April 2014 Newsletter at pages 15 to 16, prior to 2012, there was general agreement among the courts that maritime claims were not removable solely on the basis of admiralty jurisdiction. Accordingly, such claims could only be removed if the case included a jurisdictional basis independent of the court's admiralty and maritime jurisdiction, such as diversity of citizenship. Following a change in wording of 28 U.S.C. § 1441(b), different district courts have reached conflicting opinions as to whether the pre-amendment rule prohibiting removal remained in effect.

Subsequent to the cases cited in the April Newsletter, the following new opinions have been decided adhering to the traditional rule prohibiting removal in seamen's cases:

Gabriles v. Chevron USA, Inc., No. CIV.A. 2:14-00669, 2014 WL 2567101 (W.D. La. June 6, 2014); *Perrier v. Shell Oil Co.*, No. CIV.A. 14-490, 2014 WL 2155258 (E.D. La. May 22, 2014);

Gregorie v. Enterprises Marine Services, LLC., 38 F.Supp.3d 749 (E.D. La. 2014);

Porter v. Great Am. Ins. Co., 2014 AMC 2259, 2014 WL 3385148 (W.D. La. July 9, 2014); *Figueroa v. Marine Inspection Servs.*, 28 F.Supp.3d 677, 2014 AMC 1886 (S.D. 2014).

See also Cassidy v. Murray, 34 F.Supp.3d 579, 2014 AMC 2623 (D. 2014)(recreational boating case);

Pierce v. Parker Towing Co., 25 F.Supp.3d 1372 (S.D. Ala. 2014)(suit against tug boat for negligent damage to property);

In re Foss Mar. Co., 29 F.Supp.3d 955 (W.D. Ky. 2014)(suit against barge for negligent damage to property);

Alexander v. Seago Consulting, LLC, No. 4:14-CV-1292, 2014 WL 2960419 (S.D. Tex. June 23, 2014)

Settlement

Rabenstein v. Sealift, Inc., 18 F.Supp.3d 343, 2014 AMC 1386 (E.D.N.Y. 2014)

Despite the plaintiff's testimony that he did not intend to reach a final settlement of his Jones Act claim, but only for his outstanding past maintenance and cure, the court granted a summary judgment finding an oral settlement of the unrepresented seaman's entire Jones Act case. The court's ruling was even more surprising in light of the fact that while the chief mate had shattered both feet, requiring the surgical implantation of hardware

in each calcaneous, followed by a later surgery to remove the hardware, and had sustained significant lost wages, the employer only paid him $15,000 under the purported settlement.

RECENT JURY RESULTS

Esanu v. Oceania Cruises, Inc., No. 1:13-CV-22772-UU, 2014 WL 4961426 (S.D. Fla. July 18, 2014)

Passenger slipped and fell on a rain-slicked outdoor deck and injured his leg. Passenger alleged that the cruise line failed properly to maintain its floor in a reasonably safe condition. It was argued that the cruise line should have squeegeed or completely blocked off the deck or put down mats. The cruise line argued that the area was marked with caution signs and the passenger was comparatively negligent for walking in the area. The jury awarded $49,198 in damages. The jury found the passenger 80% contributorily negligent and the award was reduced.

Ingram-Wargo v. NCL (Bahamas) Ltd., No. 12-23344(S.D. Fla. Jan. 16, 2014)

Passenger slipped and fell on the dance floor while participating in a scavenger hunt game injuring her shoulder. She alleged the game show host spilled a drink he was carrying to another guest and the cruise line violated its own policy prohibiting drinks on the dance floor. The cruise line argued that it did not have any actual or constructive notice. The jury determined that the cruise line had both actual and constructive notice and awarded $791,464 in damages. The jury found the passenger to be 50% at fault and the award was reduced.

COMMITTEE ON FISHERIES

Chair: Mark T. Coberly
Editor: Terence G. Kenneally

FISHERIES CASE BRIEFS[1]

October 2014

Denehy v. Massachusetts Port Authority, No. CIV.A. 13-12473-WGY, 2014 WL 4402960 (D. Mass. Sept. 5, 2014)

Parties and Issue

John Denehy is a commercial clamdigger who harvests clams from beds located in Boston Harbor, some of which directly abut the grounds of Logan Airport. On October 7, 2010, a Swissport employee caused a jet fuel spill at Logan Airport by disabling the safety device on a fuel nozzle and leaving the pump unattended during aircraft refueling. As a result, jet fuel spilled into the waters of Boston Harbor and allegedly polluted several productive and profitable clam beds. On August 13, 2013, the Coast Guard finally designated the Massachusetts Port Authority (Massport)[2] and Swissport as the parties responsible for the fuel spill.

Mr. Denehy brought an action against Massport and Swissport seeking recovery under general maritime law and the Oil Pollution Act for damages sustained as a result of a jet fuel spill's alleged impact on profitable clam beds abutting the airport. Defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

---

[1] Submitted by Vice-Chair Terence Kenneally and based upon the legal research assistance of Kirby Aarsheim, Esq. of Clinton & Muzyke, P.C., Boston, MA.

[2] Massport is an independent public authority created by the state legislature and responsible for, among other things, owning and operating Logan Airport.

Analysis and Holding

The defendants challenged the applicability of admiralty jurisdiction by arguing that the airplane fueling, the activity giving rise to their oil spill into Boston Harbor, does not bear a substantial relationship to traditional maritime activity. Mr. Denehy responded by urging the court to focus on the maritime nature of the activities of the injured parties, the clamdiggers. The court rejected Mr. Denehy's argument on the basis that it is overruled by case law supporting the theory that it is the activity of the tortfeasor, not the injured party, which controls the substantial relationship analysis.

The court next found that Massport and Swissport's refueling activities at Logan Airport were not sufficiently related to traditional maritime activity to support the exercise of admiralty jurisdiction, observing that Massport and Swissport's activities took place entirely on land and had no intrinsic relationship to water vessels, navigable waters, or other maritime activity. The court concluded that Swissport's airplanes also did not come under maritime jurisdiction solely by virtue of their proximity to navigable waters.

The defendants further sought to dismiss Mr. Denehy's complaint on the basis that it failed to state a claim under Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701 et seq. because he failed to meet the statute's presentment requirement prior to filing suit. Interestingly, OPA's presentment requirement operates independently of the law's other statutes of limitations. To satisfy the presentment requirement while also preserving his right to sue under the statute of limitations, then, the claimant must present his claims for damages to the designated responsible parties at least 90 days before the end of the three [3] year window which starts as of the time of the relevant pollution event. Here, however, the United States Coast Guard did not determine which parties were responsible for the oil spill until August 13, 2013, a mere fifty-five [55] days before the statute of limitations deadline to file suit.

Faced with this somewhat strained posture, the court sounded the familiar refrain that statutes are to be interpreted in

accordance with their "plain and ordinary meaning" in order to give practical effect to the beneficial goals that impelled Congress to enact them. Under OPA, the court observed, that goal was to provide appropriate relief to those injured by oil spills into the nation's waterways. The court concluded that this legislative intent would best be served by staying the action until a 90–day period for presentment could pass, ensuring the defendants' statutory right to respond to presentment.

Kahea v. National Marine Fisheries Service, No. CIV-A-11-00474-SOM/KSC, 2014 WL 3726122 (D. Hawaii July 24, 2014).

Parties and Issue

Plaintiffs KAHEA and Food & Water Watch, Inc., (collectively "plaintiffs") challenged a one [1] year Special Coral Reef Ecosystem Fishing Permit issued by defendant National Marine Fisheries Service ("NMFS") to Kona Blue Water Farms allowing Kona Blue to "stock, culture and harvest" almaco jack fish in federal waters off Kawaihae Harbor on the "Big Island" of Hawaii, all as part of the Velella Concept.

The project consisted of placing 2,000 Almaco jack, a Management Unit Species, in a "CuPod," which is a brass-link mesh cage continuously towed behind a sailing vessel in federal waters. The vessel was to remain in constant motion at least three nautical miles off-shore in deep waters (between 10,000 and 20,000 feet). The fish cultured in the CuPod were to be obtained from Kona Blue's land-based hatchery, and placed inside the CuPod in federal waters through the use of a support vessel. The fish were to be fed using a hose from the vessel to the CuPod and expected to grow inside the CuPod, then to be removed and taken to land. Staff and researchers were responsible for monitoring the fish and the project's overall operation. The project's purpose was to "test the feasibility of raising native marine fish species using a new gear-type (towed, floating pen) in the U.S. Exclusive Economic Zone (U.S. EEZ)."

NMFS reviewed Kona Blue's application and proposed the issuance of a limited, one [1] year permit to allow Kona Blue to test the feasibility of the Velella Concept. As part of its review process, NMFS prepared a draft Environmental Assessment ("EA") that considered the environmental impact of the project. NMFS ultimately determined that the project would not have a significant impact on the quality of the human environment and issued a Finding of No Significant Impact ("FONSI").

Analysis and Holding

Plaintiffs argued that defendants violated the National Environmental Policy Act ("NEPA") by failing to prepare an Environmental Impact Statement ("EIS") for the project. Plaintiffs contended that proper consideration of such issues would have revealed substantial questions as to whether the project would have a significant effect on the environment, thus requiring NMFS to prepare an EIS. Defendants responded that the EA and FONSI complied with NEPA, and that therefore, the decision to forego an EIS is entitled to deference.

The court found that plaintiffs' assertion— that the special permit would leave future decision makers with little choice but to approve future aquaculture applications with inadequate environmental review— was supported by neither the law nor the record. Because the special permit was granted with respect to a temporary and limited project, the court found significant merit in NMFS's contention that no precedential effect could be established thereby because any future applications could and would be individually scrutinized. NMFS further deemed concerns about a flood of permit applications unwarranted because the special permit was a "one-time permit limited in both scope and duration." Finally, the court pointed to a complete dearth of evidence in the record supporting the plaintiffs' argument that a future aquaculture application would be summarily approved, or the discretion of future decision makers constrained, as a result of the issuance of the special permit.

The plaintiffs next argued that the defendants were required to prepare an EIS because the effects of the project on commercial fishermen, charter fishermen, and practitioners of Hawaiian medicine were "highly controversial" under 40 C.F.R. § 1508.27(b)(4). An action is "controversial" for the purposes of 40 C.F.R. § 1508.27(b)(4) if there is a substantial dispute about the size, nature, or effect of the major Federal action. A "substantial dispute," in turn, exists when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusions. The court found that the plaintiffs' reliance on comments and letters from licensed fishermen who expressed concerns that the project would harm their livelihoods was not enough to establish that the project was "highly controversial."

Finally, the plaintiffs referred to the effect of the project on Native Hawaiian fishermen and their fishing grounds, but failed to offer any explanation as to why those potential concerns were not adequately addressed by the EA's general discussion of the project's effects on fishermen and fishing grounds. Therefore, plaintiffs were unable to show that NMFS's assessment of this issue was arbitrary or capricious, and the Velella Concept continues.

Yacubian v. U.S., 750 F.3d 100 (1st Cir. 2014)

Parties and Issue

Lawrence M. Yacubian, a former scallop fisherman, filed suit in July 2012 in the District Court of Massachusetts alleging his prior prosecution by the National Oceanic and Atmospheric Administration ("NOAA") constituted malicious prosecution and abuse of process under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680. He did so after certain official reports stated that there had been abuses by NOAA in his prosecution.

The 2012 suit arose out of Mr. Yacubian's prosecution in 2000 by the enforcement arm of NOAA[3]. His prosecution in 2000 involved a violation for fishing in a Closed Area, which was detected by United States Coast Guard officials with the use of Boatracs. During that prosecution, Mr. Yacubian contacted Lieutenant Peter Hanlon, to obtain evidence as to the inaccuracy of Boatracs, and then to testify voluntarily on his behalf. Before the ALJ hearing, Lt. Hanlon was informed that his superiors were displeased with his decision to testify for Mr. Yacubian's defense and he ultimately decided not to testify. On December 5, 2001, the ALJ issued a decision that imposed fines and sanctions in the amount of $250,000.00 as proposed by NOAA. Mr. Yacubian's permits were subsequently revoked.

The district court found that the NOAA Enforcement Attorneys, who brought and pursued the prosecution, were not "investigative or law enforcement officers" within the meaning of the statute, and that Mr. Yacubian's complaint failed to state a claim for malicious prosecution or abuse of process as to SAC Cohen, who is a law enforcement officer. Mr. Yacubian appealed the district court's dismissal of his claims.

Analysis and Holding

As a matter of federal statute and case law, there can be no FTCA recovery for the actions of the prosecutors who bring such enforcement actions, but rather only for the actions of investigative or law enforcement officers who have committed the wrongful acts specified.

Under Massachusetts law, there are three elements of a malicious prosecution claim. A successful plaintiff must establish that he was damaged because (1) the defendant commenced an original action without probable cause, (2) with malice, and (3)

[3] The Administrative Law Judge ("ALJ") sustained all charges against Yacubian. On judicial review of the ALJ's decision in 2004, the district court sustained findings of liability on two charges of fishing in a prohibited area, vacated a false statement charge against him, and remanded for adjustment of penalties. On remand, Yacubian reached a settlement with the government.

that the original action terminated in his favor. The court concluded that the two prohibited fishing charges could not form the basis of Mr. Yacubian's malicious prosecution claim because those aspects of the proceedings were not in his favor, as he was found liable for those charges.

The court next considered whether Mr. Yacubian had a claim for malicious prosecution based on the initiation of the false statement charge and the allegations against SAC Cohen, one of several enforcement officers involved in the investigation and prosecution. The only wrongdoing alleged was SAC Cohen's inducement of Lt. Hanlon's superiors into pressuring Lt. Hanlon not to testify as to the prohibited fishing charges. However, Lt. Hanlon had no knowledge relevant to the false statement charge and was not a witness as to that charge. Mr. Yacubian's complaint failed to allege that the investigative or law enforcement officers induced or exercised control over NOAA's enforcement attorney's decisions in prosecuting the case. The court reasoned that Mr. Yacubian needed to show "more than a sheer possibility" that SAC Cohen acted unlawfully, and so affirmed the dismissal of his claims.

Anglers Conservation Network v. Penny Pritzker, CIV.A. 13-1761-GK, 2014 WL 4977414 (D.D.C. Sept. 30, 2014).

Parties and Issue

Plaintiffs were fishing organizations based in New York and New Jersey; the owner of an eco-tours and fishing business in Tinton Falls, New Jersey; and the "assistant herring warden" for the Town of Weymouth, Massachusetts. Their complaint pertained to the Atlantic Mackerel, Squid and Butterfish fishery ("MSB" or "mackerel" fishery) managed by the Mid–Atlantic Fishery Management Council, which represents the states of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina.

The MSB fishery is "a directed fishery dominated by midwater trawl vessels," which catch fish by "dragging large nets

behind their vessels." River herring and shad provide essential forage for many marine mammals, birds, and fish.

The plaintiffs alleged that the incidental catch of river herring and shad by trawls in the MSB fishery "contributes significantly" to the total known mortality of these species. In response, the Mid-Atlantic Council began drafting Amendment 14 to the Fishery Management Plan ("FMP") with the intension of considering the river herring and shad. The council later decided to develop a separate amendment, Amendment 15, to analyze the stocks. The council ultimately decided again to revisit the issue of river herring and shad in three [3] years, not in Amendment 15. The plaintiffs filed suit one [1] month after the council's vote to postpone its analysis of the river herring and shad stocks.

Analysis and Holding

The Magnuson-Stevens Act ("MSA") establishes a scheme under which the Secretary reviews the work of the regional councils, and the decision is appealable to the courts. Plaintiffs sought to circumvent this framework by asking the court to review an intermediate decision of the Mid–Atlantic Council, which was never presented to the Secretary for review, had not been published for notice and comment, and was never formally approved or disapproved by the Secretary. The court dismissed plaintiffs' complaint on the basis that neither the MSA, the Administrative Procedures Act ("APA"), nor the National Environmental Policy Act ("NEPA") provided any authority for judicial review concerning plaintiffs' request.

Natural Resources Defense Council vs. National Marine Fisheries Service, No. CIV.A. 12-0938-KBJ, 2014 WL 5148407 (D.D.C. Oct. 14, 2014).

Parties and Issue

Plaintiffs Natural Resources Defense Council and Ocean Conservancy objected to the National Marine Fisheries Service's ("NMFS") change in policy and filed a suit against the NMFS, the

National Oceanic and Atmospheric Administration ("NOAA"), the Department of Commerce, and the Secretary of the Department of Commerce (collectively, "defendants") to challenge Regulatory Amendment 11 on the grounds that it violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq., as well as the Magnuson–Stevens Act ("MSA").

In December of 2010, the NMFS promulgated a regulation, Amendment 17B, that banned outright the catching and retention of speckled hind and Warsaw grouper, which had been listed as undergoing overfishing since 1997. Also, scientific research suggested that these particular stocks of fish would nevertheless continue to be endangered as a result of their accidental or incidental catch when fishermen in the region targeted other deep water species ("bycatch") and thus NMFS prohibited the targeting of six other species of fish that the NMFS then believed "co-occurred" (i.e., lived) with the speckled hind and the Warsaw grouper in certain deep water areas of the South Atlantic Snapper–Grouper Fishery. In May of 2012, NMFS reconsidered its co-occurrence findings and reversed course, enacting Regulatory Amendment 11, which lifted the prohibition related to the targeting of the six [6] other deep water stocks.

Analysis and Holding

Speckled hind and Warsaw grouper were the subject of the NMFS action challenged in this case. Speckled hind and Warsaw grouper are both large, deep water grouper species that dwell in reefs and rocky hard-bottom habitats along the South Atlantic seaboard. Speckled hind and Warsaw grouper are vulnerable to overfishing due to their biology and their mating habits. NMFS took the lead in addressing this overfishing concern through its promulgation— and subsequent repeal— of various conservation measures.

Amendment 17B established an annual catch limit of zero for these two species. Amendment 17B also implemented an accountability measure to ensure that the annual catch limit was met. The accountability measure prohibited any and all harvest and

possession of speckled hind or Warsaw grouper throughout the South Atlantic. Concerning the bycatch problem, the council included in Amendment 17B (the focus of this case) a prohibition on the harvest and possession of six other snapper-grouper stocks in the fishery (blueline tilefish, snowy grouper, yellowedge grouper, misty grouper, queen snapper, and silk snapper) that were thought to co-occur with speckled hind and Warsaw grouper in depths of 240 feet[4] or greater. Amendment 17B passed with some contention from Council members.

NMFS promulgated a final rule implementing Amendment 17B, but made clear that its "approval and implementation" of the six-stock deep water prohibition "does not preclude the Council from proposing future action to modify this prohibition if scientific information indicates it is appropriate to do so."

While NMFS was undertaking final action on Amendment 17B, the council prepared Regulatory Amendment 11, which reversed its recommendation regarding the deep water prohibition. Faced with the decision of whether or not to reverse itself and do away with the regulatory provision, NMFS' analysis of this question involved not only reviewing the council's recommendation and Catch Analysis, but also conducting its own additional research, preparing an environmental assessment of the impact of lifting the prohibition, considering public comment on the matter, and forming its own conclusions regarding the propriety of adopting Regulatory Amendment 11.

Specifically, NMFS conducted a Catch Analysis to study the depths that speckled hind and Warsaw grouper are found and noted that the frequency and odds of encountering the species are significantly higher outside of 240 feet. The analysis also revealed that the other snapper-grouper stocks in the fishery had a low association to speckled hind and Warsaw grouper to habitat preferences. NMFS also discovered that the two [2] species had a low co-occurrence with blueline tilefish. NMFS prepared an

---

[4] 240 feet was the depth at which bycatch mortality of speckled hind and Warsaw grouper due to barotrauma was believed to be high.

Environmental Assessment (ES) to evaluate the environmental impact on the decision to lift the deep water prohibition and concluded that the probability of catching co-occurring species with speckled hind and warsaw grouper are low.

The court found that NMFS's actions in enacting Regulatory Amendment 11 were not arbitrary and capricious in violation of APA's standards for rulemaking, largely because NMFS relied on scientific data to draw its conclusion that the deep water prohibition was an ineffective conversation measure. The administrative record, including NMFS's actions in arriving at its conclusion to lift the prohibition, did not support the plaintiff's contention that NMFS ignored vulnerabilities or unusual biological characteristics of the speckled hind and warsaw grouper. Although the plaintiffs argued that NMFS misinterpreted the information from its Catch Analysis, the court reasoned that its proper function was not to weigh evidence anew and make technical judgments, but to give deference to the agency's interpretations of statistics and information in its area of expertise.

