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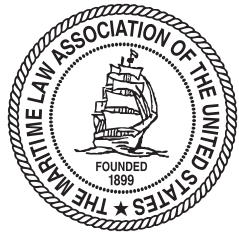

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Spring 2014

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

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EDITORIAL COMMENT

This edition of the MLA Report contains newsletters of the Association's Committees that were issued in connection with the Spring Meeting in New York in May 2014 together with a paper presented by Michael J. Ryan of New York on May 1, 2014, as part of the Association's CLE Program.

In accordance with our practice of honoring members who have materially advanced the work of the Association, we have included a remembrance of Gene B. George of Cleveland who died in September 2013 while hiking in the Colorado Rockies.

We thank the following members of the Committee on Young Lawyers on 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 view.

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

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Gene B. George

Gene B. George, a partner in Ray Robinson Carle & Davies PLL of Cleveland, Ohio, and a longtime member of the Association, died in September 2013 while hiking by himself in the high country of Colorado near Mt. Harvard. Gene, an experienced mountaineer who had climbed more than 30 of the 14,000 foot peaks in the area, was 64 years of age and in good physical condition. The circumstances of his death are still not known.

Gene was born in Cleveland on February 19, 1949. His father was employed by a marine hull insurance company, the Great Lakes Protective Association, and Gene became interested in Great Lakes shipping at an early age. Later, while in high school and college, he sailed as a crewmember aboard Great Lakes vessels. Graduating in 1971 from Bowling Green State University with *magna cum laude* honors and, only a little more than 2 years later, on December 21, 1973, from the University of Michigan Law School with a *Juris Doctor* degree, he joined the Ray Robinson firm, where he practiced maritime law for nearly 40 years.

Gene was the Vice Chair of the Committee on Marine Insurance and General Average for a period spanning 16 years and was very involved in its work. He originated, organized and edited the Committee's newsletter and regularly lectured at Committee meetings concerning recent developments in the law of marine insurance. He was also the Secretary of the Committee on Inland Waters and Towing. In addition to having an active maritime law practice he served the local maritime community, acting as Secretary and Treasurer of the Great Lakes Protective Association, the hull insurance company where his father had worked for many years, and lecturing on occasion concerning admiralty law at the University of Toledo.

We honor Gene for his contributions to the Association. His modest demeanor, sense of humor, work ethic and his always

insightful discussions on complex insurance issues (and the performance of the Cleveland Browns, Cleveland Indians and Michigan football teams) will be missed.

By: The Editors

COMMITTEE ON ARBITRATION AND ADR

Editor: Leo G. Kailas

Newsletter – May 2014

EDITOR'S COMMENT

I first wanted to report on several important developments relating to arbitration and ADR. On October 23, 2013 the Society of Maritime Arbitrators of New York ("SMA") amended the SMA Rules to provide (a) a procedure for appointing a panel in a consolidated arbitration and (b) rules for the taking of testimony via video-conferencing.

Following a Second Circuit decision in 1993 rejecting consolidation of related arbitrations absent specific agreement (in the governing contracts) between the parties to consolidate, the SMA adopted Section 2 of the Arbitration Rules which permits, at the request of any party, consolidation of related disputes arising under two or more contracts subject to SMA Rules. A good example of such a dispute would be a claim by a voyage charterer against an intermediate owner who, in turn, then brings an indemnity action against the head owner. In these consolidated multi-party arbitrations brought under the SMA Rules, disputes would sometimes arise as to which arbitrators from the original two panels would be on the consolidated panel (assuming no complete overlap). Those disputes often ended up in the courts.

In order to address this issue, the SMA amended Section 2 to provide that the parties could agree on a sole arbitrator, failing which the primary claimant and ultimate defending party would each pick an arbitrator and the intermediate or "pass along" parties would pick the third arbitrator. In the event the panel was not fully constituted within thirty days, the President of the SMA has authority to complete the panel appointments. Also, in the event of a disagreement over whether the dispute is subject to consolidation, the President of the SMA would also decide that

issue and his/her decision in the form of a reasoned award would be final and binding.

In response to modern evidence gathering techniques, the SMA also amended Rule 23 to expand the authority given to arbitrators to subpoena witnesses and order depositions of witnesses who cannot testify in person. The amended rule authorizes arbitrators to direct testimony to be taken by video conference or other electronic means. The panel has discretion to order video testimony "in those circumstances it deems appropriate" and can hear and make binding rulings on any objection to such testimony.

In related forum developments, the American Arbitration Association ("AAA") recently joined JAMS-EndDispute in adopting a rule that permits parties to agree, either by contract or stipulation, on an internal AAA appeal on the grounds that the underlying award is based on errors of law that are material and/or determinations of fact that are clearly erroneous. The AAA appellate panels will consist of retired judges and distinguished lawyers and the AAA expects that appeals can be completed in about three months. The new rule was adopted in response to the Supreme Court's decision in *Hall St. Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576, 2008 AMC 1058 (2008), which held that agreements by parties to appeal arbitration awards containing alleged errors of law or clearly erroneous fact determinations to federal courts were in conflict with the United State Arbitration Act (Title 9 U.S.C. § 1 *et seq*.) which sets forth the exclusive grounds for appeal of arbitration awards. Richard Naimark, Senior Vice President of the AAA, spoke at our Committee's Spring 2014 meeting about the new rule. Mr. Naimark noted that the adoption of the new rule was primarily in response to a survey of in-house counsel who said the most important factor in arbitrating disputes was the perceived fairness of the process, more so than speed, efficiency and finality. The AAA thus decided to give parties the option to agree to this limited appeals process. During the ensuing discussion at the meeting, Committee member Donald Murnane pointed out that European lawyers generally are fearful of any

steps that could lead to the "judicialization" of arbitration and any arbitral rules that detracted from the finality of arbitration awards. I suspect that we have not heard the last of an arbitral appellate procedure in the maritime area.

I also should note that Committee member Jay Pare sent me a draft of a paper he is doing on the recent amendment to Rule 45 of the Federal Rules of Civil Procedure to permit nationwide service of process of subpoenas. In the paper Jay wondered aloud whether these changes also mean that there is nationwide service of subpoenas by arbitrators.

Jay believes that such nationwide service and enforcement power to arbitrators could be accomplished by a simple change in the arbitration clause or governing arbitration rules that would permit arbitrators, in a special case, to sit at a location other than the agreed location for the primary arbitration. That simple change would likely enable arbitrators to issue subpoenas nationwide.

First, the amended Rule 45 seems to apply equally to arbitration subpoenas because Section 7 of the Arbitration Act incorporates Rule 45. Second, a rule change that would permit arbitrators to sit in other places would overcome the 100 mile or in-state limitation for enforcement of the subpoena issued by the arbitrators—under Section 7 enforcement must be in the district where the arbitrators or a majority of the panel are "sitting". As an alternative, Jay suggests a procedure whereby the enforcement action is transferred back to the district where the arbitrators are sitting for an enforcement order that can then be transferred back to the district where the witness is located. Jay Pare's paper certainly should prompt discussion in the arbitration community about how to create an enforceable mechanism for nationwide service of arbitral subpoenas.

Below are the case notes on cases of interest to the Arbitration and ADR Committee.

I. IS SHIP BROKER BOUND BY CHARTER PARTY ARBITRATION PROVISION IN BROKER'S SUIT FOR COMMISSIONS DUE UNDER CHARTER PARTY?

In *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 557 F. App'x 81 (2d Cir. 2014), *as corrected* (June 3, 2014),the Second Circuit reversed and remanded for further consideration the lower court's denial of Eagle Bulk's motion to compel arbitration of the broker's claim against it. The broker, International Chartering Services ("ICS"), had sued Eagle Bulk in district court to recover commissions due for arranging charters for Eagle Bulk vessels with Koran Line Corporation ("KLC"). The charters which obligated Eagle Bulk to pay commissions "on hire earned and paid under th[ese] Charter[s]" also required London arbitration of any disputes between "Owners and the Charterer."

Eagle Bulk moved to stay the action in favor of arbitration and ICS objected claiming that it was not bound by the arbitration clause. The court below denied the motion to compel arbitration and Eagle Bulk filed an interlocutory appeal.

The Second Circuit first dealt with the argument by ICS that it was not bound to arbitrate because it was not a party to the charters. Citing *MAG Portfolio Consultant, GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 61 (2d Cir. 2001), the court noted that if a company accepted the benefits of an agreement with an arbitration clause, even without signing the agreement, that company may be bound by the arbitration provision. The lower court had held that because the arbitration clause applied only to "Owners and Charterers", the broker, ICS, was not bound by that arbitration provision.

The Second Circuit then went on to the more interesting part of its analysis. It noted that "were substantive federal maritime law to apply," the lower court's decision "might be correct." However, Eagle Bulk argued that the charter parties were governed by English law and that under English law "the phrase 'Owners

and Charterers' [encompasses ICS] because they are treated as assignees from the owners or charterers."

The Second Circuit noted that the lower court had failed to determine which law should govern the dispute and therefore it remanded the case "for the district court to consider this question by applying federal maritime choice of law rules."

II. INTERLOCUTORY APPEAL OF AWARD REJECTED

In *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2014 AMC 1133, 2014 WL 1282504 (S.D.N.Y. 2014), the court rejected Bailey Shipping's attempt to appeal the arbitral panel's denial of Bailey's attempt to withdraw a negligent misrepresentation claim from the arbitration. The court noted that "whether the panel's decision is correct on the merits question is a close and interesting question", the court could not consider it because "the Court lacks jurisdiction to consider Bailey's motion to vacate it."

The court first noted that the panel's ruling was neither final nor within any exception to the finality requirement. Citing *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414, 1980 AMC 1901, 2905 (2d Cir. 1980), the court noted that under the FAA "a district court does not have the power to review an interlocutory ruling by an arbitration panel." The court confirmed the "interim" status of the award because "it had no effect other than to order Bailey to adhere to the panel's existing scheduling order." Bailey responded by arguing that the panel's decision "conclusively disposed of the issue of the withdrawal of Bailey's negligent misrepresentation claim." The court rejected that argument and correctly noted that the award "was, if anything, a 'segment of a future conclusive award'" because it directed the parties to proceed with discovery.

The court then dealt with Bailey's argument that the panel's order was a "collateral order". The court noted that the interim decision was not "effectively unreviewable", and that

Bailey had not demonstrated an interest that is "sufficiently important to merit consideration through the collateral order doctrine." The court further noted that allowing an appeal at this early stage would conflict with the strong federal policy favoring arbitration and undermine the salutary purposes of arbitration.

III. FOURTH CIRCUIT VACATUR OF AWARD ON "MANIFEST DISREGARD" GROUNDS

For those who were convinced that the "manifest disregard" doctrine for setting aside an arbitration award died with *Hall St. Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 2008 AMC 1058 (2008) and *Oxford Health Plans LLC v. Sutter*, 133 S.Ct 2064 (2013) (where Judge Kagan writing for the unanimous court in her most Sergio Leone voice, noted, "[T]he arbitrator's [contract] construction holds, however good, bad, or ugly."), please take note of *Dewan v. Walia*, 544 F. App'x 240 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 1788 (U.S. 2014). In *Dewan*, the Fourth Circuit panel reversed the district court's confirmation of an arbitrator's award because the award was "the product of a manifest disregard of the law by the Arbitrator."

Dewan involved a dispute between a company and a former employee, where three months before the arbitration the employee signed a Release Agreement which allegedly released all of his employment claims. The arbitrator concluded that the Release Agreement was enforceable but sill awarded damages to the employee. The district court confirmed the award presumably on the "any colorable basis for the award" standard noted in *Hall Street, supra*, and many other cases.

In reversing the district court, the Fourth Circuit conducted its own analysis of the release language and concluded that the employee had released all claims against the company, including those in the arbitration and therefore, the arbitrator should not have awarded the employee any damages on his claims in arbitration.

One judge dissented and while not citing *Oxford Health v. Sutter, supra*, noted that "the arbitrator unquestionably construed the release agreement at issue, [thus] we are not at liberty to substitute our preferred interpretation for the arbitrator's." *Dewan*, 544 F. App'x at 250. I suspect that *Dewan* is a one-off exception to the strong policy of the federal courts to enforce arbitration awards no matter how off the mark the awards appear to be.

IV. AWARD ENFORCEMENT ISSUES

Reversal and Remand of Lower Court Denial of Petition to Confirm Brazilian Award.

In *VRG Linhas Aereas, S A. v. MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322 (2d Cir. 2013), the Second Circuit reversed the lower court's denial of a petition to confirm a Brazilian arbitral award on the grounds that the lower court failed to consider whether the parties had agreed to an arbitration clause that assigned to the arbitration panel questions concerning the scope of the agreement.

The underlying dispute concerned Linhas' acquisition of VRG, based in Sao Paulo, from two of MatlinPatterson's indirect subsidiaries. The main share purchase agreement (the "SPA Agreement"), which MatlinPatterson did not sign, contained an ICC International Court of Arbitration dispute resolution provision. However, MatlinPatterson did sign one of the addenda to the SPA Agreement (containing a non-compete provision) but that addendum did not contain an arbitration clause. The dispute arose under the SPA Agreement and the arbitrators found that MatlinPatterson had agreed to arbitration and that its agreement to arbitrate encompassed the parties' purchase price dispute. The arbitrators found MatlinPatterson liable for damages based on fraudulent misrepresentations made regarding VRG.

The lower court had denied confirmation of the arbitration award based on its finding that even if MatlinPatterson had agreed to arbitrate disputes over its non-compete agreement, it had not

agreed to arbitrate "an entirely different issue [arising] under an agreement that it did not sign."

The Second Circuit disagreed and remanded the case to the district court to determine, "on the particular facts of this case," whether the court or the ICC Arbitral Tribunal had the power to determine the scope of the parties' agreement to arbitrate. In reaching this result, the Second Circuit referred to the Supreme Court's holding in *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995), "that questions of arbitrability are to be sent to arbitration if and only if the parties clearly and unmistakably expressed their intention to do so." *VRG Linhas Aereas, S A.*, 717 F.3d at 325. The *Linhas* court noted that the arbitration provision specifically provided that disputes arising under the agreement "including those concerning its validity, effectiveness, breach, [and] interpretation" were to be submitted to the ICC Court of Arbitration. The court reasoned that if that provision had become part of the parties' agreement—MatlinPatterson disputed that it had—the arbitrators had the power to decide the arbitrability issue and the final award would be judged by the liberal standards applicable to review of arbitration awards (and almost certainly be confirmed).

Court Denies Enforcement of Foreign Award based on lack of *In Personam* Jurisdiction over Turkish Respondent in light of Supreme Court's Decision in *Daimler v. Bauman.*

In *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014) *cert. denied*, 134 S. Ct. 2888 (2014), Sonera, a Dutch holding company, brought suit to enforce a final arbitration award against Cukurova Holding, the parent of a large Turkish conglomerate. The underlying dispute arose out of Cukurova's sale to Sonera of shares in a Turkish company that owned a controlling stake in Turkey's largest mobile phone operator. The district court held that it had personal jurisdiction over Cukurova based upon the New York contacts of several companies with which Cukurova was affiliated.

The Second Circuit reversed and remanded the case to the district court to dismiss the action for lack of personal jurisdiction based upon the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

The court noted that in light of *Daimler*, it did not need to determine whether the lower court correctly decided that Cukurova was subject to its general jurisdiction under New York law. The court noted that, "there is no need to address the scope of general jurisdiction under New York law because the exercise of general jurisdiction over Cukurova is clearly inconsistent with *Daimler*." The court applied the standard set forth in *Daimler* that "general jurisdiction exists only when a corporation's contacts with a state are 'so "continuous and systematic" as to render [it] essentially at home in the forum State.'" *Sonera Holding B.V.*, 750 F.3d at 225 (citation omitted). The court held that even if all of the Cukurova affiliates' contacts were imputed to Cukurova, they did not shift "the company's primary place of business (or place of incorporation) away from Turkey" and the contacts fell short of those required to "render it at home" in New York.

The holdings in the *Daimler* and *Cukurova* cases will clearly make it more difficult to bring arbitration award enforcement actions against foreign entities that have not consented to enforcement in New York or which do not have assets located within the jurisdiction.

Panel Chair's Failure to Disclose Illness Does Not Constitute Corruption Warranting Vacatur of Award; Judge Confirms Arbitration Award and Grants Motion for Attorneys' Fees and Costs

In *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 13CV8404, 2014 WL 2945803 (S.D.N.Y. June 30, 2014), the court denied the petitioner's motion to vacate the award and granted the motion to confirm the award and for attorneys' fees.

Vinmar chartered a vessel from Team Tankers to transport 3,500 metric tons of acrylonitrile ("ACN") from Houston to Pusan. ACN is a versatile raw material that is normally odorless and colorless. However, it required the addition of an inhibitor (MEHQ) to prevent it from rapidly polymerizing. After the vessel's arrival in Ulsan ship and shore samples were taken and tested and the test results showed that the ACN remained on specification.

Because of a precipitous drop in the price of ACN, Vinmar stored the cargo in shore tanks as it looked for a buyer amidst a falling market. Forty two days after the cargo was discharged, Vinmar asked an independent surveyor to retest the ACN. The shore tank sample showed severe degradation of the ACN, the ship sample showed mild degradation and the sample from the shore tanks in Houston was virtually unchanged from when a similar sample was tested at the load port. Vinmar commenced arbitration against Team Tankers seeking to hold the vessel responsible for the degradation.

The panel was constituted, hearings were held and in an award issued on August 26, 2013 the panel, by a 2-1 majority, concluded that Vinmar had "not shown by a preponderance of the evidence or otherwise, that the alleged contamination took place while the cargo was in the custody of the [vessel]." The majority also noted that even if Vinmar had prevailed in establishing liability, it would not be entitled to damages. Apparently Vinmar had obtained a purchase offer of $1720 per metric ton which compared favorably to the price for sound ACN.

Vinmar and its insurer moved to vacate the award on the ground of manifest disregard of law and also on the grounds that the panel chairman's failure to disclose an ultimately fatal brain tumor amounted to misconduct on his part requiring vacatur of the award.

The court first noted that the Supreme Court's decision in *Hall Street Associates v. Mattel*, cited above, put into question the

continued existence of the manifest disregard of law doctrine but that subsequent decisions in the Second Circuit had upheld the viability of the manifest disregard doctrine. *See, Schwartz v. Merrill Lynch & Co., Inc*., 665 F.3d 444, 451-52 (2d Cir. 2011); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121-22 (2d Cir. 2011). Vinmar argued, *inter alia*, that the panel majority's requiring Vinmar to prove what caused the degradation of the ACN and its finding of no damages constituted manifest disregard of governing law.

The court rejected Vinmar's arguments and found that the majority reasonably concluded that the arrival of the cargo in good order precluded Vinmar from benefiting from the usual presumption of fault associated with *prima facie* claim presentation. The majority also reasonably concluded that the damage occurred in the Ulsan shore tanks. Based on these findings the court concluded that the majority had more than "a barely colorable justification for the outcome reached" which is all that is required.

The court next dealt with Vinmar's claim that the panel chairman's failure to disclose his illness constituted misconduct and corruption. Vinmar cited the SMA Code of Ethics which requires arbitrators to disclose "any circumstance which could impair their ability to render and unbiased award based solely upon an objective and impartial consideration of the evidence." Vinmar argued that malignant brain tumors cause profound changes in cognitive function and thus the tumor should have been disclosed.

The court ruled that it was "highly questionable" that the SMA Rules require disclosure of a medical condition that did not impair objectivity or cause bias and that, in any event, violation of an SMA Rule was not grounds for vacating an award. The court further noted that over the course of the arbitration, including ten formal hearings, Vinmar saw nothing that made it question the chairman's competence.

Finally, although the court invited respondents to apply for legal fees and costs, it declined to sanction Vinmar even though it had previously cautioned Vinmar that the court believed the motion to vacate based upon the chairman's medical condition was baseless.

Second Circuit Remands Case to District Court to Determine if English Judgment is Maritime under United States Law.

I thought it would be important to report on a recent Second Circuit decision—argued in September 2012—and decided on June 12, 2014. In *D'Amico Dry Ltd. v. Primera Mar. (Hellas) Ltd.*, 756 F.3d 151 (2d Cir. 2014), the district court had dismissed the complaint based upon a lack of subject matter jurisdiction on a suit to enforce an English court's judgment on a forward freight agreement. D'Amico had sued Primera to enforce the contract which obliged Primera to pay D'Amico if market freight rates were lower than the rates specified in the forward freight agreement.

In the Queen's Bench Division action brought by D'Amico, the case was heard by the Commercial Court, and not the Admiralty Court. Under English law, forward freight agreements are not considered maritime contracts because they involve a theoretical rather than an actual shipment of goods by sea. The English court entered judgment in favor of D'Amico in the amount of $1,766,278.54 including interest and other components.

D'Amico then brought an action in district court in New York to enforce the English judgment invoking the admiralty jurisdiction of the court. The district court granted Primera's motion to dismiss for lack of subject matter jurisdiction because the English judgment was not rendered by an admiralty court and the claim underlying the judgment was not deemed maritime under English law.

On appeal, the Second Circuit isolated the point of its disagreement with the lower court. It noted that the lower court had incorrectly concluded that it could enforce foreign judgments of

non-admiralty if the underlying claim was maritime *under the law of the nation that rendered the judgment*. The court noted that it knew of no precedent that would not extend "admiralty jurisdiction to such suits when the claim was maritime according to U.S. law standards…" *D'Amico Dry Ltd.*, 756 F.3d at 160.

The Second Circuit reversed and found that the district court followed the wrong standard in looking to cases involving suits to enforce settlement agreements that involved underlying maritime claims. The court noted that the district court should have followed the principal enunciated by the Supreme Court in *Penhallow v. Doane's Administrators*, 3 U.S. 54, 1999 AMC 2652 (1795) that the enforceability of the judgment of a foreign maritime court is itself a maritime matter to be heard in the admiralty jurisdiction of United States courts.

The court found support for its view that the case should be heard—to determine if it qualified as maritime under U.S. law—in the fact that under Article III of the Constitution "Cases of admiralty and maritime Jurisdiction" are committed to the federal courts and that 28 USC § 1333 makes federal court jurisdiction exclusive. Also, under choice of law principles, the law of the forum state is used to determine jurisdictional and procedural questions and the question before the court was certainly a jurisdictional issue. Third, international comity favored allowing federal jurisdiction over suits to enforce foreign maritime judgments.

Based upon the foregoing analysis, the court concluded that "a suit to enforce a foreign judgment may be heard in the federal admiralty jurisdiction under § 1333 if the claim underlying the judgment would be deemed maritime under U.S. law." *D'Amico Dry Ltd.*, 756 F.3d at 162. It remanded the case to the district court to determine if the claim on the forward futures agreement would be deemed maritime under U.S. law standards.

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[Editor's note: The editor wishes to acknowledge the contributions of Keith Heard and Peter Skoufalos who took the time to contribute cases for the newsletter.]

COMMITTEE ON CARRIAGE OF GOODS

Editor: Michael J. Ryan
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CARGO NEWSLETTER NO. 63

Spring 2014

CIRCUIT COURT FINDS CARMACK DOES NOT APPLY, BUT CARGO CLAIMANT RECOVERS UNDER CARMACK ANYHOW…

CNA Ins. Co. v. Hyundai Merch. Marine Co., Ltd., 747 F.3d 339, 2014 AMC 609 (6th Cir. 2014)

A shipment of crates of glass sheets was transported by rail from Harrodsburg, Kentucky to Tacoma, Washington for ocean transportation to Taiwan. When the containers were unloaded at the ocean terminal, two containers were observed to be visibly damaged. After examination of the contents, they were unloaded into two different containers and shipped back to Harrodsburg.

On examination back at Harrodsburg, all but four of the crates exhibited visible damage. Two apparently undamaged crates were opened and revealed damaged glass. The shipment was declared a total loss. Suit was filed by the subrogated underwriter against the ocean carrier, along with the two railroads which transported the shipment from Kentucky to Washington.

On motion of the carrier defendants, the matter was removed to the Western District of Kentucky.

The carriers moved for summary judgment in the district court alleging that a Carmack claim had not been plead, the service contract prohibited plaintiff from suing the rail carriers and that the carriers were entitled to enforce a $500 package limitation for the 24 crates involved.

The district court found plaintiff had pleaded a Carmack claim and held the case would proceed solely under Carmack, apparently on the basis that the damage had occurred while the cargo was in possession of a rail carrier.

As to the service contract which contained a "Covenant not to Sue", the district court considered the clause did not make the rail carriers "immune from suit" but merely obligated plaintiff to indemnify the ocean carrier for any resulting claims by any subcontractor against the ocean carrier arising out of the same facts. Finally, the district court found the clause paramount, as written in the service agreement, did not expressly extend the $500 per package limitation of COGSA to the subcontractor rail carriers and did not apply to them.

Plaintiff also moved for summary judgment to strike the carriers' limitation of liability defenses on two theories: (i) that the indemnification clause in the service contract provided for full remuneration for the loss of the cargo; and (2) the Carmack Amendment barred the rail carriers from any attempted limitation of liability.

The court rejected the first theory, explaining that the indemnification clause spoke to third-party claims, and had no bearing on the ocean carrier's direct liability to Plaintiff. As to the Carmack Amendment, the court granted the motion based upon its finding the service contract limitation of liability did not apply to any of the carriers.

The case proceeded to a jury trial under a single Carmack cause of action. The jury found for plaintiff, holding the carriers jointly and severally liable for $498,509.91 "(…exactly 75% of the $664,679.88 claim, to the penny)".

The court found *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 2010 AMC 1521 (2010), did not preclude liability of the ocean carrier under the Carmack Amendment in this case and *Kawasaki* was inapplicable.

The carriers appealed and plaintiff cross appealed, contesting the district court's denial of prejudgment interest.

The court of appeals considered the preliminary and overriding question in the appeal to be "the meaning and application of the Carmack Amendment".

The court went on to give an extensive history of the Carmack Amendment, the impact of the Supreme Court's decisions in *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 2004 AMC 2705 (2004) , and *Kawasaki,* along with a review of relevant post *Kawasaki* federal and state court decisions.

The court held Carmack did not apply to the road or rail leg of an intermodal export shipment under a single through bill of lading. Therefore, the district court erred by applying Carmack in this case as it did.

[Editors' note: In a footnote, the court noted the complaint also asserted diversity jurisdiction. Therefore, the inapplicability of Carmack did not divest the court of federal subject matter jurisdiction.]

The court went on to consider the cause of action for breach of the service contract. It noted the rail carriers were unnamed "subcontractors" who neither negotiated nor signed the service contract. While the rail carriers were not parties to the service agreement and thus, not in privity with plaintiff, it further noted "because the journey contained substantial overland carriage, CNA and Hyundai "must have anticipated that a land carrier's services would be necessary for the contract's performance", thereby making Norfolk Southern and BNSF "intended beneficiaries."

Referring to *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 72, 2009 AMC 609, 630 (S.D.N.Y. 2009), and *Kirby*, 543 U.S. at 32, 2004 AMC at 2717, the court stated the rail carriers' status as intended beneficiaries along with the "broadly written Himalaya Clause" allowed the rail carriers to invoke the contract's

limitation of liability clauses. It went on to state "qualifying as an intended beneficiary in no way *creates* contractual obligations on the part of the intended beneficiary." *CNA Ins. Co.*, 747 F.3d at 372, 2014 AMC at 658.

There was no indication of any agreement the railroads were to be bound by the service contract or the carrier's regular form bill of lading incorporated therein. Each contracted with the ocean carrier independently, under its own standard transportation agreement. The service contract expressly disclaimed any agency relationship which would allow the ocean carrier to act as an agent on behalf of the plaintiff.

Referring to the service contract, the court noted its clear intent was neither to bind subcontractors nor to hold them directly liable to plaintiff for damage to the cargo. It was noted that this intent to bind only the ocean carrier was evident in the form bill of lading (referring to the covenant not to sue subcontractors' clause). The court found plaintiff could not maintain a breach of contract action against the rail carrier defendants.

The appellate court first considered the Clause Paramount which extended COGSA inland "when the goods are in the custody of [Hyundai]." The district court had held that because the cargo was in the custody of a rail carrier subcontractor when damaged, the Clause Paramount did not apply. By its terms, it applied only to damages occurring while in the custody of the ocean carrier. The court found the district court correct in this interpretation.

The court then addressed the provision of the service contract which covered damage caused during the handling, storage, or carriage of the goods by subcontractors.

This appeared to be an agreement to a separate scheme to govern the ocean carrier's liability for damage to the cargo under circumstances in which a subcontractor, such as a road or rail carrier, damaged the goods. Continuing its reasoning, the court found this provision made the ocean carrier liable "'to the extent to which [a road or rail carrier] would have been liable to [the

shipper] if it had made a direct and separate contract with [the shipper]' for that carrier's portion of the journey." *CNA Ins. Co.*, 747 F.3d at 374, 2014 AMC at 661. Thus, if a road or rail carrier had made a separate contract with the shipper, it would have been subject to Carmack (citation omitted) and under Carmack, it would be unable to limit its liability by contract.

Based on the foregoing, the court concluded plaintiff's claim for "damage caused during the handling, storage, or carriage of the goods by the ocean carrier's Subcontractor" — must be resolved under Carmack. *CNA Ins. Co.*, 747 F.3d at 375, 2014 AMC at 662.

Because the district court proceeded on the theory (later confirmed by the jury) that the damage occurred while the cargo was in the custody of either of the rail carriers, the district court was ultimately correct in its application of Carmack.

"While the district court erred by applying Carmack to this case as a general principle, that error was ultimately harmless because the court would have properly applied Carmack under a straight forward breach-of-contract action." *Id*.

The court affirmed the district court's judgment against the ocean carrier and the jury award of $498,509.91.

As to plaintiff's appeal on the issue of pre-judgment interest, the appellate court considered the service contract to control and remanded the case to the district court for reconsideration of prejudgment interest.

In a partial dissent, Judge O'Malley agreed that the Carmack Amendment did not apply to the road or rail leg in an intermodal overseas export shipped under a single through bill of lading and agreed that plaintiff could not maintain actions in bailment or negligence against the carriers, its cause of action being limited to a claim for breach of the service contract. Judge O'Malley agreed that the plaintiff's breach of contract action was only available against the ocean carrier, not the rail carrier

defendants and that ocean carrier was liable, by contract, for the subcontractor's conduct.

Judge O'Malley disagreed that the ocean carrier's liability must be resolved under Carmack as the majority held. Considering the ocean carrier was authorized, as Corning's agent, to limit the subcontractor's liability and did so by and on behalf of Corning, she would find the ocean carrier contractually liable to the extent of $10,000, and no more.

"MILLIONS" FOR DEFENSE; NOT A PENNY FOR PURSUIT…

A.P. Moller – Maersk A/S v. AGX Intermodal, Inc. et al., No. 12 cv. 7166(AT) (S.D.N.Y. Mar. 12, 2014)

A bill of lading contract was issued covering transportation of a shipment of Reebok shoes from Ho Chi Minh City, Vietnam to Smithtown, Pennsylvania. The shipment was valued at some $288,090. The ocean carrier hired a trucker to transport the shipment from a Pennsylvania rail yard to the ultimate consignee in Smithtown pursuant to a motor carrier service agreement.

The trucker took possession of the shipment on October 25, 2010 and kept it until November 12, 2010, when it was stolen from the trucker's facility. The ocean carrier informed the trucker that it would hold it responsible for all loss and damage arising from the theft.

The cargo owner was paid by its insurance company which became subrogated to the claim. The insurance company in turn hired a recovery agent to proceed in any recovery action against any and all parties concerned. The ocean carrier initiated an action against the trucker alleging breach of the agreement, negligence and negligence bailment.

In a second amended complaint, the ocean carrier, in its prayer for relief, sought costs incurred in defending against the claim and indemnification for any future amount paid in opposing

or settling the claim, to include costs, interest, disbursements and attorneys' fees.

The trucker settled the cargo claim directly with the recovery agent for $220,000 in exchange for a release which also included the ocean carrier.

Before the court was a motion by the ocean carrier seeking recovery of legal fees. Invoices totaling $95,842.50 were offered in support. The ocean carrier's counsel estimated that one half of that amount corresponded to the cargo claim asserted against the ocean carrier in Germany. The remaining half corresponded to the instant action.

The contract between the ocean carrier and the trucker contained an indemnity agreement which provided that the trucker would defend, indemnify and hold the ocean carrier harmless against all loss, liability, damages, etc. "included reasonable attorneys' fees" arising out of or in any way related to the performance or breach of the agreement.

The court stated that to prevail on a breach of contract claim under New York law, a plaintiff must establish the existence of the contract; performance of the contract by one party, breach by the other party and damages attributable to the breach. It stated that the first two elements were not in dispute and with respect to the breach, considered evidence referring to inadequate or improper security being provided by the trucker at its facility.

With respect to damages, the court rejected the argument that the claim should be dismissed as the ocean carrier was now "insulated" from liability relating to the loss. The carrier essentially conceded that settlement of the cargo claim rendered its request for damages relating to the cargo damage claim moot; however, it maintained that it remained contractually entitled to reasonable attorneys' fees pursuant to the indemnification clause of the contract.

The ocean carrier sought indemnification for fees incurred while defending against the cargo claim and also incurred in the present action seeking to obtain payment from the trucker.

The court noted under New York law, indemnification agreements presumptively covered only third party claims and in order for inter-party claims to be recoverable, a contract must contain an "unmistakably clear statement that such damages were intended."

The court noted the clause provided for payment for "any and all loss…cost or expense, including reasonable attorneys' fees, arising out of or in any way relating to…the performance of breach of this agreement." The court found the provision lacked the "necessary explicit and unambiguous reference to inter-party claims". It did provide for indemnification of third-party claims, however the court found the ocean carrier not entitled to that portion of attorneys' fees which were expended in the action to recover them. The court found the ocean carrier entitled to reasonable attorneys' fees for costs incurred "defending against claims asserted by Reebok or its subrogees."

It rejected the trucker's argument that it was necessary for the cargo claimant or its subrogee to file an action against the ocean carrier in order for the ocean carrier to be entitled to recovery. The contract allowed for recovery of fees "in any way related" to the trucker's performance or breach.

The court considered a reasonable fee analysis requires a court to consider relevant case specific variables, including the complexity of the case, available expertise, resources required to prosecute, including the case effectively, the timing demands of the case, and the returns the attorneys expected from the representation.

It further considered the invoices supporting the total amount of the fees and counsel's estimate that approximately half of that amount ($47,921.25) was attributable to fees incurred while addressing the legal claims of the plaintiff subrogee. Having

reviewed the invoices and considering the relevant factors, the court found the total amount of attorney's fees requested were appropriate, reasonable and sufficiently documented and directed payment of attorneys' fees in the amount of $47,921.25.

TENDER NOT TIMELY, BUT INTERRUPTION ONLY TEMPORARY…

CMC Cometals v. Coastal Cargo Co., Inc., CIV.A. 13-4909, 2014 WL 1457573 (E.D. La. Apr. 14, 2014)

Suit was brought for alleged damage to a cargo of tabular alumina and ferro phosphorus transported from China to New Orleans, Louisiana. Cargo plaintiff filed suit against the discharging stevedoring company exactly one year after the cargo was discharged. Some two and half months later, the stevedore moved for leave to file a third party complaint pursuant to Rule 14(c) FRCP against the vessel and its owner.

In a motion to dismiss the third-party claims, the vessel owner alleged the third party claims were time-barred pursuant to the Carriage of Goods by Sea Act, which provides for law suits to be brought within one year after delivery of the goods or the date when the goods should have been delivered. The court considered the third-party claims as being in two categories, the first the Rule 14(c) tender and second, the direct claims of negligence, indemnity and contribution.

