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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
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EDITORIAL COMMENT

This edition of the MLA Report continues the practice of publishing reports and newsletters of MLA committees so that they may be readily available to all Association members, both on-line and in print. In that connection we are pleased to present the inaugural issue of the newsletter of the Committee on Cruise Lines and Passenger Ships, issued last Fall, two additional newsletters from that Committee, and newsletters from the Committees on Marine Insurance and General Average, Marine Torts and Casualties, Recreational Boating and Salvage, all of which you should find of interest. We commend all of the committees issuing newsletters for their diligence in advising the membership of developing issues in the maritime law of the United States.

With the goal of making the MLA Report more readily accessible, we have expanded the Table of Contents to indicate major topics covered by the newsletters. We have also included a Table of Authorities listing the numerous cases cited by the newsletters. You will note that, as many of these cases were recently decided at the time the newsletters were issued, some lack official citations. However, the Table of Authorities should be useful in keeping track of new decisions.

Finally, we have adopted the caution long given by the Committee on Marine Insurance and General Average respecting their newsletter and state that the articles, case notes and comments published in this MLA Report are for informational purposes only, are not intended to be legal advice, and are not necessarily the views of the Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

Chair: Robert D. Peltz
Vice-Chair: W. Sean O'Neil

Inaugural Newsletter, October 6, 2009

INVESTIGATION OF CRIMES "ON THE HIGH SEAS" OCCURRING ON CRUISE SHIPS

Sean O'Neil

The FBI has jurisdiction when an American disappears "on the high seas," explained Special Agent Mike Leverock after Jennifer Ellis-Seitz plunged off her cruise ship on Christmas Day, 2008. See http://www.tampabay.com/news/publicsafety/article952557.ece. Though Mrs. Ellis-Seitz appears to have committed suicide, FBI jurisdiction on the high seas becomes crucially important when foul play is suspected, such as the recent incident involving Shirley McGill. On July 16, 2009, her husband, Robert McGill, was arrested on the charge of murder within the special maritime and territorial jurisdiction of the United States, 18 U.S.C.A. §1111(b). See http://sandiego.fbi.gov/pressrel/presserl09/sd071609.htm.

Black's Law Dictionary defines the high seas as "the seas or oceans beyond the jurisdiction of any country. Under traditional international law, the high seas began 3 miles from the coast; today, the distance is generally accepted to be 12 miles." Incidentally, the Death on the High Seas Act sets the high seas as beyond 3 nautical miles (approximately 3.45 miles) from the shore of the United States. 46 U.S.C.A. §30301 et seq.

Title 18 of the United States Code deals with Crimes and Criminal Procedure. The terms "special maritime and territorial jurisdiction of the United States" is defined to include the high seas, any place outside the jurisdiction of any nation with respect to any offense by or against a national of the United States and, to the extent permitted by international

law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States. 18 U.S.C.A. §7.

Under existing federal statutes and regulations, cruises lines are required to report suspected crimes to United States government officials when they occur within territorial waters or are otherwise subject to U.S. jurisdiction. 33 C.F.R. § 120.220(a).

TOXIC TORTS AND DAUBERT

Bob Peltz

Although toxic tort cases are no stranger to the maritime arena, their numbers have been increasing over the years. The issue of the sufficiency of scientific and medical evidence to support the existence of causation between the exposure to allegedly toxic chemicals and products and the particular disease in question generally plays a critical role in such cases.

Although the standard of causation under the Jones Act is significantly reduced from other cases, the federal courts have held that the plaintiff must still meet this burden with evidence that satisfies Rule 702 and therefore *Daubert* standards. *See, e.g., Seaman v. Seacor Marine,* LLC, 564 F.Supp.2d 598 (E.D. La. 2008) aff'd 2009 AMC 1506 (5th Cir. 2009) (unpublished opinion). *Also see Wills v. Amerada Hess Corp*, 379 F.3d 32 (2d Cir. 2004).

The legal requirements for establishing a toxic tort case under the Jones Act require the plaintiff to present evidence establishing: (1) that the plaintiff was exposed to the chemical in the work place; (2) that the chemical can cause the specific disease and (3) that the plaintiff's exposure was in fact the cause of his disease. *Seaman,* 564 F.Supp. 2d 598. Also see *Jackson v. A-C Product Liability Trust,* 2009 AMC 654 (N.D. Ohio 2009).

In cases arising under the Jones Act, it has been recognized that these elements can only be met with expert testimony. *See, e.g., Willis,* 379 F.3d 32; *Seaman,* 564 F.Supp.2d 589. Therefore, to meet these burdens, the Jones Act plaintiff must present admissible testimony to establish general causation as well as specific causation. *Knight v. Kirby Inland Marine, Inc.,* 42 F.3d 347, 251 (5th Cir. 2007). General causation is whether a substance is capable of causing a particular injury or condition in the general population. *Id* (quoting *Merrill Dow Pharm. Inc. v. Havner,* 953 S.W. 2d 706) (Tex. 1997). Specific causation is whether a substance caused a particular individual's injury. *Id.; Seaman,* 563 F.Supp 2d at 600.

In order to determine whether expert testimony meets the required *Daubert* standards necessary for its admissibility, federal courts have construed the Supreme Court's landmark decision as establishing a non-inclusive five factor flexible test, which looks to: (1) whether the expert's theory can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential weight of error of the technique or theory when applied; (4) the existence and maintenance of standards of control; and (5) the amount to which the technique or theory has been generally accepted in the scientific community. *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269, 275 (5th Cir. 1999).

Although a detailed discussion of the application of these factors is beyond the scope of this article, federal cases have generally focused upon the real world acceptance and testing of the expert's theories. *See e.g. Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593 (1993); *Rink v. Cheminova, Inc.,* 400 F.3d 1286, 1290 (11th Cir. 2005); *U.S. v. Frazier,* 387 F.3d 1244, 1262 (11th Cir. 2004); *Dhillon v. Crown Control's Corp.,* 269 F.3d 865, 869 (7th Cir. 2001).

CASE LAW UPDATE

Lischinskaya v. Carnival Corp., 855 N.Y. S.2d 334 (App. Div. N.Y. 2004).

A New York appellate court upheld the application of a forum selection clause contained in a Carnival Cruise Line ticket requiring a

personal injury claim by a passenger to be filed in Miami. The court further concluded that where such a clause is enforceable, as in the case before it, it was inappropriate for the trial court to look to forum non-conveniens considerations in order to determine whether dismissal was proper.

Marvin Kessler Limitation Proceedings, 2009 AMC 1355 (E.D.N.Y. 2009).

Under maritime law a party may only obtain sanctions for spoliation where it is able to show that (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a 'culpable state of mind' and (3) the destroyed evidence was "relevant" to the party's claim and defense, so that a reasonable trier of fact could find that it would support that claim or defense. The court went on to hold that an unfavorable inference will not arise where the circumstances indicate that the evidence had been lost or accidentally destroyed or where the failure to produce it is otherwise properly accounted for.

Noboa v. MSC Crociere S.P.a., 2009 AMC 1312 (S.D.N.Y. 2009).

A New York federal court upheld the application of a one year time bar provision in a passenger ticket, rejecting the plaintiff's claims that the clause was ambiguous because of its further reference to the Athens Convention. The court noted that the question of whether a contractual phrase is ambiguous is a question of law for the court and is based upon objective standards.

Lavoie v. SunCruz Casino Cruises, LLC., 2009 AMC 781 (D.S.C. 2009)

A South Carolina district court refused to enforce a passenger forum selection clause requiring suit to be filed in South Florida on the grounds that it would be unfair, because the ticket provided that the fare

was not refundable after it was paid. As a result the passenger would have to forfeit its entire fare in order to avoid the forum clause by not going on the cruise.

Reynolds v. SeaLift, Inc., 2009 AMC 857 (2d Cir. 2009).

A shipowner was entitled to a summary judgment on a Jones Act claim brought by a seaman who was injured when hit by a bus while returning to the vessel from shore leave. The court concluded that a shipowner has no duty to provide a safe means of transportation between a ship and a seaman's chosen venue for shore leave amusement.