The court next reviewed the National Standards under MSA. The court found that NMFS met National Standard One[5] because it properly considered whether lifting the prohibition was necessary to achieve the optimum yield with respect to the blueline tilefish. National Standard One requires that promulgated measures prevent overfishing. Because the deep water prohibition failed to prevent overfishing, then, NMFS was justified (and perhaps even obligated) in reversing the decision to implement that method.

Finally, in accordance with National Standard Nine,[6] NMFS paid "close attention" to bycatch in conducting a Bycatch

---

[5] National Standard One requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(l).

[6] National Standard Nine requires that "[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the

Practicability Analysis. This Analysis showed that the deep water prohibition was ineffective at reducing bycatch and that actually lifting the prohibition may be the action that reduced bycatch.

---

extent bycatch cannot be avoided, minimize the mortality of such bycatch." 16 U.S.C. § 1851(a)(9).

COMMITTEE ON MARINE ECOLOGY AND MARITIME CRIMINAL LAW

Editor: Katharine F. Newman
Assistant Editor: Charlotte Sturtz

BILGE & BARRATRY

Volume 5, Issue 2

October 2014

EMISSIONS CONTROL AREA/AIR EMISSIONS

Update

The reduction of air pollutant emissions remains a dominant issue in both the domestic and international arena. As a result there are several new regulations which limit exhaust and other atmospheric emissions from ships.

Most all of these regulations stem from the International Maritime Organization (IMO) ship pollution rules, which are contained in the "International Convention on the Prevention of Pollution from Ships," known as MARPOL 73/78. In 1997, the MARPOL Convention was amended by the "1997 Protocol," which includes Annex VI entitled "Regulations for the Prevention of Air Pollution from Ships." Annex VI places limits on sulphur oxide (SOx), particulate matter (PM) and nitrogen oxide (NOx) emissions from ship exhausts, and prohibits deliberate emissions of ozone depleting substances. Emission Control Areas (ECAs) were established pursuant to Annex VI. The adoption of special mandatory measures for emissions from ships in these areas is required to prevent, reduce and control air pollution.

Since 2010, MARPOL Annex VI has required ships operating in ECAs to use fuels with one per cent sulphur content, with the limit dropping to 0.1 percent or less in 2015. The IMO has designated waters off the North American Coast as an ECA, as

well as US waters off the coast of Puerto Rico and US Virgin Islands (US Caribbean ECA). These two ECAs – North American and the United States Caribbean – are more stringently regulated as there are limits on sulphur content of fuel oil and NOx emissions from marine diesel engines.

In the United States, MARPOL is implemented domestically through the Act to Prevent Pollution from Ships ("APPS"). On or after January 1, 2015, the sulphur limit of fuel oil used by vessels within the ECA will be reduced to 0.10%. The United States Coast Guard ("USCG") and the United States Environmental Protection Agency ("EPA") have agreed to jointly enforce these requirements and have given no indication that the 2015 compliance date will be extended or ignored. Indeed, federal officials have noted the importance of the fuel standards to air quality control issues that continue to plague U.S. ports. Thus, enforcement of the standards on vessel air pollution is seen as a priority. Both the USCG and EPA will perform inspections and investigations, and will take appropriate enforcement actions if a violation is detected.

According to the UK P&I Club, the EPA, in cooperation with the USCG, announced this August that officials have boarded vessels to collect bunker samples to determine whether the vessels' fuel sources meet the 1.0% fuel oil sulphur limit. The EPA also stated that it has been "experimenting" with vessel flyovers to assess vessel smokestack plumes for the same purpose.

The state of California has its own rules concerning air emissions contained in the California Air Resources Board's (CARB) Ocean Going Vessels (OGV) fuel rule. These regulations require vessels to use distillate fuel oil (MDO or MGO) with a sulphur content not exceeding 0.1%. The regulation includes a fee provision by which ships that are unable to achieve the fuel compliance can pay a fee instead. Any person who commits a violation of any provision is subject to penalties specified in the Health and Safety Code.

According to CARB, the OGV fuel rule includes a sunset provision which states that the requirements of the OGV fuel regulations will cease to apply if the US adopts and enforces requirements that will achieve equivalent emissions reductions to the OGV fuel regulations within California waters. In light of this provision, CARB is conducting a sunset review which will extend beyond January 2015. Thus the OGV fuel regulation will remain in effect and continue to be enforced. Thus vessel operators must comply with both the California Ocean-Going Vessel Regulation and the North American Emission Control Area requirements.

For more information on the North American ECA, please see EPA, *Designation of North American Emission Control Area to Reduce Emissions from Ships*, Regulatory Announcement EPA-420-F-10-015 (Mar. 2010), http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf.

For more information on the California regulations, please see CAL. ENVTL. PROT. AGENCY: AIR RESOURCES BOARD, http://www.arb.ca.gov/ports/marinevess/ogv.htm (last visited Mar. 19, 2015).

For more information regarding air emission regulations as applied to the maritime industry, please see UK P&I CLUB, *Stricter air pollution regulations on the horizon*, Legal Briefing (June 2014), http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/LEGAL_BRIEFINGS/UKLegal__Emissions_web.pdf.

Rebecca Hamra
Claims Executive, Charles Taylor P&I Management (Americas), Inc., on behalf of the managers of The Standard Club Europe Ltd.

MARAD – LNG as Marine Fuel

The Maritime Administration (MARAD) released its LNG life cycle emissions study. The study finds

> that use of natural gas fuels substantially reduced air pollutant emissions compared to conventional marine fuels (low-sulfur and high-sulfur petroleum). Continued improvements to minimize emissions of methane during vessel-engine operations will contribute to lower greenhouse gas (GHG) emissions from marine applications. (8/22/14).

Dennis L. Bryant, *MARAD – life cycle emissions of LNG as marine fuel*, BRYANT'S MARITIME BLOG (Aug. 29, 2014, 9:42 PM), www.brymar-consulting.com.

BALLAST WATER

Update

As reported in previous bulletins, the US Coast Guard (USCG) has produced regulations to bring ballast water discharge standards in-line with the IMO's. The USCG's Ballast Water Discharge Standard Regulation came into effect on June 21, 2012 and requires vessels to install Coast Guard approved ballast water management (BWM) systems for those vessels that will discharge ballast water into US waters. The regulations are based on a phase-in schedule with three phases. The first phase of installation began on December 1, 2013, for all vessels constructed on/after that date. The second phase begins after January 1, 2014, for older vessels with a ballast water capacity between 1500 M3 and 5000M3, which are required to install a BWM system by their first scheduled drydocking after that date. The third phase of installation beings after January 1, 2016, when all other vessels are required to install a BWM system by their first scheduled drydocking after that date.

To date, there are no BWM systems that have received full type approval from the USCG and none expected until sometime in 2015. Alternative Management Systems (AMSs) do exist and may be used for up to 5 years. However, there is no guarantee that these systems will ultimately be approved by the Coast Guard. Thus, an

operator who installs an AMS risks that the system will have to be replaced in 5 years.

The USCG provides extensions for operators who have requested to delay BWM system implementation but only if certain criteria have been met. The extension request must provide documentation that, despite all efforts to meet the ballast water discharge standard requirements, compliance by the date stipulated in the implementation schedule is not possible for the vessel. The extension request must be filed with the USCG no later than 12 months before the vessel's applicable implementation date.

The U.S. Environmental Protection Agency (EPA) has also enforced ballast water management requirements under the U.S. EPA Vessel General Permit (VGP) issued under the Clean Water Act. The 2013 EPA VGP went into effect in December 2013 and applies to non-recreational vessels 79 feet or greater. The 2013 EPA VGP regulates discharges from commercial vessels including ballast water. The VGP requirements issued by the EPA generally aligned with the USCG ballast water requirements. However, the VGP contains some additional requirements to ensure BWM systems are functioning correctly.

The procedure for applying for an extension from the USCG requires the USCG to notify the EPA. However, the EPA does not automatically recognize an extension granted by the USCG. Due to the confusion created by the dueling regulations, the USCG and EPA released a joint letter in December 2013 to clarify the issue. The joint letter includes a sample letter of acknowledgment sent to operators who have received approval for their extension request. The joint letter refers to the EPA's memorandum which was released earlier in December 2013 and explains the EPA enforcement policy with regard to vessels that have obtained an extension from the USCG for BWM installation. The EPA also states that for vessels operating in accordance with the USCG extension, which are otherwise in full compliance with the 2013 EPA VGP requirements, non-compliance with the regulations will be considered a low enforcement priority. This has

been interpreted to mean that penalties will not be imposed on operators as long as an extension has been properly obtained.

Due to the fact that a Coast Guard type-approved ballast water management system is not currently available, operators have been forced to obtain an extension from the USCG. Recently, ECM Maritime Services has reported that the USCG has clarified its position regarding extension applications for vessels with ballast capacity between 1500M3 and 5000M3. The USCG has said that extension applications are still acceptable, even when the time remaining until the next scheduled drydocking is less than 12 months. However, the USCG will require an explanation of the circumstances as to why the extension request was not previously submitted. These extensions have been granted until January 1, 2016 and not the first scheduled drydocking after January 1, 2016.

The USCG' memo regarding extensions for BWM systems can be found at the following link: http://www.brymar-consulting.com/wp-content/uploads/Misc/USCG_extension_policy_130925.pdf.

The EPA's 2013 VGP can be found at the following link: http://www.epa.gov/npdes/vessels.

The EPA/USCG joint letter can be found at the following link: http://www.brymar-consulting.com/wp-content/uploads/Misc/BWMS_USCG-EPA_policies_131224.pdf.

The EPA's Enforcement Response Policy for the 2013 EPA VGP can be found at the following link: http://www.brymar-consulting.com/wp-content/uploads/Misc/EPA_enforcement_policy_131227.pdf.

For further information regarding US ballast water discharge regulations and their application to the maritime industry, please use the following link: http://www.ukpandi.com/knowledge/industry-developments/international-environmental-compliance/#c34407.

USCG – Ballast Water Management

> The US Coast Guard provided information and updates [found at http://mariners.coastguard.dodlive.mil/2014/10/02/1022014-coast-guard-remarks-3rd-annual-ballast-water-management-tech-north-america-conference/] regarding ballast water management requirements. (10/2/14).

BRYANT'S MARITIME BLOG (Oct. 3, 2014) www.brymar-consulting.com.

Rebecca Hamra
Claims Executive, Charles Taylor P&I Management (Americas), Inc., on behalf of the managers of The Standard Club Europe Ltd.

VESSEL GENERAL PERMIT, NPDES

Final Small Vessel General Permit (sVGP) Issued

On September 10, 2014, the U.S. Environmental Protection Agency announced the issuance of the final sVGP. The sVGP is scheduled to come into effect on December 19, 2014 and will apply to non-military, commercial vessels that are less than 79 feet in length. The sVGP applies to "discharges incidental to the normal operation of a vessel" operating on inland waters and the U.S. territorial sea. Generally, the sVGP is less stringent than the VGP and prescribes Best Management Practices instead of numeric effluent limits. However, 23 states and one Indian tribe have provided additional state-specific conditions to the sVGP. For example, galley, bath, and shower water will be considered "sewage" for commercial vessels on the Great Lakes.

Unlike the VGP, the sVGP does not require vessel owners or operators to submit Notices of Intent to be covered under the permit. Rather, vessel owners and operators should complete and

maintain a Permit Authorizations and Record of Inspection (PARI) on board at all times, which may be in electronic or paper form. U.S. EPA Nat'l Pollutant Discharge Elimination System, *Small Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels Less than 79 Feet (sVGP)*, Final 2014 sVGP (effective Dec. 19, 2014), http://water.epa.gov/polwaste/npdes/vessels/upload/sVGP_2014.pdf.

USCG Updates VGP Job Aid

The U.S. Coast Guard issued an updated version of its VGP Job Aid. The Job Aid is intended to be used by Coast Guard Marine Inspectors and Port State Control Officers during inspections of U.S. flag vessels and during Port State Control inspections to assist in verification that vessels are in compliance with the December 2013 VGP. BRYANT'S MARITIME BLOG (Aug. 6, 2014) www.brymar-consulting.com.

Dana Merkel
Blank Rome LLP

WA DOE – Allowing Vessel Dismantling on Water

The Washington Department of Ecology issued a news release stating that it is developing a new water quality permit to allow vessel dismantling on the water. A public meeting regarding the proposed Vessel Deconstruction General NPDES (water quality permit will be held on 19 August in Seattle. Written comments should be submitted by 22 August. (7/16/14).

BRYANT'S MARITIME BLOG (July 22, 2014) www.brymar-consulting.com.

Chukchi Sea – General Permit for Surveys

The Environmental Protection Agency (EPA) issued a notice stating that it is re-proposing a National Pollutant Discharge Elimination System

> (NPDES) General Permit for oil and gas geotechnical surveying and related activities in federal waters of the Chukchi Sea. Comments must be received by 15 September. 79 Fed. Reg. 48147 (August 15, 2014).

BRYANT'S MARITIME BLOG (Aug. 18, 2014) www.brymar-consulting.com.

Beaufort & Chukchi Seas – NPDES Permit

The Environmental Protection Agency (EPA) is extending, through 30 September, the period within which to submit comments on the National Pollutant Discharge Elimination System (NPDES) general permit for oil and gas surveying in federal waters of the Beaufort & Chukchi Seas. 79 Fed. Reg. 56577 [found at http://www.gpo.gov/fdsys/pkg/FR-2014-09-22/pdf/2014-22475.pdf] (9/22/14).

BRYANT'S MARITIME BLOG (Sept. 22, 2014) www.brymar-consulting.com.

VESSEL RESPONSE PLAN

Update

Projected demand for increased shipping tonnage and factors such as the Panama Canal expansion project continue to incentivize the construction of larger ships. As a consequence, the maritime industry is challenged to find ways of ensuring that vessels carrying large quantities of fuel are prepared to respond to disaster as they ply coastal waters in support of global trade. Incidents such as the M/V COSCO BUSAN's allision against the San Francisco-Oakland Bay Bridge and the resulting spill of approximately 53,000 gallons of fuel oil highlight the importance of developing a comprehensive disaster response framework for the maritime domain. The implementation of tank vessel and nontank vessel response plan requirements is one way the U.S.

Coast Guard will protect U.S. waterways as vessel tonnage increases.[1]

On October 30, 2013 the Coast Guard implemented a law requiring nontank vessels 400 gross tons or greater to submit a response plan certifying the vessel owner or operator's ability to respond to environmental threats including worst case discharges. The rule generally applies to vessels operating on navigable waters of the United States. A detailed explanation of its application, including a discussion of freedom of navigation implications, is contained in the August 31, 2009 Notice of Proposed Rulemaking. Nontank Vessel Response Plans and Other Vessel Response Plan Requirements, 74 Fed. Reg. 44970 (proposed Aug. 31, 2009) (to be codified at 33 C.F.R. pts. 151, 155, 160).

In December 2013, the Coast Guard announced that three vessel operators were issued violations for noncompliance with tank vessel response plans when transiting Alaskan waters.[2] According to the announcement, the violations cited could penalize the operators as much as $11,000 per violation per day. Thus, vessels not in compliance with an approved plan are subject to costly enforcement action.

While the U.S. Coast Guard is the implementing agency for this regulation, much of the vessel response plan framework, including implementation dates are established by statute. Accordingly, an Interim Operating Authorization process was developed to assist vessel owners and operators with compliance.

The Chafee Amendment

Vessels operating in remote areas are encouraged to meet with the cognizant Captain of the Port to address ways they can

---

[1] Vessel response plans are just one component of the network of plans including the National Oil and Hazardous substance Contingency Plan, Regional Contingency Plan, and Area Contingency plan designed to ensure the availability of resources to adequately respond to environmental threats on U.S. waters.

[2] See U.S. COAST GUARD NEWSROOM, http://www.uscgnews.com/go/doc/4007/2000598/Vessel-operators-issued-monetary-fines-for-non-compliance-with-tank-vessel-response-plan-regulations-in-Western-Alaska (last visited Mar. 20, 2015).

meet response plan requirements or mitigate environmental threats in areas where resources are limited. The law provides limited opportunity to diverge from its requirements, but it does accommodate unique challenges by authorizing some flexibility. A provision in the 1996 Coast Guard Authorization Act known as the Chafee Amendment provides that a vessel "owner or operator may deviate from the applicable response plan if the President or the Federal On-scene Coordinator determines that deviation from the response plan would provide for a more expeditious or effective response to the spill or mitigation of its environmental effects." This provision authorizes vessel owners and operators to utilize a resource provider other than the one named in the Vessel Response Plan. The Chafee Amendment is an important tool for vessel operators and response organizations that may have conflicting demands or are charged with responding to disasters in areas where resources are limited.

On Board Compliance

A response plan is activated when a vessel's master determines the resources and personnel available onboard cannot meet the needs of an actual or potential incident. A vessel owner or operator can also activate a vessel response plan independent of such requests, but it is self-evident that good communication and proactive efforts by a vessel's master are critical to the implementation of the vessel's plan. Extensive time and effort has been exhausted to ensure that vessels transiting U.S. waters have the resources available to adequately respond to maritime disaster. However, a plan is only as good as its execution. Reduction of human error is key to the reduction of all maritime transportation threats. Therefore, the best way to ensure compliance with a vessel response plan is to make certain that on board personnel are prepared to activate the plan.

Brendan Sullivan

Staff Attorney for the U.S. Coast Guard, Seventh District

[Author's note: The views expressed herein are solely those of the author and do not necessarily reflect those of the United States Coast Guard or the United States Department of Homeland Security.]

Nontank Vessel Response Plan

In 1990, the United States Congress passed the Oil Pollution Act in response to the EXXON-VALDEZ oil spill. One of the provision of OPA-90 is the requirement for vessels to develop a Vessel Response Plan (VRP), a highly detailed and vessel specific manual used to prepare the vessel owner, operator, and crew to respond to a release of oil from their vessel. The VRP is used to identify response resources that may be called upon in the event of an oil spill incident, including a contracted resource for salvage, emergency lightering, or firefighting. Originally, the VRP requirement was only applicable to tank vessels carrying Class I through IV oils as cargo; however, in 2004, the President signed into law the Coast Guard and Maritime Transportation Act of 2004 (CGMTA), which in short, required non-tank vessels to prepare and submit a VRP. Pub. L. No. 108-293, 118 Stat. 1028 (2004). The plan is typically referred to as a Nontank Vessel Response Plan, or NTVRP.

The CGMTA defines a "nontank vessel" as a self-propelled vessel of 400 gross tons as measured under section 14302 of title 46 of the United States Code (the Convention measurement system), or greater, other than a tank vessel, that carries oil of any kind as fuel for main propulsion and that is a vessel of the United States or that operates on the navigable waters of the United States.

The CGMTA required that response plans be prepared and submitted by August 8, 2005. In addition, the CGMTA required the President and the Coast Guard to issue regulations requiring the submission of plans. Because of the need for additional time to receive and respond to public comments, regulations were not issued by August 8, 2005, and the Coast Guard was left without any mechanism to enforce the CGMTA.

Until regulations were in effect, the Coast Guard issued interim authorization letters authorizing nontank vessels that met certain compliance requirements to operate without an approved response plan for a limited time. See Navigation and Vessel Inspection Circular Number 01-05, CH-1, dated January 13, 2006.

On September 30, 2013, the Coast Guard issued its much anticipated Final Rule addressing nontank vessel response plans. 78 Fed. Reg. 60,099 (Sept. 30, 2013) (to be codified at 33 C.F.R. pts. 151, 155, 160). The Final Rule requires owners or operators of nontank vessels to prepare and submit oil spill response plans by January 30, 2014, and either have approval of the plan or have filed a plan containing sufficient elements to obtain Interim Operating Authorization. It is estimated that about 12,000 vessels are affected by the new regulations. Rich Miller, *U.S. now requires non-tank vessels to have oil-spill response plans*, Professional Mariner (Nov. 26, 2013, 11:55 AM), http://www.professionalmariner.com/December-January-2014/oil-spill-response-plans/.

The new regulations, which appear as 33 C.F.R. Part 155, Subpart J, specify the content of a response plan and addresses, among other issues, the requirement to plan for responding to a worst case discharge and a substantial threat of such a discharge. Additionally, the Final Rule updates the international Shipboard Oil Pollution Emergency Plan requirements that apply to certain nontank vessels and tank vessels. Finally, the Final Rule requires vessel owners or operators to submit their VRP control number as part of already required notice of arrival information.

