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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

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TABLE OF CONTENTS

EDITORIAL COMMENT

In this issue we mark with sadness the passing of two prominent, long time MLA members, William Garth Symmers (who became a member in 1938) and James J. Higgins (who became a member in 1948). Both served the Association in various ways, Bill Symmers having served as a member of the executive committee from 1958 to 1961. He became a member in 1938, the year that Nick Healy became a member. Jim Higgins was MLA president from 1968–1970. Until his last illness, he was a highly visible member of the Association, always present at the New York meetings even though the effort to attend became a hardship because of his physical limitations. His last MLA position was that of Parliamentarian. Through their contributions, both left the Association better than they first found it.

The passing of William Garth Symmers and Jim Higgins affords all of us the opportunity to reevaluate our commitment to the goals of the Association in the development of American and International maritime law. Uniformity and the fair administration of the law remain fundamentally important to our work and to our identity as maritime lawyers. To be sure, both the MLA and our legal environment have evolved substantially during the past century. However, that evolution should not—indeed, cannot—be allowed to impair the Association's continued advancement of its goals. Whatever else is true, the Association needs the expertise and commitment of its members now more than ever before. We hope this Report stands in some small way as a reminder of that need and of our shared commitment to the future of the Association.

Gordon W. Paulsen,
Editor

Festschrift to Honor the Memory of
WILLIAM GARTH SYMMERS
November 30,1910–August 16, 2000
MLA Life Member 1938–2000
MLA Vice-President 1964–1966

I believe that I knew Bill Symmers longer than did any other member of MLA. We became friends in the early 1930s at Charlottesville, VA, where, incidentally "Garth" was a prominent family name. In 1935 we were both members of the graduating class of the University of Virginia, Bill getting his LL.B. and I my B.A. In 1939, my last year in law school, I began to think about getting a job in a law firm, preferably an admiralty firm. The only maritime lawyer I knew was Bill Symmers, who was then working for the U.S. Maritime Commission in Washington. I went up to get his advice and found that he was in the process of converting the old Dollar Line into the new American Presidents Line. Because of the time difference with San Francisco he did not leave the office until 9:00 p.m. I knew that his father was then a prominent admiralty lawyer in New York, and Bill passed on his father's advice: "If you want to make a lot of money, go into a Wall Street firm. If you want to have a lot of fun, go into an admiralty firm." Then and since, Bill Symmers liked to have fun, so he ended up in the admiralty, and so did I.

I never made much money, but I certainly did enjoy the admiralty practice.

Bill did not interest me in the maritime law; I had that interest when I entered law school. What he did interest me in, however, was the Maritime Law Association. In 1952 he successfully proposed me as a member. Bill always liked to help younger lawyers in the admiralty practice, and in May 1976 two of his protegees became the senior officers of MLA. I was elected President, and Frank O'Brien was elected First Vice-President. Bill attended the meeting at Vesey Street and sat in the front row next to Arthur Boal. As he looked around, he said to me: "David, in 1952 1 knew everybody and you didn't know anybody. Now you know everybody and I don't know anybody." That fall MLA had its first resort meeting in the U.S., at The Breakers, Palm Beach. I persuaded Bill to attend, and he did have a good time, including a tennis game with my wife Eleanor.

In 1956 the firm of Symmers, Fish & Water was organized, and soon became well known in "The London Market." In 1960 Bill became a member of the Supreme Court's Advisory Committee on Admiralty Rules. At that time it seemed quite possible that admiralty procedure would disappear, being

absorbed into the Federal Rules of Civil Procedure. However, effective July 1, 1966, the Committee produced a marvelous and ultimately successful compromise in what was called the Supplemental Admiralty Rules. Admiralty Practice and Procedure were retained but one of the best features of the FRCP, the Discovery rules, were introduced into the admiralty. Ten years later the distinctive admiralty procedure of arrest and attachment came under Constitutional attack by some judges and professors. This time it was the MLA itself that by 1985 had beaten back the attack.

At the time of his death Bill's length of membership was exceeded only by that of Ed Longcope and Nick Healy. All in all, Bill Symmers was a very successful Proctor in Admiralty and a great friend to his colleagues and clients.

David R. Owen
President, MLA (1976–1978)

Festschrift to Honor the Memory of
JAMES J. HIGGINS
Who Served as President of
The Maritime Law Association of the United States
from 1968 to 1970

James J. Higgins came to Kirlins as an associate attorney in July 1948. He had been in the army in World War II, and subsequently he attended Fordham University where he obtained his LL.B in 1946. He was born and raised in Jersey City where politics is endemic to citizenry. Through his political connections he commenced his practice experience as the Trustee appointed to manage a bankrupt Chinese restaurant in Jersey City. Recognizing the limited future in that role, he sought employment through various other connections, one of which led him to an interview at Kirlins and thence to employment for the rest of his professional life with our firm. He took little, that I can recall, from his experience managing the Chinese restaurant other than a lifelong delight in good Chinese food.

During his career, Jim became involved in just about every aspect of maritime practice and rose through the Maritime Law Association, in which he took a lifelong interest, from the positions of Membership Secretary and Association Secretary to President of the Association from 1968 to 1970. During that period there was considerable activity in the marine ecology area in which he took a great interest in serving as Chair of the Ecology Committee

and as member of the three-man negotiating committee with Nick Healy and Gordon Paulsen acting on behalf of the P&I Clubs in resolving the issues then arising out of the new concept of financial responsibility for oil pollution incidents. Jim hugely enjoyed traveling in connection with his firm, MLA and CMI activities and was well known in the Far East, England and on the Continent. He was recognized worldwide for his extraordinary sense of humor and his network of personal correspondents kept up a lively exchange communicating the latest examples of local ribaldry on an international scale to the delight of his partners. Jim and I were associated professionally and as sincere friends for close to 50 years, a good part of which time we were partners. To many of his intimate friends and to others with whom he was not so friendly, Jim was sometimes thought of as a curmudgeon and, in fact, his partners viewed his abilities in this area as carrying curmudgeonry to an art form, otherwise unmatched in their experience. In my mind, all organizations are the better off for having among their group a solid curmudgeon who sharpens the mind and wit and quickens the action, and Jim provided that service for Kirlins with aplomb.

Those of us who worked closely with him greatly miss the fun and mischievousness that was so much a part of his nature. As I say, every firm needs a curmudgeon like Jim Higgins. Happily, my partners have found another curmudgeon (not me) but all in all Jim Higgins remains irreplaceable.

Marshal Keating
Treasurer of the MLA, 1978 to 1998

It is difficult for me to realize, but it's true, that my first meeting with Jim Higgins occurred when he was a student in my admiralty class at New York University Law School.

My next contacts with Jim were in the years 1964–66, when I was President of the MLA and he was its efficient Secretary. We worked together closely during that period. I remember particularly the polling of the membership by mail on whether we should have a first out-of-New York meeting, and, if so, where it should be held. (The overwhelming response was in favor of such a meeting, and most replies chose New Orleans as the situs. San Francisco was the runner-up and the next out-of-New York meeting was held there.)

I also recall Jim's skillful handling of the loan of the New York admiralty oar to the famous Nautical Museum at Greenwich, England, for an exhibition

of admiralty oars from all over the world. The New York oar, the mace of the New York Vice-Admiralty Court until the Revolution, is now owned by the U.S. District Court for the Southern District of New York, but is on permanent loan to the Museum of the City of New York. After we had obtained the Court's permission, Jim retrieved it from the New York Museum, arranged for transportation and insurance, and saw to it that it was safely back in New York after the exhibition closed.

Not long after he was Secretary, Jim served as President of the Association, for two one-year terms. He presided at our meetings with great aplomb, following Roberts' *Rules of Order* so faithfully that when he became a Past President he was appointed the Association's Parliamentarian, a position he handled very efficiently, but with good humor.

Jim's wit was famous, and his poignant remarks enlivened many an MLA meeting. He will be sadly missed whenever MLA members gather in the future.

Nicholas J. Healy
President, MLA (1964–1966)

Jim was an original who could always be relied upon to enliven our MLA meetings with colorful remarks, often based on his personal experiences. He sometimes posed as a politico, whimsically professing special knowledge of how things are accomplished in the real world. But underlying it all was Jim's practical, solid good sense. Early in his practice, Jim became an expert on legal issues related to the marine environment and continued his interest at least until he retired from active practice. At recent meetings of the directors, to which Past Presidents were invited, Jim's absence was noted with concern, invariably resulting in general inquiry as to his well-being. Jim will be greatly missed.

Herbert M. Lord
President, MLA (1974–1976)

Many who were merely acquainted with Jim Higgins thought of him as a rather rough and tough guy, not much interested in things like classical music, art and "finer things in life." It is true that he could be "rough and tough," and

that was often the impression he wanted to give.

But to those who knew him well, as I believe I did, there was another side to Jim, which revealed that he was a well-rounded and most interesting kind of man.

Under his sometimes hard-boiled exterior was a man who cared deeply about music, literature and the welfare of others. One of his favorite expressions was "You can take the boy out of Jersey City, but you can't take Jersey City out of the boy." He was from Jersey City, and made no attempt to be something he was not.

He did care about the law, especially maritime law, and was intolerant of practitioners who did not adhere to the highest standards, professionally and personally.

Jim Higgins served with distinction as President of the MLA from 1968 to 1970; Vice-President, 1966–1968; Secretary, 1961–1966; Membership Secretary, 1959–1961. At the time of his death he served as Parliamentarian, a recognition of his expertise in "Robert's Rules of Order" which he cited whenever he thought it advisable.

We all will miss Jim, his parliamentary skill and his trenchant wit. The MLA will never be the same without him.

Gordon W. Paulsen
President, MLA (1982–1984)

I remember Jim Higgins fondly as a man of much good will, good humor, and devotion, and of positive decision where decision was required. He spoke in debate with eloquent force, and with a strong vein of irony that enhanced the interest of much that he said, both in and out of council.

Although he was a powerful advocate when spoke, he reminded us by example, when the bar seemed more and more to need the example, that lawyers could practice vigorous advocacy with good humor. Even when not speaking and unannounced, he could never be unnoticed.

He was our parliamentarian for many years, and I borrow the words of his perennial motion to say, "I now move that a unanimous ballot be cast" for his election to our Hall of Presidential Fame.

Graydon S. Staring
President, MLA (1984–1986)

Jim Higgins was a fine lawyer, a gentleman, and a good friend. His wit and humor never failed to lift a gathering whenever we met. He was also a devoted member of the Maritime Law Association, serving in many capacities over many years, including President from 1966–1968. His last official title was as Parliamentarian and our meetings frequently included a word from Jim regarding procedure. In 1986 after the Nominating Committee gave its report, Jim rose to propose that the Secretary be instructed to caste one ballot in favor of the proposed slate of officers, and that motion was unanimously carried. I was Secretary at the time and to have some fun with Frank O'Brien, who was the new President, I wrote Frank a week or so later to say, with regret, that I had forgot to cast the single ballot within the statutory time limit and that under New York law he was therefore not validly in office, citing many fictitious legal authorities. Frank called Jim to find out if this was so and Jim, not to let Frank off too easily, said that Frank was *functus officio, i.e.*, out of office. But it didn't take Frank long to realize he was having his leg pulled.

Jim was always a delight to be with. He will be remembered with affection and we shall miss him.

Kenneth H. Volk
President, MLA (1990–1992)

John Sims, my mentor, introduced me to Jim Higgins on my first trip to New York for an MLA meeting in 1956. Perhaps because Jim and I were both associates in our firms, we became fast friends and occasionally had a beverage or two together. We maintained our relationship through his final illness. In one of our first conversations, Jim, who had just returned from a trip to India, enthralled me with his stories, including the fact that he had to register and be certified as an alcoholic in order to get a drink legally. I was much impressed.

In 1969, when he served as President of our Association, we were in Tokyo for a Comité meeting. Through the influence of my father, a newspaper man, we were invited to the office of the Associated Press in Tokyo, where we hoped to get international publicity for the CMI, Higgins, and Kirlin, Campbell & Keating. I am not sure what coverage we received, but,

after the meeting with some very nice gentlemen from the A.P., we decided we would go to a tea house (or perhaps a bath house) in downtown Tokyo. We hailed a cab outside of the building where the A.P. office was, and showed the address of the establishment to the driver, who refused to take us. We hailed another cab and got the same result. After ten minutes of bewilderment, we finally learned that the place we desired to go was directly across the street from the building where the Associated Press was headquartered. Since he claimed it was all my idea, Jim never let me forget the experience.

Jim was a fine lawyer, a gentleman, and a good friend, and I will miss him.

George W. Healy, III
President, MLA (1992–1994)

Each of us who knew him should be very thankful for the productive life of the twenty-sixth President of The Maritime Law Association of the United States, James J. Higgins. Jim provided leadership to the Association by serving as Secretary from 1961 until 1966, Vice President from 1966 to 1968 and President from 1968 to 1970. Since that time he was willing to continue his service to the Association as the Parliamentary Aide and in numerous other meaningful capacities.

Jim was always most generous with me by sharing his time and advice. During my term as First Vice President, and then as President during 1996 to 1998, he would often call and share his thoughts with me. However, he was always very careful to phrase them in such a way that they were merely his "reflections" and that he did not wish to influence me unduly. However, his comments, that were usually very direct, were always constructive and given in the true spirit of helpfulness.

Often, my contemporaries and I shared experiences that we had during our younger days with Jim Higgins. We each had some humorous events to relate. However, the underlying theme behind these comments was the knowledge that Jim was attempting to be helpful to us as lawyers and persons.

I recall most vividly, early in my career, at one of the P&I Association's counsel meetings, that Jim and Pat Higgins singled out Anne and me to be invited to dinner as their guests. At that time, he was Immediate Past

President of the MLA and I was just beginning. It was a very generous and thoughtful gesture and I appreciated it then ... and now. I am sure that many others share such similar instances.

During the following years, it was my pleasure and privilege to get to know Jim well. His traits as a maritime lawyer and as a leader committed to The Maritime Law Association of the United States greatly enhanced the legacy of each of us and to The Maritime Law Association of the United States.

We shall miss him.

James F. Moseley
President, MLA (1996–1998)

I had to good fortune to know the late James Higgins for over 30 years, both as a fellow member of the Association and, at times, as a participant in some of the legal matters and cases that passed between our mutual firms. As a fellow New Yorker and a graduate of the same law school as Jim, I am indeed saddened by his passing. The Association has not only lost a firm and provocative voice in the matters of the Association but also an interesting and extremely humorous gentlemen.

Most of my activities with Jim arose in the last 10 years when I had the opportunity to spend a substantial amount of time at the offices of Kirlin Campbell & Keating in connection with a litigation with one of his younger partners that had been ongoing for many years. During the occasionally heated discussions regarding the testimony of the various witnesses, Jim would always find the occasion to pass by the deposition room and drop in. Thanks to his warm Irish charm and, at times, pointed and extremely colorful comments, whatever the incipient problem was seemed to have been resolved. All concerned would have a fine discussion unrelated to the case which assisted the participants by making them feel better as the beneficiaries of Jim's well chosen and pithy comments.

As a younger member of the Association, I remember vividly the dinners in New York under Jim's tutelage as President. One of these evenings included the stirring sounds of the New York Police Emerald Society Pipe Band introducing the members of the Association with the tunes of the Garyowen as we all assembled for dinner at the Commodore Hotel, a place

long remembered by the older members.

Jim was always noted for his ability to turn an apt phrase and to diffuse many difficult situations with his fine Irish wit. The Association has lost a fine gentlemen and someone whose 'Higginsesque' comments will long be remembered by those of us who had the opportunity to come in contact with Jim and to be the beneficiary of his thoughts.