As to the first, the court considered whether the stevedore could proceed against the third party defendants, despite the expiration of the one-year statute of limitations period provided for in COGSA, noting that Rule 14(c) provided that an action pursuant to it shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Rule 15(c) of the FRCP provides that an amendment that changes the party against whom a claim is asserted relates back to the date of the original pleading if two conditions are satisfied; first, the amendment must arise out of the conduct, transaction or

occurrence set forth in the original pleading and, second, the amendment must occur within the period provided by law for commencing an action against that party.

As the period provided by law was the one-year statute of limitations under COGSA, the court found the Rule 14(c) tender was not proper because the statute of limitations had already run. It found a plaintiff cannot use Rule 15(c) to overcome the statute of limitations.

The stevedore asserted that it made a demand for arbitration and such interrupted the COGSA one-year statute of limitations; however, the court held a demand for arbitration does not interrupt the statute of limitations. It found the third-party claim as tendered under Rule 14(c) time barred by COGSA.

The court then considered the stevedore's claims for negligence, contribution and indemnity. It noted that Fifth Circuit precedent dictated that when a defendant has a claim against a third-party defendant for indemnity or contribution, the "statute usually will not commence to run against the defendant (third-party plaintiff) and in favor of the third-party defendant until judgment has been entered against the defendant… (citing cases)". *CMC Cometals v. Coastal Cargo Co., Inc.*, 2014 WL 1457573 at *2.

It noted the third party defendant did not argue that the claims for negligence, indemnity and contribution arose out of any agreement subject to COGSA or for the dismissal of those claims. Therefore, the court found the stevedore was able to assert its claims for negligence, indemnity and contribution claims in federal court, barring other jurisdictional obstacles.

Finally, the court considered an objection to service of process, which was raised in a reply memorandum, not discussed at any length, but instead, merely reserved a right to the defense. Because the issue was not formally before the court, the court found it inappropriate to discuss it. It held the third party defendant could bring a proper motion to raise the objection of

insufficiency of service of process so the parties could fully brief the issue.

BEAMERS DON'T GET ANY BETTER….

OOO v. Empire United Lines Co., Inc., 557 F. App'x 40, 2014 AMC 600 (2d Cir. 2014), *as corrected* (Feb. 7, 2014)

The Second Circuit considered an appeal from the district court's application of the $500 limitation of COGSA (See Newsletter No. 61).

Plaintiff argued that the COGSA limitation should not apply as a bill of lading had not been issued at the time when the "Beamers" were stolen (im Deutsch- "Bimmers"). The court rejected this argument, noting that plaintiff had shipped hundreds of items in the past with defendant and the jurisdictional limits of COGSA had been extended beyond the tackles in the bill of lading.

As to plaintiff's argument of "unreasonable deviation", the court noted the doctrine as having been narrowly limited. Even if the co-defendant had part in the theft of the Beamers, such would not justify extending the doctrine.

Finally, the court considered defendant's bill of lading form sufficiently invoked the limitation; the plaintiff was aware of it, and, thus, a fair opportunity to declare a higher value had been given.

The court affirmed the decision below.

COURT FINDS CARMACK APPLIES; BUT LEAVES CARGO CLAIMANT WITHOUT A REMEDY…

Am. Home Assur. v. A.P. Moller-Maersk, 2014 AMC 668, 2014 WL 1303610 (S.D.N.Y. Mar. 31, 2014)

The subrogated underwriter brought suit for damage to a shipment of forklift machinery and parts seeking full recovery for

the damaged cargo under the Carmack Amendment. The manufacturer (plaintiff's insured) had covenanted not to sue any of the ocean carrier's subcontractors in the applicable bill of lading, thus, plaintiff chose to sue the ocean carrier rather than the railroad.

The bill of lading involved was intended to be a "through" bill of lading for shipment from Illinois to final destination in Australia and, although the ocean carrier never actually issued a physical copy of the standard form of bill of lading, it did issue electronic versions and the parties did not dispute that the standard form set forth the terms of their relationship.

The bill of lading provided for a COGSA package limitation of $500 limitation "where the Carriage is Port-to-Port" or "where the stage of Carriage where the loss of damage is not known." If the loss or damage is known to have occurred during carriage inland in the USA, liability is determined "in accordance with the contract of carriage or tariffs of any inland carrier…" The bill of lading further allowed subcontracting of any part of the transportation whatsoever and included a Himalaya clause which also included a covenant not to sue subcontractors.

An international transportation agreement existed between the railroad and the ocean carrier which incorporated the Intermodal Rules and Policies Guide of the railroad by reference. The policies provided that the railroad would not be liable for loss or damage to goods absent proof of negligence and, in any event, its liability would be limited to $250,000 per shipment.

Suit was filed against the ocean carrier and the freight forwarder. The ocean carrier impleaded the railroad, seeking indemnification. A dismissal of the freight forwarder was agreed to and the ocean carrier then moved for partial summary judgment, arguing any liability would be and should be limited to $500 per package.

The court considered the principal issue to be "which of two statutes – the Carmack Amendment or COGSA" applied to the

rail portion of the international multimodal shipment at issue; noting the issue to be critically important because the statutes "impose radically different liability regimes on cargo carriers." (i.e. Carmack imposes something akin to strict liability on shippers, while COGSA provides a more carrier-friendly regime that includes a $500 per package damages limitation.)

Am. Home Assur., 2014 AMC at 684, 2014 WL 1303610.

Previously, the court (Judge Jones then sitting) accepted the argument that the Carmack Amendment and not COGSA governed. Plaintiff moved for summary judgment against the railroad and ocean carrier as being liable pursuant to the Carmack Amendment. Before that motion was decided, the ocean carrier and the railroad entered into a stipulation by which the ocean carrier agreed to dismiss its third-party complaint against the railroad.

Because the railroad had been impleaded pursuant to FRCP 14(c), plaintiff argued that its consent was required before the railroad could be dismissed from the action. The railroad and the ocean carrier argued that Rule 14(c) was no longer applicable, in light of the court having determined that the Carmack Amendment applied, and thus the claims were not maritime in nature.

Judge Jones rejected that argument and the proposed stipulation of dismissal stating her decision regarding the scope of the railroad's liability under the Carmack Amendment did not alter the maritime nature of plaintiff's claim. She then retired and the case was temporarily transferred to Chief Judge, Loretta A. Preska.

The railroad sought reconsideration and, although Judge Preska declined to revisit Judge Jones's earlier summary judgment determination, she concluded that the order was erroneous in that "the Carmack Amendment provides the exclusive remedy for a shipper's compensation for actual loss or injury." *Am. Home Assur.,* 2014 AMC at 675, 2014 WL 1303610. In other words, once it was decided the Carmack Amendment applied to the loss at issue, any maritime claims were necessarily pre-empted. To find

otherwise "would to be imposed two separate and parallel liability regimes for the exact same damage under a bill of lading." Judge Preska vacated Judge Jones's order and "so ordered" the stipulation dismissing the railroad.

The carrier was then granted permission to move for summary judgment. In its motion, it argued that it could not be liable under the Carmack Amendment because it was not a "rail carrier" within the meaning of that statute. Plaintiff, in response, argued that liability was not sought under the Carmack Amendment per se, but rather on the basis that the ocean carrier agreed to be bound by the Carmack Amendment's regime.

The case was then transferred to Judge Gardephe, who denied plaintiff's motion for summary judgment, without prejudice, finding that the ocean carrier's summary judgment motion presented a potentially dispositive issue. The court further explained that it would reinstate plaintiff's motion if it found the ocean carrier's liability was governed by the Carmack Amendment, either statutorily or contractually.

The court considered there was no basis to hold the ocean carrier statutorily liable under the Carmack Amendment. It found the ocean carrier was neither a receiving carrier nor a delivering carrier, and that it was undisputed that the ocean carrier was not a rail carrier. Nor was the ocean carrier a freight forwarder. It found the ocean carrier was not statutorily liable under the Carmack Amendment.

Dealing with contractual liability, the court considered provisions of the bill of lading which stated if the "loss or damage is known to have occurred during Carriage, inland in the USA", liability was to be determined in accordance with the contract of carriage of any inland carrier. The ocean carrier argued that its contract with the railroad incorporated the railroad's rules; thus, its liability was limited to $250,000 per shipment as provided for in that agreement.

On the other hand, the bill of lading also contained a provision stating where the stage of carriage of the loss was known, the carrier's liability would be determined by the provisions contained in any national law which could not be departed from by private contract to the detriment of the merchant and which would have applied if the merchant had made a separate and direct contract with the railroad. Plaintiff argued that this meant the ocean carrier's liability was determined by the Carmack Amendment which would have applied if it made a separate contract with the railroad.

The court pointed out that the Second Circuit had rejected a similar argument because Carmack's provision can be departed from by private contract and is not a national law which cannot be departed from.

Plaintiff asserted the ocean carrier should be liable pursuant to the liability regime (i.e. Carmack) set forth in the contract of carriage of "any land carrier" as the loss occurred while in the custody of the railroad.

The ocean carrier argued (because of Judge Preska's previous finding that "the Carmack Amendment governs the entire scope of plaintiff's claims and…such claims are non-maritime in nature") that the contract claim under the bill of lading was now pre-empted.

The court rejected plaintiff's arguments that the ocean carrier should be liable pursuant to the bill of lading clauses and stated the applicability of the Carmack Amendment is the law of the case, as is Judge Preska's ruling that "the Carmack Amendment provides the exclusive remedy for a shipper's compensation for actual loss or injury."

> …given that Maersk did not contractually agree to be bound by the liability regime set forth in the Carmack Amendment, American Home has no claim under the Carmack Amendment against Maersk.

Am. Home Assur., 2014 AMC at 684, 2014 WL 1303610.

The court granted the ocean carrier's motion for summary judgment.

IF IT WERE DONE WHEN 'TIS DONE', THEN 'TWERE WELL IT WERE DONE QUICKLY…'

SMIC Group v. Great Joy Trading Limited et al., No. 652959/2011 (N.Y. Sup. Ct., N.Y., Co. April 17, 2014).

Plaintiff brought suit for non-payment with respect to four shipments of clothing from Shanghai, China to California. It brought suit against the purchasers and also the NVOCC and its agent in China in respect to bills of lading for each shipment. Plaintiff sued the shipping defendants claiming such defendants failed to obtain original bills of lading prior to releasing the merchandise.

The court found the bills of lading defined plaintiff as subject to their terms by virtue of a "merchant" clause:

"Merchant includes the shipper, consignor, consignee, owner and receiver of the Goods and the holder of this bill of lading."

The court found COGSA applicable as the United States enactment of the Hague Rules and the bills of lading specifically incorporate the terms of COGSA.

The court also noted non-parties to bills of lading may be subject to the liability limitation of COGSA (citation omitted).

The court went on to note that COGSA contains a statute of limitation providing for discharge from liability unless suit is brought within one year after the goods are delivered or the date when the goods should have been delivered.

It also found the existence of an express contract (the bills of lading) regarding the same subject matter precludes an implied contract claim.

As to a claim for breach of an implied "covenant of good faith and fair dealing", the court stated the claim duplicates a claim for breach of contract. It is also noted that a simple breach of contract is not to be considered as a tort unless a legal duty independent of the contract itself has been violated.

As to a breach of contract by delivering without surrender of bills of lading, the shipping defendants argued that delivery was proper because the bills of lading was non-negotiable and obtaining the originals was not a requirement for proper delivery. The bill of lading is "straight" or "non-negotiable" when it states the goods are to be delivered to a consignee. It differs from a "negotiable" bill of lading.

> Surrender of the original bill of lading is not required if the bill of lading is non-negotiable and where such a condition is not specifically demanded by the shipper (citation omitted).

The plaintiff alleged "shipping defendants" were notified they were not to release the merchandise unless they were shown the original bill of lading. While the court had questions as to emails purportedly sent to the shipping defendants, it noted delivery of these shipments had been made prior to the emails and only one shipment, the last, remained to be delivered. Only the final shipment involved in the complaint may form the basis for a contract claim against the NVOCC defendants.

The court turned to the co-defendant who was the NVOCC's agent in China and noted clauses limiting liability of subcontractors and agents are regularly upheld (citation omitted) and parties are permitted to extend the provisions of a bill of lading, including COGSA's terms, to third-parties such as agents. Additionally, the bill of lading contained an explicit provision immunizing subcontractors (i.e. a "Covenant not to Sue" clause).

The court noted only the NVOCC's name appeared on each bill of lading and plaintiff provided no evidence that the China agent was not an agent of the NVOCC, other than "some slightly inconsistent language from a deposition."

Alternatively, the court found the claims against the agent was time-barred. The agent was not named defendant or served until after the one year statute of limitations for all four shipment had run.

The court ordered dismissal as to the NVOCC, except as to that cause of action involving the fourth shipment at issue.

As to the agent, all claims and cross claims as against the agent were to be severed and dismissed.

MERCHANT? MAYBE….

Michael J. Ryan[1]

The term "merchant" (as defined in Wikipedia, the free encyclopedia) is: "a business person who trades in commodities produced by others, in order to earn a profit."

Essentially, a merchant buys or sells goods, or both. By itself, the term "merchant" offers little explanation as to its meaning, purpose or intent as set forth in current ocean bills of lading. At the same time, there is a history of dealing between merchants and vessel owners/operators who carry merchant goods from one port to another. It was not unheard of for the merchant to be the captain of the vessel as well, owning both vessel and cargo.

In the days of yesteryear, bills of lading referred to the shipper, the consignee, the notify party and were executed by or on behalf of the carrier. A bill of lading usually explained that it was a contract between the carrier and the shipper, the consignee, the owner of the goods or the holder of the bill of lading. This has since been expanded.

An example of a "merchant" clause today is:

> "Merchant" is defined to include "the Shipper, Consignee, Receiver, Holder of the Bill of lading, Owner of the cargo or person entitled to possession of the cargo or having a present or future interest in the goods."

Usually, the bill of lading terms further state that a merchant "shall be jointly and severally liable to the Carrier…for the performance of the obligations of any of them under this bill of lading."

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[1] Michael J. Ryan, Of Counsel, Hill, Betts & Nash LLP. This paper was presented in part of the Continuing Legal Education program of the Association at the spring meeting in New York on May 1, 2014.

Obviously, the clause is not the same as the simple definition initially set forth above.

While the identity of a shipper and consignee may be ascertained rather readily, usually being stated as such in the bill of lading, a consignor might well not be the owner of the goods, but rather acting on behalf of the owner. The same can be said with respect to the consignee.

An NVOCC might well be acting for the shipper with respect to the actual carrier; however, it is indeed questionable whether he would sit within the simplistic definition of one who trades in commodity produced by others.

It is submitted that over the course of time, ocean carriers encountered claims with respect to cargo damage brought by entities who might well be parties in interest but were not mentioned in the bill of lading contract at all. Claims can be made by a cargo underwriter by way of subrogation or by the owner of the goods whose transportation was arranged for by an agent.

Given such situations, it is not difficult to envision a claimant asserting it was not bound by any time bar, package limitation or other defense, arguing that it was not a party to the bill of lading contract but still a real party in interest entitled to bring an action for recovery.

It is submitted that, more likely than not, the use of the term "merchant" has its genesis from those situations where the carrier, attempting to assert a defense set forth in its contract or in an applicable statute, met with the argument that the opponent was not a party to the bill of lading, not having negotiated it and possibly not having seen it.

Simply stated, it appears the definition of "merchant" as seen in most bills of lading (if not all) by itself means nothing. It is more an effort to specify those entities who should be considered as parties to the bill of lading contract and bound by its provisions.

The merchant clause, in of itself, grants nothing to the carrier. Only when it is allied with other provisions of the bill of lading relating to defenses or responsibilities does the merchant clause come into sway.

Such other provisions would include responsibility to pay freight and charges; package limitation; covenant not to sue provisions; forum selection clauses and potential "warranties", particularly as to the condition of the cargo, packaging, nature, dangerous cargo, etc.

It is not the purpose of this paper to suggest answers to the issues which may arise, but rather seeks to identify issues which have been considered in the past. This paper hopefully looks to recognition rather than solution.

In *Mahmoud Shaban & Sons Co. v. Mediterranean Shipping Co.*, *S.A.*, 2013 AMC 732, 2013 WL 316151 (S.D.N.Y. Jan. 28, 2013) , Judge Greisa of the Southern District of New York considered a suit brought against a carrier of rice as well as the owner of the vessel on which the rice was shipped. The rice outturned smelling and infested with insects. The bill of lading between the actual carrier and the NVOCC contained a broad merchant clause as well as a forum selection clause calling for resolution of disputes in the U.S. District Court for the Southern District of New York. A corresponding bill of lading agreed to between the NVOCC and the rice supplier did not include a similar forum clause; however, it did include a clause in which the supplier (presumably the shipper) agreed to defend and indemnify the carrier for any claims brought with respect to the goods before delivery to the carrier.

The supplier argued it was not subject to personal jurisdiction in the Southern District and moved to dismiss the third-party complaint. Judge Greisa denied the motion, noting it was once a given that a shipping intermediary acts as a merchant's agent for the purpose of negotiating and agreeing to a forum selection clause. Under this line of authority it was clear the shipper would indeed be bound by the forum selection clause;

however, the line of cases predated the Supreme Court's decision in *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 2004 AMC 2705 (2004). The court considered that portion of the *Kirby* decision dealing with the extension of limitation benefits to sub-contractors and the impact of such language. *Kirby* involved a package limitation, but did not involve a forum selection clause.

Judge Greisa, considering industry practice and case law supporting it, found it remains the law that an intermediary serves as the upstream merchant's agent for the purposes of agreeing to litigate in a particular forum.

Judge Greisa read the merchant clause expansively as covering "any suit by Merchant" and "any suit by the Carrier" holding that the NVOCC acted as the shipper's agent when it agreed to the forum selection clause in the bill of lading between it and the actual carrier.

Judge Greisa, in a footnote, limited his holding to the NVOCC acting as the shipper's agent when it agreed to the forum selection clause only for the narrow purpose of establishing personal jurisdiction.

While Judge Greisa upheld the forum selection clause and enforced it against the shipper, he went on to state the agreement to indemnify the NVOCC only served to obligate the shipper to mount a legal defense of the NVOCC wherever it happened to be sued, but did not subject the shipper itself to personal jurisdiction in those fora as a party to litigation.

In *Fed. Ins. Co. v. Union Pac. R. Co.,* 651 F.3d 1175, 2012 AMC 1303 (9th Cir. 2011), the Ninth Circuit considered enforcement of a covenant not to sue holding the covenant not to sue forces the "merchant" to bring all suits against the "carrier", even for damage caused by a sub-contractor such as a railroad. It found the arrangement lawful under the Hague-Rules which are functionally identical to COGSA. The covenant not to sue did not lessen or relieve the carrier of liability, but only affected the mechanism of enforcing the shipper's right.

[The court also sets forth several citations of district court decisions which reached a similar conclusion].

In *Clevo Co. v. Hecny Transp., Inc., 715 F.3d 1189, 2013 AMC 2247 (9th Cir. 2013)*, the Ninth Circuit enforced a one year statute of limitation. It found the Himalaya Clause extended the benefit of the one year statute to the freight forwarder who had misdelivered the cargo without first obtaining the original bill of lading.

These cases are examples of situations where courts have enforced bill of lading defenses, i.e. forum selection clauses, time bar clauses, and covenants not to sue, based upon the enforcement of the Himalaya Clause in conjunction with the merchant clause.

In *Nippon Yusen Kaisha v. FIL Lines USA Inc.*, 977 F. Supp. 2d 343, 2014 AMC 553 (S.D.N.Y. 2013), the actual carrier brought suit against the NVOCC defendant for freight charges incurred during shipment from the United States to ports in India.

On the bill of lading, the NVOCC's name was listed in the space labeled as "consignee". The bill of lading contained a provision that the "parties defined herein as the Merchant shall be jointly and severely liable to the carrier for payment of all freight and charges and for the performance of the obligation of each of them hereunder."

Merchant was defined as "Shipper, Consignor, Consignees, Owners and Receivers of the goods, and the Holder of this bill and any other persons acting on their behalf."

The court found the NVOCC did not carry its burden of proving he was acting as an agent for a disclosed principal and noted the bill of lading specifically made the consignee liable for the payment of the freight charges based on its status as consignee.

In *Fubon Ins. Co. Ltd. v. OHL Int'l*, 2014 AMC 1078, 2014 WL 1383604 (S.D.N.Y. Mar. 31, 2014), March 31, 2014, Judge Sullivan considered a motion by a subcontractor of the actual

carrier to enforce a covenant not to sue. The court stated the plaintiffs, as the cargo owner and its subrogated insurers are "'merchants' pursuant to the COSCO Bill of Lading, and as such are barred from suing Evans by the COSCO Bill of Lading's covenant not to sue." *Fubon Ins. Co. Ltd.*, 2014 AMC at 1093, 2014 WL 1383604 at *9.

The court further acknowledged that courts in this circuit and elsewhere hold that a party suing on a bill of lading consents to the terms of that bill of lading (citation omitted) and a cargo owner 'accepts' a bill of lading to which it is not a signatory by bringing suit on it. (citation omitted). Plaintiff was bound by the bill of lading sued on, including the covenant not to sue contained in it.

In *MTS Logistics, Inc. v. Stone Tile Direct*, LLC, 2012 AMC 1653, 2012 WL 1056333 (S.D.N.Y. Mar. 27, 2012), suit was brought by an NVOCC against the consignee defendant who had purchased natural stone from a company in Turkey. The NVOCC booked the cargo with the actual carrier and issued a bill of lading which listed defendant as "consignee" and notify party. It named the Turkish shipper as the shipper and defined "merchant" as the "shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or persons entitled to the possession of the cargo and the servants or agents of any of these. "There is no dispute that Defendant qualifies as a Merchant under the Bill of Lading."

The bill of lading further contained a clause which included a warranty that the description and particulars of the goods are correct. The Turkish shipper declared the cargo weight as some 21,450 KGS; however, the actual weight was later determined to be approximately 27,615 KGS. As a result of the understated weight, cranes were unable to safely discharge the cargo, leading to port demurrage and vessel detention charges. The actual carrier passed these charges on to the NVOCC plaintiff and the plaintiff, in turn, brought the action involved.

The court noted while, typically, the primary obligation to pay shipping costs rests with the shipper, rather than the consignee, the consignee can become liable for the shipping costs where it has

a binding statutory or contractual obligation to pay for the freight charges. The court found both the defendant and the Turkish shipper qualified as a merchant who "shall be jointly and severally liable" for their "performance and obligation" which included a warranty that the cargo weight was correct.

As the cargo weight was inaccurate, the defendant, as a merchant, is obligated to "indemnify the Carrier [for] all loss, damage, fines and expenses arising or resulting from [this] inaccurac[y]." *MTS Logistics, Inc. v. Stone Tile Direct*, LLC, 2012 AMC at 1658, 2012 WL 1056333, at *3.

In *APL Co. Pte. Ltd. v. Kemira Water Solutions, Inc.*, 890 F. Supp. 2d 360, 364 (S.D.N.Y. 2012)a carrier sued for damage to its vessel and for cleanup charges arising out of the leakage of bagged ferrous chloride. Remedial costs amounted to some five millions dollars.

The carrier referred to the merchant clause in its bill of lading contract and to a provision concerning "Dangerous, Hazardous, or Noxious, Goods" which called for the merchant to indemnify the carrier for liability and expenses arising in consequence of the carriage of such goods.

The court acknowledged that a party could be bound to a bill of lading if it was shown the party exhibited acceptance to be bound or through an agency relationship with one of the contracting parties. The court referred to *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 2009 AMC 609 (S.D.N.Y. 2009). The court stated "as a general matter, a party cannot unilaterally bind another party to a contract by capturing them within a term defined in that contract". *APL Co. Pte. Ltd.*, 890 F. Supp. 2d at 366. However, "[a]lthough seaway bills of bills of lading are contracts between a shipper and a carrier, there is ample precedent for binding a consignee to these contracts under the theory that the non-signatory consignee accepted their terms." *Id. citing Taisheng Int'l Ltd. v. Eagle Mar. Servs., Inc.*, No. Civ. A. H–05–1920, 2006 WL 846380, at *3 (S.D. Tex. Mar. 30, 2006).

Nevertheless, the court found the consignee did not accept the terms and conditions of the seaway bills based on a course of conduct, nor did it accept the terms and conditions through exercising dominion and control of the shipment.

It further stated the consignee did not accept the terms and conditions of the seaway bills by invoking the forum selection clause and the supplier did not act as an agent for the consignee, so as to bind the consignee to the seaway bill.

The court dismissed the carrier's motion for summary judgment with respect to its breach of contract and negligence claims. As to a claim under CERCLA, this claim survived.

In a subsequent decision dated February 25, 2014 consisting of some 74 pages, the court found the consignee liable under CERCLA for cleanup costs.

See also the decision of the Seventh Circuit Court of Appeals in *Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.,* 696 F.3d 647, 2012 AMC 2611 (7th Cir. 2012), where the railroad brought suit against the cargo owner (consignee) alleging responsibility for improper packing of steel injection molds which broke through their crates create and fell onto the railroad tracks causing the train to derail.

The court acknowledged that a non-party "buyer" may accept the terms of the bill of lading where it files a lawsuit under the bill and attempts to benefit from its terms. It also stated acceptance of the bill of lading may be shown through an agency relationship between the shipper and the intermediary or the NVOCC (referring to *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 2009 AMC 609; however, the court found insufficient evidence to support acceptance of the bill of lading by the cargo owner or to substantiate the carriers' claim of agency.

[On remand to the district court, the district court ultimately found (essentially a battle of experts) the cause of the molds' breaking through the bottom of the container was not by improper

stowage, but rather by weakened or inadequate welding of the container floor.]

See also Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co., 966 F. Supp. 2d 270, 2014 AMC 579 (S.D.N.Y. 2013) *aff'd*, 13-3416-CV, 2014 WL 3844155 (2d Cir. Aug. 6, 2014). Judge Chin (Circuit Judge sitting by designation) considered an argument that enforcement of a covenant of not to sue was violative of the Harter Act, Hague-Rules or COGSA. He concluded that they did not prohibit the "liability limitation in questions". Judge Chin referred to the Ninth Circuit decision in *Federal Insurance Co. v. Union Pacific Railroad Co*. (*supra*), noting the covenant not to sue merely is an enforcement mechanism rather a reduction of the carrier's obligation to the cargo owner and therefore, was permissible.

The foregoing summaries seem to indicate courts are willing to enforce bill of lading defense clauses such as time bar, package limitation, covenant not to sue, etc. as well as payment of freight or charges incurred, where the consignee is designated in a merchant clause contained in the applicable bill of lading.

At the same time, there appears to be some reluctance to fastening liability on a consignee where it did not have an active part and did and not accept responsibility under the contract.

Thus, a party may well fall within the definition of a "merchant" as set forth in a broad merchant clause, but it does not automatically follow that such person will be held responsible. For example, while a consignee may be found liable where it clearly accepted the contract (i.e. bringing suit based upon it) or actively involving itself with the bill of lading and transportation, mere inclusion of it in the merchant clause may well not be sufficient to keep it in the ball park as a contract player.

It appears that courts are more readily inclined to consider a merchant clause in conjunction with other bill of lading provisions relating to *defenses* however, it also appears the bar may be set

higher and greater participation required when *recovery* is sought from the “merchant”.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

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NEWSLETTER

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IS THERE A UNIFORM DEFINITION OF "SEAFARER" FOR PURPOSES OF THE MLC?

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The Maritime Labour Convention (2006) ("MLC") is an international treaty which consolidates 68 existing maritime labor instruments into a single text with the aim of ensuring decent working and living conditions for seafarers. A threshold question in any MLC inquiry, therefore, is: "Who is a seafarer?" 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.*" In other words, if you work aboard a ship, you're a seafarer.

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").

The purpose of the ILO's resolution was to provide clarification to flag states in defining "seafarer" so that there would be "*uniformity* in the application in the rights and obligations provided by the Convention." (emphasis added) To consider whether uniformity can be achieved, below is a non-exhaustive sampling of excerpts from flag states that have implemented legislation regarding the definition of a seafarer:

Bahamas Maritime Authority Information Bulletin No. 127:

All parties should note that at the time of publication of this bulletin, The Bahamas considers that the following persons are not seafarers for the purpose of MLC 2006 application:

Port workers, including traveling stevedores; pilots and port officials; ship surveyors and auditors; equipment repair and service technicians and riding crew whose principal place of employment is onshore; guest entertainers who work occasionally and short term on board with their principal place of employment being onshore.

Barbados' Maritime Ship Registry ("BMSR") Information Bulletin No. 203 (Implementation of the Maritime Labour Convention (2006)):

BMSR considers that the following persons are not seafarers for the purpose of MLC 2006 application:

Port workers, including traveling stevedores; pilots and port officials; ship surveyors and auditors; equipment repair and service technicians and riding crew whose principal place of employment is onshore; guest entertainers who work occasionally and short term onboard with their principal place of employment being onshore.

Bermuda's Merchant Shipping (Seafarer's Employment) Regulations 2013:

"Seafarer" in these regulations means any person, including a master, who is employed or engaged on any capacity on board a ship, on the business of the ship and where there is doubt as to whether a person working or engaged on a ship is a seafarer and subject to these regulations the Minister shall make a determination and in doing so he shall be guided by the advice and guidance provided by the ILO.

Malta's Merchant Shipping (Maritime Labour Convention) Rules, 2013:

"[S]eafarer" means any person who is employed or engaged or works in any capacity on board a ship, to which these rules apply, but excluding persons providing non-scheduled or ancillary services to a ship to assist it in its maritime voyage such as, inter alia, shore based engineers, bunker crew, pilots, members of the Armed Forces of Malta, or a member of the Civil Protection Department of Malta[.]

Panama's Executive Decree No. 86:

ARTICLE 3

"This Executive Decree applies to all Seafarers employed, hired or working in any position on board a vessel ...."

"Exempt from complying with the preceding paragraph are:

(a) port pilots; (b) port employees; (c) ship inspectors; (d) superintendents; (e) employees subject to the special labour regulations of the Panama Canal Authority; (f) technical personnel in Platforms or MODU (Mobile Offshore Drilling Units)."

Singapore's Merchant Shipping (Maritime Labour Convention) (Definition of Seafarer) Order [April 1] 2014:

Persons Not Regarded as Seafarers:

1. A person who is employed, engaged or works on board a ship in any of the following capacities: (a) diver; (b) guest entertainer; (c) marine superintendent; (d) marine surveyor; (e) privately contracted security personnel; (f) repair technician; (g) researcher; (h) scientist; (i) ship inspector; (j) specialist offshore technician.

2. A person who is employed or engaged or who works in any capacity on board a ship and who fulfils the following

criteria set out in sub paragraphs (a) and (b) together with any one of the following criteria set out in sub paragraphs (c), (d) and (e):

(a) his duration of stay on board that ship does not exceed 45 consecutive days;

(b) his working duration on board that ship in the aggregate does not exceed 4 months in any 12-month period;

(c) the nature of his work does not form part of the routine business of the ship;

(d) the work he performs is ad hoc, with his principal place of employment onshore;

(e) the labour and social conditions given to him by his principal employers are comparable to that provided for under the Act.

* * *

As the above excerpts demonstrate, whether a worker will be considered a "seafarer" will vary depending on the flag state of the vessel. For instance, a guest entertainer on a vessel flagged in Singapore is not considered a seafarer. A guest entertainer on a vessel flagged in the Bahamas or Barbados is not deemed a seafarer as long as the entertainer's work onboard is short term and his or her principal place of employment is onshore. The laws of Bermuda, Malta, and Panama do not specifically exclude guest entertainers from the definition of "seafarer," but Bermuda allows the Minister to make a determination in the case of doubt and Malta excludes persons providing "non-scheduled or ancillary services to a ship" which could include guest entertainers.

Flag state laws implementing the MLC are relatively new and there has been no opportunity to litigate the issue of who is properly considered a "seafarer" given the recent effective date of

the MLC. It may be premature to opine on whether the definition of "seafarer" approaches the ILO's goal of "uniformity in the application in the rights and obligations" provided by the MLC, but in the nascent stages of MLC-implementing legislation, uniformity (as practitioners of general maritime law in the U.S. know) can be an elusive, white whale.

A BRIEF LEGAL ANALYSIS OF NEW "ALL YOU CAN DRINK" OFFERINGS ON CRUISE SHIPS

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Recently, the major cruise lines have begun offering "All You Can Drink" options to passengers on cruises in exchange for a daily fee. These options range from completely unlimited offerings of alcoholic drinks to plans that have a per day drink limit.[1] The effect of these options is still to be seen, but it stands to reason that many passengers who choose these options are going to over imbibe in order to get their money's worth in much the same way as many passengers gorge themselves on the unlimited food options offered by the cruise lines. However, what is the legal duty owed to the passengers by the cruise lines to prevent over-serving of drinks and the inevitable accidents or assaults that can occur when people are intoxicated?

Historically, bars and restaurants have been protected from lawsuits by patrons who over-imbibe by state "dram shop" laws. However, those laws vary from state to state and there is no uniform dram shop law that applies in maritime cases. Given the quest for uniformity under the general maritime law, courts sitting in admiralty are reluctant to apply the dram shop law of one particular state over another. Instead, admiralty courts prefer to

[1] Carnival's plan, for example, has a 15 drink per day limit. For a great summary of each of the Cruise lines' drinking packages and comments thereon, go to link

apply the general maritime law negligence standard which states that a shipowner owes passengers the duty of exercising reasonable care under the circumstances. *Doe v. NCL (Bahamas) Ltd.*, 11-22230-CIV, 2012 WL 5512314 (S.D. Fla. Nov. 14, 2012), *Tello v. Royal Caribbean Cruises, Ltd.*, 939 F. Supp. 2d 1269, 1272 (S.D. Fla. 2013), *Doe v. Royal Caribbean Cruises Ltd.,* 2012 AMC 761, 2011 WL 6727959 (S.D. Fla. 2011) and *Hall v. Royal Caribbean Cruises, Ltd.,* 888 So. 2d 654, 2004 AMC 1913 (Fla. Dist. Ct. App. 2004)all citing to *Kemarec v. Compagnie General Transatlantique*, 358 U.S. 625, 1959 AMC 597 (1959).

In the *Doe, Tello* and *Hall* cases, the court ruled that the plaintiff stated a viable cause of action by asserting the maritime negligence standard having to do with the over-serving of alcohol to a passenger. In the *Doe v. NCL* case, the court later on summary judgment went a step further and held that the plaintiff set forth enough evidence to create a question of fact on the issue to proceed to trial and discussed the objective of uniformity in maritime law in denying the defendant's request to apply the Florida dram shop rule. *Doe v. NCL (Bahamas) Ltd.*, 11-22230-CIV, 2012 WL 5512347 (S.D. Fla. Nov. 14, 2012).

With the advent of these drinking plans, the argument could be made that not only are the cruise lines potentially responsible for over-serving passengers, but they actually encourage over-consumption by promoting these "All You can Drink" plans. Other related issues also come up such as: if you are a bartender working for tips are you going to cut off or limit a passenger's alcohol consumption? What if that is attempted and the passenger becomes upset because the cruise line is not living up to its deal of giving a passenger unlimited drinks? What are the realistic limits in these situations? Only time will tell, but it is likely that we will see more litigation involving these new drinking plans.

PUNITIVE DAMAGES IN TORT: ENFORCEMENT OF US-COURT JUDGMENTS IN GERMANY

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Awarding punitive damages in civil cases is, no doubt, a powerful tool. Yet there are jurisdictions, notably in Europe, where judgments ordering a defendant in a civil case to pay punitive damages are not enforceable for reasons of public policy or "*ordre public*".