The NTVRP requirements are tailored to nontank vessels based on a risk assessment to minimize the burden on vessels that pose less risk to the environment should a casualty occur. Specifically, NTVRP requirements are scaled according to combined fuel and cargo oil capacity in three groups:

1. Less than 250 barrels;

2. Less than 2,500 barrels, but greater than or equal to 250 barrels; and

3. 2,500 barrels or greater.

Nontank vessels carrying 2,500 barrels or greater generally must meet the same functional planning requirements as tank vessels.

To obtain Coast Guard approval, the NTVRP must contain the following minimum information:

(1) Identification of a qualified individual (QI) and alternate QI having full authorization to implement removal actions, and to identify and ensure by contract or other approved means the availability of personnel and equipment to respond to a discharge;

(2) Identification of an Oil Spill Response Organization (OSRO) by contract or written consent as appropriate;

(3) Identification of a salvage and marine firefighting provider and submission of a salvage contract and funding agreement or written consent agreement as appropriate; and

(4) A signed certification statement as required by 33 C.F.R. 155.5023(b).

In January 2014, the Coast Guard advised vessel owners and operators that, as of January 31, 2014, old NTVRPs which were created under the interim provisions of NVIC 01-05, CH-1 would be deactivated regardless of their expiration dates. The only NTVRPs that will remain active will be those that have been updated, reviewed and either found to be in full compliance with Subpart J and approved for five years, or issued a new six-month Interim Operating Authorization (IOA) to allow time to review and address identified deficiencies.

On July 1, 2014, the Coast Guard issued a Marine Safety Information Bulletin stating that, due to numerous complexities, about 925 nontank vessels still have not received full plan approval and their IOAs will expire on July 31, 2014. Therefore, the Coast Guard intends to grant a 3-month extension of IOAs for nontank vessels that have submitted a VRP, which includes a pre-fire plan approved by the identified salvage and marine firefighting organization when required. See MSIB 10-14 (July 1, 2014).

Vessel owners and operators should not delay in addressing these important compliance issues. The Coast Guard is still working on a significant backlog of plan and plan revisions. Therefore, being proactive will ensure vessel compliance. After

July 31, 2014, all IOA's expired; vessels will not be authorized to enter U.S. waters until a 5 year approved letter is issued.

Alexander T. Gruft
Wright, L'Estrange & Ergastolo

DEEPWATER HORIZON

CSB – DWH Casualty Report

> The Chemical Safety Board issued its two-volume draft report on the Deepwater Horizon casualty. The report finds that the blowout preventer failed to shut off the flow of high-pressure oil and gas because drill pipe buckled for reasons the offshore drilling industry remains largely unaware of. The report also discusses two instances of miswiring of the blowout preventer and two backup battery failures. Among other things, it recommends that the Bureau of Safety and Environmental Enforcement (BSEE) require drilling companies to more effectively manage technical, operational, and organizational safety-critical elements to further reduce the risk of major accidents. (6/5/14).

BRYANT'S MARITIME BLOG (June. 6, 2014) www.brymar-consulting.com.

Rainey - House Subcommittee Investigation

> The US Court of Appeals for the Fifth Circuit ruled that an investigation conducted by a subcommittee of the House of Representatives is included within the terms of a statute that criminalizes obstructing "the due and proper exercise of the power of inquiry under which any inquiry or investigation is being held by either House, or any committee of either House or any joint committee of the Congress." A federal grand jury indicted [David] Rainey for one count of obstructing Congress in violation of 18 U.S.C. § 1505, and one count of making false statements in violation of 18 U.S.C. § 1001 in conjunction with the subcommittee's investigation of issues related to the fire and explosion on the Deepwater Horizon mobile offshore drilling unit (DWH MODU). Rainey contended, among other things, that 18 U.S.C. § 1505 did not apply to subcommittee investigations. The district court agreed and dismissed that count. The government appealed. The appellate court vacated the district court order and remanded the case. *United States v. Rainey*, No. 13-30770 (5th Cir., June 27, 2014).

BRYANT'S MARITIME BLOG (July 1, 2014) www.brymar-consulting.com.

Following the remand, the grand jury filed a second superseding criminal indictment against Rainey, amending the obstruction charge. Among other changes, the second superseding criminal indictment changes the mention of "the Committee on Energy and Commerce" from the previous indictment to "the Subcommittee on Energy and Environment of the House's Committee on Energy and Commerce." The case is set to go to trial March 9.

Kaluza, Vidrine – Appeal of Dismissal of Seamans' Manslaughter Charges

In 2012, a federal grand jury in the Eastern District of Louisiana indicted Robert Kaluza and Donald Vidrine on charges of involuntary manslaughter, violations of the Clean Water Act, as well as 11 violations of the Seaman's Manslaughter Statute for the deaths of the 11 employees aboard the Deepwater Horizon. At the time of the blowout on April 20, 2010, Kaluza and Vidrine were well site leaders on board the Deepwater Horizon, responsible for supervising the implementation of BP's drilling plans and procedures. In December 2013, the District Court dismissed the charges under the Seaman's Manslaughter Statute concluding that the statute only applies to individuals who are involved in the "navigation" or "marine operations" of a vessel and that therefore, it did not apply to Kaluza and Vidrine, who were part of a separate drilling crew. *U.S. v. Kaluza*, 2013 WL 6490341, at *28 (E.D. La. Dec. 10, 2013). The United States filed an interlocutory appeal of the District Court's order of dismissal, and oral argument was held on July 8, 2014 before Judges Higginbotham, Jones, and Prado of the Fifth Circuit. The appeals court affirmed the district court's holding that the seaman's manslaughter statute was ambiguous and did not apply to well site leaders. *U.S. v. Kaluza*, 2015 WL 1056619, at *14 (5th Cir. Mar. 11, 2015).

Court – OPA Test Case Proceedings

On June 3, 2014, the district court entered a scheduling order for seven test cases regarding claims under the Oil Pollution Act of 1990. The so-called OPA Test Cases will address certain OPA 90 liability questions focusing on, among other issues, whether plaintiffs' alleged losses tied to the 2010 federal government moratoria on deepwater drilling "arise from" or are "due to" the Deepwater Horizon oil spill. The OPA Scheduling Order provides for fact and expert discovery up to March 2015, followed by summary judgment motions. If necessary, a trial will be scheduled to commence no earlier than the third quarter of 2015.

Court – State of Alabama Damages Case Proceedings

On July 16, 2014, the district court issued a scheduling order for the State of Alabama's OPA economic damages claims against BP and other parties, with fact and expert discovery continuing into 2015 and a request by the district court for the parties to set aside the month of November 2015 for a trial.

Court – Liability Under Section 311(b)(7)(A) of the Clean Water Act

On February 22, 2012, the district court held that the subsurface discharge which occurred during the Deepwater Horizon oil spill was from the Macondo well, rather than from the Deepwater Horizon, and that BPXP and Anadarko, and not Transocean, are strictly liable for civil penalties under Section 311 of the CWA as owners of the well. In re: Oil Spill by the Oil Rig "DEEPWATER HORIZON", 844 F.Supp.2d 746 (E.D. La. 2012). Anadarko, BPXP and the United States each appealed to the Fifth Circuit, and on June 4, 2014 the Fifth Circuit unanimously affirmed the District Court's February 22, 2012 decision. 753 F.3d 570 (5th Cir. 2014). On July 21, 2014, Anadarko and BPXP filed petitions requesting en banc review of the June 4, 2014 decision. The Fifth Circuit denied petitioners' request for rehearing en banc. 775 F.3d 741 (5th Cir. Jan. 9, 2015).

Court – Trial Phases

On September 23, 2014, the district court issued an amended scheduling order for the penalty phase in the liability, limitation and fault allocation trial in MDL 2179. Discovery in the penalty phase is currently in progress, and the penalty phase trial is expected to commence January 20, 2015 and last three weeks.

> In the Penalty Phase, the District Court will determine the amount of civil penalties owed to the United States under the Clean Water Act based on the court's rulings as to the presence of negligence, gross negligence or willful misconduct in Phases 1

> and 2, the court's rulings as to quantification of discharge in Phase 2 and the application of the [five] penalty factors under the Clean Water Act.

BP p.l.c., *Group results: Second quarter and half year results 2014*,
London, 1, 42 (July 29, 2014), http://www.bp.com/content/dam/bp/pdf/investors/bp_second_quarter_2014_results.pdf.

Court – DWH Settlement Appeals on the Issue of Causation

On December 24, 2013, the district court ruled on the two issues remanded to it in October 2013 by the business economic loss panel of the U.S. Court of Appeals for the Fifth Circuit: (1) requiring the claims administrator, in administering business economic loss claims, to match revenue with corresponding variable expenses (the matching issue), and (2) determining whether the settlement agreement can properly be interpreted to permit payment to business economic loss claimants whose losses (if any) were not caused by the spill (the causation issue). See Order and Reasons [Responding to Remand of Business Economic Loss issues], ("2:10–MD2179, ECF No. 12055.").

As to the causation issue, the district court ruled that the Economic and Property Damages Settlement Agreement contained no causation requirement beyond the revenue and related tests set forth in an exhibit to that agreement. The district court also held that the absence of a further causation requirement does not defeat class certification or invalidate the settlement under the federal class certification rule or Article III of the U.S. Constitution.

BP filed a motion with the Fifth Circuit requesting an injunction that would prevent the claims administrator from making awards to claimants whose alleged injuries are not fairly traceable to the spill. In a 2-to-1 decision on March 3, 2014, the business economic loss panel affirmed the district court's ruling on causation and denied BP's motion for a permanent injunction. In re Deepwater Horizon, No. 13-30315, 744 F.3d 370 (5th Cir. Mar. 3, 2014). Over a vigorous dissenting opinion, the Fifth Circuit denied

(in a 5-to-8 decision) BP's petition for rehearing en banc of the business economic loss panel's March 3, 2014 decision. The dissent noted that this decision permits payment for economic losses "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill." In re Deepwater Horizon, No. 13-30095, 756 F.3d 320 (5th Cir., May 19, 2014).

BP asked the Fifth Circuit to stay the issuance of the mandate transferring the case back to the district court until the Supreme Court could decide whether to review the Fifth Circuit's decision. The Fifth Circuit denied BP's request for a stay and issued its mandate on May 28, 2014. On that same day, the district court dissolved the injunction that had halted the processing and payment of business economic loss claims and instructed the claims administrator to resume the processing and payment of claims.

On May 28, 2014, BP filed an application with the Supreme Court seeking to recall and stay the Fifth Circuit's mandate in order to halt the processing and payment of business economic loss claims pending further review. The Supreme Court denied BP's application and the claims administrator has continued to process and pay business economic loss claims while BP seeks Supreme Court review of the Fifth Circuit's decision.

On August 1, 2014, BP filed a petition for certiorari seek review of the Fifth Circuit's decision, as well as a related decision by a different panel of the Fifth Circuit similarly interpreting the Economic and Property Damages Settlement Agreement to permit payment to business economic loss claimants whose losses (if any) were not caused by the spill.

Court – MODU as a Stationary Source

Over a vigorous dissent, a panel of the US Court of Appeals for the Fifth Circuit ruled that the US Chemical Safety and Hazard Investigation Board has jurisdiction to investigate the release of hazardous substances into the ambient air during the

April 20, 2010 blowout, explosion, and fire on the mobile offshore drilling unit (MODU) Deepwater Horizon in the Gulf of Mexico. Defendant MODU owner argued that the MODU was a vessel and thus outside the jurisdiction of the Board, which was limited to emissions from stationary sources. The court found that the statute establishing the Board included its own definition of "stationary source". The MODU Deepwater Horizon fell within that definition while it was engaged in drilling the Macondo well. *United States v. Transocean Deepwater Drilling*, No. 13-20243 (5th Cir. Sept. 18, 2014).

BRYANT'S MARITIME BLOG (Sept. 23, 2014) www.brymar-consulting.com.

Trial Judge Concludes the DEEPWATER HORIZON Spill Caused by BP's Gross Negligence and Willful Misconduct

On September 4, 2014 the federal district judge overseeing the multidistrict litigation resulting from the Deepwater Horizon oil spill issued long-awaited rulings as to liability. The court concluded that BP is subject to enhanced civil penalties under the Clean Water Act ("CWA") because the discharge of oil was the result of the company's "gross negligence" and "willful misconduct." In re Deepwater Horizon, 21 F.Supp.3d 657, 2014 AMC 2113 (E.D. La. 2014).

Background

Following the Deepwater Horizon oil spill on April 20, 2010, multidistrict litigation was consolidated in the district court in New Orleans, Louisiana. The current trial, which involves two key cases filed against BP and the other entities involved in the drilling of the Macondo well, is being heard by the court without a jury pursuant to the court's admiralty jurisdiction.

The consolidated trial's first phase in early 2013 was to determine the liability of BP, Transocean, Halliburton, and other companies, and to assess, for the purposes of penalty calculation, whether the companies acted with gross negligence and willful

misconduct with respect to the loss of well control and the resulting explosion, fire, and sinking of the rig.

The trial's second phase, which occurred during the fall of 2013, addressed the post-incident efforts to control the spill and the quantity of oil that spilled into the Gulf of Mexico. The judge has not yet issued a ruling with respect to the issues presented in the second phase. The third phase, which is scheduled to begin in January 2015, will focus on all other liability issues arising from the oil spill cleanup, including containment issues and the use of dispersants.

CWA Liability

The court held that the complexities of drilling the Macondo well in deepwater and the potential magnitude of the harms of a blowout, explosion, and oil spill were so great that BP's direction of the drilling operation was subject to an increased standard of care. The court further found that BP's operational and engineering personnel were well aware the Macondo well had been particularly troublesome to drill and those difficulties continued throughout the efforts to isolate the well from the reservoir. Thus, the court held that the record of well control problems during the drilling of the Macondo well required an even higher standard of care during the preparations for the temporary abandonment of the well.

The court found that BP's team leader on the rig and its senior drilling engineer ashore in Houston had knowledge of these difficulties and their associated risks, and failed to exercise the "heightened" vigilance required by the circumstances when interpreting the results of the negative pressure test, the principal test used to determine if the well was properly isolated from the reservoir before proceeding to displace the well. Based on the results of the negative pressure test conducted on the Macondo well, the court determined a reasonable drilling engineer in that situation would have concluded that the test was a failure and should have required the test to be repeated. The court noted that conducting a second negative pressure test would have imposed an

extremely light burden when compared to the severe and foreseeable consequences that could, and did, result from continuing the displacement procedures after a failed test. Consequently, the court held that BP's engineers' failure to order a new test before proceeding with the well displacement procedures constituted an extreme departure from the care required under the circumstances.

The court also found that BP's engineers knew of facts that would have led a reasonable drilling engineer in the industry to realize that that the failure to stop the well displacement would probably result in physical injuries, death, and severe property damage. However, even though the BP engineers had briefly to pause the displacement procedure just minutes before the blowout occurred to conduct a required sheen test, instead of directing that another negative pressure test be performed, they affirmatively ordered that the displacement procedure be resumed. The court held that this conduct amounted to recklessness.

The court further found that BP committed a separate series of negligent acts and omissions that resulted in the discharge of oil. Taken together, these additional acts of negligence amounted to gross negligence and willful misconduct under the CWA. Moreover, the court found that some of these acts and omissions resulted from profit-driven decisions. The court held that these instances of negligence, taken together, provide an independent basis for enhanced penalties under the CWA because they constituted an extreme deviation from the standard of care and a conscious disregard of known risks.

Based on these findings and conclusions, the court determined that BP was vicariously liable under the CWA's enhanced penalty provision for the gross negligence and/or willful misconduct of its employees. Accordingly, the court's ruling subjects BP to an enhanced civil penalty of $4,300 per barrel under the CWA, which is nearly four times higher than the standard penalty for oil spills involving simple negligence under that statute. As a result of this decision, BP could be found liable for as much as $18 billion in CWA penalties when phase three is completed

with regard to making a determination on the amount of oil that was discharged.

Punitive Damages

Although the court indicated that BP's conduct warrants the imposition of punitive damages under general maritime law, under precedent in the United States Court of Appeals for the Fifth Circuit, operational recklessness or willful disregard of an employee is generally insufficient to visit punitive damages upon the employer. Accordingly, the court held that in the matter before it, BP could not be held liable for punitive damages in states within the Fifth Circuit (e.g., for claims involving Texas and Louisiana). The court also ruled, however, that BP could be held liable for punitive damages for claims that are subject to standards set by other Circuit Courts. This decision is particularly important, for example, with regard to claims in Florida and Alabama, which are within the Eleventh Circuit. There already are reports that the state of Alabama is preparing its case against BP for compensatory and punitive damages.

General Maritime Law Liability

The court also concluded that BP and its drilling partners, Transocean, the owner of the Deepwater Horizon, and Halliburton, the cement contractor for the Macondo well, were each liable under general maritime law for the blowout, explosion and oil spill. However, while BP's conduct was reckless, the court held that Transocean's and Halliburton's conduct was simply negligent. For purposes of determining comparative fault, BP was apportioned 67 percent of the fault, while Transocean was apportioned 30 percent and Halliburton was apportioned 3 percent. The court concluded that Transocean's share of liability was considerably less than BP's because, while BP's failures created the catastrophic situation, Transocean's failures, by contrast, concerned its inability to stop the catastrophe BP set in motion. Similarly, while the court found that Halliburton failed properly to monitor the well, its failure was relatively small when compared to

others' failures, and it was a failure shared by Transocean's drill crew.

Related Liability Rulings

Indemnity & Release

Significantly, the court held that Transocean's and Halliburton's indemnity and release clauses in their respective contracts with BP were valid and enforceable against BP, including for any liability that Transocean may have to government entities for removal costs as an operator of the rig under the Oil Pollution Act of 1990.

Limitation of Liability

The court also ruled that Transocean was not entitled to limit its liability under the Limitation of Liability Act because certain negligent failures of the Deepwater Horizon's crew, which were within Transocean's privity and knowledge, created unseaworthy conditions that caused or contributed to the explosion, fire, and oil spill.

Looking Forward

It should be noted that this decision will not affect those claims of businesses and individuals affected by the spill that were involved in the March 2, 2012 class action settlement with BP. It will likely affect the resolution of the claims that are still pending in the federal multidistrict litigation, as well as other claims that have been filed in various state courts.

In a future opinion to be issued concerning the second phase of the trial, the judge is expected to review BP's efforts to control the spill and render his determination of the total amount of oil that spilled into the Gulf of Mexico. Based on the present rulings, BP could face liability for as much as $18 billion in Clean Water Acts penalties, depending on the court's findings and conclusions from the second phase of the trial.

In the third and final phase of the trial, the judge will determine damages resulting from the oil spill cleanup.

Following the conclusion of the trial, all of the district court's rulings for each phase of the trial may be appealed to the Fifth Circuit.

Gregory F. Linsin and Alan Weigel, Blank Rome LLP, September 8, 2014.

DOI – DWH Early Restoration PEIS

> The Department of the Interior (DOI) issued a notice announcing availability of the Final Programmatic and Phase III Early Restoration Plan and Final Early Restoration Programmatic Environmental Impact Statement relating to the Deepwater Horizon oil spill. 79 Fed. Reg. 36328 (June 26, 2014).

BRYANT'S MARITIME BLOG (June 26, 2014) www.brymar-consulting.com.

ECOLOGY

Speed Reduction

NOAA – Lowering Ship Speeds in Protected Areas

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that a new study indicates that the agency's policy of notifying – but not necessarily citing – speeding vessels in protected areas along the East Coast has been effective in lowering their speeds and protecting the critically endangered North Atlantic right whale, while keeping punitive fines to a minimum. (6/3/14).

BRYANT'S MARITIME BLOG (June 5, 2014) www.brymar-consulting.com.

Santa Barbara Channel – Speed Reduction Program

> The Santa Barbara County Air Pollution Control District issued a news release stating that a coalition of government, non-profit, and marine industry groups have launched a new trial incentive program in the Santa Barbara Channel to slow cargo ships in order to reduce air pollution and increase protection of endangered whales. Companies participating in the speed reduction program will receive $2,500 per ship transit through the waterway. (8/4/14).

BRYANT'S MARITIME BLOG (June 11, 2014) www.brymar-consulting.com.