Volume 2, January 28, 2010

DAMAGE CAPS AND UNIFORMITY

Bob Peltz

In a somewhat surprising decision, a Maryland trial court concluded in a decision published in AMC that Maryland's state statutory cap on non-economic damages was applicable to a Jones Act case in which the jury returned a $7.1 million verdict. *See McCoy v. Weeks Marine, Inc.,* 2009 AMC 1862 (Cir. Ct. Balt. 2009). Although the opinion is somewhat short on the underlying facts, it indicated that the seaman had suffered a broken jaw, broken facial bones and undefined injuries to his shoulder. Despite his injury, the plaintiff was apparently able to return to work after a six month convalescence, however, presented evidence that he would likely incur $75,000 in future medical expenses.

In 1995, the State of Maryland promulgated a cap on non-economic damages in the amount of $500,000, which would be increased each year by $15,000. Therefore, at the time of the trial, the cap amounted to $620,000.

In applying the state statutory cap to the Jones Act case, the court relied upon an earlier state appellate decision applying the cap to a case filed under the Federal Civil Product Safety Act. Somewhat incredibly, the court concluded that the "plaintiff has neither indicated how applying the cap would materially prejudice any characteristics of future maritime law or has Plaintiff displayed how applying the cap would disrupt the uniformity of maritime law."

In one of the few prior cases to consider this issue, the federal district court for Massachusetts concluded that a state statute imposing a cap on damages for tort claims against charitable institutions in the amount of $20,000 could not be applied in a maritime case. *Pike v. Woods Hole Oceanographic Institution,* 223 F.Supp.2d 198 (D.Mass. 2002). *See also In re Garvey Marine, Inc.,* 2004 WL 2005824 (N.D. Ill.

2004)(state law cap on recovery limiting the liability of an employer on a contribution claim to the amount of worker's compensation benefits paid was pre-empted by maritime law).

The court's ruling in this case is also clearly inconsistent with the overwhelming weight of authority rejecting the application of state law principles, where they would act to decrease the amount of damages recoverable under maritime law. As set forth by the United States Supreme Court in *Pope & Talbot v. Hawn,* 346 U.S. 406, 410 (1953), which rejected the application of Pennsylvania's contributory negligence defense to a seaman's claim, "[maritime law] does not support the contention that a state which undertakes to enforce federally created maritime rights can dilute claims fashioned by federal power, which is dominant in this field." *See also Hall v. Royal Caribbean Cruises Ltd.,* 888 So.2d 654 (Fla. App. 2004)(refused to apply state dram shop act to bar claim by intoxicated passenger).

Likewise, the courts have generally also refused to allow the application of state law to expand the damages, which are defined under maritime law, especially when based upon statute. *See, e.g., Ford v. Wooten,* 681 F.2d 712 (11th Cir. 1982)(DOHSA is exclusive remedy for death where negligence occurs on the high seas); *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990) (survivors of Jones Act seaman were not permitted to recover non-pecuniary damages for the death of a seaman); *In re Amtrak Sunset, Ltd. Train Crash,* 121 F.3d 1421 (11th Cir. 1997)(refusing to apply Alabama law which prohibited the apportionment of damages among joint tort feasors).

MEDICARE'S MANDATORY REPORTING PROGRAM

Carol L. Finklehoffe

Effective January 1, 2010, all insurers and self-insured entities will be required to report claims made by Medicare-eligible claimants to

the Center for Medicare and Medicaid Services and will be subject to a $1,000 daily fine for late reporting. These new requirements apply to any claimant who is entitled to Medicare benefits and has received or will receive payments in the future. The information must be submitted after the claim is resolved, whether through a settlement, judgment, award or other payment regardless of whether or not there is a determination or admission of liability. A failure to make a timely report can result in penalties, including a fine of $1,000 for each day of noncompliance.

Although in the past the burden of notifying Medicare rested with the plaintiff, this new requirement places the burden on the defendant as well. Therefore counsel for both parties must take into account Medicare's absolute right of reimbursement. Failure to satisfy Medicare's lien presents a risk of future liability against all parties, as Medicare has a direct right of action and a subrogation right for its conditional payments against any party, including a primary payer that has already paid a plaintiff or a beneficiary provider, supplier, physician, or attorney.

Discovery in liability cases must be tailored to obtain key information from a plaintiff to determine if he or she is presently a Medicare beneficiary or will be eligible for benefits within 30 months of settlement, and whether any benefits have been received or are anticipated to be received. Both pre-trial and post-trial procedures must be tailored as well. For example, verdict forms should apportion the amount of award between medical benefits (future and past) and non-medical benefits (i.e. lost wages).

The parties should document that Medicare's interests have been taken into account prior to the payment of any settlement or judgment. Suggested tools include: (1) using multi-party settlement drafts which require the Medicare beneficiaries to endorse the check; (2) issuing multiple-party checks - a multi-party check to cover anticipated Medicare recovery amount and another to the beneficiary; (3) issuing a separate check to Medicare; (4) requiring the monies be held in an escrow account until the Medicare lien has been satisfied; and establishing a Medicare Set Aside for future medical needs.

CASE LAW UPDATE

1. Jones Act

Dise v. Express Marine, Inc. 2009 AMC 2265 (D. Md. 2009)

Although an employer will be liable under the Jones Act for medical negligence in the treatment of a seaman by a doctor which it selects, *Olsen v. American S.S. Co.,* 176 F.3d 291 (6th Cir. 1999), the employer will not be vicariously liable for the negligence of a healthcare provider chosen by the plaintiff. *Joiner v. Diamond M. Drilling Co*., 688 F.2d 256, 262 n.9 (5th Cir. 1982)("[W]e can find no case holding a ship vicariously liable for the negligence of an onshore physician selected by the injured seaman himself"); *Greenwell v. Aztar Indiana Gaming Corp*., 268 F.3d 486 (7th Cir. 2001). In applying this rule to the facts before it, the court went on to further hold that an employer would not be vicariously liable for the negligence of a medical facility to which a 911 responder had taken the seaman, simply because the employer had advised its employees to call 911 in the event of an emergency and subsequently agreed to pay the medical bills for such treatment.

McDonald v. Kahikolu, Ltd. 2009 AMC 2113 (9th Cir. 2009)

Although refusing to decide whether the Pennsylvania Rule, which shifts the burden of proof to the shipowner in cases of statutory violations, would be applicable in the Jones Act context under certain circumstances, the Ninth Circuit held that the application of the rule requires a threshold casual connection between the violation and the injury. *See also Wills v. Amerada Hess Corp*., 379 F.3d 32 (2d Cir 2004), *Mathes v. Clipper Fleet,* 774 F.2d (9th Cir. 1985), *Seaboard Tug and Barge v. Rederi AB/Disa,* 213 F.2d 772 (1st Cir. 1954). Accordingly, the court refused to apply the rule in the case of an injury to a seaman working aboard a dive vessel, who had made a free dive to retrieve a mooring line, where the vessel did not have a diving manual onboard in violation of 46 C.F.R. § 197.420. The court's opinion contains a good discussion of the prior cases which have dealt with the issue of the application of the Pennsylvania Rule outside of the collision context.

Townsend v. Diamond Offshore, 2009 AMC 2139 (E.D. La. 2009)

The knowledge of a physician performing a pre-employment physical that a seaman was not physically fit to perform his intended work was imputed to the shipowner under the Jones Act. Presumably, this case would also support the imposition of vicarious liability where the physician negligently failed to determine the seaman's unsuitability for work by performing an inadequate examination. Since the seaman was aware of the doctor's findings, he was assessed with 50% comparative negligence for choosing to accept the work anyway.

Campbell v. Royal Caribbean Cruises, Ltd., 2009 AMC 2391 (5th Cir. 2009)

A dancer hired by cruise line to perform on its cruise ship was not considered to be a seaman when injured prior to embarkation during the course of onshore rehearsals. The Court concluded the test was whether one was actually serving as a seaman, not whether one "intended" to work as a seaman in the future.

2. DOHSA

Helman v. Alcoa Global Fasteners, Inc., 2009 AMC 1980 (C.D. Cal. 2009).