Howard M. McCormack
President, MLA (1998–2000)

Jim Higgins was one of the true giants of the Maritime Law Association. His contributions were many since he served as Committee Chair, Membership Secretary, Secretary, Vice President and, of course, President of the Association. In addition, for as long as I can remember, he was the official Parliamentarian for the MLA.

While his professional contributions to the Association were extensive, what made him truly memorable was his charm and his wit, which endeared him to all those who knew him personally, and to those whose only acquaintance with him was by listening to his comments at various MLA meetings. Whenever Jim Higgins rose to his feet, everyone perked up because they knew that, whatever he had to say, it would be interesting or witty, or both.

From a very personal standpoint, I will never forget the kindness he showed me as a young lawyer when I served on one of his committees. He went out of his way to show me the ropes and welcome a young lawyer into the fold. To be treated in such a manner by a lawyer of his eminence and stature meant a lot.

With his high professional skills, unfailing courtesy, and a great sense of humor, Jim Higgins epitomized as much as anyone what the MLA is all about. I'm sure I speak for all those who knew him when I say that we will miss him sorely, but we will never forget him.

William R. Dorsey, III
President, MLA (2000–present)

COMMITTEE ON CARRIAGE OF GOODS
CARGO NEWSLETTER NO. 37, FALL 2000

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

STRING STRANGLES APPELLATE JURISDICTION …

Plaintiffs, alleging cargo damage, brought an *in rem* action against a vessel, its owner and an NVOCC. Defendants (the vessel and its owner) moved to dismiss based on a forum selection clause in the bills of lading. The bills of lading, save one, were issued by a non-party to the action. With respect to its *in rem* cause of action, plaintiff accepted a Club letter of undertaking.

The court considered a motion to dismiss pursuant to Rule 12(d). In opposing the motion to dismiss, plaintiffs asserted that the bill of lading did not specifically include the vessel and that German law (the forum stated in the clause) did not recognize actions *in rem* against vessels nor did it allow maritime liens for cargo loss, damage and/or general average contribution. The court, however, found the forum selection clause to be "broad" enough to cover *in rem* claims.

The court also considered the validity of the clause under COGSA, noting its *prima facie* validity and the plaintiffs' burden of establishing that enforcement would lessen the carrier's obligations under COGSA. Although plaintiffs contended that enforcement of the clause would deprive them of their substantive rights because German law did not recognize *in rem* actions, the court stated it was not persuaded that litigation in Germany would lessen defendants' liability or deny plaintiffs' statutory remedy provided by COGSA as Germany would apply the Hague-Visby Rules. While the court recognized that an *in rem* action is a substantive right guaranteed by federal law, it referred to "present-day commercial realities and expanding international trade" as support for enforcement of the clause, absent a strong showing that it should be set aside. (Citing *Bremen v. Zapata*, 407 U.S. at 15).

The court went on to distinguish a case in the same District Court (*M/V KASIF KALKAVAN*, 989 F.Supp. 498, S.D.N.Y. 1998) where the unavailability of *in rem* proceedings prompted a district court to deny enforcement of a similar clause. Emphasizing the Club letter of undertaking, the court stated that plaintiffs had entered into a private security agreement in which they gave up the right to arrest the vessel. The court further noted that *KASIF*

KALKAVAN did not involve accepting a letter of undertaking and, finding "no reason to believe that the chosen forum, namely the courts of Hamburg, will not give effect to the private security agreement adopted by the parties," the court found the clause enforceable and dismissed.

On reargument, the court modified its decision granting plaintiffs the right to have the case reopened "for purposes of determining any claim they may have that the Hamburg, Germany Judgment is unenforceable under the criteria set out in" the *M/V SKY REEFER*. Plaintiffs appealed.

In a Summary Order not published and not to be cited as precedential authority, the Second Circuit found itself "without appellate jurisdiction," referring to the District Court's May 12, 1999 Order with respect to reopening the matter, stating that no "rights and liabilities of the parties" had yet been determined and also noting that the claim against the other defendant was still pending.

Reed & Barton Corp. v. M/V TOKIO EXPRESS, 1999 AMC 1088 (S.D.N.Y. 1999), *appeal dismissed*, No. 99-7697 (2d Cir., April 26, 2000) (unpublished summary order not to be cited as precedent)

MOVING ALONG IN THE LAND OF *STARE DECISIS* …

The Eighth Circuit had a rule that unpublished opinions were not precedents and parties generally should not cite them. (*Newsletter Editor's Note*: Other federal circuits and districts have similar rules, *i.e.*, that decisions may be in the form of summary orders, not to be published or cited as precedential authority, etc.; *see above*.)

In a taxpayer's suit, the taxpayer's argument had previously been rejected by the Circuit Court in an unpublished opinion. She argued that the court was not bound by that ruling, referring to the court's own local rule. However, the court refused to apply the rule, finding it unconstitutional and reaching back to Blackstone's Commentaries. In finding that precedent binds, whether published or not, the court stated it was not adopting a rigid doctrine of adherence, noting that cases could be overruled. At the same time a convincingly clear explanation of the reasons for doing so would be required: "In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds."

Anastasoff v. United States, No. 99-3917 (8th Cir., Aug. 22, 2000)

CHARTERERS GET A RHUMB LINE …

A chartered vessel was ordered to take the Great Circle route, as recommended by a routing service, on a voyage from Vancouver to Japan. The Master declined to accept and took the rhumb line route. As a result, the voyage took longer and charterers deducted from hire. The matter was brought to arbitration with charterers focusing on a charter party provision requiring the captain to prosecute voyages with "the utmost dispatch" and to be under the "orders and directions of the charterers as regards employment and agency." (Clause 8) The charter also incorporated the Hague Rules.

The majority of arbitrators decided in favor of charterers, considering a "sketchy" statement from the Master where he explained he had taken the southern route because the vessel had suffered unspecified weather damage on the northern route some months earlier. The majority further decided that "navigation" in the context of a defense under the Hague Rules could not be considered an "error in navigation" as it constituted part of the planning of the voyage.

In a subsequent appeal to the High Court, the court disagreed, stating that voyage planning was a "central part of the proper navigation of a ship." Thus, it held there was no breach of clause 8. The court went on to state the owners would still succeed as they would be permitted to rely on the Hague Rules' exception of "error in navigation."

On appeal to the Court of Appeal, the court held the Master was obliged to proceed with utmost dispatch without deviation and operate the ship in accordance with charterers' orders. Nevertheless, neither obligation displaced the right and responsibility of the Master in matters of navigation. The court went on to find the arbitrators were wrong as a matter of law in holding that owners' exemption under the Hague Rules based upon the error in navigation defense did not, by virtue of the wording of the Article, depend upon questions of reasonableness. The court agreed that navigation includes decisions taken during voyage planning and that the Master's decision to take the southerly route was a decision made for the safety of the vessel and thus was a decision as to navigation.

Whistler Intl. Limited v. Kawasaki Kisen Kaisha Ltd. (THE HILL HARMONY), 2 Lloyd's Report 209 (1999)

WHEN DOES THE CLOCK START RUNNING? …

Plaintiff brought an action for cargo damage. The parties apparently were the NVOCC and the actual carrier. The actual carrier moved to dismiss the complaint and cross-claim of the NVOCC based on a time bar. The plaintiff filed a Notice of Discontinuance of its claim against the actual carrier and the court went on to consider the motion to dismiss the cross-claim.

In considering the motion papers, the court noted that the parties had submitted a number of matters outside the pleadings, but declined to convert the motion into one for summary judgment. Based upon the pleadings alone, the court noted the time bar defense was asserted on the basis of the complaint's allegation that the container had arrived in Tokyo on or about September 7, 1998. Initially, the court questioned whether COGSA would apply to the timeliness of the cross-claim seeking indemnity. Even if COGSA applied, the court noted that the actual carrier's assumption that the date of delivery was the date when the goods should have been delivered, *i.e.* the date of arrival, was "too facile." Noting the date when goods should have been delivered should be determined from the bill of lading, the court pointed out the pleadings did not have the bill of lading attached. Accordingly, it was impossible to determine from the pleadings when the goods should have been delivered.

The court went on to note that even if the goods had arrived on September 7, 1998, the cross-claim did not allege that the missing goods were not in fact delivered subsequently (which appeared to be the case). As the actual carrier had not shown that the goods were actually delivered more than one year before the cross-claim, the court could not conclude that the cross-claim was untimely. The motion was denied.

Mitsui Marine Fire & Ins. Co. Ltd. v. Direct Containerline, Inc., No. 99-9461 (S.D.N.Y., March 6, 2000) (Kaplan, J)

TROUSERS TOSSED; POLO PROVES PROPRIETARY INTEREST.…

While en route from the Dominican Republic to Florida, a cargo container loaded with 4,643 pairs of men's pants was lost overboard from a vessel in rough seas. Cargo underwriters paid $197,907.80 and pursued subrogation rights against the vessel owners in a three-count complaint, asserting claims for breach of contract, bailment and negligence.

The vessel owners moved for summary judgment on the contract claim on the ground that plaintiffs did not have standing to sue because they were

not named in the bills of lading. The District Court granted the motion as to the contract claim and further ruled that the bailment and negligence claims were barred because they were pre-empted by COGSA.

On appeal the Eleventh Circuit upheld the District Court to the extent that it agreed that COGSA provided the cargo interests with an exclusive remedy. The appellate court recognized that while the statute was silent as to its pre-emptive scope, the fact that COGSA governed "during the time after cargo is loaded and before it is removed from the ship," supported the implication that COGSA superceded other laws when it applied. The Circuit Court also recognized that while COGSA claims are hybrids born of elements from both contract and tort, this does not change the fact that the resulting claim is a "unitary statutory remedy, rather than an array of common law claims."

On the issue of plaintiffs' standing to sue, the Eleventh Circuit reversed the District Court. The appellate court held that even though plaintiff was not named in the bill of lading, the terms and conditions on the back of the bill evidenced a clear intent to include the plaintiff — as the "owner of the goods" — as a beneficiary. The court also accepted plaintiff's theory that well established principals of maritime law grant an owner of lost or damaged goods standing to sue based upon its proprietary interest in the goods even if the owner is not explicitly named in the bill of lading. The court found that the record, though "regrettably sparse," contained sufficient evidence of plaintiffs' ownership of the goods.

Polo Ralph Lauren L.P. v. Tropical Shipping & Const. Co., Ltd., No. 97-01720 (11th Cir., June 21, 2000)

SPLIT SHIPMENT SURVIVES TIME BAR …

While en route from Dar Es Salaam to Baltimore, an ocean carrier noticed that a containerized shipment of red palm oil had begun leaking and removed the container from the vessel at Felixstowe to identify the cause of the leakage. Approximately one-half of the cargo was transferred into an empty container. The original container was shipped to Baltimore and delivered to the consignee in June of 1998. The second container was misplaced and then forwarded to Baltimore aboard a second vessel which arrived some four months later, on October 3, 1998.

The ocean carrier moved for summary judgment against a suit filed on October 28, 1999 on the ground of time bar under §3(6) of COGSA. The ocean carrier argued that the case was time barred in June 1999, one year after

the first container was delivered or, alternatively, on October 3, 1999, the anniversary of the second container's discharge. The consignee argued that delivery was not effective until November 5, 1998, the date it became aware of the arrival of the second shipment. Secondarily, the consignee argued that the ocean carrier was estopped from asserting the statute of limitations defense on the ground that it was misled by the ocean carrier into believing that the time bar defense would not be used or that time would be extended.

The court, by United States District Judge Denise Cote, denied the ocean carrier's motion for summary judgment. Judge Cote noted that there was "no clear precedent governing the unusual fact situation at hand" where delivery under a single bill of lading was made on two separate dates, and concluded that the statute ran from the date of the delivery of the second container.

The court went on to find a factual dispute existed as to when the second container was "delivered" for purposes of § 3(6) and held that "[e]ffective delivery requires not only the discharge of the goods from the vessel, but also notice of the discharge and a reasonable opportunity for the inspection or removal of the goods." (Citing various judicial and secondary sources as precedent).

> While [the ocean carrier] offers evidence of discharge, it does not offer evidence of notice. Thus, there exists an issue whether [the ocean carrier] provided, for the second container, the requisite notice and the opportunity to inspect to [the consignee] before October 28, and consequently, as to whether [the] claim is time barred.

As to the issue of estoppel, the court also found an issue of fact existed as to whether representations by the ocean carrier may have "lulled the plaintiff into a false sense of security and so induced him not to institute suit in the requisite time period." The court found that a declaration submitted by a representative of the consignee stating that she had relied upon the ocean carrier's assertions that the claim would be settled was sufficient to raise an issue of fact as to whether the consignee was misled into delaying suit.

Universal Ruma Co. v. Mediterranean Shipping Co., S.A., No. 99-10880 (July 17, 2000) (Cote, J.)

COURT BAGS CARRIER ON HUNG JACKETS …

The ocean carrier received three forty-foot containers loaded with men's jackets for shipment from the Dominican Republic to Florida. When delivered to the plaintiff, most of the jackets were destroyed or unusable.

In the ensuing litigation, the issue presented was whether the ocean carrier was entitled to limit its liability to $1,500 by reason of COGSA's $500 per package limitation. The ocean carrier argued that each of the three forty-foot containers was a "package" for limitation purposes because the bills of lading each specified the quantity as "1" in the column designated for the information pertaining to quantity. Also, boilerplate language on the reverse side of the bill of lading provided that the carrier's liability was limited to $500 per container when the container was stuffed by the shipper and the shipper did not declare an excess value.

The court relied upon the Eleventh Circuit precedent set forth in *Hayes-Leger Associates, Inc. v. M/V ORIENTAL KNIGHT*, 765 F2d 1076 (11th Cir. 1985) as the test for determining whether the container or some other cargo unit was the relevant COGSA package. The test, which the *Hayes-Leger* court derived from the Second Circuit's decision in *Binladen BSB Landscaping v. M/V NEDLLOYD ROTTERDAM*, 759 F2d 1006 (2d Cir. 1985), adopted four basic principals for applying the COGSA package limitation to container cases:

1. the bill of lading is the "touchstone" of such analysis;

2. the meaning of "package" defines a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods;

3. since the container is functionally part of the vessel, the container cannot be a "package" unless the parties clearly agree to that effect and at least so long as the container's contents and the number of packages or units are disclosed; and

4. absent an agreement, goods placed in a container and described as not separately packaged will be considered goods not shipped in packages.

In the case at hand, the court applied these principals and found that each of the men's jackets and not the container was the COGSA package. The facts were uncontested that each unit of men's jacket was placed on a hanger and sealed in a polyethylene bag. Each unit was then placed in a specifically-designed garment-on-hanger container furnished by the ocean carrier. The court cited Judge Sofar's decision in *Marcraft Clothes, Inc. v. M/V KUROVE MARU*, 575 F.Supp. 239 (S.D.N.Y. 1983) as analogous. In *Marcraft*, each of

4,400 individually packaged men's suits wrapped in a plastic bag after having been placed on a hanger constituted a COGSA "package" rather than the entire container.