The leading decision in Germany was delivered by the German Federal Court of Justice (*Bundesgerichtshof* – abbvd. BGH) in 1992[2] on the enforcement of a Californian judgment awarding punitive damages amounting to USD 400,000. The BGH held that punitive damages were an infringement of "*ordre public*", *inter alia*, because introducing a punitive element into a civil case would be contrary to the state's constitutional monopoly to mete out punishment through the criminal courts.

Early attempts to Frustrate Service of U.S. Court Decisions Awarding Punitive Damages

Based on the 1992 BGH decision defendants resident in Germany attempted to obstruct already the *service* of a U.S. court judgment ordering punitive damages by claiming their fundamental right to freedom of action and the rule-of-law principle as enshrined in the German Constitution would be violated by the service (not yet the enforcement) and the German authorities were under a duty to refuse to let the service proceed under art. 13 par. 1 of the 14th Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention – HSC).

[2] Decision dd. 4th June 1992 – IX ZR 149/91.

The Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG)[3], as well as several Higher Regional Courts (*Oberlandesgericht* – OLG)[4], put a stop to these actions on the grounds that refusing service under the Hague Convention required an infringement of the state's sovereignty or security which necessitated an element of abuse which was definitely not the case.[5]

Development of American and German Tort Law Since the BGH Decision of 1992 and Expectations for the Future

Since 1992, the legal approach practiced in Germany regarding punitive damages did not change significantly. Generally, the concept of punitive damages does not exist in German tort law. O*rdre Public* is being quoted as the main hurdle: damages are seen as compensatory and aimed at restitution and redressing a wrong, not as a punishment or a deterrent, both of which are considered the constitutionally protected prerogative of the state's criminal justice system rather than the civil courts.

On the other hand, if damages awarded by U.S. courts are "punitive" by name but compensatory in substance, a German court may permit enforcement on the basis that the purpose of the award is compensatory and hence in accordance with German *Ordre Public*.

There is a cautious tendency developing in German courts to be more generous in awarding damages with elements of deterrence, e.g. for non-pecuniary losses such as an unlawful

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[3] E.g. decisions of the BVerfG dd. 3rd August 1994; dd. 7th December 1994 – 1 BvR 1279/94; dd. 25th July 2003 – 2 BvR 1198/03; dd. 24th January 2007 – 2 BvR 1133/04; dd. 9th January 2013 – 2 BvR 2805/12.

[4] E.G. OLG München decision dd. 15th July 1992 - 9VA 1/92; OLG Frankfurt a.M. decision dd. 6th March 2006 - 20 VA 2/05.

[5] Decisions of the BVerfG dd. 25th July 2003 - 2 BvR 1198/03; dd. 9th January 2013 - 2 BvR 2805/12.

invasion of privacy; (in 2006 € 25,000 were awarded to a claimant who discovered that naked pictures of her had been posted on the internet – without her permission) less so, however, for pain and suffering for personal injury which is still largely mired in the perception that neither pain nor suffering are truly measurable in monetary terms so the awards are still fairly modest. Interestingly, already in 1972 a German court increased damages because of the dilatory conduct of the defendant's liability insurer in processing the victim's indemnity claim which clearly includes a punitive or at least deterrent element [6] and is apparently also practiced in some U.S. states, so perhaps the tide may change at some point in the future towards a more structured approach to enforceability of punitive damages.

UPDATE ON THE LAW

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The CARNIVAL TRIUMPH Litigation

Terry v. Carnival Corp., 2014 AMC 1337, 2014 WL 982892 (S.D. Fla. Jan. 16, 2014)

Multiple individual plaintiffs brought suit against Carnival seeking recovery for damages allegedly sustained in the fire aboard the CARNIVAL TRIUMPH occurring on February 10, 2013, which resulted in the vessel being stranded on the high seas for several days without power. In an extensive opinion on the parties' opposing pre-trial motions for summary judgment, the court entered significant orders on several important maritime issues.

Initially, the court concluded that the passengers were entitled to a partial summary judgment on liability based upon the application of the doctrine of *res ipsa loquitor*, which has not been a favored doctrine in maritime law, especially in the Eleventh

[6] Oberlandesgericht Karlsruhe Judgment dd. 02.11.1972, Court Ref.: 4 U 149/71

Circuit. The court found that the evidence establishing the three traditional elements—the plaintiff's freedom from negligence, the defendant's exclusive control over the instrumentality causing the injury and the nature of the mishap being of the type that would not occur without negligence—was undisputed. Although the doctrine normally only gives rise to an inference of negligence, the court went on to further hold that the plaintiffs were entitled to a summary judgment since Carnival had failed to produce any evidence to establish any potential non-negligent cause of the loss of power sufficient to rebut the inference.

The court also made a significant ruling on the requirements for establishing damages for the negligent infliction of emotional distress. The court concluded that the passengers' plight was sufficient to meet the "zone of danger" test required to recover emotional distress without impact or a personal injury. It then went on to hold that the passengers' claims of continual mental disturbance characterized by sleeplessness and nightmares constituted sufficient physical manifestations of such distress to allow recovery if proved.

Attorney's Fees

Royal Caribbean Cruises, Ltd. v. Cox, 137 So. 3d 1157, 1159 (Fla. Dist. Ct. App. 2014) *review dismissed*, SC14-911, 2014 WL 2149918 (Fla. May 19, 2014)

In an *en banc* opinion**,** Florida's Third District Court of Appeal, which has jurisdiction over the territory where most of the world's largest cruise lines are headquartered, reversed its long standing decision in *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517, 518 (Fla. Dist. Ct. App. 1992), which had held that Florida's offer of judgment statute was applicable to maritime cases filed in state court. In now concluding that the fee shifting provisions of the statute conflicted with maritime law 22 years later, the court joined the federal courts which had previously refused to apply the Florida statute to maritime cases. *See*, *e.g.*, *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. 1997); *Tampa Port Auth. v. M/V Duchess*, 65 F. Supp. 2d 1279 *amended*, 65 F. Supp. 2d 1299 (M.D. Fla. 1997) *aff'd*, 184 F.3d 822 (11th Cir. 1999),

Discovery

Republic of Ecuador v. Hinchee, 741 F.3d 1185 (11th Cir. 2013)

The 2010 amendments to Federal Rule of Civil Procedure 26 extended work product protection to a testifying expert's draft reports as well as to communications between the expert and the attorney retaining it, except to the extent that they (1) related to the expert's compensation, (2) identified facts or data considered by the expert in reaching its opinions or (3) identified assumptions that the expert relied upon. See Fed.R.Civ.P. 26 (b)(4)(B) and (C). In a non-maritime case, impacting admiralty litigation in the federal courts, the Eleventh Circuit refused to further extend such work product protections to communications between a testifying expert and non-attorneys—in this case other experts and corporate employees. Although not expressly deciding the issue, the court implied that communications between the expert and in-house counsel might be considered work product.

Madison v. Jack Link Associates Stage Lighting & Prods., Inc., 297 F.R.D. 532 (S.D. Fla. 2013)

In considering a vessel contractor's request to take in excess of 10 depositions in a suit brought by a cruise ship employee for personal injuries, the court held that under Rule 30 (a)(2)(A) a party seeking leave of court to take additional depositions must also "justify the necessity of each deposition *previously taken* without leave of court" as part of its burden to show the need for the additional depositions.

J.G. v. Carnival Corp., 12-21089-CIV, 2013 WL 5674707 (S.D. Fla. Oct. 17, 2013)

Although recognizing the power of district judges to sanction litigants for "bad faith" conduct in discovery, the court set

a very high bar in a case arising out of a minor passenger's claim that she had been improperly strip searched by the vessel's crew as part of its search for drugs on her. At trial, the plaintiff's testimony differed so significantly from her earlier statements that the court observed, plaintiff's case lacked any substantial factual basis.

Although plaintiff no doubt felt anxiety at being questioned by defendant's security employees, she found herself in that position because she knowingly violated defendant's policies and the law when she brought an illegal drug onboard the SENSATION. And, while plaintiff's conduct certainly did not give defendant free reign to do whatever it wished in investigating plaintiff, plaintiff testified at trial that the aspects of her interrogation over which she sued were either her idea or did not happen.

Nevertheless, quoting from earlier Eleventh Circuit precedence, the court went on to state that "false statements alone do not indicate bad faith." In refusing to award sanctions, the court gave significant weight to the minor's age at the time of her initial statements, the fact that she testified truthfully at trial in acknowledging the falsity of her earlier statements and subsequently had demonstrated in her life a maturity coupled with a development of "a much-needed appreciation for the importance of the truth."

Frasca v. NCL (Bahamas) Ltd., 12-20662-CIV, 2013 WL 2646839 (S.D. Fla. June 12, 2013)

The court allowed the plaintiff to audiotape the defendant's compulsory physical examination under Rule 35, however, denied its request to allow attendance by either counsel, a court reporter or videographer.

Experts

Hoff v. Steiner Transocean, Ltd., 12-22329-CIV, 2014 WL 273075 (S.D. Fla. Jan. 24, 2014)

In a suit against a spa concessionaire, the court rejected a *Daubert* motion seeking to strike the testimony of the plaintiff's expert that a small laceration occurring during a pedicure was a legal cause of the passenger's subsequently developed leg infection. The court held that it was not necessary for the expert to rule out all other potential causes of the infection in order for his opinion to have sufficient reliability to be admissible.

Limitation of Liability Act

Offshore of the Palm Beaches, Inc. v. Lynch, 741 F.3d 1251, 2014 AMC 731 (11th Cir. 2014)

In a suit by a passenger injured in a recreational boating accident, the Eleventh Circuit reiterated the validity of the so-called "single claimant exception" to the exclusive jurisdiction of admiralty courts to hear personal injury and wrongful death claims where the vessel owner has sought the protection of the Limitation of Liability Act as set forth in 46 U.S.C. §30501 et seq.

Noting the tension between the right to jury trial guaranteed as part of the remedies protected by the "savings to suitors" clause and the exclusivity of admiralty jurisdiction under the Limitation Act, the court observed that where there is a single claimant, who agrees to enter into stipulations which are sufficient to guarantee that the vessel owner will not be exposed to competing judgments in excess of the limitation fund that both legal interests can be satisfied. In order for these stipulations to be sufficient, the claimant must concede the shipowner's right to subsequently litigate all issues relating to limitation in the federal limitation proceeding and waive any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court proceeding. *See*, *e.g.*, *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1996 AMC 2734 (11th Cir. 1996).

PASSENGER CLAIMS

Forum Selection

Cline v. Carnival Corp., 2014 AMC 1038, 2014 WL 550738 (N.D. Tex. 2014)

In a case arising out of the CARNIVAL TRIUMPH fire, in which the passengers filed suit in U.S. District Court for the Northern District of Texas, the court denied the cruise lines motion to dismiss on the grounds of the ticket's forum selection clause, instead holding that the proper remedy was a transfer pursuant to 28 U.S.C. §1404 (a).

Medical Malpractice

Mumford v. Carnival Corp., 13-22604-CIV, 2014 WL 1243786 (S.D. Fla. Mar. 18, 2014)

Relying upon the *Barbetta* line of case, the district court dismissed with prejudice the complaint of a passenger who suffered a stroke during the course of a cruise, where it was alleged that the ship's doctor could not administer thrombolytic medication due to the lack of proper equipment, such as a CT scan, on board the vessel. As a result, the passenger was required to be air evacuated and due to the ensuing delay was left permanently paralyzed. The court held that since a carrier is not required to promulgate or enforce particular medical directives regarding patient care, it is therefore not negligent if it fails to do so. The court further dismissed the passenger's claim based upon joint venture and apparent agency for the claimed malpractice of the ship's physician.

Negligent Infliction of Emotional Distress

Gandhi v. Carnival Corp., 13-24509-CIV, 2014 WL 1028940 (S.D. Fla. Mar. 14, 2014)

A father's claim for emotional distress arising from witnessing his daughter sustain severe injuries from a malfunctioning elevator door was stricken by the court on the grounds that the father was not in "the zone of injury." The court concluded that it was not sufficient for the father to have been present at the time, but that he had to have been personally exposed to the danger as well.

Shore Excursions

Ash v. Royal Caribbean Cruises Ltd., 991 F. Supp. 2d 1214 (S.D. Fla. 2013)

The court granted a foreign excursion operator's motion to dismiss in a case arising out of a bus accident occurring in St. Maarten on the grounds that the passenger had failed to produce sufficient evidence of the defendant's contacts with the Florida to establish jurisdiction under the state's long arm statutes.

Taylor v. Gutierrez, 129 So. 3d 415, 418 (Fla. Dist. Ct. App. 2013)

In a split decision, Florida's Third District Court of Appeal reversed a trial court's holding that jurisdiction existed over a ship's doctor for his claimed medical malpractice in treating a passenger on the high seas, despite the physician's numerous trips to the state in connection with his medical practice and training. This opinion is part of a continuing pattern of decisions from the Third District dismissing cases on the grounds of lack of jurisdiction and *forum non conveniens*, a number of which have subsequently been overturned by the Florida Supreme Court. *See*, *e.g.*, *Cortez v. Palace Resorts, Inc.*, 123 So. 3d 1085 (Fla. 2013), *reh'g denied* (Oct. 1, 2013).

Shipboard Activities

Magazine v. Royal Caribbean Cruises, Ltd., 12-23431-CIV, 2014 WL 1274130 (S.D. Fla. Mar. 27, 2014)

In yet another lawsuit arising from injuries sustained by a passenger while using Royal Caribbean's flow rider body surfing simulator installed aboard its mega-ships, the court entered a summary judgment on the passenger's claims based upon negligent design, maintenance and warning, but denied the motion as to the adequacy of the carrier's instructions concerning the proper performance of the activity. The court held that there was no evidence that the carrier participated in the design or construction of the simulator or had negligently maintained it. While the court further found that there was no evidence that the warnings provided to passengers were deficient, it nevertheless concluded that the carrier had failed to carry its burden of proof on the passenger's claim that she had not been properly instructed in the safe use of the simulator.

Slip/Trip and Falls

Long v. Celebrity Cruises, Inc., 982 F. Supp. 2d 1313 (S.D. Fla. 2013)

Where a passenger fell while descending a stairway as an alleged result of metal stair nosing that was pried up, the plaintiff was not required to prove that the carrier had notice of the condition, where it was claimed that it was caused by improper maintenance, resulting in a denial of the defendant's motion for summary judgment.

Terminal Accidents

Moseley v. Carnival Corp., 13-20416-CIV, 2013 WL 5913833 (S.D. Fla. Oct. 31, 2013)

The district court granted a cruise line's motion to dismiss a lawsuit brought by a passenger, who was injured as a result of an allegedly defective sink in a terminal owned by the port, which fell off of the wall. The court held that the cruise line only owed its passengers the duty to warn of dangers of which it knew or should have known. It went on to conclude that under the circumstances of this case, the cruise line had no duty to inspect the bathroom, which was located on property owned by the port, to make sure that it was safe, even if it should have expected passengers to utilize it.

SEAMAN'S CLAIM

Arbitration

Singh v. Carnival Corp., 550 F. App'x 683 (11th Cir. 2013) *cert. denied*, 134 S. Ct. 2729 (U.S. 2014)

In yet another opinion following its earlier decision in *Lindo v. NCL (Bahamas), Ltd.,* 652 F.3d 1257, 2012 AMC 409 (11th Cir. 2011), the Eleventh Circuit reiterated the principle that a seaman's public policy defense, based upon the assertion that the arbitration provision of his employment agreement violated both the Jones Act and general maritime law of United States, applied only at the arbitral award-enforcement stage, and thus could not be raised to preclude mandatory arbitration of his claims against his employer. The court further rejected the seaman's argument that the settlement of *Lindo* following the court's decision prior to its issuance of a mandate deprived the opinion of its precedential value. *See also Brown v. Royal Caribbean Cruises, Ltd.*, 549 F. App'x 861 (11th Cir. 2013) (same); *Paucar v. MSC Crociere S.A.*, 552 F. App'x 872 (11th Cir. 2014) (CBA required the application of Panama law and arbitration in Panama); *Azavedo v. Royal*

Caribbean Cruises, Ltd., 13-22422-CIV, 2014 WL 982828 (S.D. Fla. Feb. 28, 2014)..

Ramirez v. NCL (Bahamas), Ltd., 991 F. Supp. 2d 1187 (S.D. Fla. 2013)

In a case of potential great significance, the district court refused to invalidate an arbitration provision in a seaman's contract which did not require the company to pay all of the costs of arbitration, but instead required the parties to split them equally.

Martinez v. Carnival Corp., 744 F.3d 1240 (11th Cir. 2014)

The Eleventh Circuit affirmed the district court's ruling that the issues of whether the seaman's employment contract containing the arbitration agreement had been terminated prior to the incident giving rise to his injuries and whether his employer had been negligent in providing medical care were both subject to arbitration.

Gonsalvez v. Celebrity Cruises Inc., 750 F.3d 1195, 2013 AMC 2996 (11th Cir. 2013)

Although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 et seq. does not contain an express time requirement for filing an action to vacate an arbitration award, it does set forth a three-year period to file a suit to confirm an award. Rather than utilizing the Convention's limitations period for seeking confirmation, the Eleventh Circuit instead chose to adopt the much shorter three month period found in the Federal Arbitration Act, so as to find the seaman's suit time barred where he had filed it one year after the arbitrator's opinion.

Damages

In re Moran Towing Corp., 984 F. Supp. 2d 150 (S.D.N.Y. 2013) *amended*, 10 CIV. 4844, 2014 WL 463587 (S.D.N.Y. Feb. 4, 2014)

The court awarded the estate of a seaman who was crushed to death while working on a tug $750,000 in pre-death conscious pain and suffering. The decedent survived for two months after sustaining massive internal injuries, including 20 fractured ribs.

McBride v. Estis Well Serv., L.L.C., 731 F.3d 505, 2013 AMC 2409 (5th Cir. 2013) *reh'g en banc granted*, 743 F.3d 458 (5th Cir. 2014)

The Fifth Circuit 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" to broadly pre-empt general maritime remedies in reliance upon the Jones Act and or DOHSA, even where neither statute was applicable. As a result, the court concluded that the estate of a seaman could 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 pre-empted by it.

In General

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

The Second Circuit joined the Fifth and Ninth Circuits in holding that the "reasonable man" standard of care is applicable to judging whether a seaman is guilty of comparative negligence and not the "slight duty" applicable to an employer under the Jones Act. *See also Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 1997 AMC 1521 (5th Cir. 1997); *Smith v. Tow Boat Serv. & Mgmt., Inc.*, 66 F.3d 336 (9th Cir. 1995).

The court also rejected the so-called "rescue doctrine" recognized in *Furka v. Great Lakes Dredge & Dock Co.*, 824 F.2d 330, 1988 AMC 714 (4th Cir. 1987), which held that a seaman who is injured while responding to an emergency is guilty of comparative negligence only if his actions are "reckless or wanton" in either perceiving the need for a rescue or in responding to the perceived emergency. The court concluded that since this principle had developed in the days of contributory negligence in order to avoid its harsh consequences, it was no longer necessary and inconsistent with the modern application of comparative negligence.

Naquin v. Elevating Boats, L.L.C., 744 F.3d 927, 2014 AMC 913 (5th Cir. 2014)

The Fifth Circuit concluded that there was sufficient evidence presented to the jury to affirm its verdict finding that an employee who was injured while operating a crane at his employer's shipyard was a seaman entitled to Jones Act coverage. The evidence established that the plaintiff spent 70% of his time on board his employer's fleet of lift-boats, repairing, cleaning, painting, and maintaining the vessels, operating their marine cranes, and securing their decks for voyage. Although he rarely ventured onto the open sea or spent a night on a vessel, his primary job duties were performed doing the ship's work on vessels docked or at anchor in navigable water, where he faced maritime perils. Accordingly, the further fact that he performed ship repair duties as defined under the LHWCA would not preclude him from being considered a seaman under the Jones Act.

The court went on, however, to overturn that portion of the jury's verdict awarding the plaintiff damages for the emotional distress caused by the death of his cousin's husband in the same crane accident that he was injured in. The Fifth Circuit concluded that emotional damages resulting purely from another person's injury, and not a fear of injury to one's self, are not compensable under the Jones Act, even when the plaintiff has also been injured. It went on to hold allowing damages for observing a "bad sight,"

even one which involves a family member, would contravene the zone of danger test's intent to compensate for physical dangers.

Removal

Ryan v. Hercules Offshore, Inc., 945 F. Supp.2d 772 (S.D. Tex. 2013) and *Coronel v. AK Victory*, 2014 AMC 954, 2014 WL 820270 (W.D. Wash. 2014)

Removal of Jones Act claims is precluded by virtue of the adoption of FELA remedies to seamen under the provisions of the Act. *See e.g. Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001). Traditionally, courts have also held that seamen's claims arising under general maritime law were not removable when filed in state court under the "savings to suitor's clause," on the grounds that general maritime claims do not present a federal question. *See*, *e.g.*, *Romero v. Int'l Terminal Operating Co*., 358 U.S. 354, 1959 AMC 832 (1959); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 2001 AMC 913 (2001). Where federal jurisdiction exists on another basis, however, removal of claims based upon general maritime law has been permitted. *See*, *e.g.*, *Poirrier v. Nicklos Drilling Co*., 648 F.2d 1063, 1982 AMC 1514 (5th Cir. 1981)(diversity of citizenship jurisdiction); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 2001 AMC 804 (9th Cir. 2001); *Armstrong v. Alabama Power Co.,* 667 F.2d 1385 (11th Cir. 1982).

In 2011, the removal statute set forth in 28 U.S.C. §1441 was amended. Subsequently a number of courts have reached diametrically opposed conclusions as to whether the amendments were substantive in nature or merely intended to clean up the language.

Several recent cases in Texas and Louisiana have concluded that the changes were substantive in nature and therefore eliminated the prior prohibition against removing cases based upon general maritime law, even in the absence of diversity jurisdiction. *See*, *e.g.*, *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772 (S.D. Tex. 2013) (asserting claims for negligence and unseaworthiness pursuant to the Death on the High Seas Act,

general maritime law, and the *Sieracki* seaman doctrine); *Wells v. Abe's Boat Rentals, Inc*., 2013 AMC 2208, 2013 WL 3110322 (S.D. Tex. 2013) (following *Ryan* as to all claims except those based upon the Jones Act, which were severed and remanded back to the state court); *Carrigan v. M/V AMC AMBASSADOR*, CIV.A. H-13-03208, 2014 WL 358353 (S.D. Tex. Jan. 31, 2014); *Bridges v. Phillips 66 Co.*, CIV.A. 13-477-JJB, 2013 WL 6092803 (M.D. La. Nov. 19, 2013); *Harrold v. Liberty Ins. Underwriters, Inc.*, CIV.A. 13-762-JJB-SC, 2014 WL 688984 (M.D. La. Feb. 20, 2014).

The district court in *Coronel v. AK Victory*, 2014 AMC 954, 2014 WL 820270 (W.D. Wash. 2014), however, more recently rejected these opinions and concluded that the change in language to the removal statute was not the significant factor in the analysis, because "it is the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant, that ultimately determine the removability of Plaintiff's claims." Based upon this long standing precedent, the court concluded that maritime claims filed in state court are removable only if a separate basis of federal jurisdiction exists. *See also Barry v. Shell Oil Co.*, CIV.A. 13-6133, 2014 WL 775662 (E.D. La. Feb. 25, 2014) (avoiding the statutory interpretation issue and instead ordering a remand on the grounds that removal would act to deprive the seaman of his right to jury trial since there was a lack of diversity); *Rogers v. BBC Chartering Am., LLC*, 4:13-CV-3741, 2014 WL 819400 (S.D. Tex. Mar. 3, 2014) (holding that the change in language was not substantive); *Freeman v. Phillips 66 Co., CIV.A. 14-311*, 2014 WL 1379786 (E.D. La. Apr. 8, 2014).

Wage & Penalty

Wallace v. NCL (Bahamas) Ltd., 733 F.3d 1093, 2013 AMC 2705 (11th Cir. 2013) *cert. denied*, 134 S. Ct. 1520, 188 L. Ed. 2d 450 (2014)

Following a bench trial, the district court concluded that the plaintiff room stewards were entitled to additional wages to compensate them for having to hire "helpers" in order to be able to clean passenger cabins on turnaround days, because of the extra time pressures placed upon them by NCL's "free-style" cruising, which allowed passengers to remain in their cabins later. The court further held, however, that the cruise line did not engage in willful, arbitrary, or willful misconduct, which was required for award of penalty wages under Seaman's Wage Act, even though it had created the situation where it was nearly impossible for stewards to clean their assigned cabins without helpers. The Eleventh Circuit affirmed the judgment concluding that the district court's findings were not clearly erroneous.

RECENT TRIAL RESULTS

Long v. Celebrity Cruises, 982 F. Supp.2d 1313 (S.D. Fla. 2013)

Passenger alleged she tripped and fell on a metal stair nosing that was pried up, insecurely fastened and/or raised higher than the flooring and as a result she suffered injuries to her knee. The cruise line denied notice of the condition and claimed that the accident was a result of a missed step rather than a trip. The jury found that the cruise line was not negligent.

Rosenfeld v. Oceania Cruises, Inc., No. 08-CIV-22174 (S.D. Fla., Nov. 20, 2013)

Passenger alleged she slipped and fell on a wet surface in the buffet area. Passenger alleged that the cruise line failed to maintain the floor, failed to choose adequate flooring and have non-skid surfaces and warning cones present at the time of the accident. The cruise line claimed that there was no evidence the

floor was wet nor any notice of an alleged dangerous condition. Further, that the passenger was wearing heels and drinking which was the cause of her accident. The jury found in favor of the cruise line.

Dolcin v. Royal Caribbean Cruises, Ltd., 11th Judicial Circuit in and for Miami-Dade County, Case No.: 10-45257 CA 22, December 20, 2013

A ship cleaner who injured his back while performing his cleaning duties was awarded $6.3 million. Following surgery he was declared unfit for duty. The crewmember alleged he was overworked and was provided with improper equipment to perform his job duties. He sued alleging failure to provide a safe place to work and further alleged that the medical care provided was not proper.

Felicia v. Celebrity Cruises, No. 12-CV-20477 (S.D. Fla. Feb. 25, 2014)

Passenger claimed she injured her knee requiring surgery when she slipped and fell on a wet slippery surface. Following a bench trial, the court concluded that the shipowner created a dangerous condition which caused the passenger's fall. The court concluded that had the Bolidt floor been properly maintained or warning cones properly placed, the accident would not have occurred. The court entered a judgment awarding $161,976.25.

COMMITTEE ON FISHERIES

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

FISHERIES CASE BRIEFS[1]

May 2014

H & L Axelsson, Inc. v. Pritzker, No. 13-183 (JBS/KMW), 2014 WL 1464792 (D.N.J. Apr. 15, 2014)

Factual and Procedural Background

Plaintiffs, H & L Axelsson, Inc., Dan Axelsson and Lars Axelsson, commercial fishermen based in Cape May County, N.J., brought suit to reverse and vacate the assessment of fines and penalties against them by National Oceanographic and Atmospheric Administration ("NOAA").

NOAA's National Marine Fisheries Service ("NMFS") requires permitted Atlantic herring vessels to submit multiple reports about their harvests, known as "landings," in order to monitor fish populations and prevent overfishing. The Atlantic Herring Fishing Management Plan, pursuant to the Magnuson–Stevens Fisheries Conversation and Management Act ("MSA"), requires permitted fishermen to complete monthly Vessel Trip Reports ("VTRs"), which record fishing efforts, landings and discards on paper forms supplied by a regional administrator. Because the processing of these monthly paper reports is slow, NMFS also requires certain Atlantic herring vessels to be equipped with a Vessel Monitoring System ("VMS") unit and to file weekly "Interactive Voice Response" ("IVR") reports by calling a toll-free number and entering data by pressing numbers on a touchtone phone. Atlantic herring dealers are required to submit weekly

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

reports by mail and may be required to submit weekly IVR reports, if so determined by the regional administrator.

The Axelssons allegedly failed to make reports about their Atlantic herring catches in compliance with the reporting requirements of MSA. NOAA charged the Axelssons with 27 separate violations of the MSA, which resulted in a fine of $270,000 and 24 months of permit sanctions. After an administrative hearing, an administrative law judge ("ALJ") suspended the majority of the penalties, and an agency administrator further reduced the fine to $54,000 with no suspended penalties and reduced the outright permit sanction to one month. The Axelssons sought judicial review of the ALJ's decision and urged the court to vacate the assessment of fines. They raised three main challenges to the penalties: (1) the ALJ improperly denied plaintiffs' motion to dismiss based on the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501, et seq.; (2) the ALJ's decision was not in accordance with governing statutes or agency guidelines; and (3) the excessive fine violated the Eighth Amendment to the U.S. Constitution.

Analysis and Holding

The ALJ concluded that some penalty was required to remove any incentive to commit further violations, but that there was "good cause for reducing the Agency's proposed penalties," because (1) the violations did not result in overfishing or economic gains; (2) plaintiffs did not intentionally circumvent fishery limits; (3) plaintiffs cooperated with the Agency in correcting the deficient reports; (4) plaintiffs had no history of prior offenses; and (5) the corporation was in a weakened financial position.

The court agreed with the ALJ that the conduct—even if merely negligent—was nonetheless serious because the failure to provide timely reports could negatively impact the management and conservation of the herring population and, consequently, disrupt the economy surrounding Atlantic herring. The court concluded that the fines did not violate the Eighth Amendment and

substantial evidence supported the ALJ's ruling, and accordingly, affirmed the agency's assessment of the lesser penalties.

Savchenko v. Icicle Seafoods Inc., No. C11-2081-JCC, 2013 WL 5884514 (W.D. Wash. Oct. 31, 2013).

Factual Background

The plaintiff, Paul Aaron Savchenko ("Savchenko") was injured on September 18, 2010, while working on board the F/V ADVENTURE, owned by defendant/third–party plaintiff Icicle Seafoods ("Icicle"). Savchenko experienced both left and right-sided pain after his September 2010 accident aboard the F/V ADVENTURE and before his employment aboard the F/V KARI MARIE, owned by third–party defendant Kari Marie Fisheries, LLC ("Kari Marie"). Savchenko joined the F/V KARI MARIE on January 15, 2012 as a deckhand. While on F/V KARI MARIE, Savchenko experienced multiple "flare-ups" of his back pain and left the F/V KARI MARIE in May, 2012.

For the period between May 2012 to May 2013, Icicle paid maintenance and cure benefits to Savchenko. In 2013, Icicle settled all of Savchenko's claims against it for the sum of $450,000, including claims for marine personal injury, maintenance and cure, unseaworthiness, and worker's compensation. Kari Marie was not a party to the Global Settlement and Release of All Claims executed by Savchenko, and Savchenko did not release or discharge any of his claims against Kari Marie.

The main issue presented for adjudication was whether Icicle was entitled to contribution payments made for any injuries, flare-ups, or aggravations of injury to Savchenko that occurred aboard the F/V KARI MARIE.

Analysis and Holding

The court determined that based on Savchenko's early injury in September 2010, and the fact that Kari Marie provided light work after his flare-ups or aggravations, Kari Mari was not at fault for any flare-ups suffered during his work on board the F/V KARI MARIE.

Further, in the admiralty and maritime context, a settling defendant may not seek contribution from a non-settling defendant absent a release of all claims from the plaintiff against the non-settling defendant. In entering into a settlement with Savchenko that did not release Savchenko's claims against Kari Marie, Icicle extinguished only its own proportionate share of fault. Icicle was not entitled to sue Kari Marie for contribution for any amounts that it paid pursuant to its settlement with Savchenko.

Massachusetts v. Pritzker, No. 13-11301-RGS, 2014 WL 1364907 (D. Mass. Apr. 8, 2014).

Factual Background

The Commonwealth of Massachusetts and State of New Hampshire brought action against Secretary of Commerce alleging that the National Marine Fisheries Service (NMFS), unlawfully promulgated Frameworks (FWs) 48 and 50 regulating New England's Multispecies Fishery, in violation of the Magnuson–Stevens Fishery Conservation and Management Act (MSA). The FWs instituted severe cutbacks in catch limits to prevent overfishing and rebuild overfished stocks in New England region. The plaintiffs moved for summary judgment to vacate the FWs. Defendants countered with their own motion for summary judgment.

NEFMC adopted and NMFS promulgated FW 50 to set specifications (Overfishing Limits (OFL), Acceptable Biological Catch (ABC), Annual Catch Limits (ACL)) for groundfish stocks for the fishing years (FY) 2013–2015. FW 50 instituted catch limits that are the lowest ever set for many of the stocks—including Gulf

of Maine [GOM] and Grand Bank [GB] cod—in some cases representing an almost eighty percent reduction from 2012 levels (including the GOM cod stock). FW 48 listed the status of GOM and GB cod as "overfished" and "subject to overfishing," revised the status of yellowtail flounder and white hake to "not overfished" and "not subject to overfishing," and allowed sectors to apply for exemptions from previously-imposed year-round closure areas.

Massachusetts alleged that the new catch limits will effectively close down the entire Groundfish Fishery and moved to vacate FW 48 and FW 50 for failure to comply with National Standards 2 and 8 of the MSA. New Hampshire intervened in the action to contend that the FWs also violated National Standard 1.

Analysis and Holding

National Standard 1 provides 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." New Hampshire argued that NMFS improperly discarded considerations of social and economic factors in promulgating FW 50 in favor of a "mechanistic and formula driven approach" exalting conservation goals to the exclusion of all others. New Hampshire identified NMFS's errors in violation of National Standard 1 as follows:(1) the failure to consider the optimum yield of overfished stocks; and (2) the failure to evaluate how measures undertaken to protect imperiled cod stocks would impede the achievement of optimum yield of healthier stocks.

The court relied on *Lovgren v. Locke,* where the First Circuit rejected the argument that a stock-by-stock approach to setting annual catch limits for the groundfish fishery violated National Standard 1 because it "improperly sacrifice[d] optimum yield to prevent overfishing within the Fishery's weakest stocks." *Lovgren v. Locke*, 701 F.3d 6, 12 (1st Cir. 2012) (*see also* the Spring 2013 Fisheries Case Briefs. MLA Document No. 810, p. 17586).

The court of appeals in *Lovgren* found that stock-by-stock catch limits (in lieu of aggregate limits for the entire fishery) complied with the MSA even if limits on overfished stocks would depress those of healthy stocks that are unavoidably caught with the endangered species.

The court found that New Hampshire's challenges to the FWs were foreclosed by the *Lovgren* decision based on the reasoning that FW 50 did not alter the formula for specifying the Acceptable Biological Catch or Annual Catch Limits for stocks in the Groundfish Fishery, but simply applied the mechanism established in Amendment 16 to calculate those numbers.

National Standard 2 provides that "[c]onservation and management measures shall be based upon the best scientific information available." Massachusetts challenged the accuracy of the surveys conducted by NMFS to sample the quantity of groundfish stocks, as well as the models used to assess these stocks. The catch limits set out in FW 50 were based on two stock assessments. The first assessment, conducted in December of 2011, found that GOM cod stock was overfished. A second assessment undertaken in December of 2012 essentially corroborated the results of the first and concluded that the biomass of GOM and GB cod had dropped sharply from an assessment conducted in 2008.

Massachusetts contended that the model used to determine the status of the cod stock violated National Standard 2 based on NMFS' use of proxy values to calculate the target mortality rate (overfishing threshold)—the mortality rate that, applied over the long term, would result in Maximum Sustainable Yield (expressed as Fmsy). Massachusetts further argued that the F40 percent proxy calculation made the stocks appear overfished when they were not, and thus, the proxy value was ultimately to blame for the drastic cuts in OFLs, ABCs, and ACLs in FW 50. However, the court pointed out that this argument faltered because the F40 percent proxy value used in calculating the MSY reference points in FW 50 was identical to, and was taken from, the proxy used in the 2008 Assessment, which did not find GOM cod to be overfished.