The federal district court refused to follow the earlier decision of the Second Circuit Court of Appeal in *In re Air Crash Off Long Island, New York, on July 17, 1996,* 209 F.3d 200 (2d Cir. 2000), which held that in order for DOSHA to be applicable the alleged negligence had to occur more than 12 nautical miles from land. The Second Circuit had previously concluded that DOHSA's operative language requiring the negligence to occur "on the high seas beyond a marine league from the shore" of the United States set forth two separate conditions, namely that the act had to be both on the high seas and beyond three nautical miles from the shore. In reliance upon a Presidential Proclamation issued by President Reagan that had extended the territorial sea of the United States to

12 nautical miles, the Second Circuit concluded that the proclamation changed the requirements for the application of DOHSA.

In refusing to follow the Second Circuit's majority opinion, the California District Court instead followed the dissenting opinion of then Judge, now Justice, Sonia Sotomayor, which concluded that the Presidential Proclamation had no effect on the interpretation of DOHSA, in which Congress has expressed a clear intent for the statutory scheme to apply where the alleged negligence occurred more than three nautical miles from shore, the traditional definition for the beginning of the high seas.

3. Removal

Ensco International, Inc., v. Certain Underwriters at Lloyds, 2009 AMC 1927 (5th Cir. 2009)

A provision in a marine insurance policy that provides for exclusive jurisdiction in the courts of Dallas, Texas, waives the parties' right to remove a case arising under the policy, even if the case would otherwise be subject to the New York Convention on Foreign Arbitral Awards. The Fifth Circuit concluded that the clause, which was sufficient to confer exclusive jurisdiction in the state courts of Texas met the "clear and unequivocal" test for such waivers adopted in *McDermott International Inc. v. Lloyds Underwriter's,* 944 F.2d 1199 (5th Cir. 1991). Presumably, the same rule would apply in other maritime contract contexts, such as in passenger tickets.

4. Maintenance and Cure

Cunningham v. Interlake Steamship Co., 2009 AMC 1991 (6th Cir. 2009)

The Sixth Circuit holds that the doctrine of latches determines the timeliness of claims for maintenance and cure.

5. Piracy

Hicks v. Waterman Steamship Corp., 2009 AMC 2257 (S.D. Tex. 2009)

A state court lawsuit filed under the Jones Act asserting that a seaman of a cargo vessel was injured when pirates attempted to highjack the ship because of its inadequate security cannot be removed to federal court. The defendant shipowner had argued that the claim was removable since it arose under the Marine Transportation Security Act of 2002, 46 U.S.C. § 70101, rather than under the Jones Act.

6. Forum Selection Clauses

Leslie v. Carnival Corp., 22 So.3d 567, 2010 AMC 263 (Fla. 3rd D.C.A. 2009)

An equally divided en banc panel of the Third District Court of Appeal on rehearing affirmed the panel opinion, which had upheld a forum selection provision in a cruise line ticket that required the filing of suits by passengers in the United States District Court for the Southern District of Florida in Miami. The original panel opinion rejected the passenger's contention that the application of the forum selection clause to Florida state residents acted to deprive them of the right to a jury trial because the carrier's residence in Florida destroyed diversity jurisdiction, requiring that the suit be filed on the admiralty side of the federal court. The highly unusual five to five tie resulted in the panel opinion standing as written. [2008 WL 34793].

The judges voting to reverse the panel opinion relied upon a number of federal cruise line cases, which had refused to give effect to express contractual waivers of a passengers right to a jury trial, concluding that the effect of enforcing this forum selection clause would result in a similar waiver. *See, e.g., Sullivan v. Ajax Navigation Corp.,* 881 F.Supp. 906 (S.D.N.Y. 1995); *Ginsberg v. Silversea Cruises Ltd.,* 2004 W.L. 3656827 (S.D. Fla. 2004); *McDonough v. Celebrity Cruises, Inc.,*

2000 W.L. 341115 (S.D.N.Y. 2000). The judges supporting the panel opinion concluded that the Florida passengers lost their right to a jury trial not as a result of an express contractual waiver, but instead due to the application of the court's diversity of citizenship jurisdictional requirements, which inadvertently limited the ability of some passengers to obtain a jury trial. As a result, these judges contended that there was no constitutional issue involved and that the Seventh Amendment was inapplicable to the situation.

Spivey - Ferguson v. Carnival Corp., 2009 FLW 3d DCA 2457 (11-25-09)

Following the unusual five to five split by the Judges of the Third District Court of Appeal in the en banc rehearing in Leslie, two of the dissenting judges (supporting the passenger's position) certified this case, which involved the same identical facts, as one involving great public importance for review by the Florida Supreme Court. Under Florida's appellate procedural rules, the Supreme Court's jurisdiction is extremely limited. The main route for reaching the Supreme Court is through conflict certiorari, however, its jurisdiction to hear such cases is limited to conflicts between two different District Courts of Appeal and not between different panels from the same district. Therefore, in an apparent effort to avoid the en banc deadlock in Leslie, two dissenting judges presented the plaintiff with an opportunity to seek further review through this much less traveled path.

Freed v. Celebrity Cruises, Inc., 2009 WL 4641699 (E.D. Pa. 2009)

The court enforced a forum selection clause requiring suit to be filed in Miami Dade County despite the plaintiff's complaint that she had never received a ticket for the cruise. Instead, the plaintiff, who was a travel agent, contended that she received a special discount price in return for attempting a "seminar at sea," for which the cruise line had sent confirming emails rather than a ticket. The cruise line pointed out that both confirming emails directed the plaintiff to its website, which

contained an online check in procedure that included a printout express pass. Using this feature required the passenger to acknowledge the contract terms. The cruise lines presented further evidence to establish that at check in each passenger would receive a cruise tour contract with these terms as well. Based on this evidence, the federal district court in Pennsylvania granted the defense's motion to dismiss and transferred the case to the Southern District of Florida.

Morag v. Quark Expeditions, Inc., 2009 AMC 2309 (D. Conn. 2008)

A non-party to a passenger's ticket contract may enforce a contractual forum selection clause if it is closely enough related to the carrier that its attempt to enforce the clause would be foreseeable. In this particular case, the court allowed the carrier's world wide exclusive sales agent to enforce a London forum selection clause. *See also Novak v. Tucows, Inc.*, 2007 WL 922305 (E.D.N.Y. 2007); *Direct Mail Production Services, Ltd. v. MBNA Corp.*, 2000 WL 1277597 (S.D.N.Y. 2000); *Firstclass Corp. v. Silverjet PLC*, 560 F.Supp 2d 324 (S.D.N.Y. 2008); *Holland American Line, Inc. v. Wartsila North America, Inc.*, 485 F.3d 450 (9th Cir. 2007); *Hugel v. Corp. of Lloyds*, 999 F.2d 2006 (7th Cir. 1993). A non-party is closely related to a dispute if its interests are "completely derivative of and directly related to, if not predicated upon the signatory party's interest or conduct." *Cuno, Inc. v. Hayward Industrial Products, Inc.*, 2005 WL 1123877 (S.D.N.Y. 2005).

7. Shoreside Excursions

Fojtasek v. NCL (Bahamas), Ltd., 2009 Fed. FLW D678 (S.D. Fla. 2009)

This suit was brought on behalf of a passenger, who died after falling off of a zip line on a shoreside excursion. The court, in a wide ranging opinion, held that DOHSA was not applicable to govern the claim, even though the excursion had been sold to the decedent onboard the vessel, since the "cause of action accrued on land at the time that the

decedent fell from the zip line." In reaching this conclusion, the Court expressly refused to follow the decision in *Ray v. Fifth Transoceana Shipping Co., Ltd.,* 529 So.2d 1181 (Fla. App. 1998), which applied DOHSA in a suit against a cruise line for a passenger, who was killed by terrorist bomb while on a shoreside excursion, on the grounds that the decision "was wrongly decided." The court also refused to follow the earlier federal court decision in *Moyer v. Klosters Rederi,* 645 F.Supp. 620 (S.D. Fla. 1986), which applied DOHSA to a claim arising from the death of a snorkler on an excursion off of the coast of Mexico. In Moyer, the plaintiff had also asserted landbased claims based upon the failure of the cruise line to properly perform resuscitation procedures and in their negligence for failure to warn of the perils of the excursion.