Macclenny Products, Inc. v. Tropical Shipping and Constr. Co., Ltd., No. 98-9137 (Cir. Ct., 15th Jud. Cir., Palm Beach County, Florida, Aug. 11, 2000)

VIRGINIA STEVEDORE HAS TASTE FOR KIM CHEE; COURT PUTS IT ON THE MENU …

Underwriters subrogated to the consignee's claim for damage due to alleged negligence in the handling of a printing press sued the vessel *in rem*, the vessel's owner and the discharging stevedore for damages in the amount of $425,000. The printing press had moved aboard the vessel from LaSpezia, Italy to Norfolk, Virginia, on a flat-rack container. Subsequent to discharge at Norfolk, the stevedore transported the flat rack on a chassis to a shed on the pier. While maneuvering the chassis and flat rack into a slot in the shed, the flat-rack container overturned causing damage to the printing press.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §636(c)(1) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. The Magistrate Judge heard the following motions: (1) the vessel owner's motion to dismiss the *in rem* claim against the vessel and the *in personam* claim against it based upon a Seoul, Korea forum selection clause in the bill of lading; (2) the stevedore's motion for summary judgment, claiming the benefit of the ocean carrier's forum selection clause by way of the Himalaya Clause; and (3) the plaintiff underwriter's motion for partial summary judgment as to the issue of defendants' liability.

The court granted the motions of the vessel owner and the stevedore and ruled that it was without jurisdiction to rule on the plaintiff's motion for summary judgment. The court dismissed the *in rem* claim against the vessel because the vessel had not been served or arrested within 120 days of the filing of the complaint and there was no prospect of the vessel coming into the court's jurisdiction prior to the scheduled trial date. The complaint against the vessel owner was dismissed on the basis of the exclusive forum selection clause in the bill of lading. The court relied upon the *SKY REEFER* case and its progeny and found that "the substantive law of Korea [would] not reduce the carrier's obligations to the cargo owner below what COGSA guarantees."

The court also dismissed the complaint against the Norfolk-based stevedore on the ground that the stevedore was protected by the bill of lading's

Himalaya Clause notwithstanding that the term "stevedore" was not specifically mentioned as an intended beneficiary of the clause:

> This Himalaya Clause expressly extends [the carrier's] benefits to any agents, servants or independent contractors performing any part of the carriage. Therefore, [the stevedore] was covered by the Himalaya Clause as long as it was performing part of the carriage.

The court presumed that the damage to the printing press occurred when the stevedore attempted to move the cargo into the stowage shed at the pier and held that this took place prior to either actual or constructive delivery to the consignee and within the carrier's obligations under the Harter Act.

The court found that because the stevedore was not opposed to enforcement of the forum selection clause and because the clause was binding on the plaintiff, the clause constituted a "benefit" to which the stevedore was entitled as a third-party beneficiary. The court ruled that the proper forum for the dispute was Seoul, Korea and that it, therefore, lacked subject matter jurisdiction to rule on the plaintiff's cross-motion for partial summary judgment on the issue of liability.

M.C, Watkins v. M/V LONDON SENATOR, No. 2:00-207 (E.D. Va., Sept. 6, 2000)

COURT HOLDS FOR NEW YORK CUT, NIXES GUMBO …

Plaintiff sued an ocean carrier who then impleaded the stevedore/terminal operator. The bill of lading included a provision allowing the plaintiff to sue in the U.S. District Court for the Southern District of New York. The ocean carrier and terminal operator moved to transfer the dispute to Louisiana.

The court considered the choice of forum provision in the bill of lading and, after noting the defendants did not argue that it was unenforceable, found it to be enforceable. In considering the relevant factors, the court upheld the plaintiff's choice of forum, noting that the plaintiff was a New York corporation, witnesses from Connecticut would be called (even though the incident involved Louisiana) and most of the evidence would be in the form of documents. Stating that it was experienced with maritime law, the court stated the interests of justice and efficiency required the case remain in New York. In a footnote, the court noted the amount in controversy was $60,000 and stated it would be patently unjust and inefficient to require the

hiring of new counsel, extending discovery to educate new counsel and force plaintiff to bear the cost of litigating the case in a foreign state.

The court also found unpersuasive defendants' arguments that other cases were pending in Louisiana where the same defense strategy would be used and that the Louisiana courts are more familiar with Hurricane George than were New York courts. The motion to transfer was denied.

Louis Dreyfus Corp. v. M/V MSC Lima, No 99-933 (S.D.N.Y., Oct. 4, 2000) (McKenna, J.)

NOTIFY PARTY UNINVITED TO PARTY

Plaintiffs settled their cargo damage claim with both defendants. Each had issued its own bill of lading. The court then considered a motion by the ocean carrier to dismiss the co-defendant's cross-claim on the basis of a forum selection clause in the ocean carrier's bill of lading.

The court noted the ocean carrrier's bill of lading included the co-defendant as a notify party; however, it found the co-defendant was not to be a party to that bill of lading. While forum selection clauses are generally enforceable against parties to the bill of lading, the clause will not typically cover non-parties unless the parties are so closely related to the dispute that it becomes "foreseeable" that the party will be bound. The court found the relationship between the co-defendant and the plaintiffs did not warrant an expanded application of the forum selection clause. The court also noted that the ocean carrier's bill of lading was not a through bill of lading which would govern transportation throughout and rejected the argument raised for the first time in reply papers that the co-defendant's settlement was that of a volunteer.

Maritime Ins. Co. v. Midwest Intermodel Serv., Inc., No 99-9465 (S.D.N.Y., June 30, 2000) (Stein, J.)

PARTICIPATION REACHES POINT OF ELASTICITY …

The U.S. District Court in Puerto Rico considered a motion to dismiss on the basis of a forum selection clause in connection with a suit for damage to rebars. Plaintiffs had arrested the vessel and accepted a letter of undertaking as security. Defendants in turn argued that plaintiffs had harmed them by tortious and negligent interference with the discharge of the cargo and requested the court to order plaintiffs to provide counter security.

As to the motion to dismiss, the court noted that it was "well-decided" that foreign forum selection clauses are *prima facie* valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances. The court considered whether the motion should be brought pursuant to Rule 12(b)(3) or 12(b)(6), where the defense should be raised in the first responsive pleading. On the other hand, if the motion should be brought under 12(b)(1) for lack of subject matter jurisdiction, it could be brought at any time. The defense had not been raised in the answer.

The court found that the defense should have been raised in the answer. The court noted that defendant had participated in discovery but that fact alone would not support dismissal. Rather, defendant would be deemed to have waived the defense if actions were taken inconsistent with it, caused delay, or if other parties would be prejudiced.

Noting that the defendants waited over a year and a half before filing a motion to dismiss for improper venue, the court felt "if nothing less, this delay has made an easy decision difficult. If not for the long delay, the court would uphold the forum selection clause ...." However, the court went on to note the activities conducted by defendants in addition to the passage of time. The defendants had filed a counterclaim, had requested that plaintiffs provide counter security, and had participated in discovery. "These are not actions consistent with its right to a different forum. As a result, (defendants) seek to prejudice this Court as well as Plaintiffs. With enough weight a steel bar will bend. Through its actions, (defendants) have bent the bar in this case and waived (their) right to choice of forum."

Mateco Inc. v. M/V Elli, No. 98-1525 (D. P.R., July 10, 2000) (Perez-Gimenez, J.)

SHIPPER SHANGHAIED ON SURVEYOR'S SHALLOW STATS …

Plaintiff, an oil trading firm, sued defendant tanker owners for breach of a contract of carriage, alleging that leakage in the vessel's steam coils increased the sediment and water (S&W) content in a cargo of fuel oil beyond what was allowed in the delivery contract with its customer. Plaintiff claimed damages totaling $374,953 as the result of the alleged breach. Plaintiff then sold approximately 76,000 metric tons of 1% sulfur fuel to another trader who had a delivery contract with a petroleum company based in Taiwan. The delivery contract with the petroleum company had specified a maximum S&W rate of 0.5%.

The cargo was loaded at the Port of Los Angeles and was comprised of several different parcels of oil products from four different sources. Under the delivery contract for the cargo, it was permissible for the cargo to be a blend of different oil products so long as the delivered cargo was a homogenous mixture conforming to the petroleum company buyer's specifications.

While en route from Los Angeles to Taiwan, plaintiff issued instructions to blend the various oil products which consisted of: a low sulfur waxy crude from Singapore; Peruvian fuel oil; light cycle oil; residual fuel oil; and cutter stock. Defendants carried out the blending instructions immediately prior to the vessel's arrival at Kaoshiung.

Plaintiff contended that the vessel's extraordinary consumption of fresh water was conclusive proof that the steam heating coils in the vessel's cargo tanks were leaking and that this condition accounted for the increased S&W in the cargo at discharge. Defendant contended that any leaking coils were "blocked off" prior to loading and that the vessel's large consumption of fresh water was attributable to boiler tube leaks not associated with the cargo tanks.

The court dismissed plaintiff's complaint in its entirety, finding that plaintiff had failed to meet its burden of proof under COGSA of demonstrating that the oil products were in good order and condition at loading. The court also found that plaintiff failed to substantiate any damages properly payable by the vessel owners.

Specifically, the district court found plaintiff's surveyor's test results for S&W content of the oil cargo at loading to be "unreliable." The court observed that the tests performed by the plaintiff's surveyors "represent only mathematical estimates of the S&W percentage of the cargo in total" and discounted the results because "the reliability of theoretical testing is largely dependent on the representativeness of the samples used."

Based upon expert testimony at trial, the court noted that the low sulfur waxy residual (LSWR) contained elements "which were likely to mask the water content of the full cargo" and that the cutter stock similarly was likely to contain "reclaimed waste lube oil from automobiles and trucks which has inherent sediment content including dirt, iron filings, rust ... " which, like the wax in the LSWR, masked the true water and sediment content of the oil.

The court credited testimony of the vessel's master and crew that the steam heating coils were inspected regularly for leaks and ruled out the heat-

ing coils as a source of the increased water content in the cargo. The court also found it significant that "no free water was reported in any cargo tank" either during the voyage or upon discharge of the cargo. The facts that no free water was observed in the cargo and that the heating coils were capable of heating the cargo sufficiently to effect a complete discharge of the oil, bolstered the court's conclusion that the heating coils were not the source of the S&W variance. Moreover, the court found that the receiver's claim of high S&W content to be 'inherently suspect" and inconsistent with the receiver's conduct of its willingness to combine the allegedly defective oil with the presumably non-defective oil already in its shore tanks.

Westport Petroleum Inc. v. M/V OSHIMA SPIRIT, 111 F. Supp 2d 427 (S.D.N.Y., Sept. 5, 2000)

FREIGHT FORWARDER MAKES RESERVATIONS; SHIPPER PICKS UP TAB …

During an ocean voyage, a transformer which had been negligently lashed to its flatrack broke loose and crushed a laser machine. The subrogated underwriter of the laser machine sued the ocean carrier, the shipper and the freight forwarder. The ocean carrier filed a third party action against the shipper for indemnification and clean-up costs. The shipper filed a fourth party action against its forwarder.

After trial, the court awarded a package limitation for the laser machine against the ocean carrier and damages to the ocean carrier from the shipper for clean-up costs, and also held the shipper liable for the broken laser on the basis that the shipper was directly liable to the carrier for the spilled cargo and directly liable for the broken laser.

The District Court went on to find the forwarder liable to the shipper in indemnity for both the spilled cargo and the broken laser on the basis that the forwarder contracted that it would give "door to door…close care and supervision" to the cargo. On this basis, the court found any negligence of the stevedore in lashing the transformer was imputed to the freight forwarder.

On appeal by the freight forwarder, the court noted the distinctions between a freight forwarder and a carrier. It noted that NVOCCs issue bills of lading. If anything happens to the goods during the voyage, NVOCCs will be liable to their shippers because of the bills of lading they issue. Freight forwarders, on the other hand, simply facilitate the movement of cargo to ocean vessels. They generally make arrangements for the movement of cargo

at the request of clients and are vitally different from carriers such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does *not* issue bills of lading and is, thus, not liable to a shipper for anything that occurs to the goods being shipped.

By analogy, the freight forwarder is hired to act as a "travel agent" for the transformer. It set things up and makes reservations but does not engage in any hands-on heavy lifting. Accordingly, the court found that the forwarder's statement that the shipment would receive close care and supervision was "mere puffing" and did not transform the forwarder into a carrier. Having reasonably selected a recognized, capable stevedore, the freight forwarder was not liable for the negligent actions of that stevedore. The indemnification claim against the freight forwarder was reversed and remanded.

Prima U.S. Inc. v. United Arab Shipping Co., No. 99-9025 (2d Cir., Aug. 24, 2000)

COMMITTEE ON LIMITATION OF LIABILITY
Report on *Lewis v. Lewis of Clark Marine, Inc.*

by Mary Elisa Reeves*

On May 30, 2000, the U.S. Supreme Court granted *certiorari* in *Lewis v. Lewis & Clark Marine, Inc.*, a case involving the Limitation of Liability Act and Rule F. The issue is whether a district court should retain jurisdiction in a limitation proceeding even in a single claimant adequate fund case where the claimant does not demand a jury in the state court action. The District Court lifted the stay so that the claimant could proceed in state court. The 8th Circuit reversed, finding that the "saving to suitors" clause grants claimants a choice of remedies, not a choice of forum.

In reaching its decision, the 8th Circuit discussed the shipowner's right to seek exoneration, a right articulated in Rule F but not specifically referenced in the Limitation of Liability Act. In his petition for certiorari, the claimant argued that "by creating a cause of action for exoneration, … Rule F improperly exceeds the scope of rule-making authority conferred by the Rules Enabling Act."

The District Court's Opinion can be found at 31 F. Supp. 2d 1164 (E.D. Mo. 1998) and the Eight Circuit's Opinion at 196 F.3d 900 (8th Cir. 1999). Oral argument before the Supreme Court is scheduled for November 29, 2000 at 10:00. A representative of the Limitation of Liability Committee will be present at the argument.

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COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE
NEWSLETTER, FALL 2000

Editors: George N. Proios
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I. NEWS AND INFORMATION

Bumbershoot Policy Held Not to Cover Damage to Insured's Own Vessel from Normal Wear and Tear

Reliance Ins. Co. v. Keystone Shipping Co., 102 F. Supp. 2d 181 (S.D.N.Y. 2000)

In this case, four underwriters subscribing to a standard form Bumbershoot policy commenced a declaratory judgment action seeking a declaration that the Bumbershoot policy did not provide coverage for a claim made by the insureds, Keystone Shipping Company and Intercoastal Bulk Carriers (collectively "Keystone"). Keystone claimed that the damage to its own vessel, the ENERGY INDEPENDENCE, a dedicated coal carrier, was covered under the Bumbershoot policy. Specifically, Keystone asserted that it was entitled to be indemnified for more than $6,000,000, which it had paid to defend and settle an arbitration proceeding commenced by New England Power Company ("NEP"), who had purchased the ENERGY INDEPENDENCE from Keystone. It was NEP's position at the arbitration that the ENERGY INDEPENDENCE was sold to it out of class and in need of substantial repairs to the cargo holds.

The ENERGY INDEPENDENCE was built in the early 1980's by NEP and Keystone and launched in 1983. From December 1983 through September 1995, the vessel carried coal from various points in Virginia and Maryland to New England where the coal was delivered to NEP's coal burning power plaints. In 1989, Keystone and NEP entered into a charter party agreement. Under the charter, Keystone became the owner of the vessel and NEP the charterer. The charter included a buy-out provision in which NEP could terminate the charter and offer to purchase the vessel at a set price. NEP invoked this provision and the vessel was sold and delivered to NEP in September 1995. Post sale surveys of the vessel revealed extensive corrosion in the cargo holds requiring extensive repairs and renewal of steel.