Massachusetts further argues that NMFS' trawling vessel, and its inexperienced crew, did not achieve an accurate sampling of the stocks in the Groundfish Fishery. They argue that NMFS should have conducted side-by-side trawling using a commercial vessel supplied by the groundfish industry. The court found that while the side-by-side trawling option was a proven methodology that NMFS could have deployed, National Standard 2 "does not mandate any affirmative obligation on [NMFS'] part" to collect new data. There was no evidence that more accurate stock assessments were obtained and ignored, nor any compelling evidence that the dismaying assessment results were the product of flawed data collection rather than an accurate science-based portrait of groundfish stocks in a state of imminent collapse. The court concluded that Massachusetts failed to clear the "high hurdle" of proving that NMFS ignored "superior or contrary" scientific information in performing its stock assessments as is required to make out a violation of National Standard 2.

Massachusetts' final challenge arose under National Standard 8 which provides (in part) that conservation and management measures shall, consistent with the conservation requirements of MSA, take into account the importance of fishery resources to fishing communities by utilizing economic and social data. Massachusetts claimed that NMFS violated National Standard 8 because of its failure to consider any less-restrictive viable alternatives to its proposed and ultimately implemented ACLs. Their contention was premised on the NEFMC's Environmental Assessment (EA) of FW 50, in which the Council compared the socioeconomic impact of its "preferred alternative" (the ACLs that were adopted in FW 50) with a "no-action alternative." The court concluded, however, that the plain language of National Standard 8 made clear that NMFS' obligation to minimize the economic impact of a Fishery Management Plan is subordinate to the MSA's conservation goals.

The only viable alternative that Massachusetts could identify was shrinking or eliminating the management uncertainty buffers between each stock's ABC and ACL to increase the catch limits. Consistent with National Standard 2, however, NMFS must

rely on the "best scientific information available"; it cannot simply reduce or eliminate accounting for management uncertainty in favor of socioeconomic considerations without some justification for doing so. The court found that NMFS complied fully with the mandate of National Standard 8 in considering and implementing measures to reduce the social and economic consequences of the ACLs on fishing communities, while acting consistently with the primary conservation objectives of the MSA.

Dettling v. United States, 983 F. Supp. 2d 1184
(D. Haw. 2013).

Factual Background

Plaintiffs are fishermen, Joe Dettling and Robert Cabos, who brought an action against the federal government, Department of Commerce, and NOAA asserting claims under Federal Tort Claims Act (FTCA) and Administrative Procedure Act (APA) in connection with restriction of fishing rights in a national marine monument located near Hawaii. Plaintiffs' alleged that NOAA improperly denied them fishing rights in the Papahanaumokuakea Marine National Monument ("PMNM") located near Hawaii because they fished in that area for many years before its establishment in 2006. NOAA moved to dismiss the plaintiffs' second amended complaint.

On June 15, 2006, President George W. Bush issued Proclamation 8031, which established the waters previously designated as the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve as the new Northwestern Hawaiian Islands National Monument, later changed to PMNM. Proclamation 8031 prohibited virtually all commercial and recreational fishing within the bounds of the PMNM, except for five additional years—until 2011—of certain types of fishing. On August 29, 2006, NOAA and the Fish and Wildlife Service, Department of the Interior, published joint regulations, which adopted language identical to that contained in Proclamation 8031 with respect to commercial fishing in the PMNM.

In 2008, Congress appropriated approximately $6.7 million in funds "to provide compensation to fishery participants who will be displaced by the 2011 fishery closure resulting from the creation" of the PMNM, referred to as the Consolidated Appropriations Act of 2008. The regulations defined "eligible participants" as "individuals holding commercial Federal fishing permits for lobster or bottomfish within the Monument at the time the Monument was established."

Analysis and Holding

Plaintiffs' alleged that they fished with state permits in the PMNM waters for many years before the Monument's establishment in 2006. At the hearing, NOAA admitted that both plaintiffs had general marine permits issued by the State of Hawaii, allowing all types of fishing within the PMNM waters before 2005.

Plaintiffs state that, on July 19, 2006, Dettling asked NOAA to clarify whether he was allowed to continue pelagic trolling in the newly established PMNM. On August 3, 2006, NOAA responded that he was not allowed to fish in the PMNM on his state fishing permit any longer because he did not have a federal permit issued by NOAA as of June 15, 2006, and that he would be arrested if he tried to do so. Plaintiffs alleged that, on September 17, 2006, Dettling filed a claim for compensation premised on NOAA's closure of his traditional fishing grounds pursuant to the implementation of Proclamation 8031. Dettling's September 17, 2006 letter requested "disaster relief" pursuant to MSA. The court found that, as an initial matter, the September 17, 2006 letter was insufficient for purposes of exhausting Plaintiff Cabos's remedies, as it was not filed by him or on his behalf, and he is not mentioned at all in the letter. The September 17, 2006 letter was likewise insufficient for purposes of Dettling's FTCA exhaustion requirement.

On April 4, 2007, NOAA responded stating that disaster relief was unavailable pursuant to 16 U.S.C. § 1861a because NOAA could not make a determination of a commercial fishery failure due to a fishery resource disaster, as Proclamation 8031 still

allowed for certain fishing to continue through June 15, 2011. Dettling did not thereafter respond to NOAA indicating that NOAA's interpretation of his claim for "disaster relief" pursuant to MSA was in some way incorrect. The court concluded that Dettling's request pursuant to MSA's disaster relief scheme was therefore entirely different from the claims for negligence asserted in the second amended complaint. The court also found that Dettling's letter was untimely. Under MSA, any such petition for review must be filed within 30 days after the date on which the challenged regulations are promulgated or published in the Federal Register. Proclamation 8031 was issued on June 15, 2006 and Dettling's letter is dated September 17, 2006, more than three months after the issuance of the Proclamation.

Both Dettling and Cabos filed Form 95 administrative claims with NOAA on January 7, 2011. These claims included a complaint of "economic harm" suffered as a result of an executive order signed by President Bush in January of 2009 "closing fishing in certain Pacific Remote Islands, specifically the islands of Palmyra, Kingman and Johnston." However, nowhere on the Form 95 claims did plaintiffs mention the Consolidated Appropriations Act specifically, or a government compensation scheme for lost fishing rights generally.

On February 24, 2011, NOAA sent a letter responding to plaintiffs' January 7, 2011 claims, stating that plaintiffs' claims "alleging that the issuance of Proclamation 8336 by President Bush on January 6, 2009 was a tort, is not cognizable under the FTCA as per 28 U.S.C. § 2401(b)." This response makes clear that NOAA interpreted plaintiffs' Form 95 claims to be complaining of harm caused by the issuance of Proclamation 8336 (which was not raised in plaintiffs' amended complaint). Notwithstanding this response, plaintiffs failed to file corrected Form 95 claims indicating that their claims were actually premised upon Proclamation 8031. Accordingly, the court found that plaintiffs did not, and could not, argue that NOAA's alleged negligent implementation of the Consolidated Appropriations Act was somehow encompassed in their Form 95 claims of economic harm arising out of the creation of the PRIA Monument in 2009.

NOAA argued that plaintiffs' claims must be dismissed for lack of subject matter jurisdiction because plaintiffs' claims do not fall under the FTCA's waiver of sovereign immunity. The conduct plaintiffs complained of, NOAA's alleged negligent implementation of Proclamation 8031, was undertaken by NOAA pursuant to federal law. Specifically, NOAA implemented the requirements of Proclamation 8031 through its authority under MSA. The court concluded that even assuming Proclamation 8031 and the Consolidated Appropriations Act imposed some duty upon NOAA with respect to its implementation of the laws, plaintiffs' allegations that NOAA breached such a duty are not actionable under the FTCA.

Pac. Dawn, LLC v. Pritzker, No. C13-1419 TEH, 2013 WL 6354421 (N.D. Cal. Dec. 5, 2013).

Factual Background

Plaintiffs are harvesters and shore-based processors who contend that NMFS failed to properly consider and credit more recent fishing history in its initial allocation of individual fishing quotas ("IFQs"). Many of the same plaintiffs previously challenged the Original IFQ Allocation in *Pac. Dawn, Inc., LLC v. Bryson* ("*Pacific Dawn I* "), No. C10–4829 TEH, 2011 WL 6748501 (N.D. Cal. Dec. 22, 2011) (included in the Spring 2012 Fisheries Case Summary Report). In the 2011 matter, the court held that NMFS acted in an arbitrary and capricious manner in setting the Original IFQ Allocation and remanded the regulations to NMFS for reconsideration.

After a year-long reconsideration process, wherein NMFS examined alternatives that considered more recent fishing history, NMFS decided in 2013 to retain the Original IFQ Allocation and qualifying periods. Plaintiffs filed this suit alleging that federal defendants violated the MSA and APA when they adopted the 2013 IFQ Allocation, which retained the Original IFQ Allocation.

Analysis and Holding

Plaintiffs' first argument is that NMFS violated the MSA by failing to consider and credit fishing history, investment and dependence in the fishery after 2003 for harvesters, and if they did consider it, they failed to do so reasonably because the 2013 IFQ Allocation retained the 2003 cutoff. The court found that NMFS "considered the potential advantages of the alternatives favoring more recent history" but determined that, on balance, the advantages of favoring more recent allocations were outweighed by the advantages of maintaining the existing allocations, including the Original IFQ Allocation in the 2013 IFQ Allocations.

Plaintiffs advanced numerous contentions that fell under the general argument that defendants inappropriately or inconsistently made their consideration of investments and dependence on the fishery in promulgating the 2013 IFQ Allocation. Plaintiffs' arguments flow from the fact that the 2013 IFQ Allocation has the result of allocating IFQ to 34 "latent" or inactive permit holders with historical catch history but no recent history; in particular "approximately 10.2 percent of quota allocated to 20 shore-based harvesting permits and 9.6 percent of quota allocated to 14 mothership permits that had no whiting landings post 2003."

Plaintiffs argued that had NMFS credited later fishing history, IFQ allocation would be distributed to actors such as plaintiffs who have in recent years demonstrated more of a dependence on the fishery than these latent permit holders, who by implication, are not dependent. The court reasoned that the plaintiffs' evidence was overblown and that NMFS considered the issue and articulated its reasons for adopting the 2013 IFQ Allocation.

Plaintiffs also challenged defendants' analysis of dependence by crediting "portfolio investment," which is viewing one measure of dependence and investment in the fishery as those who may passively hold latent permits as part of an investment strategy, versus those who, like plaintiffs, invested in the market

by actively fishing their permit after the 2003 control date. Plaintiffs alleged that defendants inappropriately defined dependence to include holders of latent portfolio permit activity and those operating in other fisheries, failed to weigh the pros and cons between these types of investments and dependence, and did not consider that use of portfolio investments will lead to increased capacity when "latent" permits re-enter the fishery. The court concluded that the record supported that defendants fully considered the issues outlined by the plaintiffs in their analysis when establishing procedures surrounding the 2013 IFQ Allocation. The court further noted that it was under NMFS' discretion, neither arbitrary nor capricious, to adopt a broad interpretation of dependence.

Plaintiffs alleged that defendants failed to take into account local processors' active participation and investment in the Pacific whiting fishery after 2004 and the changes to the fishery during that time. Under the 2013 IFQ Allocation, some plaintiffs received less IFQ allocation than under some of the considered alternatives. However, the Secretary is allowed "to sacrifice the interest of some groups of fishermen for the benefit as the Secretary sees it of the fishery as a whole." *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 899 (9th Cir. 2010). The court found that defendants considered the relevant factors and articulated a rational connection between the facts found and 2013 IFQ Allocation with regard to the 2004 cutoff date for processors. Accordingly, there was nothing in the record to suggest that defendants sacrificed their interests in a manner that was arbitrary and capricious or otherwise not in accordance with law.

The court next reviewed plaintiffs' arguments that defendants violated MSA's National Standards 4, 5, 7, and 8.[2]

[2] National Standard 4 – National Standard 4 provides, in relevant part, that during the allocation of fishing privileges, the allocation shall be "(A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." National Standard 5 – "[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." National Standard 7 – "[c]onservation and management measures shall, where

Plaintiffs argued that federal defendants violated National Standards 5 and 7 by failing to analyze how retaining the Original IFQ Allocation in the 2013 IFQ Allocation creates inefficiency and does not minimize costs. Plaintiffs failed to show that the 2013 IFQ Allocation violated National Standard 4 because NMFS vetted the allocation alternatives and determined that the Original IFQ Allocation maximized overall benefits.

Defendants considered the relevant factors related to efficiency in the utilization of fishery resources, minimization of costs and avoidance of unnecessary duplication, consistent with National Standards 5 and 7, and articulated the reasons why the 2013 IFQ Allocation were chosen over competing alternatives in the record. Ultimately, inefficiencies that may exist in a conservation and management system do not make the system inconsistent with National Standard Five. Nor must the defendants conduct a formal cost/benefit analysis under National Standard Seven. Additionally, defendants examined various allocation alternatives and their impact on the affected fishing communities, consistent with the factors articulated by National Standard 8. The court concluded that NMFS considered efficiency, minimization of costs, and avoidance of unnecessary duplication, where practicable, under its analysis of the national standards.

Guindon v. Pritzker, No. CV 13-00988 (BJR), 2014 WL 1274076 (D.D.C. Mar. 26, 2014).

Factual Background

Plaintiffs are commercial fishermen challenging three NMFS regulations that set quotas and fishing season lengths for the recreational sector of the red snapper fishery in the Gulf of

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practicable, minimize costs and avoid unnecessary duplication." National Standard 8 – "[c]onservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities."

Mexico. Plaintiffs brought claims under the Magnuson–Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801–1884, the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–06, and the National Environmental Policy Act ("NEPA") 42. U.S.C. § 4321 et seq. The Coastal Conservation Association intervened alleging that plaintiffs lacked standing on all claims and that all claims were moot in light of the 2013 season closure.

Each year, before the red snapper season begins, the Council receives a recommendation as to that year's Acceptable Biological Catch (ABC) from the Council's Scientific and Statistical Committee (SSC). The Council then proposes to NMFS a red snapper "quota" for the year. The recommended quota is intended to serve as the total ACL for red snapper in the Gulf of Mexico fishery. Because the quotas include fish harvested in adjoining state waters, NMFS must take those state harvests into account in managing the Gulf of Mexico red snapper fishery. The fishery is subdivided into recreational and commercial sectors, with separate quotas for each. Thus, the Council also specifies the allocation of the total quota between the commercial and recreational sectors. The FMP at issue specifies that the commercial sector receives 51 percent of the quota and the recreational sector receives 49 percent.

Plaintiffs challenged the following agency actions: the May Final Rule, June Temporary Rule, and the September Final Rule. The May Final Rule approved the Council's recommended quota of 8.46 million pounds. This created a commercial quota of 4.315 million pounds and a recreational quota of 4.145 million pounds. The May Final Rule also established individual closure dates for each Gulf state. The June Temporary Rule eliminated the state-specific closure dates and set a Gulf-wide recreational sector closure date of June 29, 2013. The 8.46 million pound quota remained in effect. NMFS set the season length at 28 days to reflect the agency's projections as to when the recreational quota would be reached.

A new stock assessment arrived in May of 2013, as anticipated. The SSC reviewed the stock assessment and determined that the ABC for 2013 could be increased to 13.5 million pounds total, as long as it fell to 11.9 and 10.6 million pounds in 2014 and 2015, respectively. Because the ABC was set very close to the overfishing limit (OFL), with only a small allocation for scientific uncertainty, the SSC also recommended a 20 percent buffer to account for management uncertainty. NMFS then published the September Final Rule increasing the 2013 quota to 11 million pounds and setting a 14 day fall fishing season.

Analysis and Holding

The court first rejected Coastal Conservation Association's arguments that plaintiffs' lacked standing to bring suit or that their claims were moot. The court found that plaintiffs' could properly challenge the agency's rulemaking because the various comments made by fishermen to NMFS's proposed rules put NMFS on notice of their claims.

Plaintiffs claimed that NMFS violated Section 407(d) by approving a 28 day season based on a "flawed projection model," without adequate accountability measures, and by reopening the season in the fall when the recreational quota had already been reached and exceeded. Section 407(d) requires NMFS to "establish ... quotas for recreational fishing ... that, when reached, result in a prohibition on the retention of fish ... for the remainder of the fishing year." The court concluded that under Section 407(d), NMFS must close the season, and may not reopen it, whenever the agency determines that the quota has been reached. The court agreed with plaintiffs that NMFS violated Section 407(d) in setting the June 2013 season, and in reopening the recreational fishing season in the fall.

Further, NMFS decided to reopen the season without accounting in any way for the possibility that some, if not most or all, of the estimated overage was due to fishing effort. NMFS disregarded the 2013 Marine Recreational Information Program (MRIP) landings estimates not because they were inaccurate but

because they raised the possibility that NMFS had set the prior quotas unnecessarily and unfairly low. The court was concerned as to why the possibility of unfairness in prior quotas, or even in a current quota, would justify disregarding accurate and reliable information. NMFS never revised or disavowed those earlier quotas. Instead it chose to adopt a landings estimate that it knew to be inaccurate, apparently to avoid punishing fishermen who might have been permitted to catch more under a hypothetical prior quota.

Plaintiffs next argued, and the court agreed, that NMFS's dismissal of the 2013 MRIP landings estimates violated National Standard 2, which requires that reliable data be treated as such. The court found that when promulgating the September Final Rule, NMFS ignored superior and contrary data, including actual landings estimate, in favor of a projection that the agency knew was inaccurate. NMFS disregarded accurate and reliable data to avoid penalizing recreational fishermen in violation of National Standard 2.

Plaintiffs further argued, and again the court agreed, that NMFS's failure to require any accountability measures violated MSA's requirement concerning accountability measures. MSA requires that every FMP must establish a mechanism for specifying annual catch limits in implementing regulations at a level such that overfishing does not occur in the fishery, including measures to ensure accountability. The administrative record contained multiple references to the high degree of management uncertainty in the recreational sector, whereas the commercial sector had none. The high management uncertainty, including quota overages in the last four years, explained the Scientific and Statistical Committee's recommendation for a 20 percent buffer for the recreational sector. The commercial buffer recommendation was 0 percent because that sector is under an individual fishing quota (IFQ) program, has accurate landings data, and had not exceeded its quota in the last four years. The Council rejected the Scientific and Statistical Committee's buffer proposal.

The single accountability measure included in the FMP, in-season closure, did very little to prevent quota overages. The court concluded that given management uncertainties, the agency's approval of a 28 day season, and the decision to reopen the season in the fall, with no additional accountability measures, effectively allowed the recreational sector to overharvest red snapper.

Oceana, Inc. v. Pritzker, No. 13-770 (JEB), 2014 WL 616599 (D.D.C. Feb. 18, 2014).

Factual Background

The court examined the issue of whether NMFS was providing sufficient monitoring to ensure that commercial fishermen followed their allotted catch limits. Plaintiff, Oceana, Inc., alleged that the current regulations did not clear that bar and instead prioritized cost over conservation. NMFS opposed this view.

Oceana sued NMFS and other government defendants over Framework 48 (FW 48) to the Northeast Multispecies Fishery Management Plan. The Plan regulated the region's groundfish fishery, which covers 13 different species of fish, including cod, haddock, and flounder, divided into 19 stocks. The fishery is governed by a sector system, which is now the primary means of allocating groundfish catch. Sectors are "temporary, voluntary, fluid associations of vessels" that share an apportionment of certain stocks of fish. Fishermen who join sectors agree to abide by certain fishing restrictions as well as manage their annual share of each stock of fish, referred to as the Annual Catch Entitlement (ACE). Fishermen who do not join a sector may continue to fish as part of the "common pool," which carries its own limitations. To ensure compliance with ACE, sectors are required to monitor and report their overall catch.

Under its groundfish plan, the Council tracks and estimates bycatch through two main programs. First, there is the Northeast Fisheries Observer Program (NEFOP), which operates in multiple fisheries and monitors catch and bycatch for both sector ships and

the common pool. The program sends government-funded on-board observers to monitor the operation of fishing vessels at sea. The second program that tracks bycatch is the At–Sea Monitoring (ASM) program, which is specifically designed for sector vessels in the groundfish fishery and provides coverage in addition to NEFOP.

FW 48 set out specific goals and objectives for monitoring programs beyond merely verifying the area fished, catch, and discards by species, by gear type. Second, FW 48 specified what cut of data—*i.e.,* which group of discard estimates—the CV standard applies to.[3] NMFS issued its 2013 Sector Operations Rule, which set the overall observer coverage level at 22 percent of all sector trips for the 2013 fishing year, which covers fishing from spring 2013 to spring 2014. This was a lower level than the 38 percent level set for 2010 and 2011 and the 25 percent level set for 2012. Ultimately, that meant that NMFS planned to fund an additional 14 percent ASM coverage beyond the 8 percent provided by the NEFOP.

Analysis and Holding

Oceana first addressed NMFS's authority to modify Amendment 16's ASM program though FW 48. MSA allows the Council to propose regulations "making modifications" to a Plan or Plan Amendment as necessary or appropriate which will be enacted as long as the modifications are "consistent with the fishery management plan," Plan Amendments, and other law. Oceana argued that FW 48 did not merely "modify" Amendment 16, as MSA permits, but instead fundamentally shifted the current monitoring programs. Many of the goals listed in Framework 48 already existed in Amendment 16, just not neatly assembled into

[3] Observers are allocated to vessels at a level that ensures that enough data is collected to meet the SBRM's performance standard for the fishery as a whole. That standard is expressed in terms of statistical precision: bycatch estimates must be sufficient to attain a [coefficient of variation (CV)] of no more than 30 percent. The 30 percent CV standard is designed "to ensure that the bycatch-related data collected under the SBRM and utilized in stock assessments and management is adequate for those tasks." In general, CVs measure how far sample numbers usually deviate or vary from the average sample, although NMFS's calculation differs slightly from the standard CV formula.

one pertinent section. Amendment 16 does broadly stated that the "primary goal of observers or at-sea monitors for [ASM] monitoring is to verify area fished, catch, and discards by species, by gear type."

Oceana next argued that FW 48's Minimum Coverage Regulation is inconsistent with Amendment 16, which originally specified coverage levels as follows: "For observer or at-sea monitor coverage, minimum coverage levels must meet the coefficient of variation in the Standardized Bycatch Reporting Methodology." The Minimum Coverage Regulation, by contrast, now states that "coverage levels must be sufficient to at least meet the coefficient of variation specified in the Standardized Bycatch Reporting Methodology at the overall stock level for each stock of regulated species and ocean pout, and to monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels."

Oceana alleged that the addition of the phrase "at the overall stock level" was inconsistent with Amendment 16, which it argued required precision at the 30 percent CV level for data by sector, not just by stock. Oceana argued that the 30 percent CV level must be applied at the sector level, which would yield a fairly small cut of data and would thus require more coverage to assure greater precision. The sample size would be smaller if the data were divided by both stock and sector and more observation would be necessary to collect enough data to meet the CV standard. Therefore, a sector-based standard would require so much coverage that the program would be forced to observe nearly 100 percent of trips.

Oceana also contended that the regulations published were so different from the Council's Framework that no "deeming" took place. Under MSA, the Council must "deem" new regulations "necessary or appropriate" before sending them to NMFS for review. Although NMFS did in fact submit the slightly altered regulatory language to the Council for approval, the Council again deemed the regulations "necessary or appropriate." The court found that NMFS's procedure did not violate MSA because the

changes at issue were clearly highlighted and flagged, and because the "deeming" task was delegated by the full Council to the Council Chair.

Oceana attempted to argue that the portion of catch that the CV standard applies to undermined NMFS's entire accountability system under MSA. The court rejected this argument on the basis that Oceana "severely" exaggerated the impact of FW 48 on the Plan's accountability scheme. The Council's expert estimated a 97.5 percent probability that the sectors' combined ACE will not be unwittingly exceeded if the 30 percent CV is applied at the stock level. Under FW 48, there is only a 2.5 percent chance that sectors would surpass their combined ACE if conditions in the fishery remain roughly the same as in previous years. The court deemed these figures as sufficient to "ensure accountability" with ACLs under MSA.

Finally, Oceana challenged NMFS's decision to set monitoring levels at 22 percent as an action that was arbitrary and capricious under APA. In addressing this argument, the court determined that NMFS's actions were not arbitrary or capricious because they persuasively reasoned that slightly lower observer coverage would produce compliant results, even with lower ACLs.

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EMISSIONS CONTROL AREA/AIR EMISSIONS

MARAD – Renewable Diesel for Marine Application

> The Maritime Administration (MARAD) belatedly posted its report: Renewable Diesel for Marine Application*. The study compared the operational and performance differences in a test vessel's use of ultra-low sulfur diesel (ULSD) versus a 67/33 blend of neat ULSD and Amyris Renewable Diesel (ARD), which is derived from sugar. No significant differences were found between the test vessel's use of neat ULSD and the blend in terms of engine performance, fuel economy, air emissions, engine vibration, underwater radiated noise, and effect on the engine itself. (8/30/13)

(BRYANT'S MARITIME BLOG (Mar. 31, 2014) www.brymar-consulting.com).

GAO – Permitting of Air Emissions on Alaska OCS

> The Government Accountability Office (GAO) issued a report on the status of regulatory activities

* **Editors' note:** Underscorings in this newsletter indicate "links" which may be accessed through the electronic version of the newsletter on the Association's website.

> and permitting of air emissions on Alaska's outer continental shelf (OCS). The report addresses the recent transfer of such permitting authority from the Environmental Protection Agency (EPA) to the Department of the Interior (DOI). GAO-14-187R (1/9/14).

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

USCG Draft Policy Letters

The U.S. Coast Guard sought comments on draft policy letters regarding the use of liquefied natural gas (LNG) as a marine fuel. The first draft policy letter (CG-OES Policy Letter No. 01-14) is directed to Coast Guard Captains of the Port (COTPs)/Officers in Charge, Marine Inspection (OCMIs) and addresses operations and personnel training for vessels fueled by natural gas and engaged in LNG fuel transfer operations.

The second draft policy letter (CG-OES Policy Letter No. 02-14) provides guidance to owners and operators of vessels and waterfront facilities intending to conduct LNG fuel transfer operations, and Coast Guard COTPs who assess fuel transfer operations.

Comments were due by 10 March 2014. The stated purpose of the two draft policy letters was for the Coast Guard "to provide guidance to help ensure the safe transfer and use of LNG as a marine fuel" as the shipping industry explores conversion from oil-based bunker fuel to cleaner burning natural gas "to substantially reduce carbon emissions, sulfur emissions, and nitrogen oxide emissions." (79 Fed. Reg. 7470). BRYANT'S MARITIME BLOG (Feb. 10, 2014) www.bryantsmaritimeblog.blogspot.com.

IMO Marine Environmental Protection Committee MARPOL Convention Actions

Tier III Requirements Regarding Nitrogen Oxides

The Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) adopted amendments to MARPOL Annex VI, Regulation 13, on Nitrogen Oxides (NOX), providing for the Tier III NOx standards to be applied to "a marine diesel engine that is installed on a ship constructed on or after January 1, 2016 and which operates in the North American Emission Control Area or the U.S. Caribbean Sea Emission Control Area that are designated for the control of NOx emissions."

The Tier III requirements do not apply to a marine diesel engine installed on a ship constructed prior to January 1, 2021 of less than 500 gross tonnage, of 24 m or over in length, which has been specifically designed and is used solely, for recreational purposes.

Sulphur Review Correspondence Group Established

The MEPC established a correspondence group tasked with developing a methodology to determine whether sufficient fuel oil is available to meet the fuel oil standard set forth in MARPOL Annex VI, regulation 14.1.3. The sulphur content of fuel oil used on board ships must not exceed 3.50% m/m (outside an Emission Control Area (ECA)), decreasing to 0.50% m/m on and after 1 January 2020. Depending on the outcome of a review, to be completed by 2018, regarding to the availability of compliant fuel oil, this requirement could be deferred to January 1, 2025.

http://www.imo.org/MediaCentre/PressBriefings/Pages/10-MEPC-66-ends.aspx#.U1vv3OZdXNA (last visited Aug. 7, 2014); BRYANT'S MARITIME BLOG (Apr. 8, 2014) www.bryantsmaritimeblog.blogspot.com.

Shippers Fined $476,750 for Violating California Fuel Regulation

The California Air Resources Board (CARB) has fined 12 shipping companies a combined $476,750 USD for failure to switch from dirty diesel "bunker" fuel to cleaner, low-sulfur marine distillate fuel upon entering Regulated California Waters, as required by state law.

All 12 companies took prompt action after being notified of the violations and, under ARB's supervision, began complying with state law. All were fined for either failing to switch to cleaner fuel within 24 nautical miles of the California coast, or for switching fuels in an untimely manner.

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, News Release (Mar. 11, 2014) http://www.arb.ca.gov/newsrel/newsrelease.php?id=584 (last visited Aug. 7, 2014).

U.S. EPA Ports Initiative

The U.S. Environmental Protection Agency (EPA) has launched a new initiative to recognize and provide incentives to ports that take action to improve environmental performance. The EPA's program will work with port authorities to develop emission measurement tools, which will help ports better understand their energy use and environmental impact. EPA also awarded $4.2 million in Diesel Emissions Reduction Act (DERA) grants to six U.S. ports to retrofit, replace, or repower diesel engines. The grant recipients are the Port of Seattle, the Port of Hueneme, the Port of Tacoma, the Maryland Port Administration, the Virginia Port Authority, and the Port of Los Angeles.

U.S. ENVIRONMENTAL PROTECTION AGENCY (Apr. 8, 2014) http://www.epa.gov/climatechange/newsroom.html.

BALLAST WATER

Great Lakes Summary

The Great Lakes and their connecting channels, composing the shared internal waters of the United States and Canada, form the largest fresh surface water system on earth.[1] A region is "characterized by its fresh water, its diverse communities, its historic marine trade, and its immense recreational boating population, [t]he Great Lakes Basin is governed by two nations, eight states, three provinces, several tribal nations and hundreds of local communities, [and] is equally represented by historical industrial interests as by growing environmental interests. This national treasure and the system that supports it are unique in their complexity and size."[2] The U.S.-Canadian maritime border, encompassing 1,500 miles of the shared border, the entirety of which is equivalent to the southwest border between Brownsville, Texas and San Diego, California.[3] The Great Lakes definitely provides an enforcement challenge.

> Upon entering the Great Lakes, a foreign-flagged commercial vessel may enter U.S. waters as many as 17 times in transiting the system even when not making a U.S. port call. Once a vessel is in the Great Lakes system, it has equal opportunity access to both countries. Similarly, the threat of invasive species and other natural and man-made threats[4]

require cooperative oversight, that is, criminal and environmental enforcement efforts that complement each other, while protecting and restoring our shared Great Lakes resources.

Because Great Lakes outflows are relatively small (less than 1% per year) in comparison with the total volume of water,

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[1] U.S. Coast Guard, District Nine, Great Lakes Maritime Strategy 2011-2016, available at: http://www.uscg.mil/d9/docs/D9_GLMS.pdf at p.6.
[2] Id. at 4.
[3] Id.
[4] Id.

pollutants that enter are retained in the water system and become more concentrated over time. As a result, the following environmental issues are the subject of ongoing focus and concern with respect to enforcement efforts: toxic and nutrient pollution, invasive species, and habitat degradation.[5]

Water Quality & Habitat Degradation

Even while the Great Lakes are in the middle of a multiyear federal restoration program, water quality remains an issue.[6] "While sustained governmental and public efforts have measurably improved Great Lakes water quality, rapid reduction in ice cover and the resurgence of some pollutants like excess nutrients are among the indicators currently raising concerns."[7] The Great Lakes ecosystem water quality has indeed in many ways improved dramatically since the passage of the Clean Water Act of 1972, which unfortunately never addressed contaminated ballast water discharges from overseas freighters, and the introduction of exotic species. While rising surface temperatures in the Great Lakes have been contributing to higher incidences of algal blooms and nutrification, there is some hope that the record snowfall and ice cover from this past winter, and coming melt-off, will increase lake levels and halt the surface temperature warming trend. On a positive note, the total number of Great Lakes Areas of Concern (defined as "geographic areas that fail to meet the general or specific objectives of the agreement where such failure has caused or is likely to cause impairment of beneficial use of the area's ability to support aquatic life") dropped from the previous year.[8]

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[5] U.S. Environmental Protection Agency, Great Lakes, Basic Information, available at: http://www.epa.gov/greatlakes/index.html.

[6] See: http://www.jsonline.com/news/wisconsin/great-lakes-water-quality-improved-but-there-are-still-issues-report-says-i49uq79-207463461.html.

[7] Assessment of Progress Made Towards Restoring and Maintaining Great Lakes Water Quality Since 1987, US & Canada Joint International Commission, 16th Biennial Report on Water Quality (2013).

[8] http://www.epa.gov/greatlakes/aoc/.

Invasive and Exotic Species

Significant progress has been made in the last few years against non-native, invasive species, primarily due to revised management and practices concerning ballast water. Indeed, no new invasive or exotic species have been discovered in the Great Lakes since 2006.[9] Current efforts are focused on eradicating the Asian grass carp and Eurasian ruffe. Ballast water sediment testing continues by the US Coast Guard. The Great Lakes Governors and the Premiers of Ontario and Québec unveiled the "least wanted" aquatic invasive species including the Asian carp, and announced joint action to block these species from entering the Great Lakes and the St. Lawrence River.[10]

FOR FURTHER INFORMATION ABOUT ONGOING GREAT LAKES ENVIRONMENTAL INITIATIVES AND EFFORTS, PLEASE SEE: Great Lakes Waterways Conference, Council of Great Lakes Governors, EPA Great Lakes Restoration Initiative. (Michael P. Hartman)

Puget Sound – Draft Proposal for No Discharge Zone

> The Washington Department of Ecology issued a news release stating that it is looking for feedback on a draft proposal to make Puget Sound, including Lake Washington, Lake Union, and the Lake Washington Ship Canal, a No Discharge Zone. The proposed zone would include the marine waters east of the line, between New Dungeness lighthouse and Discovery Island lighthouse east of Port Angeles, and Victoria to include the San Juan Islands in the north and South Puget Sound and the Hood Canal. Comments should be submitted by 21 April. (2/19/14).

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[9] See: http://www.jsonline.com/news/wisconsin/great-lakes-water-quality-improved-but-there-are-still-issues-report-says-i49uq79-207463461.html.

[10] See: http://www.cglg.org/projects/ais/docs/Least%20Wanted%20Press%20Release%20and%20Listing%206-1-13.pdf.

BRYANT'S MARITIME BLOG (Feb. 20, 2014) www.brymar-consulting.com); http://www.ecy.wa.gov/programs/wq/nonpoint/CleanBoating/nodischargezone.html; http://www.ecy.wa.gov/programs/wq/nonpoint/CleanBoating/ndzstatus.html

St. Lawrence Seaway – Ballast Water Management Report

> The Great Lakes-St. Lawrence Seaway System posted the 2013 Summary of Great Lakes Seaway Ballast Water Management Report. The report was compiled by the Great Lakes Seaway Ballast Water Working Group, consisting of the Saint Lawrence Seaway Development Corporation, the St. Lawrence Seaway Management Corporation, Transport Canada, and the US Coast Guard. The working group's mission is to harmonize ballast water management efforts among the group members. During 2013, 100% of the ships bound for the Great Lakes from outside the EEZ received a ballast tank exam. Vessels that had not conducted a ballast water exchange or flush were required to either retain the ballast water and residuals on board, treat the ballast water in an environmentally sound and approved manner, or return to sea to conduct a ballast water exchange. (2/28/14).