The court also refused to apply a ticket disclaimer of vicarious liability for the negligence of any shore based excursion operators on the grounds that the plaintiff's claim had asserted the carrier's own negligence in failing to warn of the dangers involved in the shore excursion and in selecting the particular shore based operator. On the other hand, a court dismissed the plaintiff's apparent agency claim on the ground that the complaint had failed to allege facts supporting its three critical elements: (1) representations made by the principal causing the plaintiff to believe the alleged agent had authority to act for it, (2) the passenger's belief was reasonable and (3) the passenger acted reasonably in reliance upon such belief to his detriment.

Winograd v. Carnival Corp., Superior Court of New Jersey,
Case No.: BUR-L-3680-08

In a case handled by Cruise Line Committee member Kevin McGee, the court dismissed a passenger's claim for injuries when she was attacked and robbed during a shore excursion for failing to file suit within the one year time bar provision of her ticket. The court applied the time bar provision to the plaintiff even though her traveling companion purchased and held on to the tickets. In addition to relying upon prior authority charging a passenger with knowledge of ticket provisions held by a traveling companion, the court also noted that the entire ticket was available on the carrier's internet website.

8. Seamen's Arbitration Agreements

Matabang v. Carnival Corp., 630 F.Supp.2d 1361 (S.D. Fla. 2009)

The court refused to apply the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to a claim brought by the family of an American seaman who fell overboard from a vessel owned by a U.S. corporation. The Convention provides that it does not apply where both parties to the contract are U.S. citizens unless the relationship involves property located aboard, envisages performance were enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. §202. The convention further defines a corporation as being a citizen of the United States if it is incorporated or has its principal place of business here. The court concluded that the fact that the ship was flagged in the Bahamas and was estimated to spend between 80 and 85% of its time in the Bahamas was not sufficient foreign contact to invoke the Convention.

9. Discovery

Fojtsek v. NCL (Bahamas) Ltd., 613 Fed. Supp 2d 1351 (S.D. Fla. 2009)

In a second reported decision from the same case (see 7. Shoreside Excursions), the court concluded that an incident report prepared by a shore excursion company at the direction of the carriers legal counsel was protected from disclosure as work product under the Joint Defense Agreement Doctrine. The court concluded that the doctrine was applicable, even though any claims against the excursion company were time barred when the report was prepared.

Volume 3, April 13, 2010

CHANGES IN FEDERAL PLEADING REQUIREMENTS

Robert D. Peltz and Robert C. Weill
McIntosh, Sawran, Peltz & Cartaya, P.A.

The pleading requirements for stating a legally sufficient claim under the Federal Rules of Civil Procedure have traditionally been so lax that a complaint could "not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conely v. Gibson,* 355 U.S. 41, 45-6 (1957). As a result, the successful motion to dismiss was largely an endangered species. Two recent Supreme Court decisions, however, have dramatically increased the requirements for pleading a legally acceptable complaint, thereby breathing new life into the motion to dismiss for failure to state a claim.

In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (1007), the Supreme Court held that while it was still not necessary to set forth detailed factual allegations in a complaint, mere "labels and conclusions" or a "formulaic resuscitation of the elements of a cause of action will not do." 550 U.S. at 555.

The Supreme Court also rejected the argument that a trial court should be hesitant to dismiss a complaint until a plaintiff is allowed the opportunity to conduct extensive discovery to develop facts. Instead, the Court concluded that pleading deficiencies should be "exposed at the time of minimum expenditure of time and money by the parties and court." 550 U.S. at 558. It went on to further hold that "courts must insist on some specificity in pleading before allowing a potential massive factual controversy to proceed."

In the even more recent decision of *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), the Supreme Court reaffirmed and heightened the pleading requirements of *Twombly,* while at the same time removing any doubt that its earlier decision went beyond complex or anti-trust cases. In a

case based upon a claim that government officials had violated the plaintiff's constitutional rights by discriminating based on his religion, the Court held that a complaint requires more than "an unadorned, the - defendant - unlawfully - harmed - me accusation." 129 S.Ct. at 883.

The Court went on to further note that while a trial court is required to accept the well-pled factual allegations of a complaint as true, this rule does not apply to legal conclusions. It further held that the complaint must state a "plausible claim for relief." Therefore, the factual allegations must show that the plaintiff's claim is plausible, and not merely conceivable. 129 S.Ct. at 1950.

Due to the recentness of these decisions, there have been few lower case decisions applying these rules. Nevertheless, see *Maldonado v. Fontanes,* 568 F.3d 263 (1st Cir. 2009) (court should scrutinize the plaintiff's complaint to determine whether it states a plausible entitlement to relief, rather than a mere possibility of misconduct).

RECENT DEVELOPMENTS IN CRUISE LINE/SHORE EXCURSION CASES

Jerry D. Hamilton
Hamilton, Miller & Birthisel, LLP

The validity of limitation of liability clauses contained in cruise-passenger tickets is undisputed. This fact has challenged counsel to explore other theories to make cruise lines liable to passengers injured on shore excursions operated by tour operators (independent contractors). Among the legal theories recently employed are (1) that the cruise line and the tour operator are involved in a joint venture; (2) that an agency relationship exists between the cruise line and the tour operator; and (3) that the plaintiff (passenger) is a third party beneficiary of the contract between the cruise line and the tour operator. The ability of a complaint to withstand dismissal depends upon a proper pleading out of the elements of each claim with the adequate supporting facts. This article briefly addresses the theories and their likelihood of success.

A. Joint Venture

The checklist of elements that a court will consider when analyzing a joint venture claim under federal common law are: (1) an intention of the parties to create a joint venture; (2) joint control or a right of joint control over the subject matter of the venture; (3) joint proprietary interests in the subject matter of the venture; (4) the right of both venturers to share profits; and (5) duty of both to share losses. *Skeen v. Carnival Corp.,* No. 08-22618-Civ. 2009 WL 1117432 at *3 (S.D. Fla. April 29, 2009).

The "intention to create a joint venture" should be satisfied by pleading the existence of a written or oral agreement to this effect. Id. at *3. "Joint control" can be met by showing mutual control over the subject matter of the venture and authority to bind one another with respect to the subject matter of the venture. *Id*. Also, a "joint proprietary interest" can be satisfied by demonstrating a joint ownership in the subject matter of the venture. Id.

While in many cases plaintiffs might easily show a "sharing of profits" by a cruise line and a shore excursion operator, factual allegations to support the intention and joint control elements have proven problematic. In shore excursion cases "joint control" is almost non-existent as the cruise lines have been careful in contracting and in their operation so as not to exhibit the necessary control over a tour that would needed to satisfy this element. *Skeen v. Carnival Corp.,* No. 08-22618-Civ. 2009 WL 1117432 at *3 (S.D. Fla. April 29, 2009).

Some have argued that the intention and joint control elements can be inferred by showing that the cruise line holds an insurance policy to cover liability for the shore excursion. *See Pilkerton v. Carnival Corp.,* No. 06-22609-Civ. 2009 WL 1239576 at *1 (S.D. Fla. April 27, 2007) (compelling cruise line to fully answer interrogatory by stating the names of all named insured on its shore excursion insurance policy). However the fact that insurance exists is simply not enough.

Additionally, the mere fact that a cruise line uses its staff to sell tickets for a shore excursion, for which a tour operator uses its staff to carry out the excursion, does not necessarily lead to the conclusion that they are doing so as part of a joint venture. *Skeen,* 2009 WL 1117432 at *4. As one can see the joint venture theories have not been a fruitful field to impose liability against the cruise lines.

B. Agency

Plaintiffs have also found it difficult to use the three theories of agency to support their claims. Liability based upon undisclosed agency ordinarily arises when an agent deals with a third party on behalf of a principal who is not disclosed to such third party. *Fojtasek v. NCL (Bahamas) Ltd.,* 613 F.Supp.2d 1351, 1356 (S.D. Fla. 2009). However, in the average shore excursion case an injured passenger will be aware of the identity of both parties, the alleged principal – the cruise line, and the alleged agent – the tour operator. This knowledge is an obvious obstacle to using "undisclosed agency" as a vehicle to support liability. *See id.* at 1356 (dismissing passenger's undisclosed agency count because at all times passenger was aware of the identity of the both parties to the alleged undisclosed agency).