NEP commenced an arbitration against Keystone, alleging that Keystone had breached the charter by failing to keep the vessel in class and in good repair. Keystone defended the action, claiming the vessel had been sold on an "as is" basis. After extensive arbitration proceedings, Keystone settled with NEP for $3,250,000. Keystone then submitted claims to its general liability, hull and P&I underwriters, as well as to Bumbershoot underwriters, seeking the amount it paid in settlement plus the cost of defending the arbitration proceeding. In all, Keystone sought approximately $6,000,000 from its Bumbershoot underwriters.

The insureds' general liability underwriter denied the claim, relying on the watercraft exclusion. The P&I underwriters also denied the claim, relying on their exclusion for damage to the hull of an insured vessel. Finally, the hull underwriters declined the claim on the ground that it was a "liability claim" and went on to suggest that coverage should be sought from the Bumbershoot underwriters. However, Bumbershoot underwriters also denied Keystone's claim on the grounds that the policy did not cover damage to the insureds' property, there was no occurrence under the policy, and the damage was not fortuitous since it had been the result of wear and tear and lack of maintenance.

At trial, Keystone relied upon the drop-down provisions of the Bumbershoot policy and argued that there was coverage pursuant to Clause(1)c of the Standard Bumbershoot Wording which provided that the policy would indemnify the insured for:

> All other sums which the Assured shall become legally liable to pay or by contract or agreement become liable to pay in respect of claims made against the Assured for damages of whatever nature on account of-
>
> (ii) Property Damage
>
> caused by or arising out of each occurrence happening anywhere in the world.

The definition of Property Damage contained in the Bumbershoot-Supplementary Clauses excluded property owned by the insured. But, the Supplementary Clauses also stated that the definition of Property Damage did not apply to liability arising out of ownership, charter, use and maintenance of a vessel. Thus, Keystone argued that the definition of Property Damage excluding vessels owned by the insured was inapplicable because the damage

to the ENERGY INDEPENDENCE had resulted from ownership, charter, use and maintenance of the vessel. Keystone, therefore, argued that Property Damage should mean damage to any property, even property owned by the insured.

Keystone also presented a unique theory in its effort to show an occurrence under the policy. Keystone argued, and presented evidence at trial through several expert witnesses, that the cause of the corrosion to the steel was not the result of normal wear and tear or lack of maintenance occurring over the life of the vessel, but had occurred over a four-month period due to a phenomenon known as microbially-influenced corrosion ("MIC"). MIC is a recognized phenomenon in coal-carrying railroad cars, in which microbes actually eat away at steel, causing corrosion at an accelerated rate.

Underwriters disputed the claim that MIC had caused the corrosion of the vessel on the grounds that Keystone's experts' analysis was not based upon recognized scientific analysis and that the vessel was in the condition one would expert of an 11 year-old dedicated coal carrier which had not been properly maintained.

In a 44-page decision, the court agreed with underwriters' position that the theory that MIC corroded the vessel was based on unreliable and unrecognized scientific analysis and testing. Moreover, the court found credible the underwriters' expert and documentary evidence showing the vessel had not been properly maintained. As a result, the court found that the damage was caused by normal wear and tear.

The finding that the damage to the vessel was the result of wear and tear and not MIC should have ended the case because it is well settled that lack of maintenance is not a fortuitous event. The court, however, went on to interpret the Bumbershoot policy to consider whether wear and tear could be covered under the policy. The court found the policy wording was ambiguous, and thus, considered extrinsic evidence such as the underwriters' expert's and the lead underwriter's testimony that the premiums were calculated based on the premiums of underlying liability policies only. Based on this evidence, the court held that the Bumbershoot policy was not intended to cover damage to the property while owned by the insured.

The decision is significant in several respects. First, in rejecting Keystone's theory that MIC caused the corrosion of the hull, the district court relied upon the principle set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), that the

methodology underlying scientific testing and theory must be recognized by the scientific community. In other words, "junk science" cannot form the basis of scientific conclusions. The case is also significant in that it stands for and confirms the principle that a Bumbershoot policy is intended to be a third party liability policy and is not intended to indemnify the insured for damage to his own property.

However, the decision is also cause for concern for underwriters in some respects. While the "Bumbershoot" policy has been used in the United States for many years, the incorporation of the amendments and supplementary clauses, which were added over time to address the changing nature of insureds' marine liabilities, has resulted in ambiguous and arguably conflicting clauses, as found by this court.

The court's finding of an ambiguity should place underwriters on notice of a potential for claims under a Bumbershoot policy for damage to insureds' own property, which was traditionally not considered covered under liability policies. Under the circumstances of the *Keystone* case, the court found it necessary to consider extrinsic evidence in order to resolve the ambiguity in favor of underwriters. In our experience, we have encountered various revisions to the traditional Bumbershoot policy which resolve many of the potential ambiguities created by the addition of the supplemental clauses, and in the context of litigation, eliminate the need to look to extrinsic evidence. Therefore, in light of the court's ruling, underwriters should seriously consider reviewing their Bumbershoot policies to address any ambiguities in order to avoid exposure to claims not intended to be covered under a liability policy, and specifically, damage to an insured's own property.

Finally, it should be noted that the decision is on appeal to the United States Court of Appeals for the Second Circuit.

Newsletter Editors' Note: The case was tried on behalf of underwriters by David H. Fromm and Timothy G. Hourican of Brown Gavalas & Fromm LLP, New York, New York. We are very grateful to David Fromm for his in-depth analysis of the case.

II. RECENT CASES OF INTEREST

Hull Policy Strikes, Riots and Civil Commotion Clause Excludes Coverage for Third Party Arson

Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 169 F.3d 43 (1st.

Cir. 1999)

A hull insurer refused to compensate the owners of a commercial fishing vessel destroyed by fire, asserting that the fire was either set by a third party, was an excluded event under the Strikes, Riots and Civil Commotion ("SR & CC") Clause, or was arson by the owners, and thus, was an excluded event under Massachusetts law. The insureds brought suit alleging the insurer's refusal to pay constituted a breach of the insurance contract and bad faith in violation of Massachusetts' consumer protection statute. The District Court dismissed the assured's bad faith claim, but held that the plaintiffs were entitled to recover under the hull policy's Perils Clause, which stated:

> Touching the Adventures and Perils which we, the said Underwriters, are content to bear and take upon us, they are of the Seas, Men-of-War, *Fire*, Lightening, Earthquake, Enemies, Pirates …and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel …or any part thereof, excepting, however, *such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy*….

The Court of Appeals affirmed dismissal of the bad faith claim, but reversed as to breach of contract, holding that fires intentionally set by third parties are excluded by the SR & CC Clause. Nothing in the language of that clause excluding coverage for "malicious acts" (construed to include third party arson) limits the exclusion to only those acts committed in the context of other co-listed events ("strikes, lockouts, political or labor disturbances, civil commotion, riots, martial law, military or usurped power"). While the Perils Clause protects against loss by fire, the SR&CC Clause excludes losses from third party arson. Thus, on remand, the jury must be permitted to determine whether the fire was deliberately set by a third party. In addition, plaintiffs' theory of arson would go to the jury on remand because the insurer had presented sufficient circumstantial evidence to establish the elements of the defense: (1) the fire was incendiary; (2) opportunity existed for agents or servants of the insured to set the fire; and (3) the insured had a motive to set the fire.

See Osvaldo Varane, Inc. v. Liberty Mutual Ins. Co., 284 N.E. 2d 923 (1972).

Tow Endorsement Held Warranty by Insured,
Not Exclusion from Liability

Commercial Union Ins. Co. v. Flagship Marine Svcs., Inc., 190 F.3d 26, 2000

AMC 1 (2d Cir. 1999)

A declaratory judgment action was filed by the insurer of a vessel assistance company seeking the declaration that the injury to the company's master while aiding another vessel was not covered, because the vessel being assisted was not the sort described in the policy's Tow Endorsement, which provided:

> In consideration of the rate and premium charged, it is understood and agreed that coverage is hereby provided for the towage of yachts up to 50 feet in length. The towage of yachts in excess of 50 feet is subject to prior approval of underwriters with additional premium to be agreed, if any.

The vessel under tow was admittedly a non-yacht over 50 feet in length. Focusing on the term "yacht" in the Tow Endorsement, as opposed to "vessel" elsewhere in the policy, the District Court concluded that the Tow Endorsement excluded coverage for towage of yachts over 50 feet in length, but not other types of vessels, regardless of size. However, the Court of Appeals reversed, holding that the Tow Endorsement constituted a warranty that the insured would tow only yachts less than 50 feet in length, rather than an exclusion from coverage that should be construed against the insurer. Because it is uniquely difficult for marine underwriters to assess their risks, having to rely on representations by insureds as to their vessels' condition and usage, warranties in marine insurance contracts must be strictly complied with, even if they are collateral to the primary risk. Under New York law, a breach of a warranty bars recovery; under Florida law, such breaches bar recovery if the warranty was material to the insurer's risk. Since the Court of Appeals found the warranty to be material, its breach precluded coverage, regardless of which state's law governed the interpretation of the policy.

Limitation of Liability Stay May, or May Not, Include Underwriters

Seabulk Offshore, Ltd. v. Honora, 158 F.3d 897, 1999 AMC 790 (5th Cir. 1998)

In a limitation of liability action following an allision between a vessel and a gas wellhead, the U. S. District Court for the Eastern District of Louisiana refused to extend a stay order to protect the shipowner's underwriters. After passengers aboard the vessel and the wellhead owner filed a separate action against the shipowner in the Southern District of Texas, the U.S. District Court for the Eastern District of Louisiana denied the

shipowner's motion to modify the stay order. The shipowner appealed and the wellhead owner intervened.

On appeal, the Fifth Circuit held that it had jurisdiction under 28 USCA §1292(a)(1) to hear the appeal of an interlocutory order modifying an injunction in a limitation of liability case, but that under the governing case law in the Circuit it would not exercise that authority if the order merely enforced or interpreted a previous injunction. The court concluded that denial of the shipowner's request to include its insurers in the stay order amounted to a "refusal to modify" rather than a mere interpretation of the injunction, thus allowing the court to exercise its appellate jurisdiction.

In balancing the competing interests of the parties in bringing a state court action on one hand and seeking limitation of liability on the other, the Court of Appeals has given itself latitude to forge rational and practical solutions instead of adhering to a rigid rule requiring a stay of direct actions against a shipowner's insurers. Thus, even though the court had recently held that insurers could be included in a stay order, this is not the only course available to the District Court to balance competing interests, as long as it achieves an "equivalent result." Finding no abuse of discretion in denial of the motion to modify, the Court of Appeals affirmed and remanded for further proceedings, stating that:

> the district court could choose to stay execution of the judgment against Seabulk's insurers on the first $727,000 of Seabulk's insurance policy (the stipulated value of the vessel and freight). Alternatively, …the court could choose to require the claimants to stipulate that Seabulk has a priority claim on the insurance proceeds. Under either alternative, the claimants could preserve their choice of forum rights as envisioned by the saving to suitors clause, without depleting Seabulk's liability protections.

Failure to Disclose Material Facts Voids Endorsement Adding Yacht to Policy

HIH Marine Services, Inc. v. Fraser, 211 F.3d 1359 (11th Cir. 2000)

A marine insurer brought a declaratory judgment action seeking the declaration that an endorsement adding a yacht to an insured's existing commercial charter policy was void due to the assured's failure to disclose material facts in its insurance application, including that the insured had not entered into a charter agreement with yacht's owner and did not have custody and control of the vessel at the time of the application. Affirming the District

Court's grant of summary judgment for the insurer, the Eleventh Circuit Court of Appeals held that under the doctrine of *uberrimae fidei*, material misrepresentations on an application for insurance void the policy. Misrepresentation, according to the court, is material "if it might have a bearing on the risk to be assumed by the insurer." Failure to disclose that a charter party had not been executed and that an insured had not taken custody of a vessel were material, especially in light of the insurer's earlier refusal to insure the yacht as a private vessel.

Cargo Not Required to Contribute in General Average and Is Indemnified for Salvage Contribution Where Shipowner Does Not Exercise Due Diligence to Make Vessel Seaworthy

Birmingham Southeast, LLC v. M/V Merchant Patriot, Case No. 498-007 (S.D. Ga., Savannah Division, June 15, 2000)

In a shipowner's limitation of liability proceeding, the District Court granted the motion of the cargo plaintiff/claimant for declaratory judgment that the shipowner was not entitled to receive general average contributions or benefits. The court also granted plaintiff indemnity for salvage payments and expenses incurred.

During a voyage from Brazil to Savannah with a cargo of steel products and part of a knocked-down steel mill, the vessel's main engine was twice shut down due to leakage from a failed pipe in the seawater circulating system. This shutdown caused loss of steerage and headway, resulting in cargo shifting, and eventually caused the crew to abandon ship. By the time the salvors arrived, a significant portion of the deck cargo had been lost overboard or damaged.

In an earlier order, the District Court had denied the shipowner's petition for exoneration from or limitation of liability, finding that the vessel was unseaworthy when it departed Brazil, and that the owner failed to exercise due diligence to make the vessel seaworthy prior to commencement of the voyage, since a proper inspection would have detected the defective pipe. [*See* 2000 AMC 1015]. That order was not appealed.

Under the governing bill of lading's New Jason Clause, the carrier was entitled to general average contributions even if it was negligent *unless* it was responsible for the damage under COGSA. The earlier ruling denying limitation of liability for want of due diligence implicitly established the owner's breach of the COGSA requirement that the carrier "shall be bound, before and

at the beginning of the voyage, to exercise due diligence to…make the ship seaworthy." 46 U.S.C. §1303. Hence, the shipowner was not entitled to general average contribution from the plaintiff, which could also recover reimbursement for its salvage contribution and indemnification for attorney's fees incurred in defending against salvor's claims. Although attorney's fees are not generally recoverable absent statutory or contractual authority, indemnification for attorney's fees and costs is proper where the Court finds the carrier to be responsible for the casualty. *See Complaint of Delphinus Maritima, S.A.*, 1982 AMC 796, 806 (S.D.N.Y. 1982).

Newsletter Editors' Note: Items for future issues may be submitted to George N. Proios, Lyons, Skoufalos, Proios & Flood, 1350 Broadway, New York, NY 10018; Gene B. George, Ray, Robinson, Carle & Davies P.L.L., 1650 The East Ohio Building, 1717 East 9th Street, Cleveland, OH 44114; Joshua S. Force, Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C., Twenty-Eight Floor, 909 Poydras Street, New Orleans, Louisiana 70112-1033

COMMITTEE ON MARITIME ARBITRATION AND MEDIATION

I. Overview by Donald J. Kennedy, Esq.*

The Arbitration and Mediation Committee unanimously approved four proposed amendments to the Federal Arbitration Act (FAA) at the meeting on October 4, 2000.

In considering what amendments to propose, we considered the following criteria:

a. Does the proposed amendment preserve party autonomy?
b. Does the proposed amendment limit the involvement of the courts?
c. Does the proposed amendment promote uniformity of law whether national or transnational?
d. Can the proposed amendment be limited to "maritime transactions"?

For each proposed amendment, specific statutory language has been proposed followed by explanatory "Notes" discussing an analysis of existing case law and the need for change. The amendments, in short, provide as follows:

Consolidated Arbitration. Under current law, the parties are presumed in many cases to object to consolidation unless all agree otherwise. The proposed amendment to 9 U.S.C. §4 reverses the presumption only in maritime transactions and closely tracks the corresponding provision of the Revised Uniform Arbitration Act.