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

Senate – Bill Introduced Re Vessel Incidental Discharges

A bi-partisan bill was proposed, Vessel Incidental Discharge Act (S. 2094), "to provide for the establishment of nationally uniform and environmentally sound standards governing discharges incidental to the normal operation of a vessel. (3/6/14)." BRYANT'S MARITIME BLOG (Mar. 14, 2014) www.brymar-consulting.com).

Stay of Deadline for Installation of Ballast Water Treatment Technology

On April 9, 2014, the United States Court of Appeals for the Second Circuit granted a stay of the January 1, 2014 deadline for installation of ballast water treatment technology required by the U.S. Environmental Protection Agency's ("EPA's") 2013 Vessel General Permit (the "VGP"). The stay only applies to vessels owned or operated by members of the Canadian Shipowners Association ("CSA"). This Order provides some relief to vessel operators faced with significant potential liability as a result of the EPA's refusal to extend the deadline for compliance with the VGP, notwithstanding that the U.S. Coast Guard has granted legally enforceable extensions to well over a hundred vessels operating in waters of the United States.

The USCG, under the National Invasive Species Act (NISA) of 1996, regulates ballast water discharged from vessels by requiring installation of certain technologies that treat ballast water prior to discharge. The technologies required to comply with the USCG standards must be approved by the USCG over a phased-in schedule that began on January 1, 2014. The EPA, under the Clean Water Act (CWA), issued the 2013 Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels effective December 19, 2013, which requires the same vessels to comply with certain numeric ballast water discharge limits through installation of the same technology and on the same schedule as the Coast Guard requires.

The problem is that the technology required to comply with both sets of regulations is new and has not yet been approved by the USCG. Even when the technology is eventually USCG approved, compliance will be significantly delayed to allow each vessel to carry out the appropriate testing, approval, production, and installation. The USCG has quite reasonably agreed to formally grant legal protection to vessels that cannot install the new technology because it has not yet been approved. EPA, on the other hand, declined to follow this approach, and although promising to "take this into account," is providing no assurance

that vessel owners/operators will not face serious administrative, civil, or even criminal sanctions for failing to install the equipment in time.

On December 19, CSA filed a petition seeking to reopen the VGP, challenging the EPA's determination that the ballast water treatment technologies identified (but not approved) by the USCG constituted the Best Available Technology Economically Achievable ("BAT") under the Clean Water Act on the grounds that the technology was not yet type-approved in the United States. EPA countered that the court should disregard CSA's Petition because CSA filed it too late. The Second Circuit agreed to stay the VGP requirements until a merits panel resolved the question of whether the Judicial Petition was timely. (Leanne O'Loughlin – Standard P&I Club).

VESSEL RESPONSE PLAN

USCG – Nontank Vessel Response Plans

> The US Coast Guard issued a notice stating that NVIC 01-05 (CH-1), Interim Guidance for the Development and Review of Response Plans for Nontank Vessels, has been cancelled. It was replaced by the "Nontank Vessel Response Plans and other Response Plan Requirements" final rule promulgated on 31 January 2014. 79 Fed. Reg. 19107 (April 7, 2014).

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

Alaska – APC for Nontank Vessels

> The US Coast Guard issued letters to the Alaska Maritime Prevention and Response Network approving that entity's Alternative Planning Criteria (APC) for vessels carrying OPA 90 regulated oils as fuel for main propulsion or as a secondary cargo in the Western Alaska Captain of the Port Zone (12/20/13) and the Prince William Sound Captain of the Port Zone. (1/10/14).

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

California – Spill Prevention and Response

> The California Office of Spill Prevention and Response (OSPR) will host "Spill Prevention and Response Day" on 14 May at the California Maritime Academy in Vallejo. (4/17/14).

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

DEEPWATER HORIZON

Court – DWH Class Action and Settlement Affirmed

> The U.S. Court of Appeals for the Fifth Circuit affirmed the district court order certifying a class action and approving a settlement in the ongoing litigation encompassing claims against British Petroleum Exploration & Production, Inc. and numerous other entities arising out of the 2010 explosion aboard the MODU DEEPWATER HORIZON and the consequent discharge of oil into the Gulf of Mexico. Various groups opposed the class certification and settlement. BP joined with these groups and, in addition, raised arguments

> regarding the Article III standing of certain class members. The appellate court affirmed the district court order certifying the class action and approving the settlement. *In re Deepwater Horizon*, No. 13-30095 (5th Cir. January 10, 2014).

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

DOI – DWH Early Restoration Plan

> The Department of the Interior (DOI) has extended, through 19 February, the period within which to submit comments on the Deepwater Horizon oil spill draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement. 79 Fed. Reg. 3220 (January 17, 2014).

BRYANT'S MARITIME BLOG (Jan. 17, 2014) www.brymar-consulting.com).

DOJ – Former Halliburton Manager Sentenced to Probation for Evidence Destruction

Former Halliburton manager, Anthony Badalamenti, was sentenced to one year of probation for destroying evidence relating to the DEEPWATER HORIZON Disaster. In May 2010, as part of an internal investigation of the loss, Badalamenti ran computer simulations of the well cementing job. Badalamenti later requested another employee destroy the simulations. In addition to probation, he must perform 100 hours of community service and pay a $1,000 fine. Anthony Badalamenti, *Former Halliburton Manager, Gets Probation For Destroying Gulf Spill Evidence* (Jan. 21, 2014) Huffingtonpost.com. (Brooke Riggs).

Court – State Oil spill Pollution Claims Preempted

In re: Deepwater Horizon, No. 12-30012 (5th Cir. Feb. 24, 2014).

In this recent decision arising from the mobile offshore drilling unit DEEPWATER HORIZON's drilling of the Macondo well in April 2010, and the resulting catastrophic blowout and explosion, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal of eleven (11) Louisiana coastal parishes' state-law claims under the Louisiana Wildlife Protection Statute, La. R.S. 56:40.1 (the "Wildlife Statute"). The issues presented on appeal were (1) whether federal subject-matter jurisdiction existed under the Outer Continental Shelf Lands Act (OCSLA), and (2) whether the Clean Water Act, 33 U.S.C. § 1321(o), and the Oil Pollution Act, 33 U.S.C. § 2718(c), preempted the Wildlife Statute.

The parishes filed claims against BP and other defendants under the Wildlife Statute in state court (the "state-court action"). The state-court action, among the thousands of cases transferred for consolidated management, was removed to the United States District Court for the Eastern District of Louisiana. Upon removal, at least three (3) parishes sought to remand the removed action back to state court. The federal trial court denied the motions, concluding that removal was proper because federal subject-matter jurisdiction existed under the OCSLA. *See* 43 U.S.C. § 1349(b)(1)(A). The Fifth Circuit affirmed the trial court's decision, holding that the OCSLA grants federal courts jurisdiction over cases "arising out of, or in connection with any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals." OCSLA § 23(b)(1).

Having resolved the jurisdictional issue, the Fifth Circuit next addressed whether the parishes' claims under the Wildlife Statute were preempted by federal law. Relying on *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S. Ct. 805 (1987), the Fifth Circuit concluded that federal law—the law of the point source in this case—exclusively applied to the claims generated by

the oil spill in any affected state or locality. The court further explained that the parishes' state-law claims were preempted by federal law because the Oil Pollution Act and the Clean Water Act furnish "a comprehensive remedial regime for affected states' governmental and private claims." Accordingly, the Fifth Circuit affirmed the United States District Court for the Eastern District of Louisiana's decision dismissing the parishes' state-law claims. (Imran O. Shaukat).

Court – BP Bound by Terms of Settlement Agreement

> Over a strong dissent, the US Court of Appeals for the Fifth Circuit ruled that the settlement agreement establishing a mechanism for presenting and processing claims for business losses caused by the April 2010 DEEPWATER HORIZON disaster in the Gulf of Mexico does not require those submitting claims to provide evidence of causation. That mechanism, to which BP agreed, does not require claimants to submit evidence of causation. The panel's dissenting judge contended that damages are only recoverable under OPA 90 if they result from an oil spill. *In re Deepwater Horizon*, No. 13-30315 (5[th] Cir. March 3, 2014).

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

EPA – Suspension and Debarment of BP Lifted

> The Environmental Protection Agency (EPA) issued a news release stating that it executed an agreement with BP resolving all suspension and debarment actions against BP that barred the company from doing business with the federal government following the company's guilty plea in the Deepwater Horizon disaster of April 2010. (3/13/14).

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

BP Engineer Guilty of Obstructing Justice

> Sentencing for a former BP engineer found guilty of obstructing justice in the government's investigation of the DEEPWATER HORIZON disaster has been pushed back while his lawyers fight the conviction. Kurt Mix was found guilty in December of one count of obstructing justice for deleting a string of text messages in what prosecutors say was effort to hamper the government's criminal investigation of the deadly 2010 explosion and oil spill. He had been set for sentencing in late March, but the date was recently pushed back to April 23 by U.S. District Judge Stanwood Duval. Duval is to hear arguments March 13 on defense motions, including one asking for the court to declare Mix not guilty and another seeking a new trial.

THE ASSOCIATED PRESS (Feb. 28, 2014).

BP Engineer Granted Delay in His Sentencing

> A former BP engineer has been granted a delay in his sentencing on an obstruction of justice charge related to the 2010 Gulf oil spill. The sentencing hearing for Kurt Mix had been set for late April. On Tuesday, U.S. District Judge Stanwood Duval granted a delay until Aug. 6.

THE ASSOCIATED PRESS (Apr. 2, 2014).

January 2015 Date for Final Phase of DWH Civil Trial

It's approaching four years since the sprawling lawsuit against BP and its partners in the Macondo oil well was introduced in federal court in New Orleans. It will be another year or more before BP finds out how many billions of dollars it will owe in fines related to the oil well blowout and resulting Gulf of Mexico oil spill disaster.

U.S. District Judge Carl Barbier and attorneys for BP and the federal government agreed Friday (March 21) to a Jan. 20, 2015, start date for the third and final phase of the civil trial. The last segment will determine how much in fines BP will pay tied to the April 2010 DEEPWATER HORIZON rig explosion and resulting damage.

It follows two previous stages completed in 2013. One in April focused on the liability of BP and its partners while drilling the Macondo well. The second in October aimed to settle just how much oil was released into the gulf.

Barbier set the date for the final phase after hearing more than two hours of arguments parsing what evidence attorneys would be allowed to use in the final stretch of litigation. The judge had hoped to move forward by this summer, yet he said he had little choice but to push it into next year, given the debate over what additional evidence the government and BP may bring to the table.

The grind of years of oil spill litigation surfaced early in the hearing, when Barbier took the opportunity to highlight "a drop-off in professionalism" he saw among the attorneys working on the case. "I feel like I've spent the last year dealing with nothing but distractions, fighting

and refighting old battles instead of moving forward with the litigation," he said.

When it does ultimately move forward, the third chapter of the civil saga will focus on several factors when determining how many billions of dollars the company should face in fines.

BP and its partners, which include Anadarko Petroleum Corp., part-owner in the Macondo well, could face fines up to $1,100 per barrel of oil released under the Clean Water Act. If the parties are found not just negligent, but grossly so, fines could max out at $4,300 per barrel.

The factors Barbier will use to determine that fine include the degree to which BP and its partners are at fault in the cause of the blowout, the "seriousness" of any violations of the law that may have occurred, the company's history of prior violations, and the economic impact any penalty would have on the company.

Barbier has already said that findings related to BP's negligence from the first two phases of the trial will play a role in the final phase. At question during Friday's hearing was what new evidence and testimony attorneys on both sides can present.

Throughout the hearing, Barbier emphasized that he intends to place hard limits on new evidence.

Much of the debate Friday centered on whether the litigation should consider BP PLC and all of its subsidiaries as a whole, or simply BP XP, the subsidiary that owned the Macondo well and was the defendant in the previous phases of the trial.

Barbier agreed to allow the Justice Department to gather evidence related to major incidents tied to other BP entities, including the March 2005 explosion at BP's Texas City Refinery and the company's 2006 pipeline rupture oil spill in Prudhoe Bay, Alaska. But he limited the government's discovery to four major events, including Texas City and Prudhoe Bay.

The Justice Department had sought to gather evidence related to possible violations at other deepwater wells drilled by BP, but the company argued that the government had missed a March 12 deadline to file its intent.

But just where to draw the line got murkier further into the hearing.

While BP pushed to be able to include evidence related to the oil spill cleanup effort conducted by all of its entities, it was opposed to using the parent company's financials in calculating what size penalty the company could handle.

Justice Department attorneys, on the other hand, argued BP PLC and all of its subsidiaries should be subject to all of the factors at question in the trial.

Barbier didn't rule on the issue, instead pressing the parties to agree to a certain set of facts they would abide by outside of court prior to the trial.

Barbier was most adamant about reining in the amount of evidence BP and the federal government present regarding the impact of the oil spill on the coastal environment.

Mike Brock, BP's lead counsel, said the company wants the opportunity to use new studies to show

"the big picture injury to the Gulf, the resiliency of the Gulf, the restoration that has taken place" as well as the impact of the company's intervention measures in the wake of the spill.

But Barbier noted scientific research on the spill's impact is likely to go on for years to come. Furthermore, he said, including such testimony could force the case to unnecessarily overlap with a future litigation under the Natural Resource Damage Assessment (NRDA) process.

Under the NRDA process, the federal government gauges the harm caused by an oil spill or hazardous chemical release and identifies restoration projects, which violators are required to pay for.

BP has proposed limiting the evidence presented in the civil trial to the environmental impact along the shores of impacted states and setting the assessment of marine life and water quality aside for the NRDA trial.

Barbier didn't go so far as to rule out all evidence illustrating the environmental impact of the spill, but he was skeptical of the degree it would change the course of the trial.

He noted both parties agree that the spill was extremely serious. Whether it was more or less serious than it could have been might be beside the point, he said.

"I don't know how anyone is going to stand up here and argue that this case was not extremely serious," Barbier said. "I know that's not it. There are other factors the court has to consider. The question is how fine of a point then do we have to put on this?"

(Jennifer Larino, THE TIMES-PICAYUNE (Mar. 21, 2014) NOLA.com.

NOAA – Crude Oil May Cause Abnormalities in Fish

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that study reveals that crude oil from the 2010 DEEPWATER HORIZON disaster in the Gulf of Mexico may cause severe defects in the developing hearts of larva of large marine fish such as bluefin and yellowfin tuna. http://www.pnas.org/content/111/15/E1510 (Mar. 24, 2014).

BP, Coast Guard End Spill Cleanup on Gulf Shoreline

A BP PLC company logo stands illuminated on a sign on the forecourt of a gas station in London. (Matthew Lloyd/Bloomberg)

> HOUSTON – Nearly four years after the massive Gulf of Mexico oil spill, BP and the U.S. Coast Guard on Tuesday declared an end to cleanup operations that cost the company $14 billion and once covered 778 miles of shoreline on the Gulf Coast.
>
> The Coast Guard has finished its last patrols of the three remaining miles of beach that had been soaked in oil after a blowout at BP's Macondo well sent millions of barrels of crude into the ocean on April 20, 2010. The explosion killed 11 workers on the DEEPWATER HORIZON rig and the spill lasted more than 85 days.
>
> "Immediately following the Deepwater Horizon accident, BP committed to cleaning the shoreline and supporting the Gulf's economic and environmental recovery," John Mingé, chairman and president of BP America, said in a written

> statement Tuesday. "Completing active cleanup is further indication that we are keeping that commitment."

Return to the Gulf:

> BP said it spent more than 70 million personnel hours on the response to the spill and the cleanup efforts afterward. The company said it will "keep resources in place to respond" if more oil from the Macondo well is found and needs to be removed.
>
> The oil was cleaned from Gulf waters in 2010, according to the Operational Science Advisory Teams, a multiagency group that prepared reports for the Coast Guard.
>
> The company said it has paid $12.9 billion in damage claims, settlements and other payments related to the spill.
>
> BP struck a multibillion-dollar settlement with plaintiffs in 2012 but *is still waiting for a federal judge in New Orleans to hand down rulings* on its degree of negligence before the spill and other issues that *could raise its environmental fines up to $18 billion*.

FUELFIX (Apr. 15, 2014) www.fuelfix.com.

DEEPWATER HORIZON Response is Far from Complete

The U.S. Coast Guard federal on-scene coordinator (FOSC) for the DEEPWATER HORIZON Response completed the transition to the "Middle Response" ("Middle R") process and opened active National Response Center (NRC) cases for three miles of coastline in Louisiana.

"Our response posture has evolved to target re-oiling events on coastline segments that were previously cleaned," said Capt.

Thomas Sparks, the FOSC for the DEEPWATER HORIZON Response. “But let me be absolutely clear: This response is not over—not by a long shot. The transition to the Middle Response process does not end clean-up operations, and we continue to hold the responsible party accountable for DEEPWATER HORIZON cleanup costs.”

The term “Middle R” is used to describe an enhanced NRC process of responding to reports of oiling across the Gulf with (1) dedicated Coast Guard teams pre-positioned for rapid response to residual oil; and (2) pre-stationed Oil Spill Removal Organizations on standby, ready to clean when directed. This process is fully functioning on more than 3,200 miles of Louisiana shoreline as well as along the Florida, Alabama, and Mississippi coasts.

According to Sparks, the “Middle R” process requires continued but more focused response equipment and personnel. This makes it not only a more nimble tool for targeted responses across a wide geographic area, but also reduces the impact on the coastal environment.

“Whenever an NRC case is initiated anywhere in the Gulf—which happens virtually every day—active clean-up operations are undertaken, and we go out and clean up the oil,” Sparks added.

Across the Gulf Coast, dedicated Coast Guard personnel have responded to 1,082 suspected DEEPWATER HORIZON NRC reports and overseen the cleanup of more than 5,500 pounds of oily material since June 2013.

This transition is the latest in various process evolutions that account for changing oiling conditions and scientific data. The Coast Guard also surges personnel to address potential re-oiling caused by extraordinary events such as hurricanes, severe storms and unusual tidal conditions.

"We are absolutely committed to continuing the clean-up of Deepwater Horizon oil along the Gulf - for as long as it takes, and

to surge as necessary and as the situation dictates," Sparks emphasized.

Michelle Howard, MARITIMEEXECUTIVE (Apr. 16, 2014) www.uscgnews.com.

ECOLOGY

Beaufort Sea – Taking of Marine Mammals

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it has issued a Letter of Authorization (LOA) to BP Exploration (Alaska) Inc. to take marine mammals, by harassment, incidental to operation of offshore oil and gas facilities in the Beaufort Sea, effective through 14 January 2019. 79 Fed. Reg. 3347 (January 21, 2014).

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

NOAA – Protection Proposed for Lolita

> The National Oceanic and Atmospheric Administration (NOAA) proposes to remove the exclusion of "Lolita", the sole member of the Southern Resident killer whale distinct population segment (DPS) held in captivity, as a protected member of that DPS. Lolita was captured from the Southern Resident population in 1970 and currently resides at the Miami Seaquarium. The Southern Resident killer whale DPS was listed as endangered in 2005. Comment on the proposal should be submitted by 28 March. 79 Fed. Reg. 4313 (January 27, 2014).

BRYANT'S MARITIME BLOG (Jan. 27, 2014) www.brymar-consulting.com.

NOAA – Carib Tails

> The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that commercial and recreational seafarers are invited to help track movements of endangered humpback whales in waters of the northwestern Atlantic Ocean and the Caribbean Sea as part of the Carib Tails international citizen science effort. The black and white patterns on the underside of humpback whale flukes are unique, allowing individual whales to be identified. Photographs can be compared, allowing whale movements to be accurately recorded. (1/29/14).

BRYANT'S MARITIME BLOG (Jan. 31, 2014) www.brymar-consulting.com.

NOAA – Petition for Exclusion from Vessel Speed Restrictions

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it receive a petition for rulemaking to exclude federally-maintained dredged entrance channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville from vessel speed restrictions to reduce fatal vessel collisions with North Atlantic right whales. Comments on the petition should be submitted by 3 March. 79 Fed. Reg. 4883 (January 30, 2014).

BRYANT'S MARITIME BLOG (Jan. 30, 2014) www.brymar-consulting.com.

NOAA – Caribbean Electric Ray

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that received a petition to list the Caribbean electric ray

> as threatened or endangered under the Endangered Species Act. The Caribbean electric ray inhabits coastal waters from North Carolina south, in the Gulf of Mexico, and in the Caribbean Sea. Comments on the petition should be submitted by 31 March. 79 Fed. Reg. 4877 (January 30, 2014).

BRYANT'S MARITIME BLOG (Jan. 30, 2014) www.brymar-consulting.com.

USCG – Buzzards Bay RNA

> The U.S. Coast Guard issued a notice stating that it has prepared a Finding of No Significant Impact (FONSI) based on the Final Environmental Assessment (Final EA) for amendments to the Buzzards Bay regulated navigation area (RNA) that were implemented in 2007. 79 Fed. Reg. 10818 (February 26, 2014).

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

USCG – Texas City "Y" Incident Update

On March 22, 2014 the 585-foot ship SUMMER WIND collided with a barge being towed from Texas City to Bolivar by the vessel MISS SUSAN. The barge was carrying 924,000 gallons of marine fuel oil, of which approximately 174,000 gallons spilled into Galveston Bay according to the United States Coast Guard. (Associated Press). Two days later USCG Sector Houston-Galveston issued a bulletin updating the Texas City "Y" incident. The Captain of the Port (COTP) authorized limited movement of commercial vessels, including commercial fishing vessels, through the safety zone from sunrise to sunset. (Bryant's Maritime Blog). Transits through the safety zone of charter vessels, small passenger vessels, and recreational vessels were not authorized, but as of April 4, 2014, all restrictions had been lifted except to transit using safe distance and minimum safe speeds in the vicinity of any oil

spill response or salvage operations and to avoid all areas of visible oil. (MarineLink.com). The Coast Guard reports that their Galveston-based response efforts for the Texas City collision has included the de-contamination of approximately 300 boats, oiled as a result maritime casualty. Responders continue to focus on shoreline cleanup and facility decontamination as recoverable oil in open water is no longer present in many areas. Teams are working on rehabilitation of public and environmentally sensitive areas that were impacted. The constant monitoring of the oil spilled has facilitated the removal of approximately 5,400 feet of protective boom from areas around the Houston Ship Channel as on-going assessment has determined there to be no potential impact to those areas. While swimming in the area is open, the Texas Department of State Health Services (DSHS) does advise people not to swim in areas where they can see oil. The DSHS stated that there is no indication that seafood in the marketplace has been impacted by the oil spill. However, important shorebird habitats are on both sides of the Houston ship channel, according to the Houston Audubon Society, and at peak migration season as many as 10,000 birds could be affected. (Associated Press). Currently responders have recovered 198 birds, of which 168 were dead on arrival to stabilization trailers and 30 are still receiving rehabilitation. The Coast Guard has said that its investigation of the incident is ongoing. (MarineLink.com). (Michael Dodd – Charleston School of Law).

NOAA –Crude Oil May Cause Abnormalities in Fish

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that study reveals that crude oil from the 2010 Deepwater Horizon disaster in the Gulf of Mexico may cause severe defects in the developing hearts of larva of large marine fish such as bluefin and yellowfin tuna. BRYANT'S MARITIME BLOG (Mar. 24, 2014) www.brymar-consulting.com; http://www.pnas.org/content/111/15/E1510.

Beaufort & Chukchi Seas – Incidental Take of Marine Mammals

> The Fish and Wildlife Service (FWS) issued a notice stating that it has issued letters of authorization for the nonlethal take of polar bears and Pacific walrus incidental to oil and gas exploration, development, and production activities in the Beaufort and Chukchi Seas. 79 Fed. Reg. 17564 (March 28, 2014).

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

FWS – ANS Task Force Meeting

> The Aquatic Nuisance Species (ANS) Task Force, sponsored by the Fish and Wildlife Service (FWS), will meet on 7-8 May in Arlington, Virginia. Topics on the agenda include Quagga Zebra Action Plan update, ballast water research, and fracking as an AIS pathway. 79 Fed. Reg. 18053 (March 31, 2014).

BRYANT'S MARITIME BLOG (Mar. 31, 2014) www.brymar-consulting.com.

NOAA – Draft PEA Re IOOS

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it is seeking comments on the draft programmatic environmental assessment (PEA) of the US Integrated Ocean Observing System (IOOS). Comments should be submitted by 30 April. 79 Fed. Reg. 18281 (April 1, 2014).

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

NOAA – Members Sought for MPAFAC

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it is seeking nominations for membership on the Marine Protected Areas Federal Advisory Committee (MPAFAC). Nominations must be received by 30 May. 79 Fed. Reg. 18282 (April 1, 2014).

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

ICJ – Whaling in the Antarctic Not Scientific

The International Court of Justice (ICJ) ruled on March 31, 2014 that whaling as conducted by Japan in the Antarctic does not comport with the requirements of scientific whaling under the International Convention for the Regulation of Whaling. In the case brought in 2010, Australia claimed Japan was using its whaling program as a cover for commercial hunting, and the court agreed. (*Japan Accepts ICJ Whaling Ruling*, THE JAPAN TIMES (Apr. 11, 2014) http://www.japantimes.co.jp/news/2014/04/11/national/japan-accepts-icj-whaling-ruling/#.U0lZFIVF3UA). Among other things, the court ordered that Japan revoke any extant authorization, permit, or license to kill, take, or treat whales in **Whaling in the Antarctic (Australia v. Japan),** (ICJ, 3/31/14). (Bryant's Maritime Blog). Japan's government confirmed April 11, 2014 that it will abide by the ICJ ruling but that it will study the details of the decision and consider what steps it may take "with sincerity". (*Japan Accepts ICJ Whaling Ruling*, THE JAPAN TIMES (Apr. 11, 2014) http://www.japantimes.co.jp/news/2014/04/11/national/japan-accepts-icj-whaling-ruling/#.U0lZFIVF3UA). The full judgment may be found on the ICJ website: http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4 (last visited Aug. 7, 2014). (Michael Dodd – Charleston School of Law).

Speed Restrictions to Protect North Atlantic Right Whales

The National Oceanic and Atmospheric Administration ("NOAA") has begun examining years-old Automatic Identification System ("AIS") data and levying civil penalties of up to $5,750 per count against vessel operators for violation of the "Speed restrictions to protect North Atlantic Right Whales" on the U.S. East Coast. *See* 50 CFR § 224.105 (enacted Dec. 9, 2008).

The 10-knot speed limit applies vessels greater than 65 feet in length transiting near-coastal waters defined as "Seasonal Management Areas." The regulation applies during different times of the year in the Southeast, Mid-Atlantic and Northeast. In the Southeast, from St. Augustine, Florida to Brunswick, Georgia, the speed limit applies from November 15th to April 15th. In the Mid-Atlantic, from Brunswick to Rhode Island, the limit applies from November 1st to April 30th. North of Rhode Island, the limit applies periodically in three distinct zones, from as early as January 1st (Cape Cod Bay) to as late as July 31st (Great South Channel). *See* 50 CFR § 224.105(a)(1-3).

Vessels are permitted to exceed the speed limit as "necessary to maintain safe maneuvering," but "only if justified because the vessel is in an area where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board or, when a vessel is not carrying a pilot, the master of the vessel." *See* 50 CFR § 224.105(c). In that case, it is imperative for the master of the vessel to record in the Official Logbook "the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation." *See id.*

While the regulation was set to expire on December 9, 2013, NOAA enacted a subsequent rule to remove the expiration provision and therefore the regulation continues, for now, in perpetuity. The speed limit has been controversial among East Coast bar pilots and ship operators alike who contend that it does little to protect the right whale, while drastically compromising

vessel safety. Vessels maneuvering in dredged channels are known to "crab" at considerable angles to their course, depending on their speed. "Crabbing" describes a ship sliding sideways to counter cross-currents and winds that are typical in areas just offshore of port entrances, but still within the Seasonal Management Areas. As crab angles increase, a ship sweeps a wider path, occupying more of the available width of the channel. Computer simulations and practical experience alike have shown that at slower speeds, a ship's crab angle increases substantially, and this reduces margins of safety between the vessel and the banks of the channel, or other vessels.

In the Port of Charleston, for example, a crabbing simulation for two post-Panamax vessels meeting in the dredged channel showed them occupying all but 29% of the channel at 15 knots, and *all but* 15% of the channel's width at 10 knots, thereby reducing the available open space by almost half when the speed limit is observed. Because the crabbing factors are immutable, in March 2014, NOAA began reviewing a petition to eliminate nine federally dredged channels from New York to Jacksonville from the Seasonal Management Areas. Exemption of these channels would eliminate 6.7 square miles from an estimated 17,600 square miles encompassed by the Seasonal Management Areas, for a reduction of 0.038 percent of overall area. NOAA is expected to rule on the petition in August 2014. (Ryan Gilsenan)

NOAA – Hawaiian Monk Seal PEIS

> The National Oceanic and Atmospheric Administration (NOAA) seeks comments on the Programmatic Environmental Impact Statement (PEIS) for Hawaiian monk seal recovery actions. Comments must be submitted by 12 May. 79 Fed. Reg. 20172 (April 11, 2014).

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

NOAA – GFNMS and MBNMS

> The National Oceanic and Atmospheric Administration (NOAA) has reopened, through 5 May, the period within which to submit comments on its proposal to prohibit the introduction of introduced species into state waters of the Gulf of the Farallones and Monterey Bay national marine sanctuaries (GFNMS and MBNMS). 79 Fed. Reg. 21658 (April 17, 2014).

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

FWS – Stock Assessment Reports

> The Fish and Wildlife Service (FWS) issued a notice stating that it has revised the stock assessment reports (SARs) for the Pacific walrus stock and for various northern sea otter stocks in Alaska. 79 Fed. Reg. 22154 (April 21, 2014).

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

USACE & EPA – "Waters of the United States"

> The US Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA) issued a proposed rule defining the term "waters of the United States" for purposes of the Federal Water Pollution Control Act (FWPCA) [also known as the Clean Water Act] in light of recent decisions of the US Supreme Court. Under the proposal, the following waters would be included: (a) all waters which were currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) all interstate waters, including interstate wetlands; (c) the territorial seas; (d) various identified impoundments of waters; (e) various identified tributaries; (f) all waters, including wetlands, adjacent to identified waters; and (g) on a case-by-case basis, other waters, including wetlands, provided that those waters along, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to an identified water. Comments on the proposal should be submitted by 21 July. 79 Fed. Reg. 22187 (April 21, 2014).

BRYANT'S MARITIME BLOG (Apr. 17, 2014) www.brymar-consulting.com.

ANTARCTIC

Antarctic – Passenger Ship Remains Beset

> The Australian Maritime Safety Authority (AMSA) issued a media release stating that ice conditions have again delayed efforts to remove the passengers from the Russian passenger vessel Akademik

Shokalskiy, beset off the coast of Antarctica. (1/2/14).

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

Australia – Icebreaker Returns with Rescued Passengers

The Australian Antarctic Division issued a media release stating that the icebreaker Aurora Australis arrived in Hobart, Tasmania carrying the 52 passengers rescued from the Russian passenger ship Akademik Shokalskiy on 2 January after their ship became trapped in the ice off the coast of Antarctica. (1/22/14).

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

Antarctic – USCG Opens McMurdo Sound

The US Coast Guard issued a news release stating that Polar Star (WAGB 10) successfully completed the breakout of McMurdo Science Station in Antarctica in support of Operation Deep Freeze. By opening a navigable shipping lane through twelve miles of ice (of up to ten feet thick), the US Coast Guard's only polar icebreaker allowed an ice-strengthened tanker and an ice-strengthened freighter to resupply the US scientific mission in Antarctic. There is only one maritime resupply operation during the short Antarctic summer. (2/10/14).

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

ARCTIC

ITLOS – ARCTIC SUNRISE Arbitrators Appointed

> The International Tribunal for the Law of the Sea (ITLOS) issued a press release stating that it has appointed arbitrators in the arbitral proceedings instituted by the Kingdom of the Netherlands against the Russian Federation in respect to the dispute regarding the vessel Arctic Sunrise. (1/13/14).

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

Court – Chukchi Sea Drilling EIS Struck Down

> Over one partial objection, the US Court of Appeals for the Ninth Circuit ruled that selection by the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) of one billion barrels of oil as the benchmark for analyzing the environmental impact of proposed leases for oil and gas development in the Chukchi Sea off the northwest coast of Alaska was arbitrary and capricious. Plaintiff local village sued the Secretary of the Interior alleging that the environmental impact statements supporting the leases violated the National Environmental Protection Act (NEPA). The court held that the impact statements properly took account of incomplete or unavailable information, but that reliance on a one billion barrel estimate of total economically recoverable oil was improper. The case was remanded for further proceedings. *Native Village of Point Hope v. Jewell*, No. 12-35287 (9th Cir. January 22, 2014).

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

Beaufort & Chukchi Seas – NPDES Drilling Permit

> The Environmental Protection Agency (EPA) has extended, through 19 February, the period within which to submit comments on the proposed issuance of a National Pollutant Discharge Elimination System (NPDES) general permit for oil and gas geotechnical surveys and related activities in federal waters of the Beaufort and Chukchi Seas. 79 Fed. Reg. 4344 (January 27, 2014).

BRYANT'S MARITIME BLOG (Jan. 27, 2014) www.brymar-consulting.com.

IMO – Draft Polar Code

> The IMO issued a news release stating that the Sub-Committee on Ship Design and Construction (SDC) agreed in principle to the draft text of revised Polar Code. It also agreed in principle to proposed draft amendments to the SOLAS and MARPOL Conventions to make the Code mandatory. The Maritime Safety Committee (MSC) will take up the proposed SOLAS amendments at its meeting in May. The Marine Environment Protection Committee (MEPC) will take up the proposed MARPOL amendments at its meeting in April. (1/28/14).

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

Statoil to Slow Down Exploration in Arctic

"I expect there will be questions asked about the Arctic going forward, not least since Shell suspended their plans," Tim Dodson said in an interview on the margins of a capital markets day held by the company. REUTERS (Feb. 7, 2014)

http://www.reuters.com/article/2014/02/07/statoil-exploration-idUSL5N0LC21A20140207.

White House – Arctic Region Strategic Implementation Plan

> The White House released the Implementation Plan for the National Strategy for the Arctic Region. The Plan provides guidelines for federal departments and agencies to execute the National Strategic for the Arctic Region. It is designed to meet the reality of a changing Arctic and uphold interests in safety and security, protect the environment, and work with international partners. (1/30/14).

BRYANT'S MARITIME BLOG (Jan. 31, 2014) www.brymar-consulting.com.

Shell Abandons Plans to Drill Offshore in Alaska Arctic in 2014

(Jan. 30, 2014 http://www.adn.com/2014/01/30/3298785/shell-abandons-plans-for-alaska.html).

President of the United States Barack Obama has Joined with Singer Alejandro Sanz to "Protect the Arctic and Take Measures" to Fight Global Warming.

> In a message posted to his personal Twitter account, the Spanish singer said that President Obama replied to his petition to develop measures that would protect the Arctic from the negative effects caused by global warming.

(Feb. 5 2014) http://www.latinospost.com/articles/33996/20140205/barack-obama-and-alejandro-sanz-come-together-to-protect-the-arctic.htm.

BSEE – Burning Oil in Ice Cavity Research

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that its Oil Spill Response Research (OSRR) program has completed its review of a new research project on burning oil in ice cavities. The research has led to the discovery that the average burning rate is greater in an ice cavity than in a similarly-sized vessel or a pan. (2/11/14).

BRYANT'S MARITIME BLOG (Feb. 12, 2014) www.brymar-consulting.com.

USN – Arctic Roadmap

> The US Navy released its updated Arctic Roadmap 2014-2030. It is intended to prepare naval forces over the next 15 years for operations in the Arctic Ocean. (2/24/14).