NOAA – Humpback Whale

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it received a petition to identify the Central North Pacific population of the humpback whale as a distinct population segment (DPS) and delist the DPS under the Endangered Species Act. Information and comments relating to this petition must be received by 28 July. 79 Fed. Reg. 36281 (June 26, 2014).

BRYANT'S MARITIME BLOG (June 26, 2014) www.brymar-consulting.com.

FWS & NOAA – Loggerhead Sea Turtle

> The Fish and Wildlife Service (FWS) issued a final rule designating critical terrestrial habitat for the Northwest Atlantic Ocean distinct population segment of the loggerhead sea turtle. The rule comes into effect on 11 August. 79 Fed. Reg. 39755

> (July 9, 2014). The National Oceanic and Atmospheric Administration (NOAA) issued a final rule designating critical marine habitat for the Northwest Atlantic Ocean distinct population segment of the loggerhead sea turtle. No marine areas meeting the definition of critical habitat were identified within the jurisdiction of the United States for the North Pacific Ocean distinct population segment of the loggerhead sea turtle. The rule comes into effect on 11 August. 79 Fed. Reg. 39855 (July 9, 2014). The two agencies issued a joint news release explaining the development.

BRYANT'S MARITIME BLOG (July 14, 2014) www.brymar-consulting.com.

National Marine Sanctuary

NOAA – Marine Sanctuary Nomination

> The National Oceanic and Atmospheric Administration (NOAA) issued a rule re-establishing the process for nomination of areas of the marine and Great Lakes environment as national marine sanctuaries. The rule comes into effect on 14 July. 79 Fed. Reg. 33851 (June 13, 2014).

BRYANT'S MARITIME BLOG (June 13, 2014) www.brymar-consulting.com.

NOAA – Gray's Reef NMS Regulations

> The National Oceanic and Atmospheric Administration (NOAA) promulgated a final rule updating the regulations and management plan for Gray's Reef National Marine Sanctuary (NMS). The amendments come into effect on 18 August. 79 Fed. Reg. 41879 (July 18, 2014).

BRYANT'S MARITIME BLOG (July 18, 2014) www.brymar-consulting.com.

Lake Huron – Thunder Bay NMS

> The National Oceanic and Atmospheric Administration (NOAA) promulgated a final rule expanding the boundary of the Thunder Bay National Marine Sanctuary (NMS) from 448 square miles to 4,300 square miles, extending protection to 47 additional known historic shipwrecks of national significance and making other changes. This rule will come into effect after the close of a review period of 45 days of continuous session of Congress. 79 Fed. Reg. 52960 (September 5, 2014).

BRYANT'S MARITIME BLOG (Sept. 8, 2014) www.brymar-consulting.com.

Endangered Species Act

FWS & NOAA – Critical Habitat

> The Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) have extended until 9 October the period within which to submit comments on their proposed changes to the definitions and regulations for designating critical habitat under the Endangered Species Act (ESA). 79 Fed. Reg. 36284 (June 26, 2014).

BRYANT'S MARITIME BLOG (June 26, 2014) www.brymar-consulting.com.

FWS & NOAA – ESA Policy

> The Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) have extended until 9 October the period

> within which to submit comments on their draft policy regarding implementation of section 4(b)(2) of the Endangered Species Act (ESA). 79 Fed. Reg. 36330 (June 26, 2014).

BRYANT'S MARITIME BLOG (June 26, 2014) www.brymar-consulting.com.

NOAA – Gulf of Mexico Dead Zone

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that NOAA and EPA-supported scientists have mapped the Gulf of Mexico dead zone, an area with low oxygen in the water, and determined that it covers 5,052 square miles for the summer of 2014. This is smaller in size that [sic] recorded in 2013, but greater than the Mississippi River/Gulf of Mexico Watershed Nutrient (Hypoxia) Task Force target of less than 1,900 square miles, meaning nutrients from the Mississippi River watershed are continuing to affect the coastal resources and habitats in the Gulf. (8/4/14).

BRYANT'S MARITIME BLOG (Aug. 5, 2014) www.brymar-consulting.com.

NOAA – Marine Debris Economics Study

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that it Marine Debris Economics Study shows that Southern California residents lose millions of dollars each year avoiding littered local beaches in favor of cleaner beaches that are further away and may cost more to reach. (8/12/14).

BRYANT'S MARITIME BLOG (Aug. 13, 2014) www.brymar-consulting.com.

Corals

Coral Reef Task Force – Meeting

> The US Coral Reef Task Force, sponsored by the Department of the Interior, will meet in Maui on 8-13 September. 79 Fed. Reg. 42030 (July 18, 2014).

BRYANT'S MARITIME BLOG (July 18, 2014) www.brymar-consulting.com.

NOAA – Coral Species Listed as Threatened

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that it will afford Endangered Species Act (ESA) protections to twenty coral species found in the Indo-Pacific and the Caribbean determined under the ESA to be threatened. (8/27/14).

BRYANT'S MARITIME BLOG (Aug. 29, 2014) www.brymar-consulting.com.

NOAA – Coral Species Listed as Threatened

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that it will afford Endangered Species Act (ESA) protections to twenty coral species found in the Indo-Pacific and the Caribbean determined under the ESA to be threatened. (8/27/14).

BRYANT'S MARITIME BLOG (Aug. 29, 2014) www.brymar-consulting.com.

NOAA – Elkhorn and Staghorn Coral

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice announcing the availability of the draft Recovery Plan for

elkhorn coral and staghorn coral. Comments must be received by 20 October. 79 Fed. Reg. 53019 (September 5, 2014).

BRYANT'S MARITIME BLOG (Sept. 8, 2014) www.brymar-consulting.com.

NOAA – Coral

The National Oceanic and Atmospheric Administration (NOAA) promulgated a 273-page final rule designating twenty reef-building coral species as threatened and requesting information that may be relevant to the designation of critical habitat for these species. The designations enter into effect on 10 October. Information regarding critical habitat must be received by 10 November. 79 Fed. Reg. 53851 [found at http://www.gpo.gov/fdsys/pkg/FR-2014-09-10/pdf/2014-20814.pdf] (September 10, 2014).

BRYANT'S MARITIME BLOG (Sept. 15, 2014) www.brymar-consulting.com.

Washington – Aquatic Lands Habitat Conservation

The National Oceanic and Atmospheric Administration (NOAA) and the Fish and Wildlife Service (FWS) issued a notice announcing the availability of the draft environmental impact statement relating to the proposed Washington Department of Natural Resources Aquatic Lands Habitat Conservation Plan, covering 2.6 million acres of State-owned aquatic lands. Public meetings will be held in Mount Vernon (7 October); Longview (9 October); Tacoma (13 October); and Pasco (15 October). Written comments must be received by 4 December. 79 Fed. Reg. 53020 (September 5, 2014).

BRYANT'S MARITIME BLOG (Sept. 8, 2014) www.brymar-consulting.com.

Aquatic Invasive Species

FWS – Preventing Introduction of AIS

> The Fish & Wildlife Service (FWS) issued a notice announcing the availability of voluntary guidelines to prevent the introduction and spread of aquatic invasive species (AIS) by means of recreational activities and water gardening. 79 Fed. Reg. 32308 (June 4, 2014).

BRYANT'S MARITIME BLOG (June 4, 2014) www.brymar-consulting.com.

FWS – Preventing Spread of AIS

> The Fish and Wildlife Service (FWS) seeks comments on the Classroom Guidelines for Preventing the Introduction and Spread of Aquatic Invasive Species (AIS). Comments should be submitted by 16 July. 79 Fed. Reg. 34342 (June 16, 2014).

BRYANT'S MARITIME BLOG (June 16, 2014) www.brymar-consulting.com.

ANSTF – Meeting

> The Aquatic Nuisance Species Task Force (ANSTF), chaired by the Fish and Wildlife Service (FWS), will meet on 5-6 November in Falls Church, Virginia. Topics on the agenda include: implementation of invasive species efforts for national Arctic strategy; Quagga Zebra Action Plan update; and the draft lionfish management plan. 79 Fed. Reg. 61094 [found at

http://www.gpo.gov/fdsys/pkg/FR-2014-10-09/pdf/2014-24067.pdf] (10/9/14).

BRYANT'S MARITIME BLOG (Oct. 9, 2014) www.brymar-consulting.com.

NOAA, NASA & BOEM – Monitoring Marine Biodiversity

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release [found at http://www.noaanews.noaa.gov/stories2014/20141006_boem.html] stating that it, the National Aeronautics and Space Administration (NASA) and the Bureau of Ocean Energy Management (BOEM) have joined together to support three demonstration projects intended to lay the foundation for the first national network to monitor marine biodiversity at scales ranging from microbes to whales. The projects, to be funded at approximately $17 million over the next five years, will demonstrate how a national operational marine biodiversity observation network could be developed. Such a network would serve as a marine resource management tool to conserve existing biodiversity and enhance U.S. biosecurity against threats such as invasive species and infectious agents. The three demonstration marine biological observation networks will be established in four locations: the Florida Keys; Monterey Bay and the Santa Barbara Channel in California; and on the continental shelf in the Chukchi Sea in Alaska. (10/6/14).

BRYANT'S MARITIME BLOG (Oct. 7, 2014) www.brymar-consulting.com.

ARCTIC

Update

In October Russia announced that it is substantially rebuilding Soviet era military bases in the Arctic. Most controversial is the base on Wrangle Island. The island is currently a nature preserve and world heritage site where many polar bears go to give birth. Russian President Vladimir Putin has promised to protect endangered animals, but the bases will represent a significant expansion of military assets in the Arctic region. Moscow times. Alexey Eremenko, *Russia Starts Building Military Bases in the Arctic*, MOSCOW TIMES (Sept. 8, 2014, 8:07 PM), http://www.themoscowtimes.com/business/article/russia-starts-building-military-bases-in-the-arctic/506650.html.

The United States and Canada have canceled their annual training exercise with Russian Defense forces this fall due to the situation in the Ukraine. Despite prior hope of increased cooperation, the United States has also suspended joint naval exercises in the Arctic Ocean with the Russians and a bilateral meeting on Coast Guard related arctic issues, and search and rescue. United States lawmakers have expressed concern that our naval and Coast Guard forces are falling behind and that our influence in the Arctic is weakening at a time when the Russians are actively drilling in the Arctic. Marina Koren, *Russia's Militarization of the North Pole Has U.S. Lawmakers on Edge*, NATIONAL JOURNAL (Sept. 11, 2014) http://www.nationaljournal.com/congress/russia-s-militarization-of-the-north-pole-has-u-s-lawmakers-on-edge-20140911.

On July 16, 2014 the United States appointed a Special Representative for the Arctic. The US State Department appointed Adm. Robert J. Papp, Jr., formerly Commandant of the Coast Guard, as the Special Representative. Adm. Papp is experienced in Arctic affairs and will work on Arctic policy on behalf of the State Department. Press statement US Department of State July 16, 2014. Press Statement, Sec. of State John Kerry, Retired Admiral Robert Papp to Serve as U.S. Special Representative for the Arctic

(July 16, 2014), http://www.state.gov/secretary/remarks/2014/07/229317.htm.

In August Russia took major steps to expand hydrocarbon production in the arctic and to establish procedures for dealing with environmental issues. On August 7th, 2014 the Kremlin announced that Gazprom has been granted an additional license to explore in the Kheysovsky area of the Barents Sea and that Rosneft has been granted a license to drill in the Pritaymyrsky area of the Laptev Sea. On the same day both companies and Russian Defense forces conducted a drill to respond to an oil spill at the only active drilling rig in the arctic, the Pirazlomnaya Platform. Hector Martin, *Staking a claim*, THE ARCTIC JOURNAL (Aug. 7, 2014, 9:17 PM), http://arcticjournal.com/oil-minerals/871/staking-claim.

Efforts to explore the vast hydrocarbon reserves in the arctic now face a new hurdle, the economic sanctions against Russia implemented by the United States and the European Union in response to Russia's role in the civil war in the Ukraine. Rosneft, in partnership with Exxon-Mobile announced the discovery of new hydrocarbon deposits in the Kara Sea in September. However, the discovery has been overshadowed by the sanctions against Russia, which likely will prohibit Exxon-Mobile from continuing operations related to the new discovery, and as of September 26, Exxon-Mobile is no longer actively taking part in the exploration. Kevin McGwin, *Editor's Briefing | Victory in the Arctic*, THE ARCTIC JOURNAL (Sept. 29, 2014, 4:15 PM), http://arcticjournal.com/oil-minerals/1042/editors-briefing-victory-arctic.

Following its recent failure to its efforts to explore for oil in the arctic in 2012 and a court decision halting its plans explore the Chukchi Sea, Royal Dutch Shell has filed a new exploration plan in August for the development of Alaska's Arctic oil fields. Criticism has been leveled against Shell due to its numerous failures to meet United States regulatory standards, but the company appears committed to pursuing exploration in arctic areas above Alaska. Louise Rouse, *As Shell gears up to drill the Arctic, investors must ask serious questions*, THE GUARDIAN (Sept. 2,

2014 7:30AM), http://www.theguardian.com/sustainable-business/2014/sep/02/shell-alaska-arctic-oil-safety-failings-investors.

In June, Russia released the Greenpeace icebreaker "Arctic Sunrise" after months of international protest, diplomacy, and litigation. The crew had been initially charged with piracy after allegedly attacking a Russian oil rig in the Arctic. The vessel was also arrested and held long after the crew was released. Greenpeace expressed concern as to the condition of the vessel after months in Russian hands but says it plans to return the ship to operations in the Arctic protesting drilling for hydrocarbons there. John Vidal, *Arctic 30: Russia releases Greenpeace ship*, THE GUARDIAN (June 6, 2014 7:05 AM), http://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship.

John C. Scarborough, Jr.
Perry & Neblett

USCG – Polar Code Meeting

> The US Coast Guard issued a notice stating that it will hold a public meeting is Seattle on 14 August to receive comments on topics related to the development of a mandatory code for ships operating in polar waters (draft Polar Code; draft SOLAS amendments; and draft MARPOL amendments). Written comments should be submitted by 1 September. 79 Fed. Reg. 37339 (July 1, 2014).

BRYANT'S MARITIME BLOG (July 1, 2014) www.brymar-consulting.com.

Arctic Council – Oil Pollution Prevention

> The Arctic Council issued a news release stating that its Task Force on Arctic Marine Oil Pollution

> Prevention met in Ottawa on 12-13 June. The Task Force is developing the Arctic Council Action Plan for Oil Pollution Prevention. (7/10/14).

BRYANT'S MARITIME BLOG (July 18, 2014) www.brymar-consulting.com.

BOEM – Beaufort Sea Planning Area

> The Bureau of Ocean Energy Management (BOEM) issued a Call for Information and Nominations for potential Oil and Gas Lease Sale 242, proposed for the Beaufort Sea Planning Area off Alaska in 2017. Responses to the Call must be received by 12 September. 79 Fed. Reg. 44060 (July 29, 2014).

BRYANT'S MARITIME BLOG (July 29, 2014) www.brymar-consulting.com.

NAP – Oil Spill Response in US Arctic Waters

The National Academies Press (NAP) released the final edition of its book entitled "Responding to Oil Spills in the U.S. Arctic Marine Environment". As oil and gas, shipping, and tourism activities in these waters increase, the possibilities of an oil spill also increase, yet infrastructure in the region is minimal. (8/4/2014).

BRYANT'S MARITIME BLOG (Aug. 5, 2014) www.brymar-consulting.com.

Arctic Council – Working Group Meeting

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release [found at http://www.bsee.gov/BSEE-Newsroom/BSEE-News-Briefs/2014/BSEE-Attends-Arctic-Council-Working-Group-Meeting-in-Canada/] stating that a meeting of the Arctic Council's Protection of the Arctic Marine Environment (PAME) was recently

> held in Whitehorse, Canada. The working group addresses policy and non-emergency pollution prevention and control measures related to the protection of the Arctic marine environment from both land and sea activities. The US delegation included representatives from BSEE, the Bureau of Ocean Energy Management (BOEM), the National Oceanic and Atmospheric Administration (NOAA), and the US Coast Guard. (9/26/2014).

BRYANT'S MARITIME BLOG (Sept. 29, 2014) www.brymar-consulting.com.

U.S. Takes the Helm of Council Assigned to Deal with Fast-Changing Arctic

> The Obama administration is pushing to make climate change a focal point as the United States becomes the new leader of the international Arctic Council, a move that is winning praise from environmentalists, even though it's unclear how it may translate into action.
>
> This week, senior Arctic officials from multiple countries will meet in Yellowknife, Northwest Territories, to hear the United States present its agenda for its two-year chairmanship starting next year. The council is a forum for nations bordering on the Arctic.
>
> Many environmentalists are cheering about recent remarks from U.S. Special Representative for the Arctic Adm. Robert Papp Jr., who indicated via speeches that climate change would be a main theme at the council, with new efforts on things like controlling black carbon and reducing methane.
>
> Greens say that opens the door for potential new actions to protect the pristine region and control

emissions that are melting ice and spreading soot. “It really is a turning point,” said Erika Rosenthal, a staff attorney at Earthjustice. But others caution that a too-aggressive stance could shift the council away from uncompleted priorities and possibly spur political tension.

“The admiral is barking up a slightly wrong tree,” Charles Ebinger, director of the Energy Security Initiative at the Brookings Institution, said about the recent emphasis on climate change. The Arctic Council may not be the best place to address some issues like methane, considering the international nature of its emissions. And how to respond to emergencies and oil spills in the region still remains unfinished business, he noted.

Major shift looming?

What is clear is that the U.S. chairmanship is likely to be a major shift from the approach led by the Canadian chairmanship over the past two years, which emphasized economic development in the north. The leader of the council changes every two years among countries, with the State Department leading the U.S. delegation.

“Why do we need to act now? We need to act now because I’ve seen the drastic changes that have occurred in the Arctic,” Papp said in a speech last month at the Center for Strategic and International Studies, describing how he visited the Bering Strait 30 years apart and was startled by the recent lack of ice. “We must take care that economic activity in the Arctic is sustainable and does not exacerbate the effects of climate change and environmental degradation.”

In additional remarks at the Center for American Progress, Papp outlined an extensive list of potential

U.S. actions on climate change at the council, including implementing any council recommendations on black carbon, pushing member countries to reduce methane emissions and pursuing a formal postponement or a ban on Arctic fishing.

He also called for implementing recommendations from a report to build resilience in local communities, an inventory of fresh water in vulnerable areas suffering from erosion and contamination, and a renewable pilot project in the far north to move areas away from soot-producing diesel.

At CSIS, he further outlined three broad principles for the U.S. chairmanship, including one directly about climate change mitigation and adaption. The other two also touched on the issue: Arctic Ocean stewardship and improving living conditions for Arctic residents.

"Why would we not focus on black carbon? We are going to," said Papp, noting that an Arctic Council task force has been developing a set of recommendations for member countries on curbing and tracking the sooty substance produced from the incomplete combustion of fossil fuels, biofuels and biomass.

It's a concern for the Arctic because dark ice and snow absorb more heat and melt more easily. The council task force recommendations -- which have not been formally released yet -- are expected to outline new reporting requirements for black carbon emissions, among other things.

"We are going to work very hard to implement those. . . . We will work with our seven partners as well to get them to do the same . . . to inventory

those activities that produce black carbon . . . and to show actionable progress throughout the time we have the chairmanship," Papp said at the center.

Navigating through a sea of issues

He added that the United States would also work to implement binding agreements put in place in the past three years among countries at the council about search-and-rescue and oil spill response, and push for completion and adoption of the polar code at the International Maritime Organization, a set of proposed mandatory rules for ships operating in polar regions to protect the environment and prevent Titanic-like disasters. Arctic countries should "take the lead in making sure the [polar code] standards are adopted within countries," he said.

The Arctic Council can be a wonky body, with terminology about monitoring assessments and working groups. Formed in 1996, it consists of eight Arctic nations -- Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States -- and permanent participants representing indigenous peoples including the Inuit Circumpolar Council and the Aleut International Association. In addition, there are several observer countries that can participate in meetings as well, including China and India.

While the council wields little direct power, it is a forum for countries to work out agreements among themselves, such as the legally binding pact signed in 2013 on oil spill response. It also is a venue for scientific reports, such as a 2013 assessment of ocean acidification in the Arctic.

For those reasons, the current themes from Papp and other U.S. officials on climate change could translate into significant results on the ground, according to some analysts.

That could be in simpler ways, such as providing a platform for scientists to develop protocols for measuring emissions from melting permafrost. Or it could be more formal agreements between nations on implementing provisions early from other international bodies, analysts say.