Appointment of Second Arbitrator. Under current law, if one party to an arbitration agreement fails to appoint an arbitrator, the party demanding arbitration has to seek the assistance of the District Court to compel the appointment of the second arbitrator. The proposed amendment to 9 U.S.C. §4 permits the party demanding arbitration, without the intervention of the court, to appoint the second arbitrator if one has not been appointed within thirty (30) days.

Preserving Evidence in Maritime Transactions. Under current law, arbitrators are authorized to subpoena witnesses to give testimony at a hearing with the

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subpoenas subject to enforcement by the Federal Court for the district in which the hearing is held. The proposed amendments to 9 U.S.C. §7 would authorize arbitrators to issue a subpoena to any person to give deposition testimony, produce documents or provide access to material evidence, throughout the United States. A district court may enforce the subpoena or otherwise order a person to give a deposition.

Modification of Awards in Maritime Transactions. Under current law, arbitrators are not authorized to modify final awards on their own initiative or upon the application of either party. The proposed amendment to 9 U.S.C. §11 permits arbitrators to correct an award to eliminate a typographical, arithmetic or similar clerical error or omission in the award.

II. PROPOSED AMENDMENTS TO THE FAA, DATED OCTOBER 4, 2000

CONSOLIDATED ARBITRATION

The following amendment is proposed to The Federal Arbitration Act, 9 U.S.C. §4. Renumber existing §4 as §4(a) and adding new subsection (b).

(b) Consolidation of Separate Arbitration Proceedings in Maritime Transactions

(i) In one or more maritime transactions and except as provided in subsection (iii), upon motion of a party to an agreement to arbitrate, or to a maritime arbitration proceeding, the district court in the exercise of its admiralty jurisdiction may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(A) there are separate agreements to arbitrate or separate maritime arbitration proceedings between the same persons or one of them is also a party to a separate agreement to arbitrate or a separate maritime arbitration proceeding with a third person;

(B) the controversies subject to such agreements to arbitrate or arbitration proceedings arise in substantial part from the same maritime transaction or series of related maritime transactions;

(C) there is a common issue of law or fact creating the possibility of conflicting decisions in the separate maritime arbitration proceedings;

(D) in the event there is more than one agreement to arbitrate, they are similar and provide for the arbitration proceedings to be held in the same city; and

(E) the prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(ii) The court may order consolidation of separate maritime arbitration proceedings as to certain claims and allow other claims to be resolved in separate arbitration proceedings.

(iii) The court may not order consolidation of the claims of a party to a maritime arbitration agreement which prohibits consolidation.

Notes to proposed subsection 4(b):

1. This proposal is recommended because:

   (a) it avoids the possibility of inconsistent results from separate maritime arbitration proceedings;

   (b) it simplifies the arbitration process, thereby saving time and expense;

   (c) it is a development and refinement of the law consistent with the Revised Uniform Arbitration Act and the Rules of the Society of Maritime Arbitrators [SMA].

2. As noted in the National Conference of Commissioners on Uniform State Laws, Reporters Notes to Section 10, Consolidation of Separate Arbitration Proceedings, in the recently Revised Uniform Arbitration Act, multiparty disputes have long been a source of controversy in the enforcement of agreements to arbitrate. When conflict erupts in complex transactions involving multiple contracts, it is rare for all parties to be signatories to a single arbitration agreement. In such cases, some parties may be bound to arbitrate while others are not; in other situations, there

may be multiple arbitration agreements. Such realities raise the possibility that common issues of law or fact will be resolved in multiple fora or multiple proceedings, enhancing the overall expense of conflict resolution and leading to potentially inconsistent results. See III MACNEIL TREATISE § 33.3.2. Such scenarios are particularly common in construction, insurance, maritime and sales transactions, but are not limited to those settings. *See* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 481–82 (1987).

3. Charter party transactions are not exclusively between a registered owner of a vessel and a charterer. There are many types of charter parties including bareboat, time and voyage. It would not be unusual for an owner to charter its vessel to a charterer for a fixed period of time and for the charterer in turn to subcharter the vessel to a third party for a specific voyage. In the situation described above disputes may arise between the owner/charterer and/or between the charterer/subcharterer which involve common questions of law or fact.

4. The practice of consolidating two or more arbitration proceedings developed rapidly in the maritime area after the decision in *Compania Espanola de Petroleos v. Nereus Shipping*, 527 F.2d 966 (2d Cir. 1975) *cert. denied*, 426 U.S. 936 (1976), which involved a single arbitration agreement covering more than two parties. But the Circuit Courts thereafter refused to consolidate maritime arbitrations which arose under more than one agreement to arbitrate unless a State statute authorized consolidation. *See Weyerhaeuser v. Western Seas Shipping*, 743 F.2d 635 (9th Cir. 1984), *New England Energy v. Keystone*, 855 F.2d 1 (1st Cir. 1988), *Glencore v. Schnitzer*, 189 F.3d 264 (2d Cir. 1999).

5. There may be situations when the same person is a party to two or more arbitration agreements with identical contractual terms . . . as when an ocean common carrier issues bills of ladings to different parties on similar voyages at different times. These would not be regarded as related transactions. It is not intended that the language of subsection (b)(i) would apply to arbitrations arising out of similar events which do not otherwise constitute related maritime transactions.

6. The Society of Maritime Arbitrators revised its rules in 1994 to provide for consolidated arbitration, Section 2 of the revised SMA Rules provides for the consolidation of arbitration proceedings involving related contract disputes with others “arising from common questions of fact

and law." The SMA made its change to preserve consolidation, which simplifies the arbitration process, saves time and expense and avoids the possibility of inconsistent results from separate arbitration proceedings.

7. The Federal Arbitration Act (FAA) already recognizes the important role arbitration plays in "maritime transactions." Indeed, that term is the first one mentioned and defined in the FAA, 9 U.S.C. §1. The FAA also includes unique provisions for enforcement of admiralty provisional remedies in the context of an arbitration. 9 U.S.C. §8. Under current law the parties are presumed in many cases to object to consolidation unless all agree otherwise. The MLA proposal amends 9 U.S.C. §4 and reverses the presumption only in maritime transactions, which are defined in §1 to mean " . . . charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce if the subject of controversy, would be embraced within admiralty jurisdiction."

APPOINTMENT OF SECOND ARBITRATOR

The following amendment is proposed to The Federal Arbitration Act, 9 U.S.C. §4 by adding new subsection (c).

(c) Appointment of Arbitrator in Maritime Transactions

(i) In a maritime transaction where an agreement to arbitrate provides for each party to appoint an arbitrator but imposes no time limit for appointment of the second arbitrator, if the party demanding arbitration refers to this section in his notice to the other party of the appointment of the first arbitrator, and the other party within thirty (30) days after his receipt of the notice fails to give notice to the party demanding arbitration of the appointment of the second arbitrator, then thereafter at any time before the party demanding arbitration receives such notice of the appointment of the second arbitrator, the party demanding arbitration may appoint the second arbitrator and give notice to the other party of this appointment. The second arbitrator shall be a disinterested person with the same qualifications, if any, required by the arbitration agreement.

(ii) Notwithstanding anything contained in this subsection, in exigent circumstances a party demanding arbitration arising out of a maritime transaction may petition a United States district court

to exercise its admiralty jurisdiction by enforcing the arbitration agreement with an order directing the other party to appoint the second arbitrator on less than thirty (30) days notice.

Notes to proposed subsection 4(c):

1. This proposal is recommended because:

   (a) It would eliminate or substantially reduce the district courts' involvement in the appointment of arbitrators in "maritime transactions."
   (b) It would clarify and settle the law with respect to so called "default arbitration clause" in maritime transactions and make time of the essence in an arbitration clause calling for the appointment of an arbitrator within a specified number of days.
   (c) It would bring uniformity to the procedures for the appointment of arbitrators in "maritime transactions" in the United States.

2. Typically, charter party arbitration clauses provide for a panel of three arbitrators. Many of the commonly-used tanker form charter parties, including the Association of Ship Brokers and Agents (U.S.A.), Inc. ASBATANKVOY form and the New York Produce Exchange Form (NYPE) provide that each party, appoint an arbitrator and the two party-appointed arbitrators are to appoint the third arbitrator.

3. When the first party appoints an arbitrator and calls for arbitration under the ASBATANKVOY form, the arbitration clauses provides that the second party has twenty (20) days to appoint its arbitrator, failing which the first party shall have the right, without further notice, to appoint a second arbitrator, "who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party."

4. Some printed form charter parties frequently used in the dry cargo trade, including the NYPE form charter party, provide for a panel of three arbitrators. However, the arbitration clause does not provide for the appointment of the second arbitrator by the first party when the second party fails to appoint its arbitrator. Therefore, after the first party calls for arbitration and the second party fails or refuses to appoint an arbitrator, the first party must file a petition in the United States district court to compel the second party to appoint an arbitrator. In many instances, the district court will itself appoint the second arbitrator.

5. In situations where the first party has the right to appoint the second arbitrator after a specified number of days, one district court has found that the arbitration clause calling for the appointment within 20 days did not make time of the essence. *Compania Portorafti v. Kaiser*, 616 F. Supp. 236 (S.D.N.Y. 1985). *But see also Universal Reins. Corp. v. Allstate Ins. Co.*, 16 F. 3d 125 (7th Cir. 1994), where the court held that a similar clause should be strictly enforced.

PRESERVING EVIDENCE IN MARITIME TRANSACTIONS

The following amendment is proposed to The Federal Arbitration Act, 9 U.S.C. §7. Designate the existing text as subsection (a) and add new subsections (b) and (c):

"(a) The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness, and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

"(b) In a maritime transaction, the arbitrators, or a majority of them, may issue a subpoena to any person to give deposition testimony deemed material to the transaction and/or to produce documents or provide access to evidence which may be deemed material to the transaction; and may authorize a party to seek court assistance in obtaining testimony and such other evidence for use in the arbitration proceedings. A district court, acting within its admiralty jurisdiction may, enforce the subpoena or otherwise, order that a person give a deposition, produce documents, or provide access to evidence on terms that the court deems just and reasonable.

(c) In a maritime transaction, where the formation of an arbitration tribunal is incomplete, or in other exigent circumstances impairing a party's ability to obtain authorization from the arbitrators to seek court assistance, a district court acting within its admiralty jurisdiction and upon application by any interested party, may order that the testimony of a person or other evidence be preserved for use in future maritime arbitration proceedings, on terms that the court deems just and equitable."

Notes to proposed subsections 7(a), (b) and (c):

1. Section 7 of the Federal Arbitration Act (9 U.S.C. §7) authorizes arbitrators to subpoena witnesses to give testimony at a hearing, with the subpoenas subject to enforcement by the Federal Court for the district in which the hearing is held. As a practical matter, this limits their reach to the geographical limits of the State or 100 miles from the hearing situs, whichever is greater. FRCP Rule 45(b)(2).

2. In court litigation, "discovery" subpoenas are enforceable under the Federal Rules throughout the United States by the Federal Court at the situs where the evidence is sought, regardless of where the suit has been filed. FRCP Rule 37(a)(1). But the Federal discovery rules do not apply to arbitrations. FRCP Rule 81(a)(3). A few states, like New York, have statutes providing for some discovery in aid of arbitration. CPLR 3102(c). But Federal statutes, authorizing courts to compel discovery in aid of foreign "tribunals," do not apply to arbitration. *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

3. Arbitrators, of course, have great power to compel disclosure from parties, simply by threatening to draw adverse inferences if disclosure is not made. But, there are limits even to this power. For example, unless otherwise provided in the agreement to arbitrate (see SMA Rule 23) arbitrators are not authorized to order that depositions be taken. *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999).

4. These limitations on the power of arbitrators to obtain relevant evidence, and on the power of Federal courts to assist arbitral tribunals in this regard, create especially severe difficulties for maritime arbitrations both here and abroad. Those held in the U.S. tend to go forward in only a few port cities like New York, San Francisco, New Orleans, Houston and Miami. Frequently, the relevant evidence exists elsewhere in the country, far away from the place of the hearings.

5. Another problem arises with perpetuation of evidence. Ships generally do not remain in port for long periods of time. Material documents, like logbooks and charts, as well as crucial witnesses, can sail away putting the evidence at risk. Under the old "*de bene esse*" statute, special provision was made for a Federal court to order that testimony be taken from a witness "bound on a voyage at sea." Rev. Stat, §863, republished in 7A *Moore's Federal Practice* 247 (2d ed. 1996). FRCP Rule 27 superseded the *de bene esse* statute. No special provision is made in Rule 27 for maritime claims nor, indeed, for arbitration. Moreover, the notice requirements of the Rule do not accommodate the realities of shipping matters. The Federal courts have managed to deal awkwardly on an *ad hoc* basis with applications under Rule 27 to perpetuate evidence for use in future maritime arbitrations. *See In re Deiulemar*, 198 F.3d 473 (4th Cir. 1999). But the recent decisions construing Federal statutes which authorize discovery in aid of proceedings in foreign tribunals as not applying to arbitrations, cast some doubt on the case law applying Rule 27 to arbitrations as opposed to admiralty lawsuits.

6. Discovery is now permitted in maritime arbitration only as authorized by the arbitrators in each case. Obviously, this close control of discovery should continue to be maintained. But arbitrators should be permitted to order depositions in lieu of hearings to obtain the testimony of party employees, especially seafarers, who may be subject to travel on short notice. Moreover, when maritime arbitrators decide that testimony or evidence from third parties is important to their deliberations, they should be able to authorize parties to seek court assistance to compel production of the testimony or evidence, and the courts ought to be empowered to provide such assistance. Finally, when events occur before a maritime arbitration tribunal is even in place, or at a time when the tribunal cannot take timely action, the Federal courts should be empowered to perpetuate the evidence, lest it disappear.

MODIFICATION OF AWARDS IN MARITIME TRANSACTIONS

The following amendment is proposed to The Federal Arbitration Act, 9 U.S.C. §11. Add a new subsection (d) as follows:

(d) Without limitation of the foregoing, if an arbitration award is rendered in a dispute arising out of a maritime transaction,

(i) The arbitrators may correct an award to eliminate a typographical, arithmetic, or similar clerical error or omission in the award, provided that an application by a party so to modify the award is received by them within 30 days after the date the award was filed or delivered.

(ii) If any party to an award applies to the arbitrators to modify the award under Section 10(d)(i) above, the time for confirming, vacating, modifying or correcting the award under the other provisions of this Act shall not begin to run until the award on the application is filed or delivered. Their decision on the application shall be deemed part of and included in their final award.

Notes to proposed subsection 10(d):

1. Under 9 U.S.C. § 10 a federal district court may vacate an arbitration award. Under 9 U.S.C. § 11 a federal district court may modify or correct an award. The Act does not authorize the arbitrators to modify final awards on their own initiative or upon the application of either party.

2. Courts have tended to interpret these provisions narrowly so as to confirm awards. Courts have been reluctant to exercise their power to vacate or correct awards. To do either might be perceived as not promoting arbitration or as encouraging others to challenge awards without grounds, clogging congested court calendars.

3. Arbitrators have tended not to reconsider or reopen final awards, usually believing themselves *functus officio*, absent the agreement of the parties or specific authority in the arbitration agreement or rules incorporated by it. For example, Section 30 of the Rules of the Society Maritime Arbitrators, Inc. provides: "The Panel shall retain jurisdiction to modify the Award for the sole purpose of correcting obvious clerical and/or arithmetical mistakes." The SMA Rules, however, are not incorporated into all forms of charter parties.