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

BSEE – Offshore Operations in Alaska

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that BSEE Director Brian Salerno and BSEE Alaska Region Director Mark Fesmire met in Bellingham, Washington with senior leaders from the US Coast Guard and the American Bureau of Shipping (ABS) and to see first-hand Shell's oil spill containment system onboard Arctic Challenger. The group discussed operations in the Arctic, certification of vessels, and significant issues affecting offshore operations in Alaska. (2/25/14).

BRYANT'S MARITIME BLOG (Feb. 27, 2014) www.brymar-consulting.com.

IMO – Safe Ship Operations in the Arctic

> The IMO issued a news release stating that it hosted a workshop on safe ship operation in the Arctic Ocean. The workshop was a collaboration with the Arctic Options: Holistic Integration for Arctic Coastal-Marine Sustainability Project, funded by the US National Science Foundation, and the Arctic Climate Change, Economy, and Society (ACCESS) Project, funded by the European Commission. (2/28/14).

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

Cook Inlet - Seismic Survey

> The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it received an application from Furie Operating Alaska LLC for an Incidental Harassment Authorization to take marine mammals by harassment incidental to a proposed 3D seismic survey in Cook Inlet, Alaska between May 2014 and May 2015. Comments on the application should be submitted by 3 April. 79 Fed. Reg. 12160 (March 4, 2014).

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

Alaska Sues U.S. Over Its Rejection of Oil Exploration Plan

Alaska Governor Sean Parnell said in a complaint filed in federal court in Anchorage, Alaska; "It is both disappointing and disturbing that the Obama administration, which claims that it is

pursuing an 'all of the above' energy policy, is afraid to let the people of the United States learn more about ANWR's oil and gas resources," Parnell, a Republican, said in a statement. "The modern technology that we are seeking to use is responsibly utilized all across the North Slope with extremely limited environmental impact, and would dramatically improve our understanding of ANWR's resources." (Mar. 14, 2014) http://www.businessweek.com/news/2014-03-14/alaska-sues-u-dot-s-dot-over-its-rejection-of-oil-exploration-plan-1.

The Arctic Sea Ice Season is Shortening by Five Days Per Decade, with the Appearance of Sea Ice Becoming Delayed by Warmer Weather, According to New Research

Writing in the journal Geophysical Research Letters, University College London Earth sciences professor Julienne Stroeve and her colleagues report their analysis, which used satellite data, indicates that the Arctic Ocean is absorbing more of the Sun's energy in the summer, leading to a delayed appearance of autumn sea ice. James A. Foley, NATURAL WORLD NEWS (Mar. 2014).

Arctic 30 Protesters Seek Damages from Russia

> Lawyers for the Arctic 30, a group of Greenpeace activists and freelance journalists who were detained in Russia last year, have applied to the European court of human rights for damages from Moscow. They are also seeking a declaration Russian authorities broke international and Russian law when they seized a Greenpeace ship and arrested the group protesting against oil drilling in the Arctic.

(Mar. 17, 2014) http://www.theguardian.com/environment/2014/mar/17/arctic-30-activists-damages-russia-court-greenpeace.

EXXON VALDEZ 25th Anniversary: the North Deserves a Better Future

> On the 25th Anniversary of the Exxon Valdez spill, as the Arctic Council gathers to meet in northern Canada and Exxon is getting set to drill in the Russian Arctic, Greenpeace is preparing for a fresh fight with a familiar foe.
>
> In an effort to stop history from repeating itself, Greenpeace Nordic climbers scaled an ExxonMobil rig in Norway set to drill in the Russian Arctic this summer. The activists unfurled a banner reading "No Exxon Valdez in Russian Arctic" and are calling for a ban on offshore oil drilling in the Arctic.
>
> The drilling block where Exxon will operate overlaps with the legally protected Russian Arctic National Park. The park is home to protected wildlife and whether it is even permissible to exploit the area under Russia law is a matter of controversy.

Kiera-Dawn Kolson, GREENPEACE INT'L (Mar. 24, 2014) www.greenpeace.org.

Arctic Ocean – USN Terminates Ice Camp

> The US Navy issued a news release stating that Ice Camp Nautilus has been terminated early due to the instability of the ice floe on which it was situated. As part of Ice Exercise 2014 (ICEX-2014), Commander, Submarine Forces had the camp constructed on an ice floe in the Arctic Ocean north of Prudhoe Bay as a temporary facility to operate through 30 March, but shifting winds and other factors led to multiple fractures in the ice. (3/24/14).

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

Arctic – Sea Ice Maximum

> The National Snow and Ice Data Center issued a notice stating that Arctic sea ice reached its maximum extent for the year on 21 March at 14.91 million square kilometers (5.76 million square miles), making it the fifth lowest maximum in the satellite record. (4/2/14).

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

USCG – MODU Kulluk Report of Investigation

> The US Coast Guard released its Report of Investigation into circumstances surrounding the grounding of the mobile offshore drilling unit (MODU) Kulluk on the eastern coast of Sitkalidak Island, Alaska on 31 December 2012. A series of event contributed to the causal factors that resulted in the grounding of the Kulluk, with the most significant factor being the inadequate assessment and management of the risks associated with a complex vessel movement during the winter in the unique and challenging operating environment of Alaska. Among the safety recommendations included in the report is that the Coast Guard partner with the Towing Safety advisory Committee (TSAC) to address the towage of MODUs in the Arctic marine environment. (4/3/14).

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

BSEE – Drilling in the Arctic

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release regarding the participation of the Alaska Regional Director in a panel discussion on drilling in the Arctic. The Director emphasized that, should drilling operations occur in the Arctic, they will be done safely. (4/17/14).

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

GAO – Maritime Infrastructure in the US Arctic

> The Government Accountability Office (GAO) issued a report on maritime infrastructure in the United States Arctic and its potential impact on commercial activity in the region over the next decade. The report notes that efforts have begun to improve mapping, charting, and weather information; to study the development of a deepwater port; and to acquire a new polar icebreaker that could be used for emergency response, research assistance, and patrols. The report further notes that the Committee on the Marine Transportation System (CMTS) has prioritized actions for developing Arctic maritime infrastructure and identified a lead agency for each action. GAO-14-299 (4/18/14).

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

NOAA Releases Arctic Action Plan

Earlier this year, President Obama released a plan for moving forward on his national strategy to advance U.S. security and stewardship interests in the Arctic. In keeping with the goals

and tenets of his strategy, NOAA has unveiled its Arctic Action Plan—a document that provides NOAA scientists, stakeholders and partners a roadmap to make shared progress in monitoring, understanding, and protecting this vast, valuable, and vulnerable region.

The document provides an integrated overview of NOAA's diverse Arctic programs and how these missions, products, and services support the goals set forth in the President's National Strategy for the Arctic Region. The plan also provides linkages to other agency and interagency plans crafted with constituent input, to include the National Ocean Policy, the Interagency Arctic Research Policy Committee Five Year Research Plan, NOAA's Arctic Vision and Strategy, and more.

This plan also contains an appendix listing more than 80 actions that NOAA will take in 2014 and 2015 to support our Arctic-related missions and mandates and to further our scientific understanding of the region. View the **plan** (Kathryn D. Sullivan, *NOAA's Arctic Action Plan* (Apr., 2014) www.arctic.noaa.gov/NOAAarcticactionplan2014.pdf); MARITIMEEXECUTIVE, Apr. 21, 2014).

PIRACY

CGPCS – Fifteenth Plenary Session

> The Contact Group on Piracy off the Coast of Somalia (CGPCS) met in their fifteen plenary session in Djibouti on 11 and 14 November. In their communique, the parties agreed that sustained efforts by the international community and regional partners have suppressed maritime piracy off the Horn of Africa, but have not yet eradicated it. The parties also called on pirate leaders to effect immediately the unconditional release of all hostages. (11/14/13).

BRYANT'S MARITIME BLOG (Dec. 9, 2013) www.brymar-consulting.com.

UN Resolution 2125 - Fight Against Somali Piracy Reaffirmed

UN Security Council Resolution 2125 - The United Nations Security Council (UNSC) has renewed for a year the authorization for international action to fight piracy and armed robbery at sea, off the Coast of Somalia. The UNSC reiterated its position on Somali piracy and urged the international community not to abandon its counter-piracy efforts in the wake of a decrease in successful pirate attacks on vessels in the Indian Ocean. The Resolution commended the disruption of pirate hijacks off the coast of Somalia, attributing much of the success to international naval patrols of the area, development efforts ashore, and use of privately contracted security personnel (PCASP) onboard vessels. U.N. S.C. Rep. of the Security Council, Nov. 18, 2013, U.N. Res. 2125 (2013). (Jude Smith).

Somali Pirate Negotiator Found Not Guilty in Federal Court

Ali Mohamed Ali an education minister of Somaliland boarded the M/V CEC Future a few days after it was seized by pirates in the Gulf of Aden in November 2008. An English speaker, he communicated the demands of the pirates with officials from Clipper Group, the ship's owner. The siege lasted more than two months and ended when the pirates settled for $1.7 million instead of their initial demand of $7 million. Ali was arrested in 2011 after being lured to the U.S. on a bogus invitation to attend an education conference in Raleigh, N.C. and was held in jail since that time. In December he was found not guilty of piracy, and subsequent pending charges were dismissed in January. Frederic J. Frommer, *AP NewsBreak: Not guilty verdict in piracy case*, THE SEATTLE TIMES (Nov. 27, 2013) http://www.seattletimes.nwsource.com/html/politics/2022337388_apxpiracytrial.html; *U.S. to drop case against man accused of piracy*, THE ASSOCIATED PRESS (Jan. 18, 2014) http://www.politico.com/story/2014/01/us-to-drop-case-against-man-accused-of-piracy-102356.html.

EU to Chair CGPCS for 2014 Year

From the 1st of January 2014 the European Union will assume for one year the chairmanship of the Contact Group on Piracy off the Coast of Somalia (CGPCS) with Maciej Popowski, Deputy Secretary General of the European External Action Service (EEAS) as EU chairperson. The chairmanship of the Contact Group is a joint endeavour of the EEAS and the European Commission and will continue the work carried out in 2013 under the chairmanship of the United States. Press release: European Union to lead int'l counter piracy efforts in 2014 (Dec. 26, 2013) http://www.thecgpcs.org/. (Jude Smith).

CGPCS – Newsletter

> The Contact Group on Piracy off the Coast of Somalia (CGPCS) posted its Newsletter for the fourth quarter of 2013. It discusses the organization of the five CGPCS thematic working groups and notes that there has not been a successful piracy attack on a commercial vessel off the Horn of Africa in more than a year and a half and pirates no longer control a single hijacked vessel. (12/24/13).

BRYANT'S MARITIME BLOG (Dec. 27, 2013) www.brymar-consulting.com.

Senate – Resolution Re Gulf of Guinea Piracy

> The Senate adopted a resolution supporting enhanced maritime security in the Gulf of Guinea and encouraging increased cooperation between the United States and West and Central African countries to fight armed robbery at sea, piracy, and other maritime threats. S. Res. 288 (1/7/14). *Note: The resolution does not commit the United States to anything, but illustrates the concern in the Senate over the deteriorating conditions in the Gulf of Guinea.*

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

The Gulf of Guinea is considered an emerging piracy hotspot with more organized crime and 48 incidents in 2013, accounting for 18 percent of all attacks worldwide. *Safety and Shipping Review 2014*, ALLIANZ GLOBAL CORPORATE & SPECIALTY, at 27, www.agcs.allianz.com/assets/PDFs/Reports/Shipping-Review-2014.pdf.

ICC International Maritime Bureau Annual Report

ICC International Maritime Bureau released its annual report on Piracy and Armed Robbery Against Ships for the 2013 year. www.icc-deutschland.de/fileadmin/icc/Meldungen/2013_Q2_IMB_Piracy_Report.pdf.

IMO News Release

> The IMO issued a news release stating that Secretary-General Koji Sekimizu outlined some of the targets, challenges, and priorities the Organization faces in his annual New Year Address. The IMO is committed to eliminating piracy and halving marine casualties, as well as adoption of a mandatory Polar Code during 2014 and entry into force of the Ballast Water Convention. (1/21/14).

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

AU Summit Adopted Integrated Maritime Strategy

> [A]t the 22nd Summit of the African Union (AU) in Addis Ababa, African Heads of States and Governments adopted the 2050 Africa's Integrated Maritime Strategy and Plan of Action. Outlining an overall strategy "to address Africa's maritime challenges for sustainable development and competitiveness" (§11).

The issue of piracy was prominent, however African leaders felt much of "the international country-piracy approach reflects the interests of global economic powers dependent on maritime trade (largely western states) rather than those of African states". Jan Stockbruegger, Piracy-Studies.org (Feb. 2, 2014) www.piracy-studies.org/2014/reclaiming-the-maritime-the-aus-new-maritime-strategy/.

RECAAP 2013 Asian Piracy Report

RECAAP released its annual report regarding Piracy and Armed Robbery against Ships in Asia. The report stated that the overall improvement of the situation in Asia has continued in 2013. Although the number of incidents has increased slightly, they were mostly less severe in nature; such as petty theft. RECAAP ISC January 2014 Report (Feb. 2, 2014) http://www.recaap.org/AlertsReports/IncidentReports.aspx. (Jude Smith).

***U.S. v. SAID*, Criminal Action No. 2:10CR57.**

Both the maximum **and** minimum penalty for piracy in the United States is life in prison. "In a surprising and dramatic development in the case of *U.S. v. Said*, a federal judge has held the statute unconstitutional under the Eighth Amendment," stating "an inter- and intra-jurisdictional analysis confirms that imposing a life sentence as punishment for Defendants' conduct would be grossly disproportionate. The statutorily-mandated sentence violates the Eighth Amendment and cannot be imposed." Eugene

Kontorovich, *Court holds federal high seas piracy statute unconstitutional*, THE WASHINGTON POST (Mar. 5, 2014) www.washingtonpost.com; *U.S. v. Said*, 2014 WL806230 at *11 (E.D. Va. Feb. 28, 2014).

Libya Oil Theft

A question of piracy emerged when an oil tanker docked at Es Sider, a port controlled by rebel factions within Libya. Rebels purportedly boarded the ship, forced them to load crude and to evade the Libyan navy sent to stop them. The ship, THE MORNING GLORY, a North Korean-flagged oil tanker owned by Dubai-based Saud Shipping, was intercepted by U.S. Navy Seals, who took control of the oil tanker in international waters off Cyprus and rerouted it to Tripoli. Thereafter, true ownership and state of registration fell into question. Hani Amer, *Seized oil tanker Morning Glory arrives in Libyan capital*, REUTERS (Mar. 23, 2014) http://www.reuters.com/article/2014/03/23/us-libya-tanker-idUSBREA2M05420140323. (Jude Smith).

BSEE/BOEM

BSEE – Domestic & International Standards Workshop

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that it hosted the second annual Domestic and International Standards Workshop in New Orleans. With over 330 attendees, the workshop focused on ways to increase efficiencies in the development of offshore safety and environmental standards. (1/31/14).

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

BSEE & USCG – Quarterly Meetings Re OCS Activities

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that its regional office in New Orleans hosted the year's first quarterly meeting with personnel from the Eighth Coast Guard District. The quarterly meetings are designed to promote interagency consistency in the regulation of outer continental shelf (OCS) activities, facilities, and units under the respective jurisdiction of the two agencies. (2/6/14).

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

BSEE – Offshore Operations in Alaska

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that BSEE Director Brian Salerno and BSEE Alaska Region Director Mark Fesmire met in Bellingham, Washington with senior leaders from the US Coast Guard and the American Bureau of Shipping (ABS) and to see first-hand Shell's oil spill containment system onboard Arctic Challenger. The group discussed operations in the Arctic, certification of vessels, and significant issues affecting offshore operations in Alaska. (2/25/14).

BRYANT'S MARITIME BLOG (Feb. 27, 2014) www.brymar-consulting.com.

BSEE – PREP Guidelines Update

> The Bureau of Safety and Environmental Enforcement (BSEE) issued a notice stating that it seeks comments on the draft National Preparedness for Response Exercise Program (PREP) Guidelines update. The Guidelines were last revised in 2002.

Comments should be submitted by 24 April. 79 Fed. Reg. 16363 (March 25, 2014).

BRYANT'S MARITIME BLOG (Mar. 27, 2014) www.brymar-consulting.com.

BSEE – Voluntary Confidential Near-Miss Reporting

The Bureau of Safety and Environmental Enforcement (BSEE) issued a notice stating that it will host public workshops in Los Angeles (22 April) and in Houston (24 April) on development of a voluntary confidential near-miss reporting system for use on the US outer continental shelf (OCS). 79 Fed. Reg. 17563 (March 28, 2014).

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

BSEE – Spill Response Research

The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release stating that it is investing up to $600,000 for targeted oil spill response research in drift ice conditions. (4/2/14).

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

BSEE – Drilling in the Arctic

The Bureau of Safety and Environmental Enforcement (BSEE) issued a press release regarding the participation of the Alaska Regional Director in a panel discussion on drilling in the Arctic. The Director emphasized that, should drilling operations occur in the Arctic, they will be done safely. (4/17/14).

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

US DOJ

DOJ – Revised Consent Decree for S.S. Badger Coal-Fired Ferry

Following over 8000 comments to the March 2013 consent decree filed by the Department of Justice, a revised decree filed September 13, 2013 requires that the operators of the last remaining coal-fired steamship in the United States, Lake Michigan Carferry Service, Inc. (LMC), to pay double stipulated penalties for non-compliance with the deadline for ceasing coal ash discharges; to limit the mercury and coal ash content of coal used by the S.S. BADGER during the 2014 sailing season; and to require LMC to report information on the quantity of coal ash discharged by the S.S. BADGER. The consent decree also requires LMC to pay a $25,000 civil penalty for violating mercury water quality standards in 2012. EPA & DOJ Strengthen S.S. Badger Consent Decree, GREAT LAKES ENVIRONMENT (Sept. 16, 2013) www.Shorelinemedia.net; Steve Begnoche, *SS Badger gets needed agreement, judge calls Lake Michigan Carferry-EPA consent decree fair, done in good faith*, Ludington Daily News (Oct. 11, 2013). (Brooke Riggs – Tulane Law School).

DOJ – Florida Man Sentenced for Violation of the Federal Rivers and Harbors Act

Following a guilty plea in December of 2013 businessman Richard A. Bunnell was sentenced to two counts of knowingly placing and erecting structures, docks, and piers within navigable waters of the United States without valid permits from the United States Army Corps of Engineers authorization. Bunnell was sentenced to six months home detention, concurrent probation of five years on each count of the conviction, ordered to pay a criminal fine of $175,000 and an additional payment of $50,000 to the South Florida National Parks and Trust. Enforcement Crimes

Case Bulletin (Feb. 2014) EPA Pub. 310-N-14-002. (Brooke Riggs – Tulane Law School).

DOJ – Ship Owner to Pay $1.2 million Penalty

> The Department of Justice (DOJ) issued a **news release** stating that Singapore-based Odfjell Asia II Pte Ltd and Chief Engineer of the MV BOW LIND, Mr. Ramil Leuterio, pleaded guilty in federal court to violating the Act to Prevent Pollution from Ships by discharging machinery space bilge water directly into the sea and making improper entries in the ship's oil record book. Odfjell has agreed to pay a criminal penalty of $1.2 million and serve a three-year probation period. (3/4/14).

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

[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.]

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Chair: Joseph G. Grasso
Editor: Andrew C. Wilson

Newsletter - Spring 2014

IN MEMORIAM

In September 2013, MLA member, Gene George, went missing while hiking in "The Fourteeners", a mountainous area in

Colorado where the peaks soar to 14,000 feet. Gene had been making this trek for years.

Gene was an active member of the MLA, participating in several committees including Marine Insurance & General Average and Inland Waters & Towing. He also oversaw and edited the Marine Insurance & General Average newsletter. Gene practiced maritime law for nearly forty years, after serving on ore carriers during summer breaks from school as a crewmember. That experience allowed him to gather and pass on some colorful tales which he shared with many of us. Gene achieved many honors in his practice and was recently named by his peers for inclusion in The 2014 Best Lawyers in America in his field of Admiralty and Maritime law. He will be sorely missed.

RECENT CASES OF INTEREST

Insurance v. Indemnity

In re DEEPWATER HORIZON, 728 F.3d 491, 2013 AMC 2429 (5th Cir. 2013).

This decision raises issues of particular concern to both the oil and gas industries and the insurance industry because, if the original panel decision is affirmed, this could inject a considerable amount of uncertainty into the interpretation of thousands of existing drilling contracts and radically reapportion the agreed-upon liability and insurance risks of the parties to those contracts. The matter is presently before the Texas Supreme Court on two questions certified by the U.S. Fifth Circuit. The fact situation arises out of the Macondo Well blow-out and the fire, explosion and sinking of the semi-submersible drilling rig DEEPWATER HORIZON, but the pertinent issues deal with the drilling contract and apportionment of liability.

The operator under the relevant drilling contract, BP, claims additional assured status under a $50,000,000.00 primary pollution liability policy, as well as a $700,000,000.00 “tower” of excess insurance policies issued to the drilling contractor,

Transocean. The excess policies follow the form of the underlying primary policy. BP claims that the pollution liability coverage is not restricted by the terms of the drilling contract and is, in fact, separate and independent. Transocean claims that the policies insure only the liabilities it assumed pursuant to Articles 20-25 of the drilling contract, which, while not a typical IADC form, is substantially similar and contains the customary apportionment of pollution liability. More specifically, these articles of the drilling contract, as well as others, apportion liability for pollution above the surface of the ocean to Transocean, while sub-surface pollution is apportioned to BP. The policies contain a Texas choice of law provision while the drilling contract is subject to general maritime law.

The district court had ruled that it would be an "absurd" construction to have Transocean limit its liability assumed under the drilling contract and then take on that same liability through insurance coverage. On the initial appeal, the Fifth Circuit reversed the district court based upon certain relatively recent decisions from Texas state courts. *In re DEEPWATER HORIZON,* 710 F.3d 338 (5th Cir. 2013). In this regard, the court noted that the Texas Supreme Court recently held that a court must interpret a provision in favor of the insured, so long as that interpretation is reasonable, and must do so even if the insurer's interpretation is *more reasonable than the insured's* – "[I]n particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured" and "[a]n intent to exclude coverage must be expressed in clear and unambiguous language." 713 F.3d at 344, citing *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.,* 256 S.W. 3d 660, 662, 664 (Tex. 2008). The Fifth Circuit also held that the court should look to the "terms of the umbrella insurance policy itself," to determine coverage, instead of looking to the content of the indemnity claims in the underlying contract. *Id*., citing *ATOFINA,* 256 S.W. 3d at 662, 664. Finally, the Fifth Circuit noted that it should "apply this analysis so long as the indemnity agreement and the insurance coverage provision are separate and independent." *Id.* (citing *ATOFINA*, 256 S.W.3d at 664 n. 5). Based upon these premises, the Fifth Circuit summarized, "where an additional insured provision is separate

from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity clause." 710 F.3d at 346.

Accordingly, the court held that "there is no relevant limitation to BP's coverage under the policy as an additional insured, that is, so long as the insurance provision and the indemnity clauses in the drilling contract are separate and independent." *Id.* The court then concluded that separate clauses of Exhibit "C" describing Transocean's insurance obligations required Transocean to obtain coverage for its contractual liabilities, while another provision required Transocean to name BP as an additional insured. *Id.* at 350. Therefore, the Fifth Circuit found no "relevant limitation upon the extent to which BP is an additional insured," and BP was entitled to coverage under each of Transocean's policies as an additional insured as a matter of law. *Id.*

Transocean and its insurers then filed a petition for rehearing. In the opinion subsequently issued by the Fifth Circuit, even though the Fifth Circuit had never expressly found that any provision of the policy was ambiguous, the court still inserted into the analysis, the interpretation doctrine of *contra proferentem* which construes any ambiguities against the drafter of an insurance contract or policy. Next, noting that some forums recognize a "sophisticated insured" exception to the doctrine, the Fifth Circuit noted that the Texas Supreme Court has never recognized a "sophisticated insured" exception to the general rule of interpreting insurance coverage clauses. *In re DEEPWATER HORIZON*, 728 F.3d 491, 499 (5th Cir. 2013), citing *ATOFINA*, 256 S.W. 3d at 668). Finally, after a more detailed discussion of the *ATOFINA* matter, the Fifth Circuit certified two questions to the Texas Supreme Court:

> 1. Whether *Evanston Insurance Company v. ATOFINA Petrochems., Inc.,* 256 S.W. 3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the

language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, given the facts of this case?

The Fifth Circuit then broadened the potential areas of inquiry for the Texas Supreme Court by stating "we disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified." According to one of the counsel of record, the case has been fully briefed, but the Texas Supreme Court has not requested oral argument. The case remains pending.

Uberrimae Fidei

St. Paul Fire and Marine Ins. Co. v. Abhe and Svoboda, Inc., 2014 AMC 1494 (D. Minn. 2014).

A marine insurer that provided both hull and P&I insurance to a bareboat charterer of a utility barge filed a declaratory action seeking to void the policy. The barge sank during a nor'easter while being used to paint a bridge in Narragansett Bay, R.I. An on-charter survey performed well before the loss but never provided to the insurer, had shown that the barge had open communication between bulkheads and had sustained corrosion and pitting damages of an extensive nature.

The insurer sought to void the policy based upon several theories, including: (1) the sinking was not due to a named peril;

(2) the assured did not meet the absolute warranty and negative implied warranty of seaworthiness and, thus, the assured violated the doctrine of *uberrimae fidei*; (3) the assured violated the policy condition requiring routine maintenance to its equipment; (4) the barge was not in serviceable or seaworthy condition; and (5) the loss was not due to a fortuity. The court held that the assured had violated the doctrine of *uberrimae fidei* by failing to disclose the prior survey, even though the survey was performed after the insurance application had been submitted. Consequently, the policy was voided.

Fireman's Fund Ins. Co. v. Great Am. Ins. Co., No. 10 Civ. 1653 (JPO), 2014 WL 1282550 (S.D.N.Y. March 31, 2014).

This matter involves a dispute resulting from the sinking of the DFTP-5 Drydock in its berth in calm waters in Port Arthur, Texas. The dry dock had been built by the United States Navy during World War II for the purpose of repairing naval vessels and had been towed to and from Hawaii for that purpose, eventually ending up in Port Arthur in 1984. The owner of the dry dock had purchased the dry dock in March of 2005, but prior to that time had been extensively involved with the operation of the dry dock since 2003.

Numerous reports in 2002, 2003 and later in 2005 indicated the need for extensive repairs due to wasting of hull plating, leaks and other problems. Likewise, numerous reports in 2007 indicated more problems and stated that the dry dock was in "fair to poor" condition. One report indicated that the "Pontoon Sections E, F, G, and H are in very poor condition throughout and need complete replacement if long term use is to be considered." Another 2000 report indicated that the deck plate for a pontoon needed to be replaced and observed that, in addition to other issues requiring repair, the "pontoon deck is extremely thin with many holes and cracks" and "a blowout… could rapidly flood the machinery compartment."

Yet, a report later in October 2007 indicated that the dry dock was in "satisfactory" condition and recommended that the

pontoons be dry docked and repaired "as soon as practical within the 16 to 18 months… in order to render the vessel in good stable operating condition and provide a [useful] life extension to the dry dock." Likewise, a January 2009 report rated the entire facility as an "above average risk" (which is the second highest rating possible) and stated that the risk of the dry dock becoming a total loss is one of "extremely low probability and frequency based on previous industry experience." Oddly, a report from another consultant just two months later warned the owner that "it is imperative that all pontoons and original connection plates be adequately repaired according to our reports" from 2007.

On August 20, 2009, an attempt was made to repair Pontoon H by removing it and dry docking it on blocks situated on Pontoons G, F and E. At 5:00 p.m. the ballast tanks of the remaining seven pontoons were pumped. Nevertheless, later that evening, the dry dock sank and was considered a constructive total loss. Due to the presence of asbestos, oil and other hazardous materials, the costs for removal of the dry dock and addressing the pollution associated with the sinking would turn out to be in the millions of dollars.

At the time of the sinking, the owner held five separate insurance policies what might have provided coverage related to the loss. These policies included: an MGL policy with limits of $1,000,000.00; an Excess policy with limits of $25,000,000.00; a Pollution policy with limits of $5,000,000.00; a Primary Property policy (PPI) with limits of $10,000,000.00; and, an Excess Property policy (EPI) with limits of $15,000,000.00. The PPI insurer tendered its limits of $10,000,000.00 without indicating whether the payment should be apportioned toward the first party property loss or the removal expenses. The EPI insurer then paid nearly $3,600,000.00 toward the $13.6 million of the listed value for the dry dock.

Meanwhile, the MGL and Excess Liability insurers funded the removal costs of over $12,000,000.00. Those underwriters, together with the assured, pursued claims against the EPI insurer and the Pollution insurer for the removal costs. After discovery,

the Plaintiff/insurers moved for summary judgment seeking a declaration that the EPI and Pollution insurers must contribute on a prorated basis for removal and cleanup of the dry dock, and, in an effort to establish coverage, the assured moved for partial summary judgment seeking a declaration that the EPI and Pollution polices were not maritime contracts subject to *uberrimae fidei*.

The court issued a number of decisions. Initially, the court held that because the dry dock was not a "vessel", none of the insurance policies were maritime contracts, and the court therefore lacked admiralty jurisdiction over all the claims in the case. *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 2013 AMC 567, 2013 WL 311084 (S.D.N.Y. Jan. 25, 2013) The court then partially reversed itself and held that it had diversity jurisdiction over all claims, but still held that the PPI and EPI policies were not subject to maritime law, reserving judgment on the maritime status on the remaining policies. In a subsequent ruling, the court granted the plaintiff/insurers' motion for summary judgment and held that the EPI policy provided coverage for removal and cleanup of the dry dock. *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York,* 2013 AMC 631, 2013 WL 1195277 (S.D.N.Y. March 25, 2013).

Following these rulings the parties filed a plethora of motions. The plaintiff/insurers and the assured jointly moved for summary judgment seeking a declaration that the pollution policy was not a maritime contract subject to *uberrimae fidei* and was not otherwise void for misrepresentation, concealment, or material non-disclosure under state law. The plaintiff/insurers then moved for summary judgment independently seeking a declaration that the pollution policy covered removal of the dry dock debris. The pollution and EPI insurers then filed several cross-motions for summary judgment, as well as a motion for reconsideration of the court's prior ruling.

The court then held that the pollution policy was a maritime contract. The court reasoned that even though the dispute did not involve a vessel alone, "the dispute concerns an insurance claim based on the loss of a dry dock, located in navigable waters, which

was designed for predominantly engaging in the repair of vessels, a business that has 'long been recognized as maritime'". Thus, when it sank, the dry dock "became a casualty of the business of maritime commerce." The court also noted that the pollution policy provided coverage to 25 vessels that were part of the assured's dry dock operations, as well as any vessels that were on board the dry dock for business purposes. The court did not accept the parties' "severability" contentions and ruled that in light of the business, interests and risk insured being maritime, the dry dock coverage fit neatly within the marine pollution insurance paradigm.

The court also ignored the plaintiff/insurers' warning "that this holding will lead to a parade of horribles, opening the jurisdictional door to insurance on graven dry docks (which are dug into land), marine railways (which draw the vessel out of the water), marine lifts used to load and unload vessels, and even beach houses." Instead, the court stated that, "the protection of maritime commerce is paramount, even if it imposes upon non-maritime interests."

Having made the determination that maritime law applied, the court then applied the doctrine of *uberrimae fidei* and concluded that the pollution underwriters would have relied on the insured's misrepresentations to their detriment, and that therefore there was no coverage. As the court stated, "Plaintiffs cannot seriously contest that a reasonable insured would know that the undisclosed information would have some bearing on an insurer's decision." Further, the court stated that, "there is therefore ample evidence to conclude, on the basis of the withheld surveys and reports alone, that [the assured's] non-disclosure was material. Finally, the court noted that, "the non-disclosures were egregious and go to the very heart of the value and severity of the risks."

As to the EPI policy, the court applied New York's choice of law rules and concluded that "since the risk insured by the policy is spread across multiple states, the state of the insured's domicile is determinative." On this basis, the court applied Mississippi law which requires that: "To rescind a policy for breach of a concealment clause [as was included in the EPI policy],

an insurer must establish by a preponderance of the evidence that the insured's statements were "(1) false, (2) material and (3) knowingly and willfully made." The court concluded that, "in light of the information which the [assured] failed to provide [EPI], the court concludes that it is beyond genuine dispute by clear and convincing evidence, that the 2009 property submission was incomplete, misleading and arguably false." Further, the court held that "the undisclosed information was material and that it might have led a prudent insurer, at the very least, to require a higher premium to cover the dry dock." The court therefore granted EPI's cross-motion for summary judgment.

The end result is that the EPI insurer did not have to contribute to the removal expenses, and in fact, still has a right of recovery back from the assured for the amount paid towards the first party property loss. The pollution insurer, likewise, did not have to contribute to the removal costs. The case is now on appeal.

Markel Am. Ins. Co., v. Veras, 2014 AMC 1452, 2014 WL 504721 (D.P.R. Feb. 7, 2014).

An insurer filed a declaratory judgment after a 2000 Intrepid 37 foot yacht grounded on a breakwater resulting in $60,000.00 in damages. At the time of the incident, the owner/operator was found to have a blood alcohol content in excess of the legal limit. The insurer sought to nullify coverage based on material misrepresentations in its insurance application because the insured had misrepresented the purchase price of the vessel, the existence of prior losses, having formerly owned other vessels, and having offered his vessel for sale. The insurer also claimed that the coverage was void due to the willful misconduct or criminal act of the insured, which triggered an exclusion in the policy. The court initially held that *uberrimae fidei* constitutes entrenched federal precedent, and on that basis ruled that the insured had made material misrepresentations. Therefore, the policy was void *ab initio*. The court also held that the insured had breached the warranty of truthfulness, which the court isolated within the language of the policy. Finally, the court concluded that the insured had violated an expressed condition on the insurance

agreement when he crashed his boat while driving under the influence of alcohol.

Sunderland Mut. Marine Ins. Co., Ltd. v. Comastro, No. 13-80415-CIV, 2014 WL 60015 (S.D. Fla. Jan. 7, 2014).

In another action for declaratory relief, a yacht insurer sought a declaration of no coverage regarding a 1987 63 ft. Hatteras motor vessel which sustained significant damage after it experienced water intrusion and a partial sinking that required towing back to West Palm Beach. The insurer sought relief on three theories: (1) misrepresentations during the application process; (2) a breach of the warranty of seaworthiness; and (3) breach of the warranty of named operator. The court noted that in the insured's application, she was required to list any and all individuals who would be operating the yacht. The operator at the time of this incident was not listed. On this basis alone, the court voided the policy.

The N. Assurance Co. of Am. v. North East Marine, Inc., No. 13-80415-CIV, 2013 WL 5878179 (S.D.N.Y. Oct. 31, 2013).

The important distinction in this declaratory action is that this matter involved a P&I policy rather than a hull policy. Nevertheless, the court noted in ruling on the insurers' motion for summary judgment that previously, in *EKCO Int'l Trade Corp. v. Zihni Holding, A.S.,* 92 CIV. 6075 (KMV), 1995 WL 406124 (S.D.N.Y. July 7, 1995), P&I clubs have the benefit of the doctrine of *uberrimae fidei*. But then the court declined to apply maritime law, and looked to New York law, wherein misrepresentations by the insured will void a policy where there is a material misrepresentation that would have lead the insurer to refuse to issue the policy, which is the same standard applied to misrepresentations under *uberrimae fidei.* The court concluded that triable issues of fact existed with respect to many of the contentions of the insurer in its motion and denied summary judgment.

Port Lynch, Inc. v. Samsung Fire & Marine Ins. Co., Ltd., No. 11-000398 DKW/BMK, 2013 WL 5771197 (D. Haw. Oct. 24, 2013).