The proposed polar code at the International Maritime Organization, for example, is aimed at reducing environmental catastrophes and disasters in polar regions (ClimateWire, April 1). “There’s nothing stopping the eight Arctic states from implementing the code early,” said Rosenthal of Earthjustice.

The Arctic Council task force working on black carbon has been developing a framework for years, so the United States will be the first chairing country with an opportunity to implement the coming recommendations, Rosenthal said. While that may involve simple advocacy, it also provides the United States an opportunity to use existing laws for Arctic purposes.

As one example, the 2005 Diesel Emissions Reduction Act could be used via the annual appropriation process to provide Arctic-specific funds for weaning northern Arctic communities off diesel -- their main fuel source, and a contributor to black carbon, she said. The retrofit equipment to reduce diesel emissions is well-established, so it’s a matter of will and money, she said.

"If the U.S. showed some leadership, they could give the idea to the other eight" Arctic countries, she said.

With methane, there could be a similar push perhaps leading to additional assessments and an eventual agreed-on pot of money for demonstration projects, to repair gas leaks and capture the fossil fuel.

Yesterday, the Clean Air Task Force released a report on leveraging the Arctic Council to make progress on black carbon and methane (*see related story*). While not directly responding to Papp's remarks, the group makes formal recommendations on how to use the council to curb short-lived climate pollutants that have a disproportionate impact on ice.

One of the key things the council could do is work with oil and gas companies operating in the Arctic to deploy best practices, said Lindsey Griffith, author of the report and consultant to the Clean Air Task Force.

"There's a lot of flaring that goes on in Russia that is regulated but not enforced," she said as one example. Similarly, existing programs in Alaska could be leveraged more to shift communities reliant on polluting diesel to renewables, Griffith said. Another idea would be to push the International Maritime Organization to prohibit heavy fuel use in the Arctic Ocean, she said.

Meeting includes largest emitters

Other analysts said one of the biggest opportunities for the United States may be simply using the bully pulpit of the chairmanship more, to educate the global community about basic facts on the Arctic, such as a 14 percent decline in Arctic summer sea ice per decade since the late 1970s. Also, there is disappointment among the six permanent participants at the council that it is not looking more at carbon dioxide reductions, said Whit Sheard, director of the International Arctic Program at the Ocean Conservancy.

The six participants are sending a rare letter to officials at the Yellowknife meeting this week to urge greater consideration of CO2, considering that the world's largest emitters are in the same room at the council, said Sheard [who works with one of the participants, the Inuit Circumpolar Council]. The inclusion two years ago of observer nations like China provides a rare opportunity to hash out differences on CO2 in a smaller forum than the United Nations and then take some sort of agreement, or similar mindset, to international climate negotiations, Sheard said.

"I think there's just hope it can be a parallel process that moves this global process along a little faster because of having countries feeling the changes more rapidly in the room with the biggest emitters," he added.

However, the Arctic Council can be a slow forum, and there's no guarantee that what is presented this week at the meeting will eventually be the U.S. agenda. The climate change theme is not entirely new at the council, as Norway emphasized it during its chairmanship, noted Heather Conley, director of

the Europe program at the Center for Strategic & International Studies.

“The problem is, it’s really hard to provide really pragmatic policy deliverables with such an overarching theme. . . . Climate change and the policies around climate change have different meanings to each of the eight Arctic members,” she said.

For Ebinger, methane and CO2 emission reductions are noble goals but perhaps more appropriate topics for the United Nations, considering the range of countries contributing to greenhouse gases. He noted that when Brookings put together a recent Arctic report, there was a discussion about bringing regulators together to share ideas, but some countries viewed that as a violation of sovereignty.

Papp emphasized the need to implement the existing search-and-rescue and oil spill response agreements in his speeches, but there’s a risk of trying to do too much and diverting attention away from those council agreements, according to Ebinger. In his view, there’s also a risk of overreach with something like a fishing ban, considering it is unknown exactly how climate change is driving fish migrations.

The nightmare scenario for a lot of people remains a major cruise or shipping accident, and there’s not appropriate equipment in place -- from helicopters to life rafts -- to control the situation, Ebinger said.

While the council agreements have been signed, there has been little movement on the ground, outside of divisions of which country is responsible for swaths of the Arctic Ocean when it comes to search-and-rescue operations. A better focus than

> climate change would be to add teeth and commit resources to what's already out there, according to Ebinger. That is especially so, he said, considering the high costs of equipment.
>
> "There's just so many things that need to be done with emergency response that I think we would do better in our chairmanship to pay attention to, and really start lobbying the Congress that serious money has to be spent if we want to pretend we are remotely a major player in the Arctic," he said.

Christa Marshall, *U.S. takes the helm of council assigned to deal with fast-changing Arctic*, E&E PUBLISHING, LLC (Oct. 10, 2014), http://www.eenews.net/stories/1060007544/print (omissions and first alteration in original).

PIRACY

Recent Incidents of Piracy in South East Asia

The Maritime Executive – "Tanker Goes Missing off Indonesia, Suspected Hijack"

On May 27, 2014, a Thailand-registered product tanker, ORAPIN 4 departed Singapore for Pontianak, Indonesia with 3,377 metric tons of Automotive Diesel Fuel on board. The tanker, along with the fuel and its fourteen member crew, never made it to her final destination. MarEx, *Tanker Goes Missing off Indonesia, Suspected Hijack*, THE MARITIME EXECUTIVE, May 30, 2014, *available at* http://www.maritime-executive.com/article/Tanker-Goes-Missing-off-Indonesia-Suspected-Hijack-2014-05-30.

The Maritime Executive – "Another Tanker Robbed off Malaysia"

On June 7, 2014, a tanker traveling from Singapore to Labuan was robbed by six pirates seventy-eight miles off the Tanjung Batu Bintulu coast of Malaysia. The pirates restrained the twenty-two member crew and transferred petroleum off the MT BUDI

MERSA DUA to a waiting barge. The pirates released the captain and crew unharmed. MarEx, *Another Tanker Robbed off Malaysia*, THE MARITIME EXECUTIVE, June 6, 2014, *available at* http://www.maritime-executive.com/article/Another-Tanker-Robbed-off-Malaysia-2014-06-12.

The Maritime Executive – "Pirates Scared Off in South China Sea"

On June 14, 2014, pirates attacked the tanker AI MARU, which was carrying marine fuel oil in the South China Sea approximately thirty nautical miles south of Pulau Aur, Johor, Malaysia. Upon learning of the attack, the Republic of Singapore Navy and the Royal Malaysian Navy deployed the patrol vessels RSS GALLANT and TERENGGANU KD. Their presence thwarted the attack and scared off the pirates. MarEx, *Pirates Scared Off in South China Sea*, THE MARITIME EXECUTIVE, June 6 2014, *available at* http://www.maritime-executive.com/article/Pirates-Scared-Off-in-South-China-Sea-2014-06-16.

The Maritime Executive – "Product Tanker Attacked in South China Sea"

On July 4, 2014, the MORESBY 9, a Honduras flagged product tanker went missing thirty-four nautical miles from Anambas Islands, Indonesia in the South China Sea. The tanker was carrying two thousand two hundred metric tonnes of MGO at the time it tanker was boarded. As the MORESBY 9 was the seventh known case of coastal tankers coming prey to hijacking for the cargo of diesel or gas oil in the area over the last three months, a concern has developed as to the abnormal and increasing trend of attacks within the region. MarEx, *Product Tanker Attacked in South China Sea*, THE MARITIME EXECUTIVE, July 7, 2014, *available at* http://www.maritime-executive.com/article/Product-Tanker-Attacked-in-South-China-Sea-2014-07-07.

The Maritime Executive – "Authorities Search for Tanker Amid Hijack Fears"

On October 2, 2014, a Vietnamese oil tanker, THE SUNRISE 689, vanished from radar one hundred and fifteen miles from Singapore in route to the Quang Tri province in central Vietnam. The tanker had a crew of 18 people and was carrying over 5,000 tonnes of gas oil. According to the International Maritime Bureau, at least eleven vessels prior to THE SUNRISE 689 have been hijacked in the Strait of Malacca or South China Sea since April. MarEx, *Update: Authorities Search for Tanker Amid Hijack Fears*, THE MARITIME EXECUTIVE, Oct. 8, 2014, *available at* http://www.maritime-executive.com/article/Update-Authorities-Search-for-Tanker-Amid-Hijack-Fears-2014-10-08.

Recent Incidents of Piracy in the Horn of Africa

The Maritime Executive – "TORM Tanker Deters Pirate Approach"

On June 28, 2014, the TORM SOFIA successfully deterred a pirate attack in the Gulf of Aden through activation of the maritime industry's Best Management Practices for Protection against Somalia based Piracy ("BMP 4") program. The pirates abandoned their approach and the crew was unharmed during the thwarted piracy attempt. MarEx, *TORM Tanker Deters Pirate Approach*, THE MARITIME EXECUTIVE, June 30, 2014, *available at* http://www.maritime-executive.com/article/TORM-Tanker-Deters-Pirate-Approach-2014-06-30.

Recent Incidents of Piracy in West Africa

The Maritime Executive – "Product Tanker Ambushed in Gulf of Guinea"

On August 9, 2014, a product tanker encountered pirates two hundred nautical miles of the Nigerian shoreline. The crew mustered in the tanker's safe room, and the pirates failed to board the vessel. The pirates could not keep up with the tanker, and

eventually gave up pursuit. The attack suggested a higher level of intelligence regarding the vessel's movement representing a shift towards a more sophisticated piracy operation in the Gulf of Guinea involving scouts monitoring the departure and destination ports of a vessel to coordinate the attack when the vessel is most vulnerable. The pirates involved in this incident are still at large. MarEx, *Product Tanker Ambushed in Gulf of Guinea*, THE MARITIME EXECUTIVE, Aug. 10, 2014, *available at* http://www.maritime-executive.com/article/Product-Tanker-Ambushed-in-Gulf-of-Guinea-2014-08-10.

The Maritime Executive – "Pirates Attack Tanker off Ivory Coast"

On August 27, 2014, armed pirates robbed a petroleum products tanker and held the crew hostage forty-five nautical miles off the Ivory Coast's port of Abidjan. Pirate attacks in Gulf of Guinea have almost doubled since last year, which has caused a significant increase in insurance costs for shipping companies. Despite the piracy risk, West Africa's Gulf of Guinea remains an important location in international shipping as it is a significant source of the world market's oil, cocoa, and metals. Unlike the Horn of Africa, the regional waters off of Nigeria, Benin, Togo, Ghana and Ivory Coast are not patrolled by international navies engaging in counter-piracy missions. MarEx, THE MARITIME EXECUTIVE, *Pirates Attack Tanker off Ivory Coast*, Sept. 3, 2014, *available at* http://www.maritime-executive.com/article/Pirates-Attack-Tanker-off-Ivory-Coast-2014-09-03.

Christine M. Walker
Fowler White Burnett P.A.

BSEE/BOEM

BSEE Conducts Unannounced Drill

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that it initiated a day-long unannounced spill

> response drill involving Murphy Exploration and Production Company, testing that company's ability to respond to a simulated spill event at its offshore facility in the Gulf of Mexico. (7/25/14).

BRYANT'S MARITIME BLOG (July 28, 2014) www.brymar-consulting.com.

BSEE Conducts Review of Oil Spill Response Equipment

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release (http://www.bsee.gov/BSEE-Newsroom/BSEE-NewsBriefs/2014/BSEE-Conducts-Oil-Spill-Response-Equipment-Review-inCalifornia/) stating that its Oil Spill Response Division (OSRD) conducted an onsite review of oil spill response equipment listed in DCOR, LLC's Oil Spill Response Plan for platforms offshore Long Beach, California. OSRD conducts these verifications on a rotating basis. (8/29/14).

BRYANT'S MARITIME BLOG (Sept. 2, 2014) www.brymar-consulting.com.

BSEE & USCG – MOA Re Fixed OCS Facilities

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release [found at http://www.bsee.gov/BSEE-Newsroom/BSEE-News-Briefs/2014/BSEE-and-Coast-Guard-Sign-Memorandum-of-Agreement-for-Regulating-Fixed-Outer-Continental-Shelf-Facilities/] stating that a Memorandum of Agreement [found at http://www.bsee.gov/uploadedFiles/BSEE/Newsroom/Publications_Library/MOA-OCS-09Signed19Sep2014.pdf] has been signed with the US Coast Guard for regulating fixed outer continental shelf (OCS) facilities. (9/19/14).

BRYANT'S MARITIME BLOG (Sept. 25, 2014) www.brymar-consulting.com.

BSEE and USCG Issue DP Safety Alert

BSEE and the U.S. Coast Guard issued a Safety Alert on May 20, 2014 notifying owners and operators of vessels using dynamic positioning ("DP") of recent system failures resulting in a loss of position while conducting critical Outer Continental Shelf (OCS) activities. BSEE strongly recommended that leaseholders/operators consider Coast Guard recommendations for DP vessels when evaluating potential hazards and implementing contractor safe work practices. Coast Guard recommendations include ensuring a defined Critical Activity Mode of Operation (CAMO), proper equipment inspection, repair, and maintenance, and a structured competence assurance program, among others. Safety Alert, Coast Guard Alert #08-14, BSEE Alert #312, Dynamic Positioning System Failures on Vessels Other Than Mobile Offshore Drilling Units (May 20, 2014).

Dana Merkel
Blank Rome LLP

BOEM – Atlantic OCS G&G Activities

> The Bureau of Ocean Energy Management (BOEM) issued the official notice of availability of a Record of Decision (ROD) for the Atlantic outer continental shelf (OCS) Proposed Geological and Geophysical Activities Mid-Atlantic and South Atlantic Planning Areas, Final Programmatic Environmental Impact Statement (PEIS). 79 Fed. Reg. 42815 (July 23, 2014).

BRYANT'S MARITIME BLOG (July 23, 2014) www.brymar-consulting.com.

BOEM – Risk Management, Financial Assurance & Loss Prevention

> The Bureau of Ocean Energy Management (BOEM) is extending, through 17 November, the period within which to submit comments on its advance notice of proposed rulemaking regarding risk management, financial assurance & loss prevention associated with industry activities on the US outer continental shelf (OCS). 79 Fed. Reg. 61041 [found at http://www.gpo.gov/fdsys/pkg/FR-2014-10-09/pdf/2014-24165.pdf] (10/9/14).

BRYANT'S MARITIME BLOG (Oct. 9, 2014) www.brymar-consulting.com.

Offshore Platform Owner Fined for Oil Discharges

> EPA and Bureau of Safety and Environmental Enforcement secure settlement in first joint judicial enforcement action under Clean Water Act and Outer Continental Shelf Lands Act
>
> Under a settlement agreement with the United States, ATP Infrastructure Partners, LP (ATP-IP) will pay a $1 million civil penalty and perform corrective measures to resolve claims by the U.S. under the Clean Water Act and the Outer Continental Shelf Lands Act (OCSLA) of unauthorized discharges of oil and chemicals from an oil platform into the Gulf of Mexico, announced the U.S. Environmental Protection Agency (EPA), the Department of Justice, and the Department of the Interior's Bureau of Safety and Environmental Enforcement (BSEE). This is the first joint judicial enforcement action involving EPA and BSEE claims in response to alleged violations of both the Clean Water Act and OCSLA.

. . . .

> . . . ATP-IP will be required to have the ATP Innovator's wastewater treatment operations and surface production-safety systems independently audited for Clean Water Act and OCSLA compliance if the facility is used or leased in the future by ATP-IP or a related entity.

The proposed consent decree, lodged in the Eastern District of Louisiana, is subject to a 30-day public comment period and court review and approval. A copy of the consent decree is available on the Department of Justice website at http://www.justice.gov/enrd/Consent_Decrees.html.

MarEx, THE MARITIME EXECUTIVE, *Offshore Platform Owner Fined for Oil Discharges*, Oct. 17, 2014, *available at* http://www.maritime-executive.com/article/Offshore-Platform-Owner-Fined-for-Oil-Discharges-2014-10-17.

US DOJ – Jordanian Shipping Company Fined $500,000

> The Department of Justice (DOJ) issued a news release stating that Arab Ship Management Ltd [a ship management company based in Jordan,] pleaded guilty in federal court to violating the Act to Prevent Pollution from Ships and to pay a criminal penalty of $500,000. An illegal piping arrangement for overboard discharges was found on the livestock carrier vessel Neameh and the vessel's oil record book had not been accurately maintained. (5/21/14).

BRYANT'S MARITIME BLOG (May 21, 2014) www.brymar-consulting.com.

Adelaida J. Ferchmin
Chaffe McCall LLP

Liability Limit Increases – CPI

> The US Coast Guard proposes to increase the limits of liability under the Oil Pollution Act of 1990 (OPA 90) to reflect increases in the Consumer Price Index. The liability limits for most covered entities is to be increased by about 9%, but the limit for offshore facilities is to be increased by 78% since it has previously been adjusted. Language is also proposed to clarify applicability of OPA 90 limits of liability to edible oil cargo tank vessels and to tank vessels designated as oil spill response vessels. Comments should be submitted by October 20. 79 Fed. Reg. 49205 (August 19, 2014).

BRYANT'S MARITIME BLOG (Aug 19, 2014) www.brymar-consulting.com.

Reporting Pollutants

"The US Coast Guard issued a news release [found at http://www.uscgnews.com/go/doc/4007/2242262/] stating that an oil spill reported in Buzzards Bay turned out, on closer examination, to be a large concentration of jelly fish." BRYANT'S MARITIME BLOG (Sept. 16, 2014) www.brymar-consulting.com. "The Coast Guard appreciates mariners reporting possible pollution incidents even if they do end up being nothing more than naturally occurring events." News Release, U.S. Coast Guard Newsroom, Coast Guard Determines Reported Pollution to be Jelly Fish in Buzzard's Bay, Mass. (Sept. 13, 2014) *available at* http://www.uscgnews.com/go/doc/4007/2242262/.

USCG – Oil Record Book

> The US Coast Guard is revising its Oil Record Book (ORB) to conform to the latest MARPOL Annex I amendments. It has posted a draft ORB [found at http://www.regulations.gov/#!documentDetail;D=USCG-2010-0194-0015], but this version has not been finalized. In the meantime, the Coast Guard has issued a letter [found at http://www.uscg.mil/hq/cgcvc/cvc/marpol/sdoc/Serial_756-Continued_use_of_the_2007_Oil_Record_Book-CG-4602A-Rev_01-07.pdf] to vessel masters and chief engineers regarding the continued use of the 2007 ORB. Additional guidance may be found in MEPC.1/Circ.736/Rev.2 [found at http://www.uscg.mil/hq/cgcvc/cvc/marpol/sdoc/MEPC_1_Circ_736_rev_2.pdf]. (9/24/14).

BRYANT'S MARITIME BLOG (Sept. 25, 2014) www.brymar-consulting.com.

Adelaida J. Ferchmin
Chaffe McCall LLP

Great Lakes – Dry Cargo Residue Discharges

> The US Coast Guard issued a notice stating that the Office of Management and Budget (OMB) has approved the information collection request associated with the 31 January 2014 regulation concerning the discharge of bulk dry cargo residue in US waters of the Great Lakes. 79 Fed. Reg. 54907 [found at http://www.gpo.gov/fdsys/pkg/FR-2014-09-15/pdf/2014-21893.pdf] (September 15, 2015). *Note: In other words, the Coast Guard can now enforce those recordkeeping requirements contained in its earlier rulemaking.*

BRYANT'S MARITIME BLOG (Sept. 15, 2014) www.brymar-consulting.com (original emphasis).

NRDA

NOAA – Indirect Cost Rates

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice announcing its new indirect cost rates on the recovery of indirect costs for its component organizations involved in natural resource damage assessment and restoration activities for FY 2013. 79 Fed. Reg. 61617 [found at http://www.gpo.gov/fdsys/pkg/FR-2014-10-14/pdf/2014-24112.pdf] (10/14/14).

BRYANT'S MARITIME BLOG (Oct. 14, 2014) www.brymar-consulting.com.