4. At the same time, awards do sometimes contain more or less obvious mistakes. If the party benefitting from the mistake does not voluntarily agree to accept performance without the benefit of the mistake, the party that believes itself aggrieved has no alternative but to ask the court to vacate or correct the award. This costs money and occupies the court's

time, perhaps needlessly. *See* Judge Haight's decision in *Laurin Tankers v. Stolt Tankers*, 1999 AMC 1290 (S.D.N.Y. 1999), for a discussion of the cases and description of how arbitrators and courts struggle with these issues under the existing law.

5. The proposed amendment attempts to allow mistakes to be corrected relatively easily by the arbitrators without weakening the *functus officio* doctrine and minimizes the need to go to court for relief when mistakes are made.

6. The concept of allowing such a remedy is not novel. For example, similar provisions are contained in: 1) Article 30 of International Arbitration Rules of American Arbitration Association; 2) Section 20 of the recently adopted revised Uniform Arbitration Act; 3) Section 57 of the English Arbitration Act; 4) Articles 35–37 of the UNCITRAL Arbitration Rules; and 5) Section 33 of the UNCITRAL Model Law.

COMMITTEE ON RECREATIONAL BOATING NEWSLETTER, FALL 1999

Editor: Frank P. DeGiulio

At it Again — The *Calhoun* Saga Continues

Nearly a decade after twelve year old Natalie Calhoun's tragic death in a jet ski accident in Puerto Rico waters, the U.S. District Court for the Eastern District of Pennsylvania has written the latest chapter in the on-going saga. *Calhoun v. Yamaha Motor Corporation*, 40 F.Supp.2d 288, 1999 AMC 1777 (E.D.Pa. 1999). Rather than bringing the story to a close, the District Court's decision appears to lay the foundation for *Calhoun II* — the sequel.

In July 1989, Natalie Calhoun, a Pennsylvania resident vacationing with her family in Puerto Rico, was killed when a jet ski that she was operating collided with an anchored pleasure boat near Palmas Del Mar. Her parents filed suit against the jet ski manufacturer under the Pennsylvania Wrongful Death and Survival Statutes in the U.S. District Court for the Eastern District of Pennsylvania, seeking damages for loss of earnings, support, services and society, as well as funeral expenses and punitive damages.

In a 1993 decision, the District Court concluded that federal maritime law and not state law governed the remedies available for the death of a non-seaman in state territorial waters. The District Court, therefore, found that the plaintiffs' claims for loss of future earnings and punitive damages were precluded.

On appeal, the Third Circuit reversed, holding that "in the absence of clear federal interest, the balance tips in favor of allowing state law to apply" and remanded the case to the District Court to determine whether the law of Pennsylvania or Puerto Rico should be applied to define the remedies available. *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 1995 AMC 1 (3d Cir. 1994) (reported in 4 *Boating Briefs* No. 2 (Mar.L.Ass'n. 1995)). Yamaha petitioned for *certiorari* to the U.S. Supreme Court.

In a decision perceived by many practitioners as result-oriented and one having profound impact on the law of recreational boating, the Supreme Court unanimously affirmed the Third Circuit's decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996). The Court squarely held that state law is to be applied to determine the remedies available for the death of a non-seafarer in state territorial waters. *See* 5 *Boating Briefs* No. 1

(Mar.L.Ass'n. 1996). The case was remanded to the District Court for further consideration of whether the law of Pennsylvania or Puerto Rico would apply to determine what damages were recoverable.

The latest pronouncement by the District Court appears to set the stage for yet another run to the Supreme Court. On remand, consistent with the directives of the Third Circuit and the Supreme Court, the District Court first considered the issue of whether the law of Pennsylvania or Puerto Rico should apply to define the damages available for Natalie's death. The District Court concluded that federal choice of law rules should guide the analysis since the Supreme Court agreed that the action fell within the court's admiralty jurisdiction. Applying this analysis, the District Court concluded that Puerto Rican law applied to the Calhouns' punitive damages claim which was, therefore, precluded because Puerto Rico does not permit recovery of punitive damages. Further, the court found that the law of Pennsylvania should apply to define the scope of available compensatory damages.

But the District Court did not stop there. Relying on the final footnote of the Supreme Court's decision, the District Court concluded that another issue remained to be decided. In the closing footnote of its opinion, the Supreme Court had stated:

> The Court of Appeal also left open, as do we, the source — federal or state — of the standards governing liability, as distinguished from the rules on remedies. We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful-death cases in which state law has held sway.

The District Court took this comment as a directive from the Supreme Court to decide the issue of whether substantive federal or state law was to apply to define the standards governing liability.

The District Court reviewed the convoluted history of Supreme Court decisions which have addressed the substantive rights and remedies available for personal injury and death of non-seamen in territorial waters. The Supreme Court decisions clearly mandate that federal maritime law is to govern both the substantive rights and the available remedies of a non-seafarer who is injured in state waters. Before *Calhoun*, nearly all federal courts also applied federal maritime law to define the substantive rights and available remedies in the case of the death of a non-seafarer in state waters.

Following *Calhoun*, while it is clear that the remedies available for the death of a non-seafarer in state waters are to be governed by state law, the separate issue of whether substantive federal or state law controls is, according to the Eastern District of Pennsylvania, now in doubt.

The District Court began its analysis of the substantive law issue by voicing its opinion that:

> As a conceptual matter...that federal law defines the substantive rights of a claimant seeking redress for a death occurring in territorial waters — would appear to accomplish the reconciliation of personal injury and wrongful death cases averted to by the Supreme Court as a doctrinal goal the Court looks forward to achieving at some future time.

However, following this well reasoned observation, the court proceeded to analyze the decisions of the Third Circuit and the Supreme Court in *Calhoun* and found that the decisions mandated the conclusion that state substantive law, rather than federal maritime law, governs the rights of the parties in the case of the death of a non-seafarer in state waters.

The District Court certified its findings to the Third Circuit Court of Appeals. The Third Circuit granted the appeal on April 13, 1999 and the case remains pending before that court.

The District Court's latest decision, if upheld on appeal, will have a far reaching and perhaps more profound impact on recreational boating law than the Supreme Court's *Calhoun* decision itself. The decision deals yet another body blow to the principle of maritime uniformity. Application of state substantive law to the death of a non-seafarer in state waters will bring to the fore a host of potential conflicts between state and federal maritime law on a variety of issues including applicable statutes of limitation, standards of care, duties, rules governing contributory negligence and joint and several liability, contribution rights and classes of beneficiaries. Stay tuned.

Cruise Line Exonerated in Jet Ski Accident

In the winter of 1997, Barbara Mashburn was seriously injured when a jet ski operated by Mark Hommen collided with a jet ski on which she was a passenger off Coco Cay in the Bahamas. The jet ski on which Mrs. Mashburn was riding was operated by her husband and was stopped when

the collision occurred. Both jet skis were owned by Royal Caribbean Cruises, Ltd., which rented them to the respective operators.

Royal Caribbean filed a Complaint for Exoneration from or Limitation of Liability as the owner of both jet skis pursuant to the Limitation of Liability Act, 46 U.S.C. §181 *et seq*., in the U.S. District Court for the Southern District of Florida. Royal Caribbean posted security in the amount of $7,200 for the combined value of the two vessels pursuant to Rule F of the Supplemental Admiralty Rules.

Mrs. Mashburn filed a claim in the limitation action for her injuries. She alleged that Royal Caribbean, as owner and lessor of the jet skis, was negligent in various respects. Mashburn claimed that Royal failed to properly train and supervise the operators, allowed too many vessels to be operated in a restricted area, failed to enforce safety rules, failed to check operators for intoxication and failed to equip the jet skis with a sound signaling device.

The District Court found that Royal Caribbean was entitled to exoneration from liability and granted its motion for summary judgment. *Complaint of Royal Caribbean Cruises, Ltd.*, __ F. Supp. 2d __, 1999 WL 556892 (S.D. Fla. 1999). In considering the motion for summary judgment, the trial court applied the two-step analysis required in a limitation proceeding under *In re Complaint of Hercules Carriers*, 768 F.2d 1558 (11th Cir. 1985). Under the two-step analysis, the claimant initially bears the burden of proving negligence or unseaworthiness attributable to the vessel owner. If the claimant fails to carry this burden the vessel owner is entitled to exoneration from liability. If the claimant carries the initial burden, the court must then determine whether the owner lacked privity or knowledge of the acts of negligence or the unseaworthy condition so as to be entitled to limit its liability to the value of the vessel.

The evidence before the District Court demonstrated that the jet ski operators received instructions from Royal Caribbean employees regarding the safe operation of the watercraft and viewed a manufacturer's instructional video. Operation of the jet skis was permitted only in one direction on a marked course and was supervised by Royal employees. Finally, the operators signed a Waiver and Release pursuant to which they assumed all risk of injury and agreed not to hold Royal Caribbean liable for any loss or personal injuries sustained.

The District Court concluded that the collision and Mrs. Mashburn's injuries were caused solely by the individual negligence of the operator of

the other jet ski and that Royal Caribbean was not negligent in any respect and was entitled to exoneration. In the alternative, the court also found that even if Royal had not been entitled to exoneration, it would be entitled to limit its liability because none of Royal's owners or senior management were present at the scene or had knowledge of any alleged act of negligence.

Primary Assumption of Risk Doctrine Bars Claim by Tube Rider

In *Record v. Reason*, 86 Cal. Rptr. 2d 547, 1999 AMC 2380 (Cal. Ct. App. 1999), the Court of Appeal held that "tubing" is a sport to which the doctrine of primary assumption of risk applies. The doctrine bars recovery for a defendant's negligence not rising to the level of intentional or reckless conduct. In June 1994, Michael Record accompanied Brian Reason and others for a day of water skiing and "tubing" on Castaic Lake. Record suffered spinal injuries when he fell off an inner tube being towed by a boat operated by the defendant Reason.

Michael Record brought a civil action against Reason in California state court to recover for his injuries. The defendant filed a motion for summary judgment, arguing that the primary assumption of risk doctrine precluded any recovery against the defendant as a matter of law. Conflicting evidence was presented to the trial court in connection with the defendant's motion. The defendant testified that he was operating the boat at a speed of no more than 25 miles an hour in accordance with the safety instructions on the inner tube, that the incident occurred during a gradual left turn and that the plaintiff had fallen off the tube on two prior occasions the same day without incident or complaint. The plaintiff presented testimony from a witness who claimed that the boat's speed was at least 30 miles an hour, that the incident occurred when the defendant made a sharp turn to the left and that the defendant had previously stated that the "object" was to try to knock the rider off the tube. In addition, the plaintiff testified that the defendant was aware of his prior neck injury and that, prior to the ride, he told the defendant to "go slow and take it easy because I don't want to get hurt." The plaintiff admitted that falling off a tube is a common occurrence and that some people try to turn sharply to increase the thrill of the ride.

The trial court concluded that there was no triable issue of fact regarding application of the primary assumption of risk doctrine and granted summary judgment in favor of the defendant. The plaintiff appealed.

On appeal the plaintiff contended that "tubing" is not a sport to which the primary assumption of risk doctrine applies or, in the alternative, that the

existence of triable issues of fact rendered the trial court's grant of summary judgment improper.

The California Court of Appeals began its analysis by noting that the issue of whether the doctrine of primary assumption of risk applies in a particular case is a question of law for the court. The court also distinguished the primary assumption of risk doctrine from the assumption of risk defense under California law, noting that when applicable, the doctrine serves as a complete bar to recovery. The court held that when the doctrine applies, the plaintiff is held as a matter of law to have relieved the defendant of a duty of reasonable conduct.

Noting that the issue of whether the assumption of risk doctrine applies to "tubing" appeared to be one of first impression, the Court of Appeals reviewed numerous decisions in which the doctrine had been applied to water skiing, sport fishing, white water rafting, downhill skiing, baseball, fishing and golf. The court held that the doctrine applies when a plaintiff voluntarily participates in a sporting event or activity involving certain inherent risks. The doctrine reduces the applicable duty of care based on the rationale that "the activity involves inherent risks which cannot be eliminated without destroying the sport itself." The court held that the doctrine applies to a recreational or sporting activity "if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." The court held that "tubing" meets these criteria and rejected the plaintiff's argument that the doctrine was inapplicable.

The plaintiff argued in the alternative that even if the doctrine applies generally to "tubing," the trial court erred in granting summary judgment because the doctrine's application in the particular case depended on resolution of triable issues of fact. The plaintiff contended that the doctrine would not apply if the jury believed his alleged admonition to the defendant to "go slow and take it easy." The Court of Appeals, however, rejected this argument, holding that "a party cannot change the inherent nature and risk of a sport by making a unilateral request that other participants play less vigorously...a defendant's liability must be based on 'the nature of the sport itself' rather than 'the particular plaintiff's subjective knowledge and expectations.'"

Alternatively, the plaintiff contended that there was a triable issue of fact as to whether the defendant's conduct rose to the level of recklessness. The Court of Appeals recognized that the primary assumption of risk doctrine does not insulate a defendant from liability resulting from intentional or

reckless conduct that is "totally outside the range of ordinary activity involved in the sport." Nonetheless, the court held that, even assuming the truth of all evidence submitted by the plaintiff, the defendant's conduct was merely negligent and within the inherent risk of the "tubing" activity.

Recreational Use Immunity Statutes

A number of states have enacted recreational use statutes that may be relevant to claims arising in connection with the use and operation of pleasure craft. *See, e.g.*, Cal.Civ.Code § 846, Conn.Gen.Stat. § 52-557, 7 Del.Code Ann. § 5904, Fla.Stat.Ann. § 375.251, N.J.Stat.Ann. § 2A:42A, 68 Pa.Stat.Ann. § 477, Wash.Rev.Code § 4.24.210. While the specific provisions vary, each statute is intended to provide immunity from negligence to landowners who permit their property to be used for recreational purposes without charge. Most statutes contain exceptions for intentional or reckless conduct and for injuries caused by dangerous latent conditions. Recreational use statutes figured prominently in two recent recreational boating cases.

In *Howard v. United States*, 181 F.3d 1064 (9th Cir. 1999), the Ninth Circuit considered whether the U.S. Government was immune from liability for negligence under the Hawaii Recreational Use Statute, Haw.Rev.Stat. § 520-1 *et seq*., in connection with a claim for personal injuries sustained by the plaintiff at Hickam Air Force Base on Oahu. The plaintiff, the wife of a military officer, was injured on a recreational boating dock located on the base while attending a sailing instructor course offered by a non-governmental organization. The dock facility was not open to the general public and the plaintiff paid an attendance fee to the sailing course organizers. The plaintiff sued the federal government for her injuries. The District Court granted summary judgment in favor of the United States based on the Hawaii Recreational Use Statute. Plaintiff appealed.

On appeal, the Ninth Circuit noted that under the Hawaii statute, a landowner is immune from liability for ordinary negligence if the land is made available for recreational use without charge. The plaintiff advanced various arguments as to why the statute should not apply. The court rejected the plaintiff's arguments, including her contention that the act should not apply because she was a business invitee who was present only to attend a paid instructional course and not for recreational purposes. The decision of the District Court was affirmed.

The Supreme Court of Washington considered the applicability of Washington's Recreational Use Statute to a pleasure boat casualty in

Ravenscroft v. Washington Water Power Co., 136 Wash.2d 911, 969 P.2d 75 (Wa. Sup.Ct. 1999). Robert Ravenscroft was seriously injured when a boat in which he was a passenger struck a submerged tree trunk while operating on Long Lake reservoir. Ravenscroft sued the land owner, Washington Water Power Company, and Spokane County, alleging that the county was responsible for regulating boating safety on the lake.

The evidence demonstrated that the power company had raised the level of Long Lake, thereby submerging a formerly wooded area where the accident occurred. The trees were cut off but the stumps remained, submerged below the water surface. No buoys or warning signs marked the submerged stumps. It was undisputed that the reservoir was available to the public for boating without charge.