Counts based upon a theory of actual agency have also been dismissed. The elements of an actual agency relationship are: (1) acknowledgment by the principal that the agent will act for it; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. Injured passengers who attempt to use a theory of actual agency face a problem similar to that encountered when using the joint venture theory, i.e. they have difficulty showing the requisite intent and control elements. *See id.* (dismissing passenger's actual agency count because of the absence of factual allegations to support an actual agency relationship between the cruise line and the tour operator).

Depending upon the facts involved in a passenger's case, apparent agency might prove to be more fertile ground for establishing cruise ship liability. An apparent agency is established by showing that

(1) the alleged principal made some sort of manifestation causing a third party to believe that the alleged agent had authority to act for the benefit of the principal; (2) the third party's belief was reasonable; and (3) the third party reasonably acted on such belief to his detriment. *Doonan v. Carnival Corp.,* 404 F.Supp.2d 1367, 1371 (S.D. Fla. 2005). Success in pleading this theory of liability depends upon (1) the level of interaction between the cruise line's crew and tour operators and, (2) the reasonable inference to be drawn from such interaction. The mere fact that a cruise line is billing, advertising, organizing and directing passengers to the operator's shore excursion is insufficient to lead to the inference that an agency relationship existed between the cruise line and the tour operator. *Fojtasek Ltd.,* 613 F.Supp.2d at 1357. However, should a plaintiff have facts to support an allegation that the tour operator's staff wore the ship's uniform, the ship's crew participated in the shore excursion and gave directions to the tour operator's staff, these factors might support a claim for liability based upon apparent agency. *See, e.g. Doonan,* 404 F.Supp.2d 1372 (finding that ship's doctor might be cruise line's apparent agent as opposed to an independent agent where ship's doctor wore ship's uniform, ate with the ship's crew and was addressed by ship's crew as an officer of the ship).

C. Third Party Beneficiary

Lastly, passengers have also faced difficulty when relying on contract law third-party beneficiary theory. *See, e.g., Morse v. Carnival Corp.,* No. 09-20441, slip op. (S.D. Fla. June 24, 2009). To maintain a claim for breach of a third party beneficiary contract, a plaintiff claiming third party beneficiary status must prove (1) the existence of a contract; (2) clear or manifest intent of the contracting parties that the contract primarily and directly benefits the third party; (3) breach of the contract by a contracting party; and (4) damages. *Steadfast Ins. Co. v. Corporate Prot. Sec. Group, Ins.,* 554 F.Supp. 2d 1335, 1338 (S.D. Fla. 2008).

Plaintiffs have had difficulty in proving element (2) i.e. a clear and manifest intent of the parties to the contract to primarily and directly benefit a particular passenger. A plaintiff has the burden of showing that both parties to the contract intended to benefit the plaintiff. *Steadfast,*

554 F.Supp. 2d at 1338. Further, such intent may not simply be "gleaned" from the contract, id., but must either expressly appear in the contract, or be clearly demonstrated by the contracting parties' actions. *Id*.

D. Conclusion

While on their face, the theories of joint venture, agency and third party beneficiary sound good they have a difficult time withstanding legal scrutiny. Lawyers advancing those theories certainly have to go above and beyond just notice pleadings to ensure that the allegations can survive initial dismissal and then they must find the evidence to support them.

CASE LAW UPDATE

Medical Malpractice

Gliniecki v. Carnival Corp., 632 F.Supp.2d 1205 (S.D. 2009).

Under the well established doctrine of *Barbetta v. S/S Bermuda Star,* 848 F.2d 1364 (5th Cir. 1988), which holds that a shipowner does not have a duty to provide medical services to passengers, the court concluded that a claim based upon the claimed duty to timely transport a passenger to suitable Panamanian medical facilities ashore in an adequately equipped ambulance must be dismissed with prejudice for failing to state a legally recognizable duty. The court went on to hold that "to vest Carnival, and shipowners like it, with the duty to provide medical transportation services in foreign ports of call, each time a passenger fell ill would turn cruise lines into insurers of their passenger's health, a proposition which runs contrary to the dictates of Barbetta." *See also Walsh v. NCL (Bahamas) Ltd*., 466 F.Supp.2d 1271 (S.D. Fla. 2006) (no duty to provide wheelchair to a passenger after a slip and fall); *Hajtman v. NCL (Bahamas) Ltd*., 526 F.Supp.2d 1324 (S.D. Fla. 2007)(no duty to promulgate procedures to ensure passenger's access to ship's physician); *Hesterly v. Royal Caribbean Cruises Ltd*., 515 F.Supp.2d 1278 (S.D. Fla. 2007) (rejecting characterization of cruise lines as a medical care provider.

Passenger Suits

Adams v. Carnival Corp., 2009 AMC 2588 (S.D. Fla. 2009).

A cruise line was entitled to a summary judgment on a suit brought by a 340 pound passenger who claimed to have been injured when a chair collapsed underneath him. In support of its motion for summary judgment, the cruise line introduced testimony establishing that the chair had been regularly inspected by a trained employee, that the chair was certified by the manufacture to hold weights up to 400 pounds and that there had been no prior incidents of collapses with the model. As a result, the court concluded that even if there was a jury question as to whether the chair was defective or not, there was no evidence to support the requisite element establishing the cruise line's knowledge of such alleged defect. The court went on to further hold that even if the doctrine of res ipsa loquitor was applicable to supply an inference of a defect, that it did not relieve the plaintiff of the burden of producing evidence to establish the shipowner's notice of such defect.

Expert Witnesses

Norfolk & Portsmouth Belt Line RR Co. v. M/V Marlin,
2009 AMC 2465 (E.D. Va. 2009).

In applying Federal Rule of Evidence 702 to a bench trial, the court concluded that although a marine surveyor had extensive experience in evaluating the nature and effect of damages and estimating the cost of repairs after an incident, he lacked sufficient experience, training and specialized knowledge to estimate the pre-incident value of a bridge tendering system damaged in an allision. In striking the expert's testimony, the court relied upon the well established rule that the fact that a proposed witness is an expert in one area, does not automatically qualify him to testify in all related areas. *See also Shreve v. Sears Roebuck & Co.,* 166 F.Supp.2d 378 (D.Md. 2001); *Oglesby v. General Motors Corp.,* 190 F.3d 244 (4th Cir. 1999); *Berlyn, Inc. v. Gavette Newspaper, Inc.,* 214 F. Supp. 2d 530 (D.Md. 2002). The Court went on to conclude

that the witness did not have to be a professional appraiser or an engineer to offer an expert opinion on the value of the fendering system, provided that his methodology for evaluating the structure is sound. *See, e.g. La Esperanza De P.R. Inc. v. Perez,* 124 F.3d 10 (1st Cir. 1997) (concluding that a marine surveyor was qualified to give an appraisal based upon his experience even though he was not an appraiser per se): *Crescent Towing Salvage Co., Inc. v. M/V Chios Beauty,* 2008 WL 5264268 (E.D. La. 2008).

Berner v. Carnival Corp., 2009 AMC 2506 (S.D. Fla. 2009).

A biomechanical engineer is qualified to testify that the force which with a passenger's head hit a deck would produce sufficient energy to cause the plaintiff's claimed mild to moderate head injury. Since the witness was not a physician, however, he would not be permitted to testify as to the existence of the plaintiff's claimed injuries or their causal relationship with the subject incident. The opinion contains an extensive discussion of other cases which have considered the parameters of a biomechanical engineer's testimony.

Arbitration

Balen v. Holland American Lines, Inc. 583 F.3d 647 (9th Cir. 2009).

An arbitration agreement contained in a seaman's collective bargaining agreement was enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (9 U.S.C. §201 et seq.) with reference to a claim brought under the Seaman's Wage Act, 46 U.S.C. §10313. This opinion expands upon the prior holdings of the Fifth and Eleventh Circuit Courts of Appeal upholding such arbitration agreements for claims arising under the Jones Act. *See e.g. Bautista v. Star Cruises,* 396 F.3d 1289 (11th Cir. 2005); *Francisco v. Stolt Achievement MT.,* 293 F.3d 270 (5th Cir. 2002).

Thomas v. Carnival Corp., 573 F.3d 1113 (11th Cir. 2009).