OIL SPILL LIABILITY TRUST FUND

Court – Spill Responders' Right to OSLTF Compensation

> The US Court of Appeals for the Fifth Circuit ruled that the Oil Pollution Act of 1990 (OPA 90) provides the exclusive source of law for an action involving a responsible party's liability for removal costs governed by OPA. In the instant case, defendant barge owner was determined to be a responsible party with regard to the release of oil from the barge DM 932 following a collision with the MV Tintomara in the Mississippi River on 23 July 2008. When the defendant did not fully pay the claims of third party defendant spill responders within the required 90 days, they sought and obtained payment from the Oil Spill Liability Trust Fund (OSLTF), which then brought suit against defendant to recover the amounts paid. Defendant contended that the spill responders failed to provide

> adequate documentation for the amounts billed to and paid out of the OSLTF. The court held that the responsible party does not have a cause of action against spill responders who exercised their statutory right to file claims with the OSLTF after the responsible party failed to timely pay their claims. US v American Commercial Lines, No. 13-30358 (5th Cir., July 16, 2014).

BRYANT'S MARITIME BLOG (July 18, 2014) www.brymar-consulting.com.

TEXAS CITY Y SPILL UPDATES

> The Texas General Land Office (GLO) posted the June 2014 edition of The Responder newsletter. This edition has articles regarding the Texas City Y oil spill, as well as one on the scrapping of USS Forrestal in Brownsville. (6/23/14).

BRYANT'S MARITIME BLOG (June 26, 2014) www.brymar-consulting.com.

OPA PRESENTMENT

Commercial clammer brought putative class action on behalf of all members of the Boston Clamdiggers Association against the Massachusetts Port Authority and Swissport Fueling, Inc. alleging that as a result of a fuel spill which occurred at Boston Logan International Airport, several productive and profitable clam beds adjacent to the airport were severely impacted. The clammers alleged negligence under general maritime law and also sought recovery of damages pursuant to the Oil Pollution Act of 1990. Defendants filed a motions to dismiss all claims.

The court held that it lacked jurisdiction to hear the general maritime claim because the action of the tortfeasor -- the fueling of jet aircraft adjacent to navigable waters, is not a traditional

maritime activity. The court discussed the evolution of the test for admiralty jurisdiction and also admiralty jurisdiction as applied to aviation activities. The court cited to the Supreme Court decision in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock, Co.,* which held that the focus of the test for traditional maritime activity is on the activity of the tortfeasor, not the activities of the injured party. 513 U.S. 527 (1995). The court concluded that fueling an aircraft is not a traditional maritime activity, therefore admiralty jurisdiction was not present.

OPA's presentment provision provides, that unless an exception applies, a claimant must present his claims to the Responsible Party and may only bring suit after, either the Responsible party denies liability, or the claim is not paid within ninety days from presentment. Notably, the presentment requirement is independent of OPA's three year statute of limitations provision. In order to satisfy both the presentment requirement and the statute's time bar, the claimant must present his claim to the Responsible Party at least ninety days before the end of the three year statute of limitations period.

The clammers found themselves wedged between a clam bed and a hard spot. The defendants were not designated as the Responsible Party until fifty-five days before the end of the three year statute of limitations. The clammers could not have met both the threshold requirement of presentment, and filed their suit before the OPA three year statute of limitations had run. The court looked to the plain meaning of OPA and determined that the best course of action would be to stay the OPA action for ninety days before permitting the suit to proceed. *Denehy v. Mass. Port Auth. & Swissport Fueling, Inc.*, 42 F.Supp.3d 301 (D. Mass. 2014).

Scott Gunst,
Reeves McEwing, LLP

[Editors' note: With considerable thanks to Dennis Bryant, whose updates and blog (www.brymar-consulting.com) have provided an invaluable resource to the generation of this newsletter; and also to Jennifer Porter, who has solicited and

organized contributions from volunteers from the MLA Young Lawyers' Committee, namely Adelaida J. Ferchmin, Alexander T. Gruft, Scott Gunst, Rebecca Hamra, Gregory F. Linsin, Dana Merkel, Patricia O'Neill, Jennifer Porter, John c. Scarborough, Jr., Brendan Sullivan, Christine M. Walker and Alan Weigel.]

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Chair: Andrew C. Wilson
Editor: Julia M. Moore

Newsletter - Fall 2014

FROM ACROSS THE POND

Rhys Clift of Hill Dickinson, LLP (London), appeared at the MLA Spring meeting of the Marine Insurance & General Average-Committee in New York to report on developments related to certain reform efforts associated with insurance contract law in the UK. He subsequently provided this summary:

Reform of Insurance Contract Law: The Insurance Contracts Bill (Latest Edition 17th June 2014) – A Short Note

The Joint English and Scottish Law Commission have been engaged in a project to propose reform to English (and Scottish) insurance contract law, wading through the labours of Hercules, for nearly ten years.

Thus far only a short statute has been created in respect of certain aspects of insurance law so far as it affects the placement of insurance by consumers; as Plutarch once said: the mountain has brought forth but a mouse.

However, a draft Insurance Contract Law Bill (that is draft legislation) has been issued by the Joint Commission which has far more wide ranging implications. If this draft Bill attains the Royal Assent and becomes law there will be very significant change to insurance contract law (both that affecting consumers and business purchasers of insurance).

The Joint Commission has issued several drafts of the Insurance Contract Law Bill commencing in January 2014, the

latest of which was issued on 17th June 2014. The Joint Commission has indicated that H M Treasury would be the sponsoring department within Government and intends to consult on whether the draft Bill has broad consensus of support, to determine whether it is suitable for consideration under the procedure for Law Commission Bills (see further below). The period within which H M Treasury would wish to receive views on the latest Bill is very short (2nd July 2014). The latest version of the draft Bill (and the Explanatory Notes published with it) are different in significant respects to earlier iterations of the draft Bill. This window of time (two weeks) is a very short period within which to offer a response on a matter of such complexity and importance.

In October 2010 the House of Lords approved a procedure for Law Commission Bills which was to be used exclusively for those that attract broad consensus support in Parliament. The Joint Commission is hopeful that this Bill would be suitable for this procedure, in the knowledge that this last Parliamentary session is particularly short ending on 30th March 2015. As we understand it, if there are concerns or objections to the Bill in its present form it might be better that these are put forward on an individual basis that is by individual syndicate, individual company, individual broker or assured (rather than by group or association) in order that the clearest statistical picture can be obtained as to the support or otherwise which the Bill might attract.

English law in relation to insurance (both marine and non-marine) has been substantially unamended (by statute) for 100 years. Indeed, insurance contract law (both marine and non-marine) is a matter of Common Law and has progressively grown and been adapted over a period of more than 150 years, by the work of the judiciary. The Marine Insurance Act 1906 (which substantially codifies the law) did not change the law but merely set out the law as it was then understood.

What is now contemplated, however, is a very significant and wide ranging change to insurance contract law (in part

affecting consumers and business purchasers), in particular with regard to:

- Non-disclosure
- Misrepresentation
- Breach of warranty
- Damages for late payment of claims

So far as business insurance is concerned, it is contemplated that in many respects insurers would be entitled to contract out of the provisions of the new Act. However, it might perhaps be rather difficult to contract out (as a matter of market practice or trading) rather than not being obliged to offer coverage in the first place. And there will, in any event, be stringent "transparency" requirements where effort is made to contract out. An alternative solution (to a wide liberty to contract out) might be to proceed with a Bill that is designed to protect consumers (and perhaps SMEs) only, in much the same way as the law protects consumers in the making of contracts and in obtaining credit, but to exclude business insurance from the scope of reform (including Marine, Trade, Energy and Aviation), in much the same way as MAT risks were excluded from the reforms proposed by the Law Commission in its last report in 1980.

It is often said that it is desirable that there should be certainty in the law; this is plainly right in terms of speed, cost and risk in resolving disputes and claims (and works to the benefit of insured and insurer). Where both sides have some confidence on the meaning of the law, the application of statutes and standard contract terms, the thinking is that disputes should be capable of (early) resolution. The Contract Certainty initiative in the insurance market was designed to further this objective in terms of gathering together all the pieces of paper that make up an insurance (or reinsurance) contract and ensuring that they are put into the hands of the assured or reassured at an early date (albeit, it

remains clear that certainty of content (in terms of paperwork) does not necessarily entail *certainty of meaning*).

As we say, so far as the substantive law is concerned the Common Law has progressively inched towards some measure of certainty by progressive adaptation made over more than 100 years. However, if the Insurance Contract Law Bill makes law, much of the law which is accumulated and has been progressively crafted in this way will cease to apply. English law will then enter into a period of significant uncertainty which might take decades to resolve. In other words it might take decades (with adaptation of policies and costly litigation in between) to get back to the point where insurance practitioners operate within the same degree of certainty as it might be said they do now.

Wide ranging change may be required to claims handling, to reserving procedures, and to policy wordings.

On 10th June 2014 Hill Dickinson held a seminar at which Jonathan Gilman QC, Claire Blanchard QC and Rhys Clift of Hill Dickinson spoke on the amendments proposed to insurance contract law on the basis of the draft Bill then available (dated 30th May 2014). The talks were focused on the significant changes contemplated by the Bill under the heading: "Insurance Contract Law Bill: Hidden Change and Unintended Consequences". Further detail may be published in due course.

We shall issue further bulletins on this vital new piece of legislation in the next few months (particularly of course if the draft Bill finds its way onto the Statute Book and becomes law).

Rhys Clift
Hill Dickinson LLP
20 June 2014

[Editors' note: Since this note was first written the draft Bill has progressed through Parliament. This is the link to the relevant part of the Law Commissions' site:

http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm.

It appears that the Law Commission is not pursuing the establishment of a new remedy of damages for late payment (see the current Bill). The creation of such a right remains an aspiration of the Commission, we believe. This PPT sets out a summary of the position under English law: http://www.jdsupra.com/legalnews/insurance-contracts-law-bill-damages-f-59787/.]

RECENT CASES OF INTEREST

Uberrimae Fedei/Utmost Good Faith

New York Marine and General Insurance Co. v. Continental Cement Co., LLC, 761 F.3d 830, 2014 AMC 2063 (8th Cir. 2014).

In a recent decision, the Eighth Circuit Court of Appeals affirmed the continued vitality of the maritime doctrine of utmost good faith and held that an insured's failure to disclose the findings of a general survey of the vessel was a violation of the duty which voided the policy ab initio. The decision in *New York Marine and General Insurance Co. v. Continental Cement Co., LLC* was the first time that the Eighth Circuit declared the duty of utmost good faith to be entrenched federal maritime precedent. Previously, the Eighth Circuit had applied the duty in non-marine insurance contexts.

In doing so, the Eighth Circuit joins the federal courts of appeal in the First, Second, Third, Ninth, Tenth and Eleventh Circuits which have confirmed that the doctrine is entrenched federal maritime precedent. For those keeping score, there is no decision from the Fourth, Sixth or Seventh Circuit courts of appeals, but opinions of the district courts sitting in those Circuits have applied the doctrine, relying on decisional law from other Circuits. Only the Fifth Circuit has explicitly rejected the doctrine as established federal maritime precedent.

The decision in *Continental Cement*, arose out of the sinking of the cement barge MARK TWAIN on the Mississippi River in 2011. The MARK TWAIN was a steel-hulled barge built in the 1920's using riveted construction. In 2008, Continental Cement considered retiring the MARK TWAIN from service as a transport barge and to use it as a stationary dock barge instead. To determine whether the MARK TWAIN was fit for that purpose, Continental Cement had the barge inspected by a marine engineer who noted that while there were no active hull leaks, there was evidence that numerous rivets had leaked in the past. The survey also observed that some of the bulkheads were no longer watertight because they were missing rivets and the bilge system was "not even close" to functioning. The survey concluded with ten recommendations for repair. Continental Cement followed none of those recommendations and placed the MARK TWAIN back in service as a transport barge.

In 2010, Continental Cement applied for a marine insurance policy covering all five (5) of its barges, including the MARK TWAIN, from New York Marine and General Insurance Co. and Starr Indemnity and Liability Company ("Starr Indemnity"). The application for the policy requested that the applicant provide "recent surveys, if available." Continental Cement attached a copy of a 2006 Appraisal Report that listed the value of each barge, but did not provide Star Indemnity with the 2008 survey noting that the vessel exhibited signs of leaking, a lack of watertight integrity in some bulkheads and a non-functioning bilge system. The policy was bound. Less than two (2) months later, the MARK TWAIN sank at Continental Cement's dock. Starr Indemnity denied coverage for the hull loss and wreck removal and filed the declaratory judgment action.

During discovery, Starr Indemnity learned about the 2008 survey and amended its complaint to assert that (1) Continental Cement breached its duty of utmost good faith by withholding the 2008 survey, and (2) the MARK TWAIN was unseaworthy at the time that Continental Cement applied for the coverage and, therefore, it breached its absolute warranty of seaworthiness. The matter went to trial where a jury found for Starr Indemnity and the

court entered judgment on the verdict that the "insurance policies for the barge MARK TWAIN have been voided at their inception." Continental Cement appealed arguing that the court erred by applying the federal maritime doctrine of utmost good faith instead of Missouri state law.

The Eighth Circuit Court of Appeals began its analysis by noting that a dispute arising under a marine insurance policy is governed by state law unless an established federal admiralty precedent addresses the issue raised, citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-21 (1955). Continental Cement argued that the doctrine of utmost good faith was not established federal admiralty precedent, relying on the Fifth Circuit's decision in *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991). The court rejected this view noting that the principal of utmost good faith was a "cardinal rule" of insurance contracts that had been previously recognized in other contexts within the Eighth Circuit. Surveying decisions from the Second, Third, Ninth and Eleventh Circuits, all of which found that the doctrine was established maritime precedent, the court concluded that "[b]ased on its lengthy history, we conclude that 'no rule of marine insurance is better established tha[n] the utmost good faith rule. … We decline to follow the approach adopted by a single circuit in *Anh Thi Kieu* or to fashion a new rule based on policy considerations urged by Continental Cement. Under the Supreme Court's longstanding framework in *Wilburn Boat*, "[o]ur only task is to determine whether *uberrimae fidei* is already an established rule of federal maritime law," and we conclude that it is." *New York Marine*, 761 F.3d at 840 (internal citations omitted).

Marine Insurance Co. Ltd. v. Cron, No. 3:13-CV-00437, 2014 WL 4982418 (S.D. Tex. Oct. 6, 2014).

While the Eighth Circuit used the doctrine of utmost good faith as a direct route to void a policy for breach of the duty of utmost good faith, the district court in Galveston reached the same conclusion in a similar case, but arrived at its decision using a more circuitous legal analysis.

In *Marine Insurance Co. Ltd. v. Cron*, plaintiff, Marine Insurance Company Limited ("Marine"), filed a motion for summary judgment against its insured, Cron, seeking to void the marine insurance policy issued on the yacht RELENTLESS based on Cron's misrepresentation of the purchase price of the yacht. Cron, the owner of a marine salvage repair and resale business in Texas, purchased the yacht at an insurance auction for $65,000 as a "constructive total loss" in 2010. After making some preliminary repairs, Cron sailed the vessel from New Jersey to Texas where he purportedly began a "systematic complete overhaul" using "first class materials and craftsmanship, and restored the vessel to an excellent condition." *Marine Ins.*, 2014 WL 4982418, at *1.

In 2011, Cron refinanced the yacht and the bank required insurance. The insurance application specifically asked Cron to provide the "Market Price" and the "Purchase Price" of the vessel to be insured. Cron directed his insurance broker to fill in both blanks with $300,000, and attached a survey in support of the claimed market value. Marine subsequently issued a policy with an agreed value of $305,000 on the RELENTLESS. The policy included a clause which provided that the policy "shall be governed by and construed in accordance with the laws of the State of New York."

In 2012, the RELENTLESS ran aground and sustained damage. While the vessel was still in drydock, it caught fire resulting in a total loss. Marine investigated and determined that the fire was intentionally set, but could not determine by whom. Marine then filed a declaratory judgment action seeking to void the policy for misrepresentations in the application for insurance and subsequently filed a motion for summary judgment seeking a declaration under New York law that the policy was void ab initio for Cron's misrepresentation of the purchase price. The district court noted that resolution of the motion turned on the validity of the choice of law provision. If the clause was valid, then the misrepresentation of the purchase price "would constitute a material misrepresentation under New York's *uberrimae fidei* doctrine." *Id.* If the clause was invalid, Marine would have to prove that the misrepresentation was intentional under Texas state

law since the Fifth Circuit Court of Appeal's decision in *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991) held that the doctrine of *uberrimae fidei* was not sufficiently entrenched in maritime law to displace Texas state law on the issue.

To determine if the choice of law clause was valid, the district court applied the Fifth Circuit's two-part analysis set forth in *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc*., 585 F.3d 236 (5th Cir. 2009), which held that under federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable. The court noted that maritime law "follows the Restatement's approach" which instructs that the choice of law provision governs unless either: (1) the chosen state has no substantial relationship to the parties or transaction, and there is no other reasonable basis for the parties' choice; or (2) the state's laws conflict with the fundamental purposes of federal maritime law. Both requirements were met under the first prong.

The examination performed under the second prong, however, was considerably more complicated. The district court acknowledged a lack of clarity and consistency in case law stating, "[i]t is unclear if this requires a comparison between New York law and general maritime principles, or between New York law and the Texas law that maritime choice-of-law analysis would apply absent the forum selection clause….Circuit law is not clear on which is the proper comparison." *Marine Ins.*, 2014 WL 4982418, at *3 (internal citations omitted). The district court then conducted both analyses, finding support for this approach in Great Lakes.

In conducting the first comparison, the court found that New York's requirement of utmost good faith cannot be contrary to fundamental principles of federal maritime law, because the standards were the same. With respect to the second "contrary to fundamental principles" comparison, the court relied upon *Anh Thi Kieu's* direction that "state law should not be applied unless it bears a reasonable similarity to the federal maritime practice," and cited the Fifth Circuit's determination in *Anh Thi Kieu* that "the

fundamental nature of both laws [Texas and federal maritime] however, is the same. Texas insurance law shares the concern of federal maritime law that an assured should not profit from her material misrepresentations to the underwriter." *Anh Thi Kieu*, 927 F.2d at 887. The district court concluded that the choice of law provision was valid, New York law applied and Cron's misrepresentation of the purchase price voided the policy.

Material Misrepresentation in Insurance Application Voids Coverage Under State Law

Gamez v. Ace American Insurance Co., No. 11-22842, 2014 WL 3921366 (S.D. Fla. Aug. 11, 2014).

The decision in *Gamez* arose out of the mysterious disappearance of a new 32' Glasstream fishing yacht. The owner, plaintiff Gamez, loaned the yacht to Alexis Suarez, a recent acquaintance for a fishing trip in 2007. Neither the yacht nor Suarez were heard from again. Insurer Ace American Insurance Company ("Ace") denied coverage for the loss. The case was tried to a jury which determined that while Gamez had proved his claim, he was barred from recovery because Ace proved that Gamez had misrepresented material facts in the application for the policy related to the vessel's location, its ownership, the identity of the primary operator and the ownership of prior vessels. Gamez moved to set the verdict aside and for judgment as a matter of law under F.R.C.P. 50(b) or alternatively for a new trial under F.R.C.P. 59(a).

On the motion for judgment as a matter of law, Gamez argued that under Florida statutory law, a fraudulent misrepresentation only voids the policy if the misrepresentation "increased the hazard by any means within the control of the insured." *Gamez*, 2014 WL 3921366, at *1. Gamez then argued that because the cause of the vessel's loss was unknown, Ace could never carry the burden of proving that misrepresentation of Gamez's increased the hazard. The court disagreed noting that there were two distinct legal theories an insurer can assert to deny coverage under Florida law: fraudulent inducement and material breach. Distinguishing between the two, the court stated that a

breach of a warranty, condition or provision of coverage only excuses the insurer from paying the loss if the breach or violation "increased the hazard by any means within the control of the insured."

In contrast, the court held that misrepresentations in an insurance application were completely different. Misrepresentations in the application do not increase the risk of loss, like a breach of warranty, but interfere with the insurer's ability to assess the risk of loss before deciding how much coverage to provide and the corresponding premium. Therefore, misrepresentation was subject to a different standard. In order to avoid coverage, the misrepresentation must have affected "the insurer's liability to pay a certain amount of money. The misrepresentation need not increase the hazard." After noting that the parties' contract altered the statutory analysis by requiring that the misrepresentation be intentional, the court examined the evidence at trial and concluded that the evidence supported the jury's determination that Gamez had intentionally misrepresented the vessel's location, its ownership, the identity of the primary operator and the ownership of prior vessels. The district court further found that the jury could infer that these misrepresentations affected Ace's "liability to pay a certain amount of money." Because the verdict as to Ace's affirmative defense was founded on legally sufficient evidence, and was not contrary to the weight of evidence, the plaintiff's motions were denied.