In this matter, a vessel at sea experienced a fire in a storage room which disabled the bilge high water alarm. Subsequently, the vessel lost electric power and began to take on water and the main generator was shut down to protect it from the rising water. The vessel eventually sank. The insurer denied coverage on the basis that the plaintiff had not complied with survey recommendations made three years before the loss, which also constituted a breach of the warranty of seaworthiness and the warranty against misrepresentation.

In its initial analysis, the court noted that the Ninth Circuit has ruled that the application of the *uberrimae fidei* doctrine was established federal admiralty law, citing *Certain Underwriters at Lloyd's, London v. Inlet Fisheries, Inc.*, 518 F.3d 645, 650 (9th Cir. 2008). The court noted that the assured had not complied with the survey recommendations even two additional years later when the vessel was dry docked. The assured argued in favor of Hawaiian law, which the court concluded would result in the same compliance requirements. The court also ignored the assured's late policy delivery contentions. The court granted the insurer's summary judgment and also rejected all of the plaintiff's claims related to the insurer's failure to pay the loss.

Catlin (syndicate 2003) at Lloyd's v. San Juan Towing and Marine Services, Inc., 979 F. Supp. 2d 181, 2013 AMC 2724 (D.P.R. 2013).

In another dry dock loss, an insurer filed a declaratory action seeking to void a hull policy based on the fact that the dry dock was overvalued for insurance purposes and because the insured failed to disclose an accurate description of the actual condition of the dry dock. The stated value of the dry dock at the time of the loss was $1,750,000.00 but in the meantime the insured was negotiating a potential sale of the dry dock for between $775,000.00-$800,000.00. Thereafter, the dry dock sank. A surveyor investigating the loss determined that the dry dock was in

poor condition, that significant deterioration and corrosion of the structure had occurred, and that the corrosion had existed for a significant period of time. In fact there was such "significant corrosion that there were gaping gaps in the plating." The court concluded that the insured had indeed overstated the value of the dry dock and failed to disclose an accurate description of the dry dock's condition when applying for insurance and, therefore, under the doctrine of *uberrimae fidei,* the insurance policy was void *ab initio*.

Starr Indemnity & Liability Co. v. Cont'l Cement Co., LLC, No. 4:11CV809JAR, 2013 WL 1442456 (E.D. Mo. April 9, 2013).

This matter arises out of the sinking of a cement carrying barge which sank in the Mississippi River while at a dock. At the time of the sinking, the barge was covered by a marine policy containing both hull and P&I provisions. The assured presented a claim to the insurers' TPA, which declined the loss due to a lack of a sufficient peril covered by the policy. Subsequently, the insurer filed a declaratory action seeking to void coverage on five theories: (1) the sinking of the barge was not caused by a named peril; (2) the assured failed to exercise due diligence; (3) the removal of the barge was an uncovered salvage operation because it was not compelled by law as required by the policy; (4) the assured breached the duty of *uberrimae fidei*; and (5) the assured breached its warranty of seaworthiness.

Following some initial discovery, the assured moved for summary judgment contending that any requirement of "due diligence" was restricted to the Inchmaree Clause and not an exclusion under the perils clause. The court rejected the assured's contentions based upon the Eighth Circuit's recognition that "there is implied due diligence obligation for defects and seaworthiness which arise after the commencement of the risks." Likewise, the court denied the assured's Motion for Summary Judgment on the wreck removal issue because the combination of correspondence from the Corps of Engineers as well as additional communications with same would lead "[a] reasonable owner, fully informed, [to]

conclude that failure to remove would likely expose him to liability imposed by law." 2013 WL 1442456, at *10.

The court then applied the doctrine of *uberrimae fidei* (the court actually used the term "duty of *uberrimae fidelis")* and held that it is entrenched federal precedent. The court also held that under that doctrine, summary judgment was precluded, as the court believed that issues of fact existed regarding whether the assured violated its duty of utmost good faith. Next, the assured contended that the insurer had waived any coverage issues by failing to return the premium. The court denied the assured's motion in this regard since the insurer was ready to return the premiums at any time. Finally, insofar as the assured argued the application of Missouri law on fraud, the court concluded that issues of material fact existed regarding whether there had been a material misrepresentation. Finally, the court denied the insurer's motion for summary judgment on the insurer's theory of "vexatious refusal to pay." The court felt that there were additional issues of fact on that theory as well. The matter then proceeded to trial with a verdict in favor of the insurer. The case is presently on appeal.

Exclusions

Ardente v. Standard Fire Ins. Co., 744 F. 3d 815, 2014 AMC 1378 (1st Cir. 2014).

This matter involves the sinking of a motor yacht as a result of leaks in through-hull fittings. The leaks were attributed to the use of balsa wood in the construction of the yacht, which is not waterproof. Water seeping into the balsa wood around the installation holes spread throughout the hull eventually leading to significant damage. The insurer declined the loss based upon the policy language excluding coverage for "loss or damage caused by or resulting from… defects in manufacture, including defects in construction, workmanship and design *other than latent defects as defined in the policy."* The policy defined "latent defect" as a "hidden flaw inherent in the material existing at the time of the original building of the yacht, which is not discoverable by ordinary observation or method of testing." As a result, the only dispute was whether the balsa wood constituted "a hidden flaw inherent in the material." While the district court had ruled that, "there can be no such thing as an inherent flaw," finding the terms "inherent" and "flaw" to be antithetical, the court of appeals disagreed, suggesting that these terms had been taken out of context and viewed in isolation. The court of appeals concluded that the policy's definition of "latent defect," when read in context, "while not a model of precision, is not self-contradictory." The court of appeals held that the balsa wood constituted a defect in construction or workmanship rather than a "latent defect." Accordingly, the court of appeals reversed the district court and entered summary judgment in favor of the insurer.

Alaska Village Elec. Coop., Inc. v. Zurich Am. Ins. Co., 552 F. App'x 709 (9th Cir. 2014).

Our former editor, Gene George, had reported on this case in the Committee's Fall 2012 newsletter, when it was before the district court. The court of appeals reversed.

The case involved a standard all risk builder's risk contract on AIMU forms for the construction of two ocean-going petroleum barges in South Texas yards. Counsel for the assureds had insisted upon the deletion of Addendum No. 2, the primary purpose of which has always been to exclude damage resulting from defective work. Both barges were eventually found to be afflicted with widespread defective welding, so much so that the ABS required roughly $1,200,000.00 in wholly remedial work. There was no allegation that the costs claimed were anything other than costs of repairing the defective work itself. The district court had felt that the basic policy language excluded the costs of repairing faulty workmanship, and that the omission of Addendum No. 2 could not possibly change the meaning of the policy.

The court of appeals found that the policy was ambiguous and allowed the assured to present extrinsic evidence that, when viewed in a light most favorable to the assured, demonstrates that it specifically negotiated for coverage of faulty workmanship. Accordingly, the court concluded that there is a genuine factual dispute as to the parties' intent and, ultimately, the meaning of the All-Risks policy. The court of appeals reversed for further consideration in the district court below.

COMMITTEE ON RECREATIONAL BOATING

Chair: Lars Forsberg
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BOATING BRIEFS

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GOVERNMENT LIABILITY

Fourth Circuit: Coast Guard Breached No Duty to Missing Boaters

Turner v. United States, 736 F.3d 274, 2013 AMC 2853 (4th Cir. 2013)

The U.S. Court of Appeals for the Fourth Circuit has held that the U.S. Coast Guard was not liable for failing to launch an immediate search for overdue boaters, given that the Coast Guard neither increased the danger facing the boaters nor dissuaded others from coming to their aid.

Mr. and Mrs. Turner were operating their 20-foot motorboat at night, in rough weather, near Elizabeth City, North Carolina. After Mrs. Turner fell overboard, she saw her husband turn the boat around to try to recover her. But she then lost sight of the boat, and sometime thereafter Mr. Turner entered the water as well, unbeknownst to his wife.

Later that night, Mr. Turner's father became concerned when he could not reach the Turners on their cell phones. He dialed 911, which relayed his report to the North Carolina Wildlife Resources Commission and the U.S. Coast Guard. When the Coast Guard returned his call about a half hour later, the father expressed his concern and mentioned three rough locations where he thought the Turners might be. But due to the large size of the area in question, the fact that the Turners were reported to be experienced boaters and swimmers, and the fact that an active search was

already underway on a separate and unrelated emergency, the Coast Guard did not begin an active search for the Turners. The Coast Guard did, however, make marine radio broadcasts asking others in the area to keep a lookout for the Turners' boat.

The next morning, a friend of the Turners began his own search and located their boat washed ashore with no sign of the Turners. Upon learning of this, the Coast Guard reclassified the case as an "overdue distress" and launched an air and sea search. Mrs. Turner, who had stayed afloat overnight by clinging to crab-pot buoys, made it to shore shortly thereafter, but Mr. Turner remained missing. For the next two days, the Coast Guard deployed twelve boats and planes and searched 173 square miles without success. After the search ended, Mr. Turner's body was found washed ashore, with the likely cause of death determined to be drowning.

Mrs. Turner, in her own right and on behalf of her husband's estate, brought a negligence suit under the Suits in Admiralty Act, claiming in particular that the Coast Guard waited too long to begin searching. The trial court dismissed her claims, holding that the Coast Guard had no duty to commence a search any earlier than it did. (We reported on that decision in Boating Briefs Vol. 21:2.) Mrs. Turner appealed.

As the appellate court observed, the Coast Guard is authorized by statute to undertake search and rescue operations, but it does not have any affirmative duty to do so. Once it does undertake a search, however, the Coast Guard has a common-law duty to act with reasonable care. Its actions are judged according to the Good Samaritan Doctrine, under which a rescuer may be held liable if the rescuer increases the risk of harm to the victim or induces reliance by the victim or other potential rescuers.

Here, according to the appellate court, the Coast Guard's delay in beginning an active search did not affirmatively worsen the Turners' plight. Nor did the Coast Guard induce any reliance on the part of the Turners, who themselves had no communications with the Coast Guard during their ordeal. Nor had the Coast Guard

dissuaded any potential third-party rescuers from conducting a search, inasmuch as the Coast Guard did not represent to anyone that it was going to undertake its own search when the Turners were reported as overdue.

Mrs. Turner also alleged that the Coast Guard improperly destroyed evidence by deleting and recording over the audiotapes of the telephone calls made on the night in question. The trial court rejected this argument, and the appeals court did likewise. Because Mrs. Turner had not sent the Coast Guard a preservation letter or other correspondence threatening litigation, and because the deletion of the tapes was standard operating procedure for the Coast Guard, the appeals court held that there was no basis to impose sanctions against the Coast Guard for spoliation.

INSURANCE

Failure to Disclose Criminal History as Required by Insurance Application Voids Policy

Great Lakes Reinsurance (UK) PLC v. Kranig, No. 2011-122, 2013 WL 2631861 (D.V.I. June 12, 2013)

This case stemmed from the grounding and sinking of the catamaran sailboat SOLITUDE in St. Thomas.

Two years earlier, in response to questions on his insurance application, the vessel's owner identified himself and another person as the proposed insureds, and he denied that either of them had been convicted of or pleaded no contest to a criminal offense or had any "violations / suspensions (including Auto) in [the] last 5 years." The application stated that it would be incorporated into the policy and that any misrepresentation would render the policy null and void from inception. The policy was issued and then renewed the following year.

While being moved from one mooring to another, the vessel grounded and became a total loss. As part of the insurer's investigation, both the owner and his fellow insured (who was

handling the vessel at the time of the loss) were examined under oath. The investigation revealed that the owner, a few years before the loss, had been charged with and pleaded guilty to domestic violence after assaulting his fellow insured on the vessel. Moreover, the fellow insured had previously been in an automobile accident while driving under the influence of alcohol and drugs and had pleaded guilty to DUI. More recently, her driver's license had been suspended. When the owner signed the insurance application, however, he apparently did not consider domestic violence to be a "criminal offense" and he believed the statements regarding his fellow insured's driving and criminal background (based on her representations to him) were correct.

The insurer brought an action for declaratory judgment, contending that the policy was void due to the misrepresentations in the insurance application. The court agreed.

The policy provided that any disputes "shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well-established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York." *Id.* at *6. Here, the court observed that the doctrine of *uberrimae fidei* ("utmost good faith") is entrenched in the Third Circuit (whose jurisdiction includes the Virgin Islands), and that under that doctrine an applicant for marine insurance must fully disclose to the insurer all facts material to the risk, even if the insurer does not explicitly ask for the information. A fact is "material" if it would have prompted an insurer not to issue the policy or prompted it to charge a higher premium.

Here, the owner failed to disclose on the insurance application both his and his fellow insured's criminal histories (and in the case of the fellow insured, also the suspension of her driver's license). The application specifically asked for this information, and there was testimony from the insurer that the coverage would not have been bound had the insureds' criminal and driving histories been disclosed. The omissions were therefore material as a matter of law, and as a result the policy was void from inception.

Allegation of BUI in Civil Suit, Coupled with Guilty Plea, Triggers Criminal-Acts Exclusion and Relieves Insurer of Duty to Defend

Markel Am. Ins. Co. v. Norris, No. 2:12-cv-80-MEF, 2013 WL 4737246, (M.D. Ala. Sept. 3, 2013)

Markel insured a 22-foot Chaparral owned by a law firm. One night, while being operated by one of the firm's lawyers (who was also an insured under the policy), the Chaparral collided with another boat. The force of the collision threw a boy on the other boat into the water, where he was run over by the Chaparral.

In the ensuing personal-injury suit, the boy's parents alleged that the incident was caused by the lawyer's operating the Chaparral "in an unsafe manner, in the dark and under the influence of alcohol." *Id.* at *2.

In a separate criminal case, the lawyer was charged with and pleaded guilty to two felonies in connection with the incident: boating under the influence of alcohol and first-degree assault.

The Markel policy excluded coverage for liabilities "caused by, resulting from or arising out of . . . [w]illful or intentional misconduct or criminal act on the part of any insured or during any illegal activity on the part of any insured." The policy went on to specifically exclude coverage for liabilities "occurring while an insured is operating the insured watercraft with a blood or breath alcohol level equal to or in excess of the legal limit applicable for the operation of motor vehicles in the state where you reside." *Id.*

After the guilty plea, Markel concluded that it had no duty to defend or indemnify its insureds in the personal-injury suit and filed an action for declaratory judgment based on the policy's criminal-acts exclusion.

Since the complaint in the personal-injury suit alleged that the incident was caused by the lawyer's operating the boat under the influence of alcohol, and since the lawyer pleaded guilty to and

was convicted of boating under the influence, the court agreed that Markel had no duty to defend. The court observed that under Alabama law a guilty plea "is a conviction of the highest order and is an admission, of record, of the truth of whatever is sufficiently charged in the indictment."

The insureds countered that, under Alabama law, a criminal conviction "is not to be conclusive of the facts of which [the defendant] was convicted when such fact is an issue in a civil case." *Id.* at *5 (citing *Fidelity Phenix Ins. Co. of N.Y. v. Murphy*, 146 So. 387, 393 (Ala. 1933)). In this instance, though, the court stated that Markel was not relying on the conviction as conclusive proof that the insured had been boating under the influence. Instead, Markel was relying on the allegations in the underlying action and on the guilty plea and conviction to bring the case within the terms of the criminal-acts exclusion.

Having held that Markel had no duty to defend, the court nevertheless declined to rule that Markel had no duty to indemnify. Determining whether Markel had a duty to indemnify would be premature, the court wrote, since "the duty to indemnify is not ripe for adjudication until the insured is in fact held liable in the underlying suit." *Id.* at *7 (collecting cases). If the insureds ultimately prevailed in the underlying suit, then the question of Markel's duty to indemnify would be moot. Thus, the issue of indemnification was not sufficiently ripe to present a "case or controversy" and therefore would not be addressed at this stage.

First Circuit Reconciles Latent-Defect Coverage with Manufacture-Defect Exclusion

Ardente v. Standard Fire Ins. Co., 744 F.3d 815, 2014 AMC 1378 (1st Cir. 2014*)*

A yacht builder failed to use waterproof laminate in way of the hull fixtures, and over time the absence of laminate in these areas allowed water to seep directly from the fixtures' installation holes into the hull's balsa core. The yacht's owner submitted a claim to his marine insurer for the cost of repairing the wet core.

The policy excluded coverage for "[d]efects in manufacture, including defects in construction, workmanship and design . . . ." *Id.* at 817. But as an exception to that exclusion, the policy provided coverage for damage resulting from a "latent defect," which the policy defined as "a hidden flaw inherent in the material existing at the time of the original building of the yacht, which is not discoverable by ordinary observation or methods of testing." *Id.* at 818. The insured argued that the builder's failure to use waterproof laminate around the fixtures was a "flaw in the material" and therefore constituted a latent defect, even though there was nothing wrong with the balsa itself when it was installed. *Id.*

On appeal, the First Circuit ruled that in light of policy's exclusion for defects in manufacture, the term "latent defect" should not be read to encompass the builder's failure to use waterproof laminate:

> [The insured's] interpretation of the word "material" would allow the latent-defect exception to swallow the manufacture-defect exclusion, rendering the exclusion superfluous and doing violence to the policy. To say that "material" in the definition of "latent defect" refers not to an individual raw ingredient used in constructing the yacht, but rather to a composite of various raw ingredients that appear in close proximity in a

> particular area of the ship, yields the following result: If a carpenter building the yacht accidentally affixes balsa wood instead of solid laminate around the installation holes, we could refer to the defect as a "latent defect" instead of a "defect in construction or workmanship." Similarly, if an engineer drawing the blueprints of the yacht accidentally calls for balsa wood instead of solid laminate to be placed around the installation holes, we could refer to that defect as a "latent defect" instead of a "defect in design." But it is clear that the policy meant to exclude from coverage precisely those types of defects.

Id. at 819-20.

Since applying the "latent defect" exception in the manner suggested by the insured would render the manufacture-defect exclusion meaningless, the insurer prevailed on appeal.

Court Rejects Insurer's Reliance on Exclusion for Wear and Tear and Finds Coverage for Sinking Caused by Hose Failure

Markel Am. Ins. Co. v. Olsen, No. 10-11667, 2013 WL 2372193 (E.D. Mich. May 30, 2013)

The 56-foot yacht CAMELOT, built in 1982, sank alongside a dock in calm weather after a raw-water intake hose failed. The insurer, citing the policy's exclusions for wear and tear and gradual deterioration and contending that the vessel was unseaworthy, denied coverage and brought a declaratory-judgment action. The insured counterclaimed for breach of contract and violations of Michigan's Trade Practices Act. The insured prevailed on the coverage question after a three-day bench trial.

The vessel had been docked in Fort Lauderdale following a rough passage from Virginia. It had been inspected by various individuals both before and during the passage and was found to be

well-maintained. After four days alongside the dock in Fort Lauderdale, the vessel sank.

The insurer retained a marine surveyor and a professional engineer to investigate the incident. They concluded that the sinking was the result of a raw-water intake hose that had failed due, in their view, to wear and tear and long-term deterioration. The policy excluded loss or damage "caused by or resulting from . . . wear and tear, gradual deterioration, [or] failure to maintain" the vessel. *Id.* at *4. The insurer therefore argued that the loss was excluded from coverage or, alternatively, that the insured had breached the implied warranty of seaworthiness. The insured conceded that the hose failure caused the sinking but disputed the reasons for the hose failure and argued that the vessel was seaworthy.

On the issue of whether the loss was excluded, the court concluded that the insurer had not proven that the loss was proximately caused by wear and tear or a failure to maintain the hose. Although the hose was 27 years old, there was no literature the insured could have consulted to determine the hose's useful life and therefore the insured was not in a position to know whether it needed maintenance or replacement. Also, if wear and tear had truly been the culprit, then the large leak would have likely been preceded by smaller leaks, which had evidently not occurred. Moreover, although surface cracking was discernible on close inspection of the hose, the hose had appeared to be in serviceable condition, and there was abundant evidence that the insured was a conscientious owner who otherwise maintained the vessel well. The court concluded that the hose failure was likely attributable to the stresses encountered during the sea passage rather than to wear and tear or lack of maintenance.

On the issue of seaworthiness, although an insurer typically bears the burden of proving that a vessel was unseaworthy, in this case—because the vessel sank while moored in calm water—the insured had the burden of proving that the vessel was seaworthy. Here, the court concluded that the same evidence suggesting that the hose failure was not caused by wear and tear or a failure to

maintain was likewise sufficient to overcome the presumption of unseaworthiness.

Judgment was therefore entered for the insured. While not explicitly addressing the insured's claim under the Michigan Trade Practices Act, and without making any finding that the insurer had acted in bad faith, the court nevertheless directed that the insured's legal fees be paid as part of the judgment.

JURISDICTION

E.D.N.Y.: Floating clubhouse is not a vessel

Armstrong v. Manhattan Yacht Club, Inc., 2013 AMC 1938, 2013 WL 1819993 (E.D.N.Y. April 30, 2013)

After being injured while performing maintenance duties on the floating "Clubhouse" owned by the Manhattan Yacht Club, the plaintiff sought damages under the Jones Act. He argued that he was a seaman, while the yacht club asserted that he was simply a land-based maintenance worker.

The court determined that the plaintiff's claim could only succeed if the Clubhouse was a vessel. The physical characteristics of the Clubhouse were therefore vital to the analysis. The two-story structure included a viewing platform and a bar serving alcoholic beverages. Visitors to the Clubhouse came and went by boat. Forty-foot steel "spuds" and an anchoring system secured the Clubhouse to the riverbed. The structure moved once a year, when the spuds were raised and it was towed to a marina to avoid inclement winter weather. It had no crew, engine, steering gear, navigation lights, or lifeboats. The Clubhouse was categorized as a "passenger barge" on its U.S. Coast Guard Certificate of Inspection, but the Certificate also stipulated that "passengers shall only be carried when vessel is anchored, moored, or made fast (spud) to bottom." *Id.* at 1939.

Applying *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 2013 AMC 1 (2013), in which the Supreme Court held that a

floating home was not a vessel even though it could be towed through navigable waters, the district judge found many similarities between the Clubhouse and the floating home at issue in *Lozman*. The fact that a Certificate of Inspection had been issued by the Coast Guard did not necessarily mean that the structure was a vessel for purposes of the Jones Act. Because a reasonable observer would not consider the Clubhouse to be designed, to any practical degree, for carrying people or things on water, the judge concluded that the Clubhouse was not a vessel, and therefore plaintiff was not a "seaman" entitled to assert a Jones Act claim.

S.D. Tex. Says Fall From Boat Lift Along Navigable Canal Sounds in Admiralty

Hupp v. Danielson, No. 3:12-cv-00375, 2013 WL 3208588 (S.D. Tex. June 24, 2013)

After taking delivery of a high-performance powerboat, the new owner and his friend piloted the vessel to a boat lift behind the owner's house. The lift was constructed along a narrow canal, which provided direct access to a lake which in turn emptied into Galveston Bay.

The boat was floated onto the lift and raised for cleaning, with the hull less than a foot out of the water and a portion of the outdrives remaining in the water. As the owner's friend stepped onto one of the beams of the lift, the lift failed. Cables and other parts of the lift struck the friend, and he fell into the water. He brought an admiralty suit against the owner. The owner moved to dismiss the suit for lack of jurisdiction.

The court observed that maritime tort jurisdiction exists where (1) the tort occurs on navigable waters (or is caused by a vessel on navigable waters) and (2) the tort bears a connection to maritime activity.

The canal in question was used by commercial fishermen and other commercial vessels. It also provided access to a navigable lake, from whence one could reach Galveston Bay and

ultimately the Gulf of Mexico. The canal was therefore navigable for purposes of maritime jurisdiction.

The next question was whether the tort occurred on the navigable canal. The owner argued that the boat lift was merely an extension of land, much like a pier, wharf, or dock. The plaintiff, on the other hand, argued that the boat lift was akin to a liftboat or drydock, which have previously been held to be subjects of maritime jurisdiction. The court found that the boat lift was functionally closer to a drydock or liftboat and thus concluded that the tort had occurred on navigable waters.

The "connection" test encompasses two issues: whether the incident has a potentially disruptive effect on maritime commerce and whether the character of the activity giving rise to the incident is substantially related to traditional maritime activity. To determine whether the incident was potentially disruptive, the court examined whether the general features of the incident, "'projected onto the busiest of commercial waterways,'" would be likely to disrupt commercial activity. *Id.* at 4 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 538 (1995)). Had this type of incident occurred on a busy waterway like the Houston Ship Channel, it would have likely been a disruption to those who witnessed it, as well as to those who attended to the rescue of the injured person. The court also found that the activity underlying the incident—raising a boat in order to clean its hull—should be considered a traditional maritime activity.

Accordingly, the court concluded that the case could proceed in admiralty.

YACHT BROKERS

Suit for Commission Barred by Florida's Statute of Limitations

Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC, 714 F.3d 1234 (11th Cir. 2013)

A yacht broker sued a builder to recover commissions based on the broker's having allegedly facilitated the sale of two multi-million-dollar yachts. The builder denied that any commission was owed and refused to pay anything more than a relatively modest "referral fee."

The district court concluded that the broker's claims for *quantum meruit* and unjust enrichment were barred by Florida's statute of limitations, Fla. Stat. § 95.11(3)(k), because they accrued more than four years before the broker brought suit. In particular, the district court found that the claims accrued when the broker allegedly conferred a benefit upon the builder and that this occurred, at the earliest, when the builder and the buyer executed a purchase agreement and, at the latest, when the buyer made his first payment to the builder. Because the contracts between the buyer and the builder were signed and the first payment was made more than four years before the broker brought suit, the district court held the claims were time-barred. The Eleventh Circuit affirmed.

The appeals court observed that, under Florida law, the four-year limitations period began when the claims accrued—that is, "'when the last element constituting the quantum merit and unjust enrichment claims occurred.'" *Id.* at 1237 (quoting FLA. STAT. §95.031(1)). It was therefore necessary to determine the point at which the broker allegedly conferred a benefit on the builder. In this regard, the broker consistently alleged in the trial court that the relevant benefit was the broker's having introduced the parties to each other, which occurred more than four years before suit was filed. Since the broker alleged no other benefit, the Eleventh Circuit concluded that the broker by its own admission

had "conferred a benefit"—thus triggering the statute of limitations—more than four years before suit was filed.

The broker countered that its claims were timely because the benefit it conferred was "delayed significantly beyond the time of the services being performed." *Id.* at 1238. Specifically, it asserted that the claims relating to the first yacht did not accrue until the buyer took delivery. Had the buyer not taken delivery, the builder would have received no "benefit" and the broker would have been entitled to no commission. The Eleventh Circuit rejected this argument and held that under Florida law a benefit is conferred when the plaintiff performs, even if at that point there remains uncertainty as to whether the defendant will ultimately receive the value of the benefit.

As to the second yacht, the broker contended that its claims did not accrue until the buyer began making installment payments toward the purchase price. Since the broker was to be paid its commission in successive pro rata installments as the builder received payments from the buyer, the broker's theory was that a new limitations period commenced as each incremental payment was made. The court also rejected this theory and held that the broker's claims accrued when the services were provided—regardless of whether the broker was entitled to receive a pro rata commission on payments made at some later time.

PRODUCT LIABILITY

Wrongful-Death Claims Rejected Due to Misuse of Product

Korban v. Boostpower USA, Inc., 533 F. App'x 820 (10th Cir. 2013)

A man died from serious burns he received while riding as a passenger in a friend's high-performance speedboat. The boat's owner had installed a highly modified engine several years after purchasing the boat. On the day of the incident, the boat owner, the victim, and another friend boarded the boat to take a ride. They had been drinking alcohol. While boarding the vessel, the victim fell

against the engine and unknowingly dislodged one of the fuel rails (the gas lines that deliver fuel to the fuel injectors). The fuel rails were manufactured by defendant Boostpower.

During the boat ride, the owner noticed that the fuel rail was leaking gasoline. He stopped the boat and adjusted the fuel rail by hand so that it would stop leaking gasoline. The men proceeded with their ride back to the boat ramp. The owner noticed as he accelerated the boat that the fuel rail was again leaking. This time, he asked the victim to hold the fuel rail with his hands to keep it from leaking. Before they made it back to the boat ramp, the victim exclaimed that gasoline was spraying all over him. The owner then stopped the boat and turned off the ignition, but the fuel that had sprayed on the victim nevertheless ignited and formed a fireball, causing burns that were ultimately fatal.

The plaintiff's experts opined that the accident would not have occurred if the fuel rail had been designed with a "security bar" to hold it in place. This, the plaintiff claimed, would have prevented the fuel rail from coming loose.

But the district court granted summary judgment to Boostpower, ruling that the fuel rail was misused and that its design, therefore, did not cause the accident.

Applying the substantive law of Oklahoma, the Tenth Circuit held that summary judgment for Boostpower was appropriate for two reasons: a lack of causation and misuse of the product.

As to causation, the court reflected that a proximate cause of an injury is a cause which, "'in a natural and continuous sequence, unbroken by independent cause'" produces the event and without which the event would not have occurred. *Id.* at 823 (quoting *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1214 (10th Cir. 2002)). Causation here was not established, the court concluded, because the fire did not result from "'a natural and continuous sequence, unbroken by an independent cause.'" *Id.* (quoting *Hollander*, 289 F.3d at 1214). Here the boat owner had

discovered the leaking fuel rail and had attempted, unsuccessfully, to remedy the situation twice before the fire.

As for misuse of the product, the court recognized that a manufacturer typically would not be liable for injuries resulting from a particular use if that use was not foreseeable by the manufacturer. The court relied on the fact that the boat owner had previously discovered that the fuel rail was loose and spraying fuel out under pressure on two occasions during the boat ride, and yet elected to continue operating the vessel in the face of the obvious hazard. The manufacturer, the court concluded, could not have intended or reasonably anticipated such a misuse. The Tenth Circuit therefore affirmed the grant of summary judgment to the manufacturer.

Court Applies Australian Law to Claims against WaveRunner Manufacturer

McCarthy v. Yamaha Motor Mfg. Corp., No. 3:12-cv-117-TCB, 2014 WL 904527 (N.D. Ga. Feb. 28, 2014*)*

The plaintiff was an Australian citizen who suffered spinal-cord injuries while operating a Yamaha WaveRunner in Australia. The Wave-Runner had been manufactured in Georgia, and the case was brought in the Northern District of Georgia on the basis of diversity jurisdiction. Yamaha moved for the application of Australian law. The plaintiff opposed it, arguing that Georgia law should apply. The court granted Yamaha's motion in part and denied it in part.

The court was asked to decide whether Australian law governed the following four issues: (1) limits on compensatory damages; (2) limits on punitive damages; (3) the effect of contributory negligence; and (4) the prevailing party's ability to collect fees and costs from the losing party. The court held that Australian law would apply to issues (1), (2), and (3), while Georgia law would apply to issue (4). The decision was based on Georgia's conflicts-of-law rules.

In general, Georgia courts apply the law of the place of injury. But the application of foreign law will be limited to "'statutes and decisions construing those statutes'" and will not extend to a foreign nation's judge-made laws. *Id.* at *2 (quoting *Frank Briscoe Co. v. Ga. Sprinkler Co.*, 713 F.2d 1500, 1503 (11th Cir. 1983)). Moreover, Georgia courts do not apply foreign law if doing so would conflict with Georgia public policy.

Australia was the place of the accident, so it was up to the plaintiff to explain why Australian law should not apply. There was no evidence that Australia had a "loser pays" statute, and therefore the prevailing party's right to recover fees would have to be determined by Georgia law, under which the parties normally bear their own fees.

Australia does, however, have statutes that impose caps on compensatory damages, that limit the cases in which punitive damages are available, and that provide for certain affirmative defenses, including contributory negligence. The plaintiff argued that Australian law on these subjects conflicted with Georgia public policy. The court disagreed.

Australia's statute on damage caps did not measure "damages from a different perspective" or "wholly limit" one avenue of recovery, so there was no public-policy conflict on the question of damage caps. *Id.* at *4. The court also noted that Australian law on the availability of punitive damages was "not so dissimilar" to the law of Georgia, and thus there was no public-policy conflict on the question of punitive damages. *Id.* And, as to the effect of contributory negligence, the court found that Australian law was actually more forgiving than Georgia law in that Australian law, unlike Georgia law, did not bar recovery if a plaintiff was more than 50 percent at fault. Thus, no public-policy conflict existed, and Australian law would govern the question of contributory negligence.

TORTS

Owner of Mooring Dolphin not Liable for Allision

Veldink v. Boise Cascade Corp., No. 3:12-cv-01029-PK, 2013 WL 1907375 (D. Or. May 7, 2013)

This case arose from an 18-foot boat's allision with an unlit dolphin (of the mooring variety). The dolphin, owned by a paper mill, consisted of five steel pilings driven deep into the riverbed and extending at least four feet above the high-water mark and 26 feet above the low-water mark. The dolphin was constructed in accordance with a U.S. Army Corps of Engineers permit, and was on the side of the river not typically used by boaters.

In the pre-dawn hours, during poor weather, the plaintiff set out to fish for salmon with his friend on his friend's boat. The two turned off their flashlights because of the glare on the falling rain, and the plaintiff sat down because he was cold, leaving the boat owner to navigate alone in the dark. The owner stopped consulting his GPS while navigating a channel, and the vessel struck the dolphin moments after the owner realized that he was coming too close to the paper mill.

The plaintiff brought suit against the paper mill, alleging that it was negligent by failing to mark, light, or remove the dolphin. Under the Oregon Rule, a boat owner would be presumptively negligent in an allision like this, since a vessel would not usually strike a stationary object absent some mishandling of the vessel. But here the boat owner was not a party to the suit, and the judge noted that the Oregon presumption is not determinative of liability: "there is room in maritime law to find comparative fault in the stationary object." *Id.* at *4 (citing *Wardell v. Dept. of Transp.*, 884 F.2d 510, 513 (9th Cir. 1989)).

Observing that a wharfinger has a duty to warn of hidden hazards or deficiencies but no duty to warn of obvious hazards like pilings extending well above the water line in seldom-used areas of the river, the court granted summary judgment to the paper mill.

Irreconcilable Charter Party and Vessel-Services Agreement Cancel Each Other Out; Arbitrator Denies Owner's Claim Against Helmsman for Grounding

In re Arbitration Between Lone Fox, LLC and Gordon Ingate, ICDR No. 50 196 T 00644 11 (Aug. 7, 2013) (David J. Farrell, Jr., Arb.)

S/V LONE FOX had completed a day of New York Yacht Club racing. America's Cup veteran Gordon Ingate (respondent) was at the helm. Also aboard were Ira Epstein, who was the principal of the vessel owner, Lone Fox, LLC (claimant), and Brian McClellan, who served as first mate and was hired by Epstein for his local knowledge and sailing skill.

On the return to Gilkey Harbor, Ingate steered a course laid out by Epstein. Epstein testified that Ingate should have steered the vessel to port of Nun "2" northwest of Minot Ledge. Nonetheless, and for unclear reasons, LONE FOX found itself in the gap between Minot Ledge to the west and Minot Island to the east.

McClellan and Epstein decided that the vessel should come about immediately, and directed Ingate to begin his turn. Unfortunately, Ingate steered toward, not away from, the ledge. The vessel struck the ledge before completing the turn. Epstein then instructed Ingate how to steer off the ledge, but LONE FOX grounded again—and harder. Only then did Epstein take the helm. Ironically, had LONE FOX not turned at all, it likely would have transited the gap safely due to a high tide.

Epstein's company, as the vessel owner, commenced arbitration proceedings against Ingate, claiming he was liable for the damage caused by the grounding.