In order to compel a seafarer to arbitrate its personal injury claim under the Convention on the Enforcement of Foreign Arbitral Awards, there must be an arbitration clause in the contract of employment applicable to the voyage on which the plaintiff was injured. The existence of such an arbitration clause in a subsequent contract at the time that suit was filed will not relate back to the date of the incident, unless the contract indicates a clear intent for a retroactive application. Finding no such intent in the contract before it, the court therefore refused to compel arbitration of the seaman's Jones Act, unseaworthiness and maintenance and cure claims.

Although the court found that the seaman's subsequently accruing wage claim was covered under the new contract with the arbitration provision, it declined to compel arbitration on separate public policy grounds as permitted under Article V of the Convention. Under the terms of the arbitration clause, all proceedings were required to be litigated in the Philippines under the law of the vessel's flag, which in this case was Panama. While the court indicated that it was not troubled by the fact that the contract required arbitration in the Philippines, it concluded that the requirement that the proceedings be governed by Panamanian law, which would preclude the seaman's U.S. statutory remedies, would violate the applicable public policy concerns rendering the agreement unenforceable.

Loss of Consortium

Doyle v. Graske, 579 F.3d 898 (9th Cir. 2009).

The Eighth Circuit Court of Appeal joined the Fifth, Ninth and Eleventh Circuits in holding that general maritime law does not allow recovery for loss of consortium damages by the spouses of nonseafarers negligently injured beyond the territorial waters of the United States. *Also see Chan v. Society Expeditions, Inc.,* 39 F.3d 1398 (9th Cir. 1994); *Nichols v. Petroleum Helicopters, Inc.,* 17 F.3d 119 (5th Cir. 1994);

Lollie v. Brown Marine Service, Inc., 995 F.2d 1565 (11th Cir. 1993); *In re: Amtrak "Sunset Ltd." Train Crash,* 121 F.3d 1421 (11th Cir. 1997); *Frango v. Royal Caribbean Cruises Ltd.,* 891 So.2d 1208 (Fla. 3d DCA 2005).

Forum Non Conveniens

Loya v. Starwood Hotels & Resorts Worldwide, 583 F.3d 656 (9th Cir. 2009).

The doctrine of forum non conveniens is applicable to claims based upon the Death on the High Seas Act and accordingly, a district court could properly dismiss a claim for the death of a Washington state resident against a Mexican resort arising from a scuba trip. *See also Pain v. United Tech. Corp.,* 637 F.2d 775 (D.C. Cir. 1980).

Popescu v. CMA CGM, 2009 AMC 2895 (S.D. Fla. 2009).

In analyzing a shipowner's base of operations under the Lauritzen-Rhoditis choice of law analysis, the operations of a corporation's subsidiaries in the United States are not relevant unless they are alter egos of the parent.

Jones Act

Powell v. American President Lines, Ltd., 2010 AMC 30 (W.D. Wash. 2009).

A seaman may only assert a claim under the Jones Act against its employer and accordingly, a claim against the master will be dismissed.

A seaman may not bring a claim for negligent infliction of emotional distress in the absence of any physical injury or conduct where he merely claims that he was harassed by his supervisor.

Utoafili v. Trident Seafoods Corp., 2010 AMC 90 (N.D. Cal. 2009).

Although concluding that the Jones Act does not preclude the enforcement of forum selection clauses in a seaman's contract, the court went on to further hold that in exceptional cases where the application of the clause would effectively preclude the claimant from having the ability to litigate its claim, the court could decline to enforce it. In the case before it, the court relied upon the financial and physical difficulties which would be imposed upon the plaintiff by making her try her case in the selected forum to refuse to give effect to the forum selection clause.

Punitive Damages

Wilson v. Noble Drilling Corp., 2009 AMC 2745 (E.D. Lou. 2009).

The Supreme Court's recent decision in *Atlantic Sounding Company* upholding the recovery of punitive damages in maintenance and cure claims did not change the prior law prohibiting the recovery of such damages under the Jones Act.

Maintenance and Cure

Kuthe v. Gulf Caribe Maritime, Inc., 2009 AMC 2869 (S.D. Ala. 2009).

A seaman is not precluded from recovering maintenance and cure for injury or illness that arise from conditions which preexist his employment, except where he knowingly or fraudulently concealed his condition from the vessel owner at the time he was employed.

Johnson v. Cenac Towing, Inc., 2009 AMC 2749 (5th Cir. 2008).

A seaman's knowing concealment of a pre-employment physical condition sufficient to result in a forfeiture of maintenance and cure will not act to defeat a Jones Act negligence claim. Such a concealment, however, may constitute comparative negligence.

Collick v. Weeks Marine, Inc., 2010 AMC 69 (D.N.J. 2009).

A court may enter a preliminary injunction directing an owner to pay maintenance and cure where the plaintiff produces evidence to establish it is reasonably likely that it would be entitled to the recovery of such benefits, medical treatment is necessary to prevent the seaman's condition from worsening, and the plaintiff unable to afford such treatment on his own.

Procedure for Compulsory Physical Exams

Barry v. Mi-Dis Line S.A., 2010 AMC 199 (S.D. Ga. 2009).

The court concluded that Federal Rule of Civil Procedure 35 authorized an examination of the plaintiff by the defendant's vocational rehabilitation expert, but limited the parameters of the examination to preclude any inquiry regarding the liability issues in the case. *See also Fishcher v. Coastal Towing, Inc.,* 168 F.R.D. 199 (E.D. Tex. 1996).

Discovery

Pentair Water Treatment (OH) Co. v. Continental Insurance Co., 2010 AMC 233 (S.D.N.Y. 2009).

A notice of corporate representative deposition designating a witness to testify regarding "all facts concerning a party's affirmative defenses" is objectionable where it requires an application of facts to legal theories, so that the deposition would in a sense be that of the party's attorney, or at the very least merely a parodying of what the attorney told the witness.

Forum Selection Clauses

Cooper v. Maridian Yachts, Ltd., 575 F.3d 1151 (11th Cir. 2009)

In determining whether a choice of law provision contained in a contract between two parties also governs tort claims between those par-

ties, the court must first examine the scope of the provision. A choice of law provision that relates only to the agreement (e.g., "this release shall be governed in accordance with the law of") will not encompass related tort claims . Where the provision applies to "all disputes arising out of or in connection with the agreement," on the other hand, it will generally include tort claims as well.

The Eleventh Circuit refused to follow the First and Fourth Circuits which held that the substantive law that governs the underlying action automatically applies to a subsequent claim for indemnity or contribution. *See Vaughn v. Farrell Lines, Inc.,* 937 F.2d 953 (4th Cir. 1991); *Jen. Contracting and Trading Co., LLC v. Interpole, Inc.,* 899 F.2d 109 (1st Cir. 1990). Instead, the trial court must use the Lauritzen-Rhoditis eight factor test to determine the applicable law.

[15682]

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

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MMSEA SECTION 111 REPORTING

Roger Phillips

Overview

Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA Section 111) added mandatory reporting requirements for insurers and self-insurers with respect to Medicare beneficiaries who receive settlements, judgments, awards or other payment from various types of insurance including liability insurance and self-insurance.

Medicare applies to U.S. citizens and qualifying resident aliens 65 years of age or older and persons with certain disabilities. Any ship operator, terminal operator, drilling company, cruise line etc. with exposure to US personal injury/illness claimants, be they crew, passengers, longshore workers, etc. is affected by this legislation as are their insurers.

The legislation is complex, far reaching and evolving and any company with any exposure, even limited, would be wise to review what is necessary for compliance. This article deals with the technical aspects of the reporting process for liability insurance (workers' compensation has a number of specific differences) and how claims management will need to be adapted to comply. As will be seen, the changes are significant.

Reporting is made electronically by "Responsible Reporting Entities" or an agent acting on their behalf to Centers for Medicare & Medicaid Services ("CMS"), and was due to commence April 1, 2010

but has been delayed until January 1, 2011. Initial production reports are required to include all cases with medicals that are open at January 1, 2010 and onwards or cases with settlements only from October 1, 2010 onwards.

Setting up a reporting system after a claim has occurred is not to be recommended since the legislation provides for penalties for non compliance of $1,000 per claim per day and the registration process will take 3 months or more to complete.