At the trial court level, the power company moved for summary judgment on the basis of Washington's Recreational Use Statute, RCW 4.24.200 *et seq*. The trial court denied the defendant's motion, ruling that an exception to the statute for "known, dangerous, artificial, latent conditions" could apply in the circumstances of the case. The Washington statute provides that: "Nothing...shall prevent the liability of...a landowner...for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted..." On appeal, the Court of Appeals reversed the trial court and remanded with directions to dismiss the plaintiff's claim. Review was granted by the state Supreme Court.

The Supreme Court of Washington considered the issue of whether an unmarked, submerged tree trunk constitutes a known, dangerous, artificial and latent condition within the meaning of the exception to the grant of immunity under the Washington statute. The evidence showed that the power company knew of the existence of the stumps and that their presence in the channel constituted a dangerous condition. Although the accident was caused by contact with a submerged, rooted tree stump, the court held that the "condition" was artificial within the meaning of the statute because it existed solely through the human effort of raising the water level, cutting the trees and leaving stumps in the channel. Finally, the court held that the issue of whether the condition was "latent" within the meaning of the statutory exception was a question of fact based on whether the injury causing condition would have been readily apparent to the ordinary recreational user and, therefore, the trial court's grant of summary judgment was improper.

Court Upholds Prohibition Against Launching of Recreational Craft at Public Beach

In 1992, the City of North Myrtle Beach in South Carolina enacted an ordinance prohibiting the launching or beaching of motorized watercraft on public beaches between the hours of 9:00 a.m. and 5:00 p.m. from May 15 to September 15 annually. Bob Barnhill, an operator of a jet ski rental business on a public beach within the city limits, commenced a declaratory judgment action seeking the determination that the ordinance was unconstitutional.

A referee appointed by the trial court found that the ordinance was invalid because it exceeded the City's police power, was preempted by state law and violated the South Carolina Constitution.

The Supreme Court of South Carolina upheld the ordinance in *Barnhill v. City of North Myrtle Beach*, 333 S.C. 482, 511 S.E.2d 361 (S.C. 1999). The court held that the ordinance was within the City's police power because it was reasonably related to the purpose of promoting public safety. While affirming the referee's finding that state statutes preempted the entire field of regulating vessels on navigable waters, the court held that the ordinance was not preempted because it related solely to regulation of the beaches. Finally, the court rejected the referee's finding that the ordinance violated Article XIV § 4 of the state Constitution which provides that "All navigable waters shall forever remain public highways free to citizens of the State and the United States without tax, impost or toll imposed..." In this regard the court held that although the Constitution does not permit a complete prohibition of the use of navigable water, the public's access to navigable water is subject to reasonable regulation for a legitimate legislative purpose.

Towing Endorsement Held to Constitute a Warranty

Gary MacLean, the captain of a vessel owned by Flagship Marine Services, Inc., was seriously injured in 1994 while his vessel was towing a 61 foot commercial vessel. Flagship, a licensee of Sea Tow Services, Int'l., was in the business of providing towage assistance to vessels in distress. MacLean sued for his injuries. Flagship agreed to settle his claim for $545,000.

Flagship was insured under a policy issued by Commercial Union Insurance Company. The policy contained a "Tow Endorsement" which provided as follows: "In consideration of the rate and premium charged, it is understood and agreed that coverage is hereby provided for the towage of

yachts up to 50 feet in length. The towage of yachts in excess of 50 feet is subject to prior approval of underwriters with additional premium to be agreed, if any."

Commercial Union denied coverage for MacLean's injuries based on the Tow Endorsement and commenced a declaratory judgment action in the U.S. District Court for the Southern District of New York. Commercial Union moved for summary judgment on the Tow Endorsement. The District Court, focusing on the use of the term "yacht" in the wording, concluded that the endorsement excluded coverage for towage of yachts (i.e., non-commercial vessels) in excess of 50 feet but did not preclude coverage for towage of commercial vessels, regardless of size. Following a bench trial the District Court entered judgment in favor of Flagship on the question of coverage. Commercial Union appealed.

On appeal, the Second Circuit reversed the decision of the District Court and held that Commercial Union had no duty to defend or provide coverage to Flagship in connection with MacLean's claims. *Commercial Union Ins. Co. v. Flagship Marine Services, Inc.*, __ F.3d __, 1999 WL 639170 (2d Cir. 1999). In construing the policy, the Second Circuit first considered the issue of whether the Tow Endorsement constituted a warranty or an exclusion from coverage. Flagship contended that the endorsement was merely an exclusion and, therefore, should be construed against the insurer if ambiguous.

The Second Circuit held that when read in the context of the policy as a whole, the endorsement was a warranty by which the insured promised to limit its towing activities to the towing of yachts less than 50 feet in length. The court then noted that under maritime law and the law of New York, breach of a warranty by the insured is a complete defense to coverage irrespective of causation but that under Florida law (where the incident occurred), the breach must be causally related to the loss so as to result in an increase in the risk assumed by the insurer. The appellate court found it unnecessary to make a choice of law determination based on the facts of the case. The Second Circuit held that the Tow Endorsement was unambiguous on its face when considered in the context of the entire policy. The court concluded that the endorsement was an affirmative statement of coverage which necessarily implied that "towage of anything other than yachts up to 50 feet in length" was not covered. The court supported its opinion by noting that the endorsement replaced a standard provision of the policy excluding coverage for towage of any vessel or craft so that absent the endorsement there would be no coverage whatsoever for towing operations. Flagship admitted that the vessel towed at the time of MacLean's injuries was a 61' long commercial

vessel. The court concluded, thus, that Flagship had breached the warranty. Further, the Second Circuit held that the wording of the endorsement itself, which referred to the premium charged and provided for additional premium for extended coverage, demonstrated that the breach was material to the risk assumed by Commercial Union.

Other Recent Cases

Lady v. Outboard Marine Corp., __ F.Supp.2d __, 1999 WL 641653 (S.D.Miss. 1999). Plaintiff's product liability claims against a manufacturer for failure to install a propeller guard on a recreational boat are preempted by federal law consistent with the Eleventh Circuit's decision in *Lewis v. Brunswick Corp.,* 107 F.3d 1494 (11th Cir. 1997).

Beckman v. Rick's Watercraft Rentals, 719 So.2d 1025, 1999 AMC 678 (Fl.Ct. App. 1998). Plaintiff's product liability and negligence claims against a jet ski manufacturer and rental agency for personal injuries are barred by the three year maritime statute of limitations, 46 U.S.C. § 763a.

Trump v. Cantieri Di Baia, S.P.A., 1999 WL 705431 (S.D.N.Y. Sept. 10, 1999). Ivana Trump's suit against the Italian shipyard and seller of the yacht *M/Y IVANA* for defective design and breach of contract was dismissed for lack of personal jurisdiction under F.R.C.P. 12(b)(2) where, aside from plaintiff's residence, the only contact with New York occurred when the yacht was present in New York waters for fourteen days.

North American Specialty Ins. Co. v. Bader, __ F.Supp.2d __, 1999 WL 528247 (D.N.J. 1999). An insurer brought a declaratory judgment action seeking a determination of no coverage under a boat policy for a third party death claim arising from a collision with the decedent's boat. The insurer's summary judgment motion based upon the defendant/insured's alleged violation of the doctrine of *uberrimae fidei* for failure to disclose the replacement of the boat's existing engines with high performance engines was denied. The evidence failed to show that the alleged misrepresentation would have been material to the underwriter's evaluation of the risk.

Travelers Property Cas. Corp. v. Pendergraft, 1998 WL 856101 (E.D.La. Dec. 9, 1998). The court granted an insurer's declaratory judgment motion, finding no duty by the insurer to defend or to provide coverage under a homeowner's policy for third party liability claims arising from the insured's operation of a rented 85 horsepower jet ski where the policy contained a watercraft exclusion which limited coverage to claims arising from

the operation of craft of 50 horsepower or less if the craft was not owned by or rented to the insured.

Lecy v. Bayliner Marine Corp., 973 P.2d 1110, 1999 AMC 1469 (Wa.Ct.App. 1999). Applying federal substantive admiralty law, a state appellate court granted a new trial and vacated a judgment in favor of the plaintiff on product liability claims following a jury trial. The appellate court found the trial court had erred in allowing a special verdict form which permitted the jury to consider negligence in design after finding that the product was not unreasonably dangerous as designed under a strict product liability theory.

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Editor: Frank P. DeGiulio

Boat Owner Not Entitled to Recover Loss of Use Damages

In 1988 the corporate owner of the yacht *Blackhawk* contracted for the use of a floating dry dock to conduct repairs to the vessel. Although apparently used for business purposes, the *Blackhawk* was documented as a pleasure boat under U.S. law. The boat was extensively damaged when the bilge and keel blocks gave way during the attempt to secure the boat in the dry dock. There was no evidence that the vessel had ever been chartered by the owner. The owner brought suit against the owner and the builder of the drydock claiming the cost of repairs and loss of use during the repair period. The district court entered judgment in favor of the boat owner but held that the owner was not entitled to recover for loss of use.

The boat owner appealed. In *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, __ F.3d __, 2000 WL 292573 (11th Cir., March 20, 2000) the Eleventh Circuit Court of Appeals considered the issue of whether the owner of a pleasure boat may recover loss of use damages in connection with a maritime tort claim. The Court of Appeals affirmed the district court's denial of loss of use damages, holding that the boat owner had not proved "that profits had actually or may reasonably supposed to have been lost." The court relied on the U.S. Supreme Court's 1897 decision in *The Conqueror,* 166 U.S. 110, 17 S.Ct. 510 (1897), which it referred to as "[t]he seminal case regarding damages for loss of use of a pleasure boat...."

The decision in *The Conqueror* is generally viewed as establishing the parameters for recovery of loss of use damages arising from a collision or other maritime tort whether related to a pleasure craft or a commercial vessel. In that case, Frederick W. Vanderbilt sued the U.S. Custom Service on the grounds that his private yacht was improperly seized for import duties allegedly owed. Vanderbilt claimed damages for loss of use of $100 per day during the five months that the boat was detained. Following a trial the district court awarded Vanderbilt $15,000 for loss of use. At trial Vanderbilt had introduced the testimony of several yacht brokers as expert witnesses with regard to the charter value of the yacht. However, there was no evidence that Vanderbilt actually chartered the boat. To the contrary, the evidence established not only that Vanderbilt intended to use the yacht solely for his personal pleasure but that he would not have used the yacht at all during the winter off season in New York when the vessel was under seizure.

On appeal, the Supreme Court reversed the decision of the district court and held that "loss of use will be allowed only when profits have actually been, or may reasonably supposed to have been, lost, and the amount of such profits is proven at trial." The Court found the testimony of Vanderbilt's experts to be speculative, of questionable credibility and insufficient to establish a right to loss of use damages. The Court recognized the fact that some pleasure boats are let to hire and earn profits for their owners, thereby leaving open the possibility that such owners could recover loss of use in an appropriate case. As regards Vanderbilt the Court held that mere deprivation of use was insufficient as "[t]here must be a pecuniary loss, and not a mere inconvenience arising from the inability to use the vessel for purposes of pleasure...."

In its appeal of the *Central States Transit* decision, the defendant boat yard seized upon language in the Supreme Court's subsequent decision in *Brooklyn Eastern District Terminal v. U.S.*, 287 U.S. 170, 53 S.Ct. 103 (1932), to argue that the rule of *The Conqueror,* requiring a pleasure boat owner to prove pecuniary loss as a prerequisite to loss of use damages, had been overturned by implication. *Brooklyn Eastern* involved a towing company's claim for loss of use its tug boat due to a collision. Justice Cardozo, reviewing the principles governing the right to recover for loss of use arising from a maritime tort, strongly suggested that the holding in *The Conqueror* was subject to question:

> The vessel may be a yacht, employed for pleasure and not for business. Even then, in the judgment of many courts, the value of her use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are used. [citations omitted] There are statements to the contrary in *The Conqueror* that may be in conflict with that view, but they are were not essential to the judgment and in the light of later decisions as to the loss of pleasure vehicles are unquestionably in opposition to a strong current of authority.

Despite this rather strong language from a renowned jurist, the Eleventh Circuit in *Central States Transit* rejected the defendant's argument and held that they were bound by *The Conqueror* to affirm the district court's denial of loss of use damages.

Federal Court Holds That Limitation Act Provides Independent Basis of Subject Matter Jurisdiction

In the summer of 1997 Michael Bergeron was seriously injured in a boating accident on Lake Winnisquam in New Hampshire. Bergeron was rid-

ing in an innertube towed by a pleasure boat owned by Gary and Claire Berstein. Bergeron, a minor, filed suit against the owners in Massachusetts state court. The Bersteins then filed a limitation action in Massachusetts federal district court under the Limitation of Liability Act, 46 U.S.C. § 181 *et seq*. ("the Limitation Act"). The state court action was stayed.

Bergeron moved to dismiss the limitation action for lack of admiralty subject matter jurisdiction. In a decision which stands alone among those courts which have considered the issue in recent times, the District of Massachusetts concluded that it was bound to apply the Supreme Court's decision in *Richardson v. Harmon*, 222 U.S. 96 (1911), and held that the Limitation Act provides an independent basis of admiralty subject matter jurisdiction over torts involving vessels. *Complaint of Berstein*, 2000 AMC 760 (D. Mass. 1999).

In moving to dismiss the limitation proceeding, Bergeron argued that the action did not fall within the court's admiralty jurisdiction because Lake Winnisquam is wholly within the State of New Hampshire and is not capable of supporting interstate navigation in its present state due to the existence of lockless dams. Bergeron therefore argued that the "*situs*" test for admiralty tort jurisdiction was not satisfied because the accident did not occur on navigable waters.

In response to Bergeron's motion, the boat owners first presented the court with evidence that the lake could and did support interstate navigation via Silver Lake and the Winnipesaukee and Merrimack Rivers prior to the construction of the dams. The owners urged the court to adopt an "historical" test for determining navigability. However, the District Court rejected the owner's argument after noting that prior decisions which had adopted a "historical" navigability test had been overruled or superceded by subsequent case law.

The owners argued in the alternative that the Limitation Act itself provided an independent basis for admiralty subject matter jurisdiction based on the decision in *Richardson v. Harmon.* In *Richardson*, a vessel owner had attempted to limit its liability for damages arising from a collision with a bridge. In 1911, prior to passage of the Admiralty Extension Act, admiralty tort jurisdiction did not extend to shoreside damage caused by a vessel. However, the vessel owner argued that an 1884 amendment to the Limitation Act, now 46 U.S.C. § 189, expanded the scope of the Act to include *all* liabilities involving vessels, whether or not such liabilities fell within the traditional scope of admiralty jurisdiction. The Supreme Court agreed that the 1884 amendments were intended "to add to the enumerated claims of the old

law any and all debts and liabilities not theretofore included." As a result the Court held that the Act encompasses "all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime."

Between 1911 when *Richardson* was decided and the end of the 1980's, only a handful of decisions had addressed the issue of whether the Act provides an independent basis of subject matter jurisdiction. Ironically, a number of these cases were decided by the Massachusetts District Court. In each case the courts followed *Richardson*. *See The Trim Too*, 1941 AMC 1147 (D. Mass 1941) (explosion on pleasure boat ashore for winter storage); *City of Bangor*, 1936 AMC 615 (D. Mass. 1936); *The Irving F. Ross*, 1923 AMC 1015 (D. Mass. 1923).