Choice of Law – Admiralty Doctrine of Laches Rejected in Favor of New York Statute of Limitations

American Steamship Owners Mutual Protection and Indemnity Ass'n, Inc. v. Dann Ocean Towing, Inc., 756 F.3d 314, 2014 AMC 1531 (4th Cir. 2014).

This appeal arose out of a dispute between the American Steamship Owners Mutual Protection Association ("the Club") and its insured, Dann Ocean Towing, Inc. ("Dann") over whether the choice of law provision in the Club's marine insurance contract with Dann required application of New York's six (6) year statute

of limitations, or the equitable doctrine of laches typically applied in admiralty. Ultimately, the district court concluded that New York law applied, making the Club's claims against Dann time barred. The Court of Appeals for the Fourth Circuit affirmed.

The dispute originated when a tugboat owned by Dann grounded on a coral reef in 1998 resulting in property and environmental damage claims. Dann settled both claims in 2001 for a total amount of $2,170,000. The Club agreed to contribute $1,170,000 toward the settlement. However, when one of Dann's liability insurers became insolvent and could not pay its portion of the settlement leaving a shortfall of $278,552.55, the Club agreed to pay the shortfall to preserve the settlement, but reserved the right to recovery of same from Dann.

Thereafter, Dann refused to pay the shortfall. In response, the Club withheld payment to Dann for certain other insurance claims. Dann then refused to pay its insurance premiums for policy years 1999, 2000, and 2001. Finally, in August of 2008, the Club filed suit against Dann for breach of its insurance contract by failing to reimburse the Club's payment of the settlement shortfall and by failing to pay its premiums. Dann counter-claimed that the Club breached its contract by failing to pay claims. Both parties asserted that the other's claims against it were time-barred.

On cross motions for summary judgment in 2010, the district court initially concluded that the equitable doctrine of laches, rather than New York's six (6) year statute of limitations governed the timeliness of the Club's claims against Dann. In its laches analysis, the district court found that the Club's claim for the shortfall was not barred because the delay in filing suit was reasonable. The Club had made various out-of-court attempts to obtain reimbursement and the delay did not prejudice Dann. The district court subsequently changed its mind in 2012 and determined that the choice of law clause in the insurance contract compelled the application of New York's statute of limitations, which barred all but one of the Club's claims. The Club appealed.

The appeal centered on the choice of law clause in the contract which provided that the insurance contract “shall be governed by and construed in accordance with the law of the State of New York.” The Club contended on appeal that because the case arose under admiralty jurisdiction, the district court was required to apply laches as the procedural law of the maritime forum, rather than the state statute of limitations. The Fourth Circuit disagreed. Noting that the doctrine of laches typically applies to a maritime claim, the appellate court found that the parties to the contract elected to avoid the doctrine of laches by including an enforceable choice of law provision that required the application of another jurisdiction’s law (New York) and, implicitly, that jurisdiction’s statute of limitations.

The court stated: “We do not discern any contrary authority preventing a federal court sitting in admiralty from enforcing a valid choice of law provision in a maritime contract incorporating a statute of limitations, in place of the traditional doctrine of laches. Accordingly, we agree with the district court . . . that an otherwise valid choice of law provision in a maritime contract is enforceable and may require application of a jurisdiction’s statute of limitations, in lieu of the doctrine of laches, to govern issues regarding the timeliness of claims asserted under that agreement.” *American Steamship*, 756 F.3d at 318-19. The court found no merit in the Club’s claim that the choice of law clause was not broad enough to encompass the “procedural” rules of the chosen jurisdiction in addition to the “substantive” rules. Finding the plain language of the insurance contract to be unambiguous, the court held that the clause did not contain any indication that the parties intended to preserve the application of the doctrine of laches.

Finally, the appellate court noted that even if it were to find that the clause was ambiguous, which it did not decide, then the court would invoke the rule of contra proferentum and construe any ambiguity against the Club as drafter of the contract and the Club Rules which governed that contract.

Wharfinger's Legal Liability – No Coverage for Dock Collapse

Essex Insurance Co. v. Detroit Bulk Storage, Inc., No. 11-13277, 2014 WL 3687032 (E.D. Mich. July 23, 2014)

This decision arose out of the structural failure of a dock owned by Detroit Bulk Storage ("DBS") which collapsed and created an open void resulting in claims for property damage, as well as a claim for the loss of an unknown quantity of bulk salt which had been recently off-loaded from a vessel. DBS made a claim on plaintiff Essex Insurance Co. ("Essex"), which issued a "Wharfinger's Legal Liability" policy to DBS. In response, DBS filed a declaratory judgment action seeking a declaration that the dock collapse did not fall within the Wharfinger's Policy and was not a covered occurrence. DBS counterclaimed, arguing that the policy was ambiguous and that it constituted an "illusory promise" which barred Essex from avoiding coverage.

In arriving at its decision, the district court conducted a thorough analysis of contract interpretation and construction. The court began by conducting a threshold choice of law analysis to determine if issues of contract interpretation were governed by federal maritime law or Michigan state law. After resolving that question in favor of Michigan state law, it dismantled each of DBS' claims of contract/policy ambiguity, as well as its claims of latent ambiguity, and determined that the coverage was not illusory.

The court found that the policy provided real protection to DBS for damages and accidental loss to watercraft and their cargo on board while in the care, custody or control of DBS, and for third party property damage or loss caused by those watercraft (or cargo on board) when the damage arises from DBS's operations as "Wharfingers" and "resulting from or arising out of [DBS's] mooring or docking operations." The district court then held that the only remaining issue was whether the loss sustained due to the collapse was attributable to the mooring and docking operations of DBS. The district court found that it was not. In addition, the court also found that the loss was not covered due to an exclusion for

loss or damage to property leased or rented to DBS. Because the dock that collapsed was leased to DBS, coverage for the loss was specifically excluded. Summary judgment was entered in favor of Essex.

Of interest in this decision is the fact that Essex contended that the term "wharfinger" in the Wharfinger Policy had a specialized meaning under admiralty law which required the court to infer that DBS had to be liable as a wharfinger in order for coverage to attach. This view was rejected by the court as contrary to the "clear language of the policy."

Five days after the decision above was issued, the same court rendered a decision in *Detroit Bulk Storage, Inc. v. Frankenmuth Mutual Insurance Co.*, No. 11-13277, 2014 WL 3731309 (E.D. Mich. July 28, 2014). In this branch of the case, DBS was seeking coverage under Frankenmuth's general commercial liability policy and damages from Praxair and U.S. Steel for the collapse. All of these parties were Michigan residents. The original basis for subject matter jurisdiction was admiralty, by virtue of the marine insurance policy issued by Essex. With the dismissal of Essex from the action, the court examined whether it would exercise supplemental jurisdiction over the claims against Frankenmuth, Praxair and U.S. Steel pursuant to 28 U.S.C. §1367. Finding no reason to do so, the district court dismissed the remaining claims.

P&I Club Rules and Procedures for Deciding Claims are Fair

Trident International Ltd. v. American Steamship Owners Mutual Protection and Indemnity Ass'n, Inc., No. 05 Civ. 3947, 2014 WL 4667332 (S.D.N.Y. September 19, 2014)

The opinion in this case appears to be the first formal decision from a district court to examine whether the claims and appeals process utilized by a P&I Club's board of directors pursuant to its Club Rules was fair. The litigation arose out of three separate personal injury claims by employees of Trident International Ltd. ("Trident"), a cruise ship caterer. Trident

presented its indemnity claims to the Club seeking reimbursement in the amount of $669,208.47 representing maintenance and cure, and settlement payments. In all three cases, Trident failed to comply with certain Club Rules, which were conditions precedent to coverage.

The Club Rules required: (1) "prompt notice" of "any happening," (2) that the insured minimize or avert any expense or liability associated with the incident or happening, and (3) that the insured neither settle nor admit liability without prior approval from the Club. The Club denied the claims based on Trident's failure to comply with these conditions precedent. Trident then sent a letter seeking reconsideration to the Club's Board of Directors, but provided nothing further. The Board reviewed Trident's appeal of the denial of coverage, but did not reverse the coverage decisions. Trident filed suit and the district court conducted a bench trial on the coverage issue.

The district court explicitly stated that the questions for trial were: "First, was the Board's procedure fair? In other words, did Trident have fair notice and opportunity to present evidence to the Board, as well as a fair process of review? Second, was the Board's substantive decision to deny coverage incorrect?" *Trident*, 2014 WL 4667332, at *2. Trident had the burden of proof on both questions.

In its decision after trial, the court confirmed a prior ruling that New York Insurance Law §3420 did not apply and that the Club's Rules governed the relationship between the parties. The court noted that the Club Rules established certain requirements as conditions precedent to coverage, including the requirements breached by Trident. The court then found that the Rules "clearly give the American Club 'sole discretion' to reject or reduce recovery for a claim if the Board feels that one of the conditions precedent to coverage have been breached." *Id.,* at *4. Further, the court noted that, under the Rules, the Club's rights were specifically reserved until an insured formally presented its indemnity claim, and that any dispute about coverage between the

Club and an insured "shall in the first instance be referred to and adjudicated by the Board of Directors."

After reviewing the evidence and the testimony of numerous witnesses, the court concluded that "Trident has failed to show that a fundamental lack of procedural fairness caused the rejection of its appeals of the Club's denial of coverage." *Id.*, at *5. The court then conducted a review of each of the three claims presented by Trident and found that the Club properly denied coverage in each case.

FORTUITOUS VS. NON-FORTUITOUS LOSSES

All Risk Yacht Policy does not cover damage caused by a broken hose clamp – loss was not a fortuitous event.

Great Lakes Reinsurance (UK) PLC v. Fortelni, 33 F. Supp. 3d 204 (E.D.N.Y. 2014).

In *Great Lakes*, the defendant insured obtained an all-risk Commercial Yacht Insuring Agreement ("policy") from the plaintiff. The yacht policy provided first-party property and liability coverage for the insured vessel. The policy excluded losses due to wear and tear, lack of maintenance, gradual deterioration etc. The policy also excluded losses to the insured vessel's engines, mechanical and electrical parts unless caused by an "accidental external event such as a collision, impact with a fixed or floating object, grounding, stranding, ingestion of foreign object, lightning strike or fire." *Great Lakes*, 33 F. Supp. 3d at 206.

In 2012, the insured vessel sustained extensive damage when it began taking on water into its engine compartment, damaging the vessel's engines. It was undisputed that the water entered the compartment through a hose that became disconnected from a water pump used to circulate raw seawater to cool the engines. The damage was estimated to be close to $470,000. After concluding its investigation, the insurer, Great Lakes, denied the claim on the ground that the loss was not an "accidental

physical loss" because it resulted from the failure of a stainless steel clamp used to secure the raw water hose connection. There was no evidence as to why the clamp failed. The parties cross-moved for summary judgment.

In deciding the issue, the district court applied New York law governing the interpretation of insurance contracts. The court then found that the policy was an "all risk" policy, which places the initial burden on the insured to establish the existence of a policy, and the loss, before the burden shifts to the insurer to establish that the loss fell within one of the exceptions to coverage. Noting that the policy provided coverage for "accidental" physical loss or damage but did not define the term "accidental," the court adopted the parties' view that the definition of the term "accidental" is synonymous with the term "fortuitous." Relying on the Restatement of Contracts, the court stated that a fortuitous event is one that is "dependent upon chance." In contrast, an event is not fortuitous when it results from an inherent defect in the object damaged, from ordinary wear and tear, or from intentional misconduct.

Applied to this claim, the court held that the loss was not fortuitous stating that "[t]o hold otherwise would transform this 'all-risk' policy into a maintenance contract." *Id.* at 209. The court noted that the insured failed to provide any persuasive case law supporting its theory that a mechanical failure of unknown cause could, on its own, satisfy the insured's burden of proving a fortuitous event. While acknowledging that the burden on the insured was "nominal," and noting that there was no burden to prove the exact cause of the loss, citing, *Fed. Ins. Co. v. PPG Realty, LLC*, 06 Civ. 2455 (JSR), 2007 WL 1149245, at *8 n.4 (S.D.N.Y. Apr. 17, 2007) (*aff'd sub nom. Fed. Ins. Co. v. Keybank Nat'l. Ass'n.*, 340 F. App'x 5 (2d Cir. 2009), the court pointed out that the insured had still failed to present *sufficient* evidence to establish that the damage was caused by a fortuitous accident or chance event. The insurer's motion for summary judgment was granted and a declaration that there was no coverage under the policy for the incident was issued.

All Risk Yacht Policy Does Cover Damage Caused by "Stuck" Valve – Loss Was a Fortuitous Event

LaMadrid v. National Union Fire Ins. Co. of Pittsburgh, PA, 567 F. App'x 695 (11th Cir. 2014)

In contrast, the Eleventh Circuit Court of Appeals in *LaMadrid* reversed a decision in favor of an insurer on a similar fact pattern finding that the insured had sustained its nominal burden of proof that the loss of its starboard engine was "accidental" or fortuitous under an all-risk yacht policy. The cause of the engine damage was determined to be the result of a valve which was stuck in the open position. As in Great Lakes, there was no firm evidence of what caused the valve to remain open, just as there was no evidence in Great Lakes about what caused the clamp to break. Initially, the district court ruled that LaMadrid could not sustain its burden of proof because it could not demonstrate why the relief valve was stuck in the open position.

However, the court of appeals reversed and held that the district court erred by requiring the insured to prove the precise cause of the engine's failure. The court further found that the insured had carried its "light burden" of proof by presenting expert testimony that the unexplained loss had occurred before the end of the engine's projected lifespan. Then, although the issue of whether the loss was excluded from coverage was not before the court, the panel took the opportunity to note that it found it "persuasive" that the policy did not specifically exclude mechanical failures from coverage. The case was remanded for further proceedings to determine the applicability, if any, of the insurer's exclusions.

Umbrella Coverage Triggered

Indemnity Insurance Company of North America v. W&T Offshore, Inc., 756 F.3d 347 (5th Cir. 2014)

In this decision, the Fifth Circuit Court of Appeals reversed a decision from the Southern District of Texas which held that

coverage under umbrella policies was only triggered if the underlying/primary coverage was exhausted by the payment of claims that were covered under the umbrella policy. The insured, W&T Offshore ("W&T") sustained significant damage to its operations as a result of Hurricane Ike. Anticipating that W&T would seek recovery for removal of debris expenses ("ROD") under the umbrella policies issued to W&T, the underwriters filed a declaratory judgment action claiming that their policies were not triggered. Underwriters argued that the umbrella policies are only triggered if W&T's primary insurance was exhausted by the payment of claims that were covered under the umbrella policies.

Applying Texas law, the Fifth Circuit reversed and held that while the district court's analysis had merit at first glance, a closer review of the "plain text" of the coverage provision revealed that underwriters were liable for damages in excess of the retained limit, without regard to whether those losses were covered by the umbrella policies. To reach its conclusion, the appeals court read the policy as a whole and scoured the provisions for language that supported its view that umbrella underwriters were liable to W&T without regard to whether the underlying/primary claims were covered by the umbrella policies.

Insured Contract Exception to Watercraft Exclusion Does Not Apply to Additional Insured

Holden v. U.S. United Ocean Services, LLC, 582 F. App'x 271 (5th Cir. 2014)

In this revised opinion from the Fifth Circuit Court of Appeals, the panel examined the question of whether an additional insured was covered by the insured contract exception to a watercraft exclusion in a marine general liability policy issued by St Paul. The decision arose out of personal injuries sustained by Paul Holden ("Holden") who was injured handling a gangway to a barge. Holden filed suit against the barge owner, U.S. United Ocean ("United") who was an additional insured under his employer's liability policy by virtue of a ship repair services

contract between Holden's employer and United. Holden settled the suit, leaving only the third party coverage suit against St. Paul.

The issue on appeal was whether the barge owner was entitled to indemnity under the terms of St. Paul's marine general liability policy. There were two possible avenues for coverage: (1) the general insuring clause which extended coverage to those obligations the insured was legally liable to pay; and (2) as an additional insured. The appeals court found that neither provided coverage to United. With respect to the first option, the court affirmed that because section 905(b) of the L.H.W.C.A. voided the agreement by Holden's employer to indemnify United, coverage under the general insuring language was not triggered since the insured was not "legally obligated to pay."

With respect to the second option, the court found that the exception to the watercraft exclusion also did not provide coverage. Relying on language in the policy which stated that the watercraft exclusion does not apply to "liability assumed under an insured contract…..under which the "Named Insured" assumes the tort liability…," the court held that the specific use of the term "Named Insured" limited coverage to instances where the named insured assumed the tort liability under an assumed contract. *Holden*, 582 F.App'x 271, 276-77. The court rejected the additional insured's argument that the exception to the exclusion was triggered when an insured contract existed between the named insured and the additional insured. Finding that this interpretation overlooked the "structure of the policy and operative language" the court held that the policy was not designed to provide watercraft coverage to an additional insured. *Id.* at 275.

The decision includes a lengthy dissent which challenged the basis for the appeals court's affirmance that coverage was barred by section 905(b) of the L.H.W.C.A. The dissent also took issue with the holding that the watercraft exclusion barred coverage. The dissent argued that the majority opinion ignored the language of the watercraft exclusion regarding the named insured's assumption of tort liability for another party for bodily injury. The dissent concludes with the comment that if St. Paul had wanted to

condition application of the insured contract exception to the watercraft exclusion on the validity of the assumption of liability by the named insured, it should have explicitly said so in the policy.

This decision includes a note that it was not selected for publication, should not be published and is not precedent except under local rules of the Fifth Circuit.

COMMITTEE ON YOUNG LAWYERS

Chair: Norman Stockman
Vice Chair: Blythe Daly
Secretary: Jennifer Porter

NEWSLETTER

Vol. 2014-2 - October 2014

Message from the Chair

"Sell not virtue to purchase wealth, nor Liberty to purchase power."

Benjamin Franklin
Poor Richard's
Almanac (1738)

Just a bit of early Ben Franklin to get you in the spirit, as we approach the start of the fall MLA meeting in Philadelphia, which runs from Wednesday, October 22 to Friday, October 24. I hope everyone who can has made plans to attend.

On Thursday night following the cocktail party at the Benjamin Franklin Institute, we will meet for a YLC dinner beginning at 8:15 p.m. at Tinto, a nearby restaurant. The YLC will not hold a formal committee meeting in Philadelphia, but I encourage all YLC members to attend any committee meetings that might interest you. A few of particular interest to the YLC are noted elsewhere in this newsletter.

I would like to extend a special thanks to all of you who have volunteered for committee work since our last meeting. You truly are the life-blood of this committee.

If you have a question or suggestion, please do not hesitate to contact me.

See you in Philly!

Stockman

YLC OPPORTUNITIES AT THE FALL MEETING

While the YLC will not hold a formal meeting in Philadelphia, YLC members are encouraged to attend any committee meetings of interest. Two committees, Vessel Regulation and International Organizations, will address matters that may be of particular interest to YLC members, as described below.

Vessel Regulation CLE on Suspension and Revocation Hearings:

The MLA Committee on Regulation of Vessel Operations, Safety, Security, and Navigation will sponsor a one-hour CLE entitled: "Everything You Wanted to Know about USCG Suspension and Revocation Representation in Sixty Minutes" on Thursday, October 23, 2014 at 3:45 pm in the offices of Blank Rome LLP, One Logan Square, 130 North 18th Street, Philadelphia, PA 19103-6998. The CLE will be presented in conjunction with the joint meeting of the Committees on Marine Ecology, Government Counsel, and Regulation of Vessel Operations which will begin at 2:00 pm.

The CLE will feature information about the merchant mariner license/document suspension and revocation process from the Office of Investigations for USCG Sector Delaware Bay, the Chief Administrative Law Judge of the United States Coast Guard, Walt Brudzinski, and Allen Black, an experienced private practitioner from the firm of Winston & Strawn LLP. The program will be structured around a common fact pattern which will highlight the most important aspects of effective representation in a fast-paced format intended to maximize the flow of information in a short time period. CLE-approval pends.

If suspension and revocation proceedings are part of your practice, or you are considering venturing into this representation, this CLE program is a "must see."

To get on the list at security for access to the building, please contact Marie Hagan at Blank Rome whose email address is hagan@blankrome.com.