CMS estimate the time required to complete this information collection ranges between 5 minutes per response and 375 hours, depending on the specific requirement. This estimate includes the time to review instructions, search existing data resources, gather the data needed and complete and review the information collection.

Background

Medicare is by statute a "Secondary Payer," and thus is secondary to payments made under liability or other insurance/self insurance. Accordingly, when other insurance applies, Medicare make "conditional payments" to medical providers. This has been the case since 1980, but in practical terms, little was done to enforce recovery of payments from entities with primary payer responsibility.

Section 111 is only about reporting and does not in itself change any existing requirements such as Medicare Set Asides. As this is an area of confusion for many parties, we address this further on in this article.

The new legislation gives teeth to CMS enforcing Medicare Secondary Payer (MSP) status by requiring insurers and self insurers to report medical payments and settlements made to Medicare beneficiaries. CMS will now have the information to enable them to enforce recovery and to verify that in their view settlements have protected CMS interests for responsibility for future medical treatment.

Medicare is clearly making an aggressive push to make sure it does not pay medical expenses when others may be the primary source of payment. In December 2009 CMS filed suit against named insurers, settlement beneficiaries and plaintiff attorneys involved in a $300 million global settlement reached in 2003 in a case that alleged injuries from exposure to polychlorinated biphenyls manufactured in Alabama.

Treating Section 111 as a 'not me' issue is clearly an unwise course.

Who reports?

Entities with reporting responsibility must register as a "Responsible Reporting Entity" (RRE) and complete testing file transmissions. So who is required to be an RRE?

The legislation applies mandatory reporting to liability insurers and self-insurers. A deductible was initially classed as self insurance until an update was published by CMS in late February 2010 changing the position. Until this time the basic rule of thumb was that whoever pays the claim, be it the insured or insurer, irrespective of who actually ultimately funds the payment, has reporting responsibility. This put the ship operator, paying to be paid, on the line as responsible for reporting, irrespective of whether any subsequent payment over the deductible recovery was made by insurers.

CMS' latest ruling, however, throws the whole reporting obligation on the insurer, including foreign insurers, provided that the claim is reported under the policy. For an under deductible claim, even when paid by the insured, the insurer has reporting responsibility provided that the insured has reported the claim to the insurer. If the insured does not report the claim to the insurer then it has reporting responsibility.

Several P&I Clubs have taken the position that they will not be providing reporting services and, based upon the initial requirements, that was correct, but CMS' latest position makes this approach improper.

It is clear that unless another change in ruling occurs, liability insurers, including P&I Clubs, are required to register as RRE's and report.

As a matter of practicality simply reporting a claim to the insurer is wholly inadequate for reports to be filed except in cases where the insurer or adjuster acting on the insurer's behalf is doing all of the day to day claims handling. This is particularly true of claims where responsibility for medicals exists, e.g., crew claims. Making the insurer responsible for reporting is all well and good but to actually do the reporting will require very careful consideration and implementation of claims procedures.

In cases with a large deductible the simplest route and least work for all involved would be for the insured to do the reporting, but one must keep in mind that CMS do not allow responsibility for reporting to be offloaded between parties, although any party can be the agent of the RRE for reporting purposes, including the insured. There are pitfalls in this for insurers however as we discuss below.

At a minimum, clear ground rules need to be established between the insurers and insured to achieve reporting compliance.

Foreign Insurers

Initially CMS did not have in place any facility for foreign entities to register as RRE's but a new registration process for entering foreign addresses will be available in April 2010. Foreign insurers doing business in the U.S. will need to register for reporting no later than September 2010. An earlier registration would be recommended based upon TecnoRisk experience.

Reporting Agents

Reporting can be done by reporting agents but this still involves the entity with reporting responsibility in registration and extensive internal procedural changes. The relationship between the RRE and its reporting agent is 'one to one'. In other words an RRE cannot use multiple sources for filing.

The agent can assist you with registration and, most importantly will handle testing of file transmission to CMS. The testing process is required because file transmission is electronic and involves copying files to a secure web site and receiving back and processing response files.

Even if using an agent the RRE still retains liability for compliance with the legislation including determining whether an injured party is or may become a Medicare beneficiary, gathering and providing required information to the agent, and ongoing case management specific to Section 111 reporting.

Other RRE Registration Considerations for Insurers

An issue that insurers will face with reporting is considering exactly how they will register. It is not uncommon in the marine world for insurers to have a network of local adjusters/claims agents, and these entities would seem to be the perfect entities to act as reporting agent. This would, however, require the insurer to set up multiple RRE registrations, one for every local adjuster or claims agent etc. This is permissible but clearly an administrative burden.

Organizations who do not expect to have anything to report.

Registration is not compulsory. However CMS recommend that those who do not register initially because they have no expectation of having claims to report must register in time to allow a full quarter for testing if they have future situations where they have or expect to have claims to report.

If you wait until you have a reportable claim then you will be out of compliance for at least 90 days therefore. When CMS start levying the fines provided in the legislation then this will be an expensive option. This is discussed in more detail in the section below entitled “Penalties for Non Compliance.”

CMS indicate that they are developing a system to assist 'low volume' reporters as a matter of priority. It is expected that this will be a direct data entry system on their web site. The devil will, as ever, be in the detail.

What is reportable?

Injury or illness claims from Medicare beneficiaries that involve responsibility for medical payments or settlements that have the effect of releasing medical reserves.

Even those companies that do not typically employ crew 65 or older could have a reportable claim. In addition to the exposure to persons who become disabled every ship operator (and not just cruise lines or operators of passenger vessels) has an exposure to Medicare eligible persons. Longshore workers are an aging workforce as are other shoreside workers e.g. shoreside processors for the commercial fishing industry, and these could of course be Medicare eligible or become so as a result of disability.

For the claim to be reportable medicals do not have to actually be paid. It is sufficient for responsibility for medicals to have been assumed or medicals to have been included in the settlement or released i.e. some element of medical reserve such as future medicals.

Medicare Set Asides

With the aggressive drive of CMS to enforce secondary payer status the marine claims community has become more focussed on the need to protect Medicare's interests in settlements and "Medicare Set Asides" ("MSA's") has become a hot topic.

MSA's apply to workers compensation cases of $250,000 or higher. As part of a settlement agreement a pre-determined sum of money is set aside in the settlement to protect Medicare from future treatment costs associated with an injury. An example of a situation where an MSA

would be required would be a relatively young claimant with a serious hip injury that is likely to require a future hip transplant when he may be a Medicare beneficiary. CMS Regional Offices participate in an agreement on what the required sum shall be and this is a Medicare Set Aside.

This requirement does not apply to liability insurance but this does not mean that CMS cannot become involved at a future date in asserting that Medicare's interests were not adequately protected. CMS does not have a mandate to be involved in MSA's in liability cases but on a case by case basis Regional Offices can do so dependent upon their workload. Liability RRE's compared with their workers compensation counterparts have the worst of both worlds in having an obligation to protect Medicare's interests without CMS having an obligation to participate in the settlement agreement.

One other issue that we have seen in the settlement area is parties seeking to agree who has responsibility for Section 111 reporting. Any such agreement does not in any way alter 'RRE Status' so be careful to be sure that whoever reports is the responsible party.

The Reporting Process

High points are:

- As indicated involves registration with Centers for Medicare and Medicaid Services ('CMS') as a Responsible Reporting Entity ('RRE').
- Completion of registration involves several steps, one being submission of electronic test files to CMS and the processing of response files from CMS.
- RRE responsible for putting system in place to determine who is or may be a Medicare beneficiary. Data dumps of all claims in your system are not permitted and in any event would involve you in a lot of work – see below for details of "response files."
- Zero reporting required.
- Report when responsibility for Medical assumed or Settlement agreed.