Epstein and Ingate had intended for their relationship to be governed by a Recreational Bareboat Charter Agreement ("Charter") and a Vessel Services Agreement ("VSA"). The arbitration hinged on the question of who, as between Epstein and Ingate, was ultimately responsible for the navigation of the vessel.

The Charter purported to be a demise charter but provided that, if Ingate utilized the services of a captain, then the captain was responsible for safe navigation and would not be bound to comply with any unsafe or improper order.

Meanwhile, under the VSA, Lone Fox had agreed to provide Ingate with a competent captain and crew who, as independent contractors, would be charged with the management, operation, and navigation of the vessel.

Epstein testified that he was the captain and owner of the LONE FOX but that he did not serve as captain during the Charter. He relied on the language of the Charter and contended that he had turned the vessel over to "Skipper Ingate." He testified that he referred to himself as "Captain" only to avoid potential problems with his insurance company. *Id.* Epstein also testified that McClellan was his first mate and that he had authority to take the helm from Ingate.

Ingate testified that he was "purely the helmsman." *Id.* He stated that he had authority to "direct the crew in various maneuvers of setting the sails, generally the handling of the boat by the crew and myself" but that "[a]fter we crossed the finishing line, from that stage I was not the skipper anymore." *Id*.

McClellan testified that he was unsure who was in charge, but his testimony suggested that responsibility for navigation fell to him and Epstein.

The arbitrator held that, as the contemporaneously executed Charter and VSA could not be reconciled, they canceled each other out and would therefore be disregarded. Based on the remaining evidence, the arbitrator found that Ingate was not a true demise charterer, inasmuch as there was no clear and complete transfer of control to him. Rather, Lone Fox, LLC had furnished Epstein as captain and McClellan as first mate. And because the grounding was caused by poor navigation, Lone Fox, LLC would bear the loss. Lastly, since the Charter and VSA were hopelessly contradictory, the clauses in the agreements calling for an award of

attorney's fees and costs to the prevailing party were likewise without effect, and therefore each party would bear its own fees and costs.

[Editors' note: Thanks to Sandy Welte of Camden, Maine for bringing this decision to our attention.]

LEGISLATIVE DEVELOPMENTS

Selected Changes in State Boating Laws

Idaho has criminalized the grossly negligent operation of vessels. "Grossly negligent" is defined to mean without due caution and circumspection, and in a manner as to endanger or be likely to endanger any person or property. The new law takes effect June 1, 2014.

Illinois has removed PFD requirements for racing shells, rowing sculls, racing canoes, and racing kayaks participating in events designated as "PFD Optional." The state has also amended the definition of "overloading" such that water skiers, tubers, parasailers, or other persons towed by a motorboat must be considered part of the total number of passengers and cargo allowed by a watercraft's capacity plate. Finally, operators of vessels involved in a personal injury or fatal accident will now be deemed to have consented to either a breath test using a portable device as approved by the Department of State Police or a chemical test (blood, breath, or urine).

In **Indiana**, the fee for a boat-dealer license is now $30 for a whole year and $10 more for each additional place of business. The state also changed the classifications of dealers. A "Class A" dealer has more than one place of business. A "Class B" dealer has one place of business. Also, the state's motor-vehicle sales advisory board will now include at least one member representing boat dealers.

Kentucky has declared itself the "Houseboat Capital of the World." It will also require "a reasonable and articulable suspicion

based upon specific and articulable facts which, taken together with rational inferences from those facts" before officers of the department of Fish and Wildlife may stop a boat.

North Carolina has classified operating a vessel under the influence as a Class 2 misdemeanor, punishable by a fine of not less than $250. The state has also delegated authority to local counties to prohibit the abandonment of vessels in navigable waters subject to State provisions.

In **Ohio**, individuals possessing a valid merchant mariner credential issued by the U.S. Coast Guard in accordance with 46 C.F.R. § 10.109 and having at least one endorsement of master or operator as defined in 46 C.F.R. § 10.107 will no longer be required to complete a boater-safety course before operating a recreational vessel. When operating any recreational vessel, however, such individuals must carry documentation of their merchant mariner credentials and endorsements, and the documentation must be presented to a watercraft officer or law-enforcement officer upon request. Also, state watercraft officers and other law-enforcement officers will no longer be permitted to stop or board any vessel solely for the purpose of conducting a safety inspection unless the owner or operator voluntarily requests the officer to conduct a safety inspection. Officers still can stop or board a vessel if they have reasonable suspicion that the vessel or its equipment is in violation of Ohio law or a local ordinance, resolution, rule, or regulation, or if the stop is conducted at an authorized checkpoint.

In **Washington**'s 200-foot Orca Whale buffer zones, the following are not considered "vessel(s)": inner tubes, air mattresses, sailboards, and small rafts, or flotation devices or toys customarily used by swimmers. Violation of an Orca buffer zone now carries a fine of $500 in addition to any statutory assessments that may apply. And, persons arrested due to accidents resulting in personal injury or fatality, as well as persons under suspicion of operating under the influence of THC, may be subject to a blood test with the consent of the arrested person and a valid waiver of the warrant requirement or without the consent of the person so

arrested pursuant to a search warrant or when exigent circumstances exist.

[Editors' note: Thanks to Todd Lochner of Annapolis for submitting this state-law summary, which was prepared with the assistance of two law students from the Roger Williams University School of Law: Eugene Samarin ('15) and Patrick O'Connor ('15).]

COMMITTEE ON SALVAGE

Chair: Jason R. Harris*

Newsletter - Spring 2014

RECENT DEVELOPMENTS IN SALVAGE LAW

Martin v. One Bronze Rod, No. 8:12-cv-656-30 EAJ, 2014 WL 345905 (M.D. Fla. Jan. 30, 2014). *Rare award of title to Bronze Rod awarded in favor of salvor.*[1]

Plaintiff/salvor Francisco Martin ("Martin") arrested a Bronze Rod ("the Rod") and requested a declaratory judgment seeking either title to or proceeds from the Rod under 33 USC § 384 (providing for the condemnation of a captured piratical vessel brought into a United States port) and the general maritime law governing piratical forfeitures, the common law of finds, or the law of salvage.

The court found that Martin's complaint did not show a sufficient nexus to piratical cargo to support a warrant of arrest or judgment on the pleadings under the law governing piratical forfeitures. The court also rejected the "finds" theory since Martin was not able to show that the Rod was un-owned or abandoned.

However, the court found that Martin's complaint supported the salvage claim because: (1) there was a marine peril because the Rod was buried in the bottom sediments of the river and exposed to natural elements (corrosion or oxidation) and the

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*Please direct comments/questions to Salvage Committee Chairman at jrharris@welchharris.com. Mr. Harris is a partner with Welch and Harris, LLP, 636 Court Street, Jacksonville, NC 28540, telephone (910) 347-0161. The views and opinions expressed herein are not necessarily those of the Maritime Law Association of the United States, the Salvage Committee, the editor, or anyone other than the contributor of the case summary.

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risk of being struck by vessels; and (2) Martin successfully removed the Rod from the soil and water column and transferred a portion of the Rod to the court for a symbolic arrest which was found to be a voluntary endeavor and successful removal of the object from peril.

The court recognized that an award of title to the salvaged property is unusual, but relying on *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978), noted that in certain circumstances, including where the salvor's expenses exceed the value of the salvage property, it may be appropriate. Therefore, because Martin had conducted extensive academic and field research and expended substantial money, time, and effort to locate, survey, photograph, and recover the Rod, the court granted Martin's request to award him title to the Rod as compensation for his services.

Northeast Research, LLC v. One Shipwrecked Vessel, 729 F.3d 197 (2d Cir. 2013). *Abandonment pursuant to the Abandoned Shipwreck Act inferred from circumstantial evidence and need not be proved by express or explicit statements of intent to abandon.*[2]

Plaintiff/Appellant Northeast Research, LLC ("Northeast") discovered an early nineteenth century wooden schooner (the "DUNKIRK SCHOONER") submerged in New York waters of Lake Erie and filed an *in rem* action seeking an award under admiralty law as the finder or salvor of the vessel. The State of New York intervened, asserting title to the sunken vessel under New York law and the Abandoned Shipwreck Act, 43 U.S.C. § 2101 *et seq*. ("ASA"), which vests title to abandoned shipwrecks in the state on whose submerged land the shipwreck rests. The district court granted summary judgment in favor of New York and denied Northeast's motion for summary judgment seeking a salvage award. Northeast appealed, seeking review of the district court's holding that New York had title to the wreck pursuant to the ASA. On appeal, Northeast conceded that the DUNKIRK

[2]Ellen Shults, Welch and Harris, LLP, Jacksonville, NC. Email: egshults@welchharris.com.

SCHOONER is a historically significant shipwreck embedded in the submerged lands of New York, but disputed that it was "abandoned" within the meaning of the ASA.

In its analysis, the Second Circuit noted that the ASA effectively displaces the maritime law of salvage and the law of finds that otherwise govern shipwrecks, the practical effect being that if a shipwreck is found in the submerged lands of a State, a finding of abandonment leaves the finder with neither title nor a salvage award. After an extensive review of case law on abandonment, the court next concluded that for purposes of the ASA, abandonment may be inferred from circumstantial evidence (provided such evidence is sufficiently strong to satisfy the clear and convincing burden), and need not be proved by express or explicit statements of intent to abandon. Applying the court's analysis to the evidence of record, the court concluded that New York demonstrated that the shipwreck had been abandoned within the meaning of the ASA. The requisite elements of the ASA having been met, the court held that the district court's dismissal of Northeast's case on summary judgment was proper and that title to the DUNKIRK SCHOONER vested in the State of New York.

Sea Hunters, LP v. S.S. PORT NICHOLSON, No. 2:08-CV-272-GZS, 2013 WL 1789740 (D. Me. Apr. 26, 2013*). Court concludes it has jurisdiction to compel discovery regarding ownership of sunken vessel prior to completion of salvage operations.*[3]

Sea Hunters, LP ("Sea Hunters"), the salvor-in-possession of the wreck site of the vessel it identified as the S.S. PORT NICHOLSON ("PORT NICHOLSON"), a cargo ship torpedoed and sunk by a German submarine while en route to New York in 1942, served discovery requests upon the Secretary of State for Transport of the United Kingdom ("UK") regarding UK's purported ownership of the PORT NICHOLSON. UK sought a protective order with respect to Sea Hunters' discovery requests. UK contended the discovery sought by Sea Hunters was

[3]Megan Greene, 2L at Campbell Law School, Raleigh, NC. Email: madavis0811@email.campbell.edu.

premature, and, therefore, irrelevant, because Sea Hunters sought information on the ownership of the PORT NICHOLSON, which had not yet been salvaged.

First, the court rejected UK's argument that the discovery sought was irrelevant because Sea Hunters had not yet successfully salvaged the PORT NICHOLSON. The court noted that while completion of salvage operations is required prior to an award, "it does not follow that the exploration or adjudication of a claim of ownership *necessarily* must await the completion of salvage operations." 2013 WL 1789740, at *5. The court found UK's claim of ownership, together with its express notice that it did not consent to Sea Hunters' salvage services, had a "chilling effect" on the salvage operation. This, according to the court, was a "sufficiently palpable impact" so as to render the discovery regarding UK's claim of ownership relevant. *Id.*

Next, the court rejected UK's argument that the court lacked jurisdiction to compel UK to respond to the discovery requests. The court explained it may exercise quasi *in rem* jurisdiction over the *res* to adjudicate rights among the parties over whom the court has personal jurisdiction up to the value of the *res*. The court found that UK's restricted appearance in the case pursuant to Rule E(8) of the Supplemental Rules for Admiralty or Maritime Claims, neither "prevents this discovery nor strips the court of jurisdiction to compel it." *Id.* at *6

Additionally, the court found that it could properly exercise "*in rem* jurisdiction by constructive possession," which allows for a determination of an exclusive right to salvage a wreck in international water. *Id.* at *5. Relying on *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), the court noted that *in rem* jurisdiction by constructive possession may be exercised over "claims of purported owners who have rejected third parties' salvage efforts," and that by expressly notifying Sea Hunters that it did not consent to the operation, UK interfered with the operation and precluded Sea Hunters from obtaining specific property from the abandoned vessel. *Id.* at *7. Under such circumstances, the court concluded it

could properly exercise *in rem* jurisdiction by constructive possession jurisdiction over UK (within the limits of its restricted appearance) in order to compel discovery related to ownership of the PORT NICHOLSON.

Sea Hunters, LP v. S.S. PORT NICHOLSON, No. 2:08-cv-272-GZS, 2013 WL 5435636 (D. Me. Sept. 29, 2013). *Intervenor qualified as "party" with standing to mount a Rule 60(b) challenge of court order appointing salvor the exclusive salvor-in-possession.*[4]

Mission Recovery, LLC ("Mission Recovery") filed a motion to intervene in the salvage action pursuant to Federal Rule of Civil Procedure Rule 24 as of right or, in the alternative, permissibly, and also claiming standing pursuant to Federal Rule of Civil Procedure 60 to challenge the court's order appointing Sea Hunters the exclusive salvor-in-possession.

Examining first Mission Recovery's basis to intervene as of right, the court found that Mission Recovery's "significant steps" toward salvage of the PORT NICHOLSON, including entering into a separate salvage agreement with a salvage company and receiving substantial financial contributions from investors to fund it, demonstrated a direct, protectable interest in the litigation as required by Rule 24. The court further noted the clashing interests of Mission Recovery and the existing parties, concluding that Mission Recovery had met the minimal showing that the representation afforded by the existing parties to the litigation was inadequate.

Next, the court concluded that Mission Recovery met the standard for permissive intervention, noting that Mission Recovery's motion was timely, subject matter jurisdiction was proper, and that Mission Recovery's salvage claim shares with the existing action common questions of law and fact. The court further noted that if made a party to the ongoing salvage action,

[4]Ellen Shults, Welch & Harris, LLP, Jacksonville, NC. Email: egshults@welchharris.com.

Mission Recovery was likely to contribute in a significant way to the underlying factual and legal issues.

Finally, quoting extensively from *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 920 F. Supp. 96, 98 (E.D. Va. 1996), the court found that Mission Recovery qualified as a "party" for purposes of a Rule 60(b) challenge because actions *in rem* are designed to adjudicate rights in specific property against all of the world, that judgments in such cases are binding to the same extent, and if the whole world are parties bound by the judgment, "the converse should also be true: the whole world are parties who may request relief from the judgment." Alternatively, the court held it had the power to reexamine its prior order *sua sponte*. Therefore, having found sufficient any of the three grounds for relief asserted by Mission Recovery in its motion to intervene, the court granted the motion and directed Mission Recovery to file a claim in the action.

Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 512 F. App'x 890 (11th Cir. 2013). *Eleventh Circuit affirms district court's dismissal of researcher's claims against Odyssey Marine relating to the MERCHANT ROYAL where no case or controversy yet exists*.[5]

Keith Bray, a shipwreck researcher, sought rescission of a contract that Bray alleged Odyssey Marine Exploration ("Odyssey"), fraudulently induced him to enter. Bray alleged he entered into an oral agreement with Odyssey, the terms of which called for him to give Odyssey his research related to the location of the MERCHANT ROYAL, a British ship that sank off the English coast in 1641, in exchange for a percent value from the recovery of that vessel and other costs. Later, Odyssey informed Bray that it had no plans to search for the MERCHANT ROYAL and executed a written agreement in which Odyssey paid Bray a cash sum as "payment in full" for Bray's research file. After executing the written contract, Bray learned that Odyssey had been

[5]Kyle Smith, Warren, RI. Licensed in MA and RI. Email: ksmith2979@gmail.com.

searching for the MERCHANT ROYAL, and that the company had found a sunken vessel it believed to be the MERCHANT ROYAL. Odyssey initiated *in rem* proceedings to claim ownership of the vessel, and Bray moved to intervene, seeking to rescind the written agreement and reinstate the original oral agreement on the grounds of mutual mistake or fraud in the inducement. However, following preliminary proceedings, it became apparent that the wreckage was not the MERCHANT ROYAL, but instead a different, yet-to-be identified vessel. Bray's claims were subsequently dismissed and Bray appealed.

On appeal, the Eleventh Circuit affirmed the district court's dismissal of Bray's claims. The court affirmed the dismissal of Bray's claim for mutual mistake on the grounds that it is a defense and is to be used in avoidance of a contract. Bray's claim for rescission was dismissed because he failed to plead an offer to return all of the benefits he derived as required.

The court held that Bray's claim for fraud in the inducement was properly dismissed for failure to plead an actual injury. Bray alleged he was injured by being unable to sell his contingent interest in the MERCHANT ROYAL that existed under the original agreement. The court reasoned that because he did not allege facts to show the existence of a market for such a speculative commodity or that someone would have paid more, the pleading was insufficient to state a claim.

Finally, the court affirmed dismissal of Bray's claim seeking a declaration of rescission of the written agreement and reinstatement of the oral agreement for failure to present an actual case or controversy. The court reasoned that to give an opinion now would be the equivalent of an advisory opinion because the MERCHANT ROYAL had yet to be found and Odyssey had yet to refuse to pay pursuant to the oral agreement.

Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, 979 F. Supp. 2d 1270 (M.D. Fla. 2013). *Bad faith salvage claim and subsequent actions of salvor warranted award of attorney's fees, costs, and sanctions relating to litigation costs of true owner.*[6]

The ongoing saga of Odyssey's salvage of the NUESTRA SEÑORA DE LAS MERCEDES, a 19th-century Spanish frigate shipwrecked off the coast of Portugal, continues with this ruling by the court on the Kingdom of Spain's motion to recover attorney's fees and litigation costs associated with the defense of its sovereign naval property.

Spain filed a motion to recover attorney's fees and costs based upon multiple bad faith acts of Odyssey during litigation. In support of its motion, Spain cited Odyssey's intentional misidentification of the shipwreck to the court, withholding of evidence regarding identity and existence of the wreck, and continued disregard for the orders of both the magistrate and district judges during the proceedings.

Finding in favor of Spain, the court ruled that Odyssey purposefully obscured information from the outset of litigation in an effort to obstruct the court, and in an attempt to defeat the rightful claims of Spain, resulting in significant litigation which would not have happened if not for Odyssey's bad faith abuses and deceptions. The court awarded Spain reduced attorney's fees and costs and further imposed awards for contempt and sanctions.

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[6]Jude Smith, Houston, TX. Licensed in PA, NJ, OH, DC, & TX (pending). Email: snowlock@gmail.com.

Tow Tell Marine Serv., LLC v. M/V 28' Spencer, No. 13-20488-Civ, 2013 WL 6212192 (S.D. Fla. Nov. 27, 2013). *Potential spill of 250 gallons of gasoline and oil not "substantial physical damage" under Article 14 of the Salvage Convention*.[7]

This action arose from Tow Tell Marine's salvage of the vessel, which capsized near the coast of Miami-Dade, FL after encountering high seas. In its complaint for a salvage award against the vessel and the vessel owner, Tow Tell Marine alleged that by righting the vessel, de-watering the hull and safely towing the vessel, it prevented the release of approximately 250 gallons of gasoline and oil into the surrounding ecosystem, and was therefore entitled to "special compensation" under Article 14 of the 1989 International Convention of Salvage.

The court noted that although a salvor is entitled to "special compensation" under Article 14 where the salvor has carried out salvage operations of a vessel which has "threatened damage to the environment," Article 1 of the Salvage Convention defines "damage to the environment" as "*substantial* physical damage" to the environment caused by "pollution, contamination . . . or similar *major* incidents." The court interpreted the drafters' emphasis on "major" and "substantial" to mean the drafters were not concerned with "small-scale" pollution, but only events of a more widespread nature, and that while it was reasonable to believe the grounding and subsequent leakage of the vessel would have caused some environmental damage, such damage was not the type of damage entitling a salvor to special compensation under Article 14. Accordingly, the court dismissed Tow Tell Marine's claim for special compensation. The court further noted the complaint stated the elements of a salvage claim, but that Tow Tell Marine was entitled to a salvage award only for the "value of the res as it was recovered," (approximately $500.00), even if Tow Tell Marine's expenses exceeded that amount.

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[7]Ellen Shults, Welch & Harris, LLP, Jacksonville, NC. Email: egshults@welchharris.com.

Girard v. M/Y "QUALITY TIME," 2014 AMC 323, 2014 WL 495739 (S.D. Fla. 2014). *12 percent award to professional salvor for night operation involving diver.*[8]

Salvors brought suit to determine an award for salvaging a 42' recreational vessel that struck a submerged object and began taking on water near Key West, Florida.

First, the court determined that the salvage of the QUALITY TIME was a "low level" salvage (generally warranting a 5-10 percent award of vessel's post-casualty value) because no special skills or risks out of the ordinary were faced by the salvors. However, because the salvage occurred at night and required a diver to enter the water, the court found that the salvors were entitled to an award of 10 percent of the vessel's post-casualty value. In addition, the court awarded a 2 percent uplift because the salvors were professional salvors, entering a final award of approximately $17,000 (12 percent of $140,800.45, the post-casualty value of the vessel).

In re Mielke, No. 10-13519, 2013 WL 5913681 (E.D. Mich. Nov. 1. 2013). *Relationship between salvor and law enforcement irrelevant to inquiry of whether operation is "voluntary" for purposes of establishing elements of salvage claim.*[9]

St. Clair Salvage ("St. Clair") sought partial summary judgment seeking a salvage award in connection with St. Clair's recovery of the MIELKE WAVE, the subject of a limitation of liability action filed by the vessel's owner ("Mielke") following a collision with another vessel on Lake St. Clair, Michigan. In opposition to St. Clair's pure salvage claim, Mielke argued that the salvage of the MIELKE WAVE was not voluntary (a requisite element to a salvage claim) because the salvor worked in an "on-going special relationship" with local law enforcement in that St.

[8]Scott Gunst, Reeves McEwing, LLP, Philadelphia, PA. Email: sgunst@lawofsea.com. Thanks to Richard J. McAlpin and Craig Liszt, McAlpin Conroy, Miami, FL, for the submission.

[9]Sarah Neal, 2L at Campbell Law School, Raleigh, NC. Email: skneal0702@email.campbell.edu.

Clair agreed to salvage vessels in certain areas of Lake St. Clair. The court disagreed, stating first that Mielke failed to prove the alleged "on-going" relationship, and second, the determination of whether the salvage services are "voluntarily" rendered turns on the existence of a binding agreement between the salvor and the owner of the vessel; thus rendering the relationship between the salvor and law enforcement irrelevant to the inquiry.

Having determined that St. Clair could prove the elements of a pure salvage claim, the court next turned to *The Blackwall* factors in fashioning an appropriate award, finding that $3,000.00 represented the reasonable and accurate salved value of the MIELKE WAVE, and that in accordance with salvage law, the salvage award could not exceed that amount.

In re Arbitration Between Towboat Nantucket Sound, Inc. and Capt. Rodney Van Trent, Final Award, March 18, 2014. *Valid salvage agreement executed despite owner's allegations of intimidation and emotional duress.*[10]

This arbitration arose out of a dispute between Towboat Nantucket Sound, Inc. (TNS) and Rodney van Trent Farnsworth, ("Farnsworth") following the grounding and recovery of the M/Y AURORA ("AURORA"), a 56' power catamaran, off Weepecket Islands, Massachusetts. TNS was notified by Farnsworth's insurer of Farnsworth's request for assistance and dispatched two vessels in response.

The panel found that despite Farnsworth's allegations and arguments of duress, including Farnsworth's initial objections to signing the salvage form, but then relenting because of alleged intimidation of physical harm, destruction of the AURORA, and emotional duress, a valid salvage agreement was executed between Farnsworth and TNS.

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[10]Ellen Shults of Welch & Harris, LLP, Jacksonville, NC. Email: egshults@welchharris.com. Thanks to David S. Smith, Farrell McAleer & Smith, LLP, Salem, MA, for the submission.

Turning to the salvage award, the panel unanimously decided that TNS established by a preponderance of the evidence that a marine peril existed, that TNS voluntarily rendered salvage services in response to Farnsworth's request for immediate assistance, and that TNS's efforts were successful in salving the AURORA and entitled TNS to a salvage award of $50,000.00 (approximately 7 percent of $689,972.00, the undisputed value of the AURORA), plus interest, due under the contract for its efforts. The panel rejected Farnsworth's claims for loss of use and expenses, finding a lack of evidentiary support for the contentions.

Starr Indemnity & Liability Co. v. Cont'l Cement Co., *LLC*, No. 4:11CV809JAR, 2013 WL 1442456 (E.D. Mo. Apr. 9, 2013).
Letters from Corps of Engineers ordering removal of sunken barge satisfied coverage requirement for purposes of Continental's P & I claim for wreck removal coverage.[11]

This case arises out of a dispute over liability and indemnity coverage for the sinking and removal of the MARK TWAIN, a cement barge that sank in the Mississippi River on February 7, 2011 at the defendant's dock near St. Louis, Missouri. Continental sought partial summary judgment that letters from the U.S. Army Corps of Engineers ordering the removal of the sunken barge satisfied the coverage requirement that wreck removal be "under statutory power or otherwise pursuant to law." The court found that Continental was entitled to indemnity for wreck removal because "a reasonable owner, fully informed, would conclude that failure to remove would likely expose the owner to liability imposed by law based upon the language in the Corps' letters." The court went on to deny the summary judgment motion due to other coverage defenses asserted by Starr.

[11]Lauren Burk, Phelps Dunbar, LLP, New Orleans, LA. Email: lauren.burk@phelps.com.

In the Matter of Arbitration Between Sea Tow Shinnecock/Moriches and M/Y BITE ME, Final Award, March 18, 2014.[12] *10 percent award to professional salvors for low order salvage operation.*

Sea Tow sought an award of $28,000.00, plus interest, for its efforts in recovering the M/Y BITE ME ("Respondent") after its grounding at low tide on a sandbar on the central Atlantic shore of Long Island, NY. Respondent argued that freeing the BITE ME was a covered service under the terms of the owner's Sea Tow membership, and that Sea Tow was, therefore, entitled to nothing, or alternatively that the operation was a low order salvage entitling Sea Tow to a minimal award.

After examining the Sea Tow Membership agreement to determine whether the ungrounding was a covered service, the arbitrator found that the BITE ME was aground in an area that met the agreement's definition of "dangerous surf" and that the vessel likely suffered propeller damage and did not proceed under its own power, therefore, concluding that at least one and probably two of the five conditions required for the operation to be covered as a free ungrounding service were not met.

However, the arbitrator sided with the Respondent as to the nature of the award, and, after applying the criteria in Article 13 of the Salvage Convention, found that freeing the BITE ME was a low order salvage, notwithstanding the three hours it took to accomplish, because of the calm sea conditions and low risk involved in the operation. The arbitrator subsequently found that the vessel had a salved value of $68,950.00 and awarded Sea Tow $6,500.00 (approximately 10 percent of the post-casualty value), plus interest.

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[12]Ellen Shults, Welch & Harris, LLP, Jacksonville, NC. Email: egshults@welchharris.com. Thanks to James E. Mercante, Rubin Fiorella & Friedman, LLP, New York, New York, for the submission.

In re Arbitration Between the Sporting Life, Inc. and Cocktails Leasing Co., LLC, Final Award, June 25, 2013.[13] *Professional salvor awarded $100,000.00 (10-25 percent of post-casualty value of vessel) for efforts to recover vessel that was holed and hard aground near Woods Hole, Massachusetts.*

The Sporting Life, a professional marine salvage and towing company, sought a salvage award of $640,000.00 plus interest, an equitable uplift, and attorneys' fees and costs from Cocktails Leasing Company and the M/Y COCKTAILS *in rem* (collectively "Cocktails") for salvage services following the grounding of the M/Y COCKTAILS on Great Ledge, Woods Hole, Massachusetts.

Greatly disputed in this matter was the post-casualty value of the vessel. Sporting Life contended the post-casualty value of the vessel to be $2,523,680.00 and claimed to be entitled to an award of $640,000.00, 25.4 percent of what it salvaged. Cocktails contended the post-casualty value, if not a constructive total loss, was somewhere between less than $500,000.00 and $1,000,000.00 and advocated an award of between $40,000.00 and $80,000.00.

Describing post-casualty value determination as an "imprecise exercise," the arbitrator found that based on the weight of evidence, the yacht's post-casualty value was most likely within the range of $400,000.00 to $1,000,000.00. Applying the *Blackwall* factors and taking into consideration, pursuant to Article 13(b) of the International Convention on Salvage, the potential risk (albeit remote) that the yacht's fuel tanks might have been breached, the arbitrator awarded Sporting Life $100,000.00 (10 – 25 percent of the post-casualty value) and denied its claim for an equitable uplift, attorneys' fees, and costs.

Mosaic Underwriting Serv., Inc. v. Moncla Marine Operations, LLC, 2014 AMC 770, 2013 WL 1556141 (E.D. La. 2013). *Stay of*

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[13]Ellen Shults, Welch & Harris, LLP, Jacksonville, NC. Email: egshults@welchharris.com. Thanks to James E. Mercante, Rubin Fiorella & Friedman, LLP, New York, New York, for the submission.

litigation granted to signatory of arbitration agreement against non-signatory pending outcome of London arbitration.[14]

This action involved a dispute between the owner of a salvaged barge and the excess P&I underwriters of the barge who sought a declaratory judgment that they were entitled to take title to the barge and sell it to recover their contribution to the salvage costs. The owner of the barge opposed the excess P&I underwriters' claims and impleaded the hull and primary P&I underwriters, as well as the underwriting agency which obtained the hull and primary P&I coverage, arguing that the underwriters conspired and colluded to compensate it under the primary and excess P&I policies rather than the hull policy in order to ensure that the primary and excess P&I underwriters would receive a credit for the salvage value of the barge (something not provided for under the hull policy).

The hull, primary P&I underwriter, and the underwriting agency all sought and were granted a stay of the case on the basis of London arbitration clauses in their contracts with the barge owner, despite arguments by the owner that the wording in the policies was ambiguous, that impleader via Rule 14(c) renders arbitration inappropriate since it creates a direct claim against the third-party defendants on behalf of the excess P&I underwriter, or that arbitration would create piecemeal litigation.

Following this defeat, the barge owner then moved to stay the excess P&I underwriters' action and compel them to arbitrate their claims in the third-party defendants' London arbitration, arguing that although the excess P&I policy did not contain a London arbitration clause, the excess P&I underwriters should nevertheless be bound by the arbitration provisions in the hull and primary P&I policies.

Although the court found no evidence to support any theories (such as incorporation by reference, assumption, agency,

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[14]Jon Werner, Lyons & Flood, New York, New York. Email: jwerner@lyons-flood.com.

alter ego, estoppel, or third-party beneficiary) that would bind the excess P&I underwriters to an agreement to arbitrate as non-signatories, the court exercised its discretion under Section 3 of the Federal Arbitration Act to grant the barge owner's request for a stay of the proceedings. The court found that the litigation and arbitration involved sufficiently similar operative facts, were intertwined strongly enough to lean in favor of a stay, and that the arbitration would be impacted if litigation continued.

Williamson v. Recovery Ltd. P'ship, 731 F.3d 608 (6th Cir. 2013). *Interlocutory appeal allowed on order of preliminary injunction (but not prejudgment attachment) in admiralty case under 28 U.S.C.* § 1292 *even though non-admiralty claims were asserted.*[15]

This case is one of many episodes of litigation concerning the recovery of treasure from the wreck of the SS CENTRAL AMERICA, which sank in 1857, and concerned several consolidated appeals. Plaintiffs entered into non-disclosure agreements with certain salvage company defendants, in which plaintiffs agreed to assist in locating the wreckage in exchange for a percentage of net recovery from the expedition.

Plaintiffs brought claims in Ohio State Court alleging breach of the non-disclosure agreements, conversion, and breach of fiduciary duty. Defendants removed the matter to United States District Court for the Southern District of Ohio and counterclaimed, alleging breach of contract, civil conspiracy, and unfair competition.

The district court granted summary judgment on a number of claims in the case, including summary judgment for the plaintiffs on the counterclaims asserted by the various entity defendants, who subsequently filed an interlocutory appeal. Following the filing of the initial appeal, plaintiffs obtained orders of pre-judgment attachment and preliminary injunction, the subject of a second interlocutory appeal. Both appeals were consolidated.

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[15]Seth Buskirk, Clark, Newton & Evans PA, Wilmington, NC. Email: spb@clarknewton.com.

On appeal, the Sixth Circuit first addressed questions of its appellate jurisdiction and held that the interlocutory order of summary judgment as to the defendants' counterclaims was subject to immediate appeal in its entirety because it concerned an "admiralty case" under 28 USC § 1292(a)(3) even though non-admiralty claims were also asserted. The court further held the order of preliminary injunction was subject to immediate appeal under 28 USC § 1292(a)(1) but the order of prejudgment attachment was not, despite defendants' arguments that the attachment had the practical effect of a preliminary injunction.

Finally, the court rejected defendants' contentions that plaintiffs' claims were time barred under the two-year statute of limitations for civil actions to recover remuneration for giving aid or salvage services. The court held that because plaintiffs' claims were based on the non-disclosure agreements, such claims were not considered "pure" salvage, and, therefore, the two-year time bar did not apply.

Moniz v. Hawaii, No. CIV. 13-00086 DKW, 2013 WL 2897788 (D. Haw. June 13, 2013). *Pro se complaint alleging court's admiralty jurisdiction in an attempt to contest a traffic violation and/or foreclosure eviction dismissed as wholly frivolous.*[16]

Pro se plaintiffs brought a complaint against Hawaii State Judges, clerks, police officers, and various Hawaii state agencies alleging admiralty jurisdiction styled as a "Bill of Lading/Salvage Claim." Plaintiffs contested a traffic violation and/or foreclosure eviction adjudicated in Hawaii State Court on the grounds, inter alia, that plaintiffs possess title to the state district court and that the Hawaii State Courts have no jurisdiction over them.

Despite considerable leeway provided *pro se* plaintiffs, the court found the complaint to be un-intelligible and dismissed it *sua sponte* for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. First, the court reaffirmed

[16]Olaf Aprans, Clinton & Muzyka, PC, Boston, MA. Email: oaprans@clinmuzyka.com.

prior jurisprudence holding that Hawaii state courts have jurisdiction over individuals claiming citizenship of the Sovereign Kingdom of Hawaii. Second, the court found no basis for admiralty jurisdiction. Third, the court held that judicial immunity bars plaintiffs' claim against Hawaii state court judges. Accordingly, the U.S. District Court of Hawaii dismissed the complaint *sua sponte* as frivolous.

COMMITTEE ON YOUNG LAWYERS

Chair: Norman Stockman
Vice Chair: Blythe Daly

NEWSLETTER

Vol. 2014-1, April 2014

Message from the Chair

Flowers are blooming, birds are singing, and the echoes of sneezes linger in the air. It must be spring! And that means it's once again time for the Spring MLA meeting in New York City, April 29-May 2.

I hope that everyone who can has made plans to be in New York for the meeting. In addition to the substantive committee meetings, the annual meeting, and the Friday night dinner, we will have our usual committee meeting Thursday afternoon and our highly-anticipated social event Thursday night. I look forward to seeing you there.

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 New York!

Norman Stockman

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 are interested in volunteering to serve as a YLC liaison, please email the Secretary of the YLC, 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

At the request of President Parrish, 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.** This promises to be an interesting project. 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: **Kelley Tiffany, Jude Smith, Imran Shaukat, Leanne O'Loughlin,** and **Michael Hartman.**

Once again, at the request of **Jason Harris**, Chair of the Salvage Committee, the YLC assisted in preparing the committee's newsletter *Recent Developments in Salvage Law.* The following YLC members contributed to the project: **Ellen Shults, Olaf Aprans, Lauren Burk, Seth Buskirk, Alberto Castañer, Thomas Dunlap, Scott Gunst, Adam Jaffe, Jude Smith, Kyle Smith,** and **Jon Werner.**

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 a 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.

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