Please note that you are not required to attend the entire committee meeting, but if you do choose to attend only the CLE, still be sure to contact Marie Hagan to get on the list at security and be considerate of the committee if the meeting is ongoing when you arrive.

International Organizations Newsletter:

Phillip Buhler, Chair of the International Organizations Committee, would like to start a bi-annual IO Committee newsletter. He invites all interested Young Lawyer Committee members to attend the IO meeting (or to call in if they are not attending in person) to discuss contributing to the newsletter.

The International Organizations Committee will meet on Thursday, October 23 at 9:00 a.m. at Blank Rome, One Logan Square, 130 North 18th Street, Philadelphia, PA 19103. If you plan to attend or need the call-in information, or if you have questions about the newsletter project, please contact Jessica Martyn directly at jmartyn@pbh.com.

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program is progressing nicely. The program assigns one YLC member to each of the MLA's standing committees to serve as a liaison. The goal of this program is to increase the communication between the standing committees and the YLC, which we hope will lead to opportunities for our members in those committees as well as increasing the utilization of the YLC for committee projects. Additionally,

liaisons provide a brief status report at each YLC Spring meeting pertaining to the work of each standing committee.

A chart identifying the appointed liaisons is posted on the YLC page of the MLA website for everyone's reference. Let this serve as a reminder to our liaisons that the YLC is ready to work. Spread the word to your respective committees and please call on us when we can be of service.

If you have questions about the YLC liaison program, please email YLC Secretary Jennifer Porter at Jennifer.Porter@kyl.com. If you are currently a YLC liaison and have a project that needs help, please e-mail me at nstockman@handarendall.com.

NEW AND ONGOING PROJECTS

MLA Amicus Brief Project –

The YLC is assisting in compiling for the MLA website all of the amicus curiae briefs filed by the MLA over the years. **Ben Segarra** is heading up this effort on behalf of the YLC, with the assistance of **Marissa Henderson, Imran Shaukat, and Eric Thiel.** The project is nearing completion. We had more volunteers than likely necessary for the project, and I want to thank everyone who responded to our call for help.

RECENT PROJECTS

At the request of **Katharine Newman**, Chair of the Marine Ecology and Maritime Criminal Law Committee, the YLC was asked to assist in preparing summaries to include in their fall newsletter Bilge & Barratry. Many thanks to the following individuals who assisted in preparing the latest edition of the newsletter: **Adi Ferchmin, Alex Gruft, Scott Gunst, Becky Hamra, Patricia O'Neill, John C. Scarborough, Jr., Brendan Sullivan,** and **Christine Walker.**

At the request of **Chet Hooper** and **David Nourse**, YLC members **Ben Segarra** and **Rick Beaumont** assisted in proofreading the MLA Report prior to publication.

CALL FOR PROJECTS

To the Standing Committees: Please let us know how we can help with your projects. If you have projects in need of research or have writing opportunities that are well-suited for younger lawyers, please keep our committee in mind. Additionally, we can usually find a YLC member to assist with staffing your meeting (handling CLE paperwork, sign-in sheets, handouts, and assisting with presentation set up, etc.), if and when the need arises.

PUBLICATION OPPORTUNITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to **Benedict's Quarterly Maritime Bulletin**. You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair or director unless s/he is Proctor or Non-Lawyer member. Proctor applications may be obtained from the MLA Membership Secretary or may be downloaded from the MLA website (www.mlaus.org) in the "Membership Forms" section.

YLC MEMBERSHIP LIST ON WEBSITE

If you are not already signed up as a member of the YLC on the MLA website, please make sure you do so. We use the membership list on the website as a vehicle for communicating

with our members. In this regard, we have reason to believe that some of our young lawyers are not registered as YLC members and thus do not receive our communications. If you know anyone that might fall into this category, please pass this along and encourage them to formally join via the website so they can stay in the loop. Conversely, if you are no longer a YLC member and are tired of our shenanigans, feel free to unsubscribe.

TABLE OF CASES

Page(s)

Aggarao v. MOL Ship Mgmt. Co.,
675 F.3d 355, 2012 AMC 781 (4th Cir. 2012) 18390, 18391

Aggarao v. MOL Ship Mgmt. Co.,
No. CIV. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014)..........................18390, 18392, 18393, 18402

Albany Ins. Co. v. Anh Thi Kieu,
927 F.2d 882 (5th Cir. 1991) 18486, 18488, 18489

Alexander v. Seago Consulting, LLC,
No. 4:14-CV-1292, 2014 WL 2960419 (S.D. Tex. June 23, 2014)..18406

Allianz Global Corporate & Specialty v. MSC "Moneterey",
2014 AMC 2946, 2014 WL 4631891 (S.D.N.Y. Sept. 16, 2014) 18369

Am. Exp. Co. v. Italian Colors Rest.,
133 S. Ct. 2304 (2013) 18403

Am. Ry. Express Co. v. Levee,
263 U.S. 19 (1923)..18368

American Steamship Owners Mutual Protection and Indemnity Ass'n, Inc. v. Dann Ocean Towing, Inc.,
756 F.3d 314, 2014 AMC 1531 (4th Cir. 2014) 18490, 18492

Anglers Conservation Network v. Penny Pritzker,
CIV.A. 13-1761-GK, 2014 WL 4977414 (D.D.C. Sept. 30, 2014) 18414

Aronson v. Celebrity Cruises, Inc.,
30 F.Supp.3d 1379 (S.D. Fla. 2014) 18398

Ash v. Royal Caribbean Cruises Ltd.,
2014 AMC 1564, 2014 WL 2480612 (S.D. Fla.
June 3, 2014)...18398

Asignacion v. Schiffahrts,
2014 AMC 713, 2014 WL 632177 (E.D. La.
Feb. 10, 2014) 18393, 18402

Atlantic Sounding Co. v. Townsend,
557 U.S. 404, 2009 AMC 1521 (2009)......18399, 18403, 18405

Barlow v. Liberty Mar. Corp.,
746 F.3d 518, 2014 AMC 866 (2d Cir. 2014) 18395

Bonilla v. Seven Seas Cruises S. De R.L., LLC,
2015 AMC 221, 2014 WL 4056550 (S. D. Fla.
Aug. 14, 2014) 18401

Burdeaux v. Royal Caribbean Cruises, Ltd.,
No. 11-22798-CIV, 2012 WL 3202948 (S.D.
Fla. Aug. 3, 2012) *aff'd*, 562 F. App'x 932 (11th
Cir. 2014) 18400

Carmouche v. Carnival Corp.,
36 F. Supp. 3d 1335 (S.D. Fla. 2014) 18398, 18399

Cassidy v. Murray,
34 F.Supp.3d 579, 2014 AMC 2623 (D. 2014) 18406

Certain Underwriters at Interest at Lloyds of London v. United Parcel Serv. of Am., Inc.,
762 F.3d 332, 2014 AMC 2274
(3d Cir. 2014)...18366, 18367, 18369

CMA-CGM (Canada) Inc., v. World Shippers Consultants, Ltd.,
921 F. Supp. 2d 1 (E.D.N.Y. 2013) 18377

Consolidated Rail Corp. v. Gottshall,
512 U.S. 532, 1994 AMC 2113 (1994)..............................18404

Davanzo v. Carnival Cruise Lines,
2014 AMC 1361, 2014 WL 1385729 (S.D. Fla.
April 9, 2014)..18394

Denehy v. Mass. Port Auth. & Swissport Fueling, Inc.,
42 F.Supp.3d 301 (D. Mass. 2014) 18478

Denehy v. Massachusetts Port Authority,
No. CIV.A. 13-12473-WGY, 2014 WL
4402960 (D. Mass. Sept. 5, 2014) 18408

Detroit Bulk Storage, Inc. v. Frankenmuth Mutual Insurance Co.,
No. 11-13277, 2014 WL 3731309 (E.D. Mich.
July 28, 2014)..18494

Esanu v. Oceana Cruises, Inc.,
No. 1:13-CV-22772-UU, 2014 WL 4954401
(S.D. Fla. May 5, 2014) 18401

Esanu v. Oceania Cruises, Inc.,
No. 1:13-CV-22772-UU, 2014 WL 4961426
(S.D. Fla. July 18, 2014)..18407

Essex Insurance Co. v. Detroit Bulk Storage, Inc.,
No. 11-13277, 2014 WL 3687032 (E.D. Mich.
July 23, 2014)..18493

Fed. Ins. Co. v. PPG Realty Co.,
06 Civ. 2455 (JSR), 2007 WL 1149245
(S.D.N.Y. April 17, 2007) *aff'd sub nom Fed. Ins. Co. v. Keybank Nat'l. Ass'n* 340 F. App'x 5
(2d Cir. 2009)..18497

Figueroa v. Marine Inspection Servs.,
28 F.Supp.3d 677, 2014 AMC 1886 (S.D. 2014) 18406

Frasca v. NCL (Bahamas) Ltd.,
No. 12-20662-CIV-GOODMAN, 2014 WL
1385806 (S.D. Fla. Apr. 9, 2014) 18401

Furka v. Great Lakes Dredge & Dock Co.,
755 F.2d 1085, 1985 AMC 2914 (4th Cir. 1985) 18395

G.H. Renton v. Palmyra Trading Corporation
[1957] AC 149 18380

Gabriles v. Chevron USA, Inc.,
No. CIV.A. 2:14-00669, 2014 WL 2567101
(W.D. La. June 6, 2014)..18406

Gamez v. Ace American Insurance Co.,
No. 11-22842, 2014 WL 3921366 (S.D. Fla.
Aug. 11, 2014) 18489

Garan, Inc. v. M/V Aivik,
907 F. Supp. 397, 1995 AMC 2657 (S.D. Fla.
1995) 18396

Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.,
585 F.3d 236 (5th Cir. 2009) 18488

Great Lakes Reinsurance (UK) PLC v. Fortelni,
33 F. Supp. 3d 204 (E.D.N.Y. 2014) 18496, 18497

Gregorie v. Enterprises Marine Services, LLC.,
38 F.Supp.3d 749 (E.D. La. 2014).....................................18406

Grigsby v. Coastal Marine Serv. of Tex., Inc.,
412 F.2d 1011, 1969 AMC 1513 (5th Cir. 1969) 18395

Hess Corp. v. Dorado Tanker Pool, Inc.,
No. 14 CIV. 6412 NRB, 2015 WL 915294
(S.D.N.Y. Mar. 4, 2015) 18375

Holden v. U.S. United Ocean Services, LLC,
582 F. App'x 271 (5th Cir. 2014) 18499, 18500

In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993,
121 F.3d 1421, 1997 AMC 2962 (11th Cir. 1997) 18399

In re Deepwater Horizon,
21 F.Supp.3d 657, 2014 AMC 2113 (E.D. La. 2014) 18440

In re Deepwater Horizon, No. 13-30095,
756 F.3d 320 (5th Cir., May 19, 2014) 18439

In re Deepwater Horizon, No. 13-30315,
744 F.3d 370 (5th Cir. Mar. 3, 2014)................................18438

In re Deepwater Horizon,
775 F.3d 741 (5th Cir. Jan. 9, 2015) 18437

In re Foss Mar. Co.,
29 F.Supp.3d 955 (W.D. Ky. 2014)..................................18406

In re: Oil Spill by the Oil Rig "DEEPWATER HORIZON",
844 F.Supp.2d 746 (E.D. La. 2012), *aff'd*. 753 F.3d 570 (5th Cir. 2014) 18437

In the Matter of the Arbitration between Hess Corporation and Dorado Tanker Pool, Inc.
S.M.A. No. 4236 (Arb. at N.Y. 2014) (Berg, O'Brien and Monaghan) 18373

Indemnity Insurance Company of North America v. W&T Offshore, Inc.,
756 F.3d 347 (5th Cir. 2014) 18498

Ingram-Wargo v. NCL (Bahamas) Ltd.,
No. 12-23344(S.D. Fla. Jan. 16, 2014) 18407

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock, Co.
513 U.S. 527 (1995)..18478

Kahea v. National Marine Fisheries Service,
No. CIV-A-11-00474-SOM/KSC, 2014 WL 3726122 (D. Hawaii July 24, 2014)..................................18410

LaMadrid v. National Union Fire Ins. Co. of Pittsburgh, PA,
567 F. App'x 695 (11th Cir. 2014) 18498

Levi v. NCL (Bahamas) Ltd.,
No. 13-21898 (S.D. Fla. July 24, 2013)............................18399

Lieberman v. Carnival Cruise Lines,
No. CIV. A. 13-4716 JLL, 2014 WL 3906066 (D.N.J. Aug. 7, 2014)..18397

Lindo v. NCL (Bahamas), Ltd.,
652 F.3d 1257, 2012 AMC 409 (11th Cir. 2011) 18403

Lobo v. Celebrity Cruises, Inc.,
704 F.3d 882, 2013 AMC 740 (11th Cir. 2013) 18404

Lollie v. Brown Marine Serv., Inc.,
995 F.2d 1565, 1993 AMC 2947 (11th Cir. 1993) 18399

Man Ferrostaal, Inc. v. M/V Akili,
704 F.3d 77, 2013 AMC 113 (2d Cir. 2012) 18381

Marine Insurance Co. Ltd. v. Cron,
No. 3:13-CV-00437, 2014 WL 4982418 (S.D. Tex. Oct. 6, 2014) 18486, 18487, 18488

McBride v. Estis Well Serv., L.L.C.,
768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) 18404

McBride v. Estis Well Services, L.L.C.,
731 F.3d 505, 2013 AMC 2409 (5th Cir. 2013) 18405

Mediterranean Shipping Co. (USA) Inc. v. Am. Cargo Shipping Lines, Inc.,
No. 13-CV-6357 ER, 2014 WL 4449796
(S.D.N.Y. Sept. 10, 2014) 18376

Merideth v. Carnival Corp.,
No. 13-CIV-23931, 2014 WL 4817478 (S.D.
Fla. Aug. 18, 2014) 18402

Meyers v. Ramada Hotel Operating Co.,
833 F.2d 1521 (11th Cir. 1987) 18400

Miles v. Apex Marine Corp.,
498 U.S. 19, 1991 AMC 1 (1990)..........................18399, 18405

Misener Marine Const., Inc. v. Norfolk Dredging Co.,
594 F.3d 832, 2010 AMC 250 (11th Cir. 2010) 18396

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, *Inc.*,
473 U.S. 614 (1985)..18392

Natural Resources Defense Council v. National Marine Fisheries Service,
No. CIV.A 12-0938-KBJ, 2014 WL 5148407
(D.D.C. Oct. 14, 2014)...18415

New York Marine and General Insurance Co. v. Continental Cement Co., LLC,
761 F.3d 830, 2014 AMC 2063
(8th Cir. 2014)..18484, 18485, 18486

Norfolk S. Ry. Co. v. Kirby,
543 U.S. 14, 2004 AMC 2705(2004).................................18375

Oilmar Co., Ltd v. Energy Transport Ltd and P.T. Cabot Indonesia, No. 3:03-CV-1121 (JCH) (D. Conn. Oct. 6, 2014) 18371

Ordonez v. NCL (Bahamas) Ltd., No. 13-24262 (S.D. Fla. Jan. 8, 2014) 18399

Perrier v. Shell Oil Co., No. CIV.A. 14-490, 2014 WL 2155258 (E.D. La. May 22, 2014)....................18406

Pierce v. Parker Towing Co., 25 F.Supp.3d 1372 (S.D. Ala. 2014)....................18406

Porter v. Great Am. Ins. Co., 2014 AMC 2259, 2014 WL 3385148 (W.D. La. July 9, 2014)....................18406

Pysarenko v. Carnival Corp., No. 14-20010-CIV, 2014 WL 1745048 (S.D. Fla. Apr. 30, 2014) *aff'd*, 581 F. App'x 844 (11th Cir. 2014)....................18403

Quiroz v. MSC Mediterranean Shipping Co. S.A., 522 F. App'x 655 (11th Cir. 2013) 18388

Rabenstein v. Sealift, Inc., 18 F.Supp.3d 343, 2014 AMC 1386 (E.D.N.Y. 2014) 18406

Ramirez v. Carolina Dream, Inc., 760 F.3d 119, 2015 AMC 57 (1st Cir. 2014)....................18404

Razo v. Nordic Empress Shipping Ltd., No. CIV A 07-CV-05745SDW, 2008 WL 2902184 (D.N.J. July 24, 2008) *aff'd*, 362 F. App'x 243 (3d Cir. 2009) 18392

Rosenfeld v. Oceania Cruises, Inc.,
654 F.3d 1190, 2011 AMC 2838 (11th Cir. 2011) 18394

Royal Caribbean Corp. v. Modesto,
614 So.2d 517 (Fla. Dist. Ct. App. 1992) 18396

Royal Caribbean Cruises, Ltd. v. Cox,
137 So. 3d 1157, 2014 AMC 1919 (Fla. Dist. Ct. App. 2014) review dismissed, 145 So. 3d 822 (Fla. 2014)....................18396

Seco v. NCL (Bahamas), Ltd.,
588 F. App'x 863 (11th Cir. 2014) 18397

Shore v. Magical Cruise Co.,
No. 6:14-CV-358-ORL-31, 2014 WL 3687100 (M.D. Fla. July 24, 2014)....................18399

Skye v. Maersk Line Corp.,
751 F.3d 1262, 2014 AMC 1257 (11th Cir. 2014) 18404

Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.,
762 F.3d 165, 2014 AMC 1817 (2d Cir. 2014) 18375

Sosebee v. Rath,
893 F.2d 54, 1990 AMC 1601 (3d Cir. 1990) 18396

Southworth Mach. Co. v. F/V COREY PRIDE,
994 F.2d 37, 1993 AMC 2261 (1st Cir. 1993)....................18396

Tai–Pan, Inc. v. Keith Marine, Inc.,
1997 AMC 2447, 1997 WL 714898 (M.D. Fla. May 13, 1997)....................18396

Tampa Port Auth. v. M/V Duchess,
65 F. Supp. 2d 1279 (M.D. Fla.) *amended*, 65 F. Supp. 2d 1299 (M.D. Fla. 1997) *aff'd,* 184 F.3d 822 (11th Cir. 1999)....................18396

Texas A&M Research Found. v. Magna Transp., Inc.,
338 F.3d 394, 2003 AMC 1839 (5th Cir. 2003) 18396

The Jordan II
[2013] 2 Lloyd's Rep. 87. 18380

Torres v. Carnival Corp.,
No. 12-CV-23370-JLK, 2014 WL 3548456
(S.D. Fla. July 17, 2014) 18394

Torres v. Carnival Corp.,
No. 12-CV-23370-JLK, 2014 WL 3667763
(S.D. Fla. July 22, 2014) 18401

Trident International Ltd. v. American Steamship Owners Mutual Protection and Indemnity Ass'n, Inc.,
No. 05 Civ. 3947, 2014 WL 4667332 (S.D.N.Y.
September 19, 2014) 18494, 18495, 18496

United States v. American Commercial Lines,
No. 13-30358 (5th Cir., July 16, 2014)...............................18477

United States v. Rainey,
No. 13-30770 (5th Cir. June 27, 2014) 18435

U.S. v. Kaluza,
2013 WL 6490341 (E.D. La. Dec. 10, 2013).....................18436

U.S. v. Kaluza,
2015 WL 1056619 (5th Cir. Mar. 11, 2015)......................18436

United States v. Transocean Deepwater Drilling,
No. 13-20243 (5th Cir. Sept. 18, 2014) 18440

Vaughn v. Atkinson,
369 U.S. 527, 1962 AMC 1131 (1962)..............................18392

Veverka v. Royal Caribbean Cruises Ltd.,
No. 12-CV-03070 ES, 2012 WL 6204911
(D.N.J. Dec. 11, 2012) 18398

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,
515 U.S. 528, 1995 AMC 1817 (1995)..............................18392

Wharf v. Burlington N.R. Co.,
60 F.3d 631 (9th Cir. 1995) 18395

Wilburn Boat Co. v. Fireman's Fund Ins. Co.,
348 U.S. 310 (1955)..18486

Yacubian v. U.S.,
750 F.3d 100 (1st Cir. 2014)..18412

Young v. Norwegian Seafarers' Union,
138 So. 3d 1189 (Fla. Dist. Ct. App. 2014) 18403

Yuzhny Zavod Metall Profil LLC v. Eems Beheerder B – the M/V EEMS SOLAR, English High Court, Queen's Bench Division, Admiralty Court: Jervis K, Q.C., the Admiralty Registrar: 5 June 2013...18378