As the district court in *Berstein* noted, since 1989 no fewer than seven U.S. Circuit Courts of Appeal have rejected the argument that the Limitation Act provides an independent basis of subject matter jurisdiction. *See e.g., Seven Resorts, Inc. v. Cantlen*, 1995 AMC 2087 (9th Cir. 1995). In addition, Courts of Appeal in the Fourth, Fifth, Seventh, Eighth and Eleventh Circuits have held that the Limitation Act does not provide a separate basis for subject matter jurisdiction. However, a number of these decisions failed even to mention, let alone attempt to distinguish, *Richardson v. Harmon*. The issue was also before the Supreme Court on two occasions in the 1990's in *Sisson v. Ruby*, 497 U.S. 358 (1990) and in *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995). In each case, however, the Supreme Court decided the appeal on other grounds and, therefore, found it unnecessary to reach the issue.

Despite the overwhelming weight of recent contrary authority, the District Court in *Berstein* concluded that *Richardson v. Harmon* had not been overruled by the Supreme Court and that it was bound by *stare decisis* to follow *Richardson*. Accordingly, the District Court in *Berstein* found that subject matter jurisdiction existed under the Limitation Act despite the fact that the circumstances surrounding the underlying tort claim failed to satisfy the contemporary tests for admiralty subject matter jurisdiction.

Federal Regulations Limit PWC Use in National Parks and Recreation Areas

The National Park Service recently implemented regulations designed to limit the use of Personal Watercraft ("PWC") in national parks. The Final Rule, published in the Federal Register at 65 Fed. Reg. 15077 (March 21,

2000), became effective on April 20, 2000. The regulations do not impact recreational boating other than PWC.

The regulations prohibit the use of PWC in any national recreation area unless the Park Service specifically determines through formal rulemaking that PWC use is permissible based on a review of various public interest factors. There are currently 87 areas within the National Park System where recreational boating is generally permitted. According to the background information published with the Final Rule, PWC use was observed in 32 of these areas.

The regulations carve out an exception for ten designated recreation areas where the primary use is recreational boating. In these areas PWC use may continue subject to regulation by local National park officials. The ten areas are Amistad and Lake Meredith in Texas, Bighorn Canyon in Montana, Chickasaw in Oklahoma, Curecanti in Colorado, Gateway in New York, Glen Canyon in Arizona/Utah, Lake Mead in Arizona/Nevada, Lake Roosevelt in Washington and Whiskeytown-Shasta in California.

The Final Rule also establishes a two-year grace period for eleven other recreation areas. In these designated areas PWC use may continue until April 20, 2002, subject to regulation by local park officials. After the expiration of the grace period, PWC use in these areas will be prohibited unless authorized by a special rulemaking. The eleven areas subject to the two-year grace period are Assateague in Maryland/Virginia, Cape Cod in Massachusetts, Cape Lookout in North Carolina, Cumberland Island in Georgia, Fire Island in New York, Gulf Islands in Florida, Padre Island and Big Thicket in Texas, Indiana Dunes in Indiana, Pictured Rocks in Michigan and Delaware Water Gap in Pennsylvania/New Jersey.

The Park Service received approximately 20,000 responses to the proposed rule, originally published and opened to comment in September, 1998. The most common objection to the rule (i.e., some 12,700 responses), according to the Park Service, was that it unreasonably discriminates against one form of recreational vessel. The Park Service answered this objection by citing *Personal Watercraft Industry Association v. Department of Commerce*, 48 F.3d 540 (D.C. Cir. 1995). In that decision, the circuit court had held that a federal agency may discriminate and manage one type of vessel differently than others as long as it has a rational basis for doing so. The Park Service compared its approach to PWCs to its regulation of snowmobiles and off-road vehicles.

Inquiries regarding the Final Rule may be directed to National Park Service, Ranger Activities Division, Room 7408, 1849 C Street NW, Washington, D.C. 20240.

Florida State Court Holds That Dive Accident is Not Subject to Maritime Law; Limitation Act Does Not Invalidate Release

In April 1995, Kenneth Borden tragically drowned while participating in an off-shore scuba diving class in Florida. Before participating in the class, Borden signed a document which purported to release the organizers and dive instructors from liability for their own negligence. Borden drowned after the boat captain detached the dive "tag line" from the boat, preventing Borden from pulling himself towards the boat. Borden's estate commenced a wrongful death action against the dive instructors, the dive boat owner and PADI (Professional Association of Diving Instructors) in Florida state court.

Borden's estate argued that the release was rendered invalid and unenforceable by the Limitation of Liability Act, 46 U.S.C. § 183c. Section 183c of the Act provides in part that:

> [i]t shall be unlawful for the...owner of any vessel transporting passengers between ports of the United States...to insert in any...contract or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master or agent from liability...for such loss or injury, or (2) purporting in such event to lessen, weaken or avoid the right of any claimant to a trial...on the question of liability for such loss or injury....All such provisions or limitations contained in any such...contract...are declared to be against public policy and shall be null and void and of no effect.

However, the trial court concluded that §183c of the Limitation Act did not apply and that the release was enforceable, and entered summary judgment against the plaintiffs and in favor of all defendants. The estate appealed.

The Florida Court of Appeal affirmed the trial court's decision, holding that admiralty law was inapplicable to the accident and, as a result, that §183c did not apply to invalidate the release. *Borden v. Phillips*, __ So.2d __, 2000 WL 158485 (Fla.App.1st Dist., Feb. 16, 2000). The Court of Appeal first concluded that § 183c was applicable during the voyage to the dive site because the vessel was transporting passengers. However, the court then considered whether the accident itself would fall within admiralty jurisdiction such that admiralty law would apply. Applying the test set forth in *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043 (1995), the court held that the accident would not fall within admiralty jurisdiction because

the alleged negligence was unrelated to the operation or maintenance of the vessel. Accordingly, the court held that § 183c was inapplicable to the release.

In reaching its holding, the Florida Court of Appeal distinguished *Matter of Pacific Adventures, Inc.*, 5 F.Supp.2d 874, 1998 AMC 2857 (D.Haw. 1998), in which a federal district court had concluded that § 183c of the Limitation Act invalidated a similar release signed by a dive participant. (See 8 *Boating Briefs* No. 1 (1999)). *Pacific Adventures* involved a claim by a dive participant who was injured when her leg became entangled in a boat's propellor. The District Court for Hawaii found that the plaintiff's accident fell within admiralty jurisdiction and that the plaintiff's status as a passenger had not ended even though she was injured while diving. In a dissenting opinion in *Borden*, a single appellate judge argued that Mr. Borden remained attached to the dive boat as a passenger at the time of his death and that the majority had erred in concluding that the alleged negligence did not relate to the operation of the dive boat.

The applicability of § 183c of the Limitation Act was also considered in a recreational context in *Waggoner v. Nags Head Water Sports, Inc.* 141 F.3d 1162, 1998 AMC 2185 (4th Cir. 1998). In *Waggoner,* the Fourth Circuit Court of Appeals considered whether § 183c invalidated a release in a jet-ski rental agreement. The court held that § 183c was inapplicable on the ground that it applies only to common carriers of passengers for hire. (See 7 *Boating Briefs* No. 1 (1998)). It does not appear that the decedent's estate in *Borden* advanced the argument that a dive boat is not a common carrier of passengers to which § 183c applies. The *Waggoner* decision was not mentioned by the Court of Appeal in *Borden*.

Coast Guard Proposes Reduced Standard of Intoxication

On March 16, 2000 the Coast Guard published a Notice of Proposed Rulemaking to reduce the federal Blood Alcohol Concentration ("BAC") standard for recreational boaters from .10 BAC to .08 BAC. The proposed rule, which would amend 33 CFR Parts 95 and 177, is published at 65 Fed. Reg. 14223.

In its regulatory notice, the Coast Guard cites the concern that alcohol remains a significant factor in boating deaths and the desire to support what is termed a trend toward reduced state boating BAC standards as reasons for the proposed rule. Specifically the Coast Guard notes that while the overall number of boating deaths dropped from 1,100 in 1986 to 821 in 1997, the number of deaths in which alcohol was a factor remained stable. According

to Coast Guard statistics, alcohol was consumed by vessel occupants in 27 percent of all boating fatalities in 1997.

The materials accompanying the proposed rule indicate that in 1987 only 21 states had enacted BAC standards for recreational boaters. Nineteen of these 21 states had adopted a BAC of .10 while the remaining two had specified a .08 BAC. By 1999, 54 states and territories had enacted BAC standards for recreational boaters. A BAC of .10 is specified by 34 states. Twenty states specify a BAC of .08 for recreational boaters.

The proposed rule would also amend existing federal regulations by replacing the term "intoxicated" with "under the influence of alcohol or a dangerous drug" as used in connection with the new BAC standard.

The proposed rule, like the existing regulations, would adopt and would not preempt existing state BAC standards for navigable waters wholly within a particular state or within state coastal boundaries. Accordingly, there would be no change in those states that utilize the higher .10 BAC standard. The federal standard applies to navigable coastal waters beyond state boundaries, to vessels owned by U.S. citizens while operating on the high seas and to navigable waters and waters on federal property in those states which have not enacted BAC standards for recreational boating (presently Iowa and New Mexico).

Comments in response to the proposed rule must be submitted by July 14, 2000. Comments may be submitted by mail addressed to Docket Management Facility, U.S. Department of Transportation, Room PL-401, 400 Seventh Street SW, Washington, D.C. 20590, by telefax to 202-493-2251 or by E-Mail to http://dms.dot.gov. Questions concerning the proposed rule may be directed to Carlton Perry, Project Manager, Office of Boating Safety, U.S. Coast Guard by telephone at 202-267-0979 or E-Mail at cperry@comdt.uscg.mil.

Primary Assumption of Risk Doctrine Does Not Bar Tube Rider's Personal Injury Claim

In Volume 8, No. 2 (Fall/Winter 1999), we reported the decision in *Record v. Reason*, 86 Cal.Rptr.2d 547, 1999 AMC 2380 (Cal.Ct.App. 1999), wherein the California Court of Appeal held that "tubing" is a sport to which the doctrine of primary assumption of the risk applies. The court held that the doctrine barred the plaintiff's personal injury claim based on alleged negligence in the operation of the towing boat.

A separate division of the same court recently addressed a similar claim in *Bjork v. Mason*, 92 Cal.Rptr.2d 49, 2000 AMC 455 (Cal.Ct.App. 2000). Fifteen year old Brian Bjork sustained injuries when a tow rope attached to the inner tube on which he and another boy were riding broke, striking him in the eye. Bjork brought suit against David Mason, the adult owner and operator of the towing boat, in California state court. The incident occurred when the boat operator suddenly accelerated the towing boat while operating in a no-wake zone. The operator testified that he checked the condition of the tow rope before the activity began but he could not recall how old the tow rope was. There was evidence that the tow rope was frayed and damaged. The operator also testified that it is not uncommon for tow ropes to break while "tubing." The plaintiff alleged that the operator negligently accelerated the boat and negligently furnished a defective tow rope for the activity.

The trial court found that the plaintiff's claims were barred by the primary assumption of risk doctrine and granted summary judgment in the defendant operator's favor. The plaintiff appealed.

On appeal the plaintiff argued that summary judgment was improperly granted due to the existence of triable issues of fact regarding whether the doctrine of assumption of the risk barred the plaintiff's claims under the circumstances. As in *Record v. Reason*, the Court of Appeal held that "tubing" is a sporting activity to which the doctrine of primary assumption of the risk applies and that the boat operator and tube rider are "co-participants" in the sport. In so holding the court rejected the plaintiff's first argument that summary judgment was improperly granted with regard to the plaintiff's allegation that the operator negligently accelerated the boat in a no-wake zone. The court held that changes in speed and turn angle are risks inherent in the sport and that when the doctrine of primary assumption of the risk applies, a co-participant is liable only for intentional or reckless conduct totally outside the range of risk inherent in the activity.

The plaintiff argued in the alternative that summary judgment was improper in light of his allegation that the owner and operator of the boat negligently furnished a defective tow rope. In considering this argument the Court of Appeal held that the owner/operator of the boat had a dual capacity of co-participant and supplier of equipment in connection with the activity. After reviewing analogous cases outside of the recreational boating context, the court held that "when a person supplies equipment to be used in a sport, even if he or she thereafter becomes a coparticipant in the sport, the act of supplying of the equipment is something separate and distinct from participation in the sport and the tests for liability are accordingly different." The Court of

Appeal held that general negligence rules apply to claims based on the furnishing of equipment for an activity to which the primary assumption of risk doctrine applies, reversed the trial court's entry of summary judgment and remanded the case for further proceedings on the defective equipment claim.

Other Recent Cases

Krummel v. Bombardier Corp., __ F.3d __, 2000 WL 266543 (5th Cir. March 27, 2000). Plaintiff who sustained a broken leg while using a PWC, brought a products liability action against the manufacturer, claiming defective design of the craft's footwells and failure to warn. The district court found that the PWC was not defectively designed but entered judgment against the manufacturer for failure to warn users of the potential risk of leg injuries. On appeal, the Fifth Circuit reversed and rendered judgment for the manufacturer on the basis that the plaintiff had failed to demonstrate that the manufacturer should have foreseen the risk of injury through either a pattern of similar injuries or a design defect.

Naglieri v. Bay, 1999 WL 1611209 (D.Ct. 1999). The estate of decedent who drowned while serving as a volunteer crew member on the defendant's racing sloop brought a negligence cause of action against the owner under the general maritime law and Connecticut law. The decedent drowned when the sloop broached after encountering a sudden 42 knot wind gust. The decedent, who was not wearing a PFD, was thrown into the water. Efforts by the captain and crew to retrieve him were unsuccessful. Following a bench trial, the district court entered findings of fact and conclusions of law and entered judgment for the defendants.

Olson v. Empire District Electric Co., 2000 WL 140752 (Mo.App.S.D. Feb. 9, 2000). The defendant electric company, a Kansas corporation, owned and operated a dam and lake in Cherokee County, Kansas. Eric Olson, a Missouri resident, was killed in a boating accident on the lake when his boat was swept into the dam. The electric company moved to dismiss a suit brought by the decedent's estate on the ground that the action was barred by the Kansas Land and Water Recreational Areas Act. The statute immunizes landowners who permit their property to be used by the public for recreational purposes without charge. The trial court granted summary judgment to the defendants. The Court of Appeals affirmed. *See* discussion of recreational use immunity statutes in 8 *Boating Briefs* No. 2 (Fall/Winter 1999).

Sprietsma v. Mercury Marine, 2000 WL 355575 (Ill.App. 1 Dist. April 6, 2000). The estate of a decedent killed when struck by a propellor after

falling from a pleasure boat brought a wrongful death action against the boat's manufacturer based on its alleged failure to equip the boat with a propellor guard. The appellate court affirmed the trial court's entry of summary judgment in favor of the manufacturer on the ground that the plaintiffs' state law tort claims were impliedly preempted by the Federal Boat Safety Act, 46 U.S.C. § 4301 et seq. *See* discussion of other cases in 7 *Boating Briefs* No. 1 (Fall/Winter 1998).

LeBlanc v. Cleveland, 198 F.3d 353 (2nd Cir. 1999). In a suit arising from the collision of a kayak and a motor boat on the Hudson River 29 miles upstream of Fort Edward, the district court dismissed the action for lack of subject matter jurisdiction, finding that the accident did not occur on navigable waters. The area of the Hudson in question cannot presently support interstate navigation due to the presence of man-made dams. The Second Circuit affirmed the dismissal, rejecting the defendant's argument that the court should apply an historical navigability test.