- Report whether liability accepted or not.
- Geographic location of accident does not matter.
- Reporting is done electronically in a very specific and complex format.
- Files require dto be transmitted to the Coordinator of Benefits ("COB") using one of three transmission protocols.
- Two main types of file are involved.
    - o **Query File.** An enquiry file involving limited information provided to COB to determine if the claimant is a Medicare beneficiary. Can be submitted once per calendar month at any time. File is in a flat file, fixed width format with a File Header and File Footer in a specified format. Specifically designed software is needed to create these files.
    - o **Claim Input File.** A much more detailed submission where the claimant is a Medicare beneficiary. Submitted quarterly in a specified time frame. Again in a flat file etc format. Claim report files are submitted for Medicare beneficiaries upon assumption of responsibility for medicals, upon termination of medicals, when changes to specified 'significant' information occur and upon a settlement agreement. Each of these items triggers a separate report so it can be a multiple step process.
- Effective 1/1/2011 reporting is required to include ICD-9 Diagnosis and E Codes (Cause codes). "ICD" = "International Classification of Diseases." RRE's will need a system in place to gather ICD-9 Diagnosis codes or the ability to report them based upon an assessment of what a valid code could be.
- Reporting thresholds apply for settlement only cases (i.e. no medical responsibility applies). These thresholds change each year up to 2014. Your risk management information system or agent reporting system should be able to determine what requires to be reported so that unnecessary reports are not filed. If you are using an agent system your adjusters should be aware of the reporting thresholds to avoid rekeying of data in the agent system unnecessarily.

- COB responds to files submitted with a response file that must be downloaded, and processed to determine the required action on a case by case basis. Response files include a range of information that is too lengthy to cover in this brief synopsis. Suffice to say a system needs to be in place to let the claims handler know what, if anything, needs to be done next.
- Files submitted are monitored for compliance with mandatory reporting standards. Exceeding threshold errors would appear to make companies potentially subject to compliance audits.
- In addition to an initial filing of an "Add" report several events that can occur in a claim trigger the requirement to file an additional report termed an "Update" report. It is important that your claims adjusters are familiar with these requirements. Ideally your claims system should assist the claims handler by applying business rules to alert when action is required.

Claims Management

To meet reporting obligations changes will need to be made to day to day claims management processes. Clearly the first task that will need to be addressed is could the claimant in an injury or illness claim be a Medicare beneficiary at the date of incident or become a beneficiary up to the claim closure?

There are also numerous data elements that are required to be supplied many of which are not normally maintained in current claims handling. Claims handlers will need to be aware of these and ideally the claims system should alert the user to required information and changes to information that trigger additional reports.

If the claims handler believes that the claimant may be eligible for Medicare benefits they are entitled to ask if the claimant is a beneficiary. CMS provide a "Model Language" document to make this enquiry.

One thing the claims adjuster will need to determine is the last and first name of the claimant exactly as they are on the person's Social Security card so there is no room for error. If you are relying on the Social Security number as a determination of Medicare status it is most important to verify that the name that you are using matches exactly that on the Social Security card. Many people, particularly married women, use names that do not match what is recorded with the Social Security Administration. Response files include what CMS has on file for Medicare beneficiaries' "key personal information" when a match is found based upon the information submitted.

Remember that the responsibility to determine Medicare eligibility rests with the RRE.

ICD-9 Codes

As indicated earlier from 1/1/2011 it is mandatory to report ICD-9 Diagnosis and cause codes. Most claims handlers will not be familiar with assigning these and will need software to assist the process. For additional information see Wikipedia http://en.wikipedia.org/wiki/List_of_ICD-9_codes.

Follow Up Reporting

A case that involves a simple one time settlement will typically only require filing one Claim Input File after having determined Medicare beneficiary status. Claims with the assumption of responsibility for medicals, as would always be the case in a crew injury claim, the position is far more complex and several events trigger the requirement for follow up reporting.

The claims handler will need to be familiar with these and ideally the claims management system should specifically assist in the process. It will come as no surprise to learn that the requirements are very detailed and action specific.

Conclusion

Reporting is complex and many business rules apply. The new interpretation of self-insurance vs. deductible makes it essential that insurance contracts contain very clear language as to what exactly constitutes the insured reporting a claim within deductible if the insurer is to report. By the same token insureds would be well served to be quite clear that the insurer IS doing the reporting.

Clear claims handling procedures will be necessary for insurers to be able to report the intricate level of detail required particularly where the day to day claims handling is done by the insured.

If however the insured is to handle reporting it is clear that the only way the RRE requirement can be "assumed" by the vessel operator is for the contract to stipulate that for the purposes of Section 111 reporting only a claim is considered as "reported" only if all necessary information for reporting purposes is provided. That way it would seem that the insured has not reported the claim and is legally the RRE. It would require a legal opinion to know if that is possible but all parties with potential exposure to reporting obligations would do well to be clear on not only who is reporting but also that they are legally entitled under the status to be the RRE.

Whoever reports, claims personnel need to become familiar with the requirements so that internal systems can be adapted to meet the needs and there is a clear need to review the way that the in-house claims management system can assist to reduce the burden of compliance.

Clearly if the CMS estimate of an average burden time of up to 375 hours per report is correct you need a system that can cut that dramatically and to do that functionality needed to handle Section 111 reporting should be a core part of claims systems.

TecnoRisk have claims systems that manage the Section 111 process and are available to assist any companies or insurers needing assistance in developing their Section 111 compliance strategy.

[15693]

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[Our sincere thanks to Roger Phillips, the President of TecnoRisk LLC, for the foregoing article. Mr Phillips is a marine insurance risk management consultant and developer of a risk management information system for marine claims. – Eds.].

UNITED KINGDOM: MARINE INSURANCE POLICIES – REJECTION OF CLAIMS FOR INHERENT VICE

Linda Jacques

It is not uncommon for hull and cargo underwriters to reject claims by relying on excluded perils in their standard forms. This can occur at all ends of the financial spectrum. The Court of Appeal has recently had to examine the issues surrounding the "inherent vice" exception in the Institute Cargo Clauses (A) in the case of *Global Process Systems Inc. v. Syarikat Takaful Malaysia Berhad*. (The "Cendor MOPU"[1]).

In November 2005 the oil rig Cendor MOPU was being carried on a barge around the Cape of Good Hope with its legs elevated in the air above the deck. The oil rig was on the second stage of a voyage from the Gulf of Mexico to Malaysia via the Cape of Good Hope. The legs on the oil rig suffered fatigue cracking. This was caused by the repeated bending of the legs under the wave motion of the barge as it was towed. The cracking caused the starboard leg and then two further legs to break off and be lost.

The oil rig had been insured under a cargo insurance policy for all risks which incorporated the Institute Cargo Clauses (A). The insurers rejected the claim for loss and damage under the policy. They did so because they claimed the loss had been caused by "inherent vice", i.e. metal fatigue, as an inevitable consequence of the voyage. The Court of Appeal was asked to look at the circumstances leading up to the loss before forming a view as to whether the insurers were entitled to reject the claim. The factual background was that prior to sailing from the Gulf of Mexico the claimants had engaged experts to organize transit. It had been acknowledged at that stage by the experts that if the rig was transported with its legs protruding upwards there was a risk that metal fatigue would occur due to the actions of the waves. It is not clear from the report as to how much input the claimants had when looking at the option. The consultants involved looked at various calculations/options but eventually it was decided that the rig should be carried with its legs some 300 feet in the air.

[1] [2009] EWCA Civ 1398

When the rig had arrived at Saldanha Bay near Cape Town the motion of the waves had already caused some cracking to the legs on the voyage from the Gulf of Mexico and repairs were carried out. The surveyors then issued a certificate of approval for the tow to proceed for the final section of the voyage. It was at that stage that the legs broke off.

The claimants argued that the loss of the rig was accidental and fell within the terms of the all risks cover. The insurers on the other hand said the cause was inherent vice in the legs themselves, alternatively that the loss was an inevitable consequence of the voyage embarked. The case made its way up to the Court of Appeal, which decided that this was an accident at sea and that the burden was on the insurer to establish inherent vice or that the accident was inevitable. This involved an examination as to how the loss had been caused.

In considering whether damage had been caused by inherent vice the Court looked at whether it was a certainty that the accident would have occurred. This involved a consideration of the various factors that had caused the metal fatigue.

The Court decided that the cargo had been properly stowed. They also decided that it was in good condition in the sense that surveyors had been consulted as to how the rig should be carried. They had also certified that it was fit for the intended voyage.

They came to the view that metal fatigue was not the sole cause of the loss of the leg. A "leg breaking wave" had caused the starboard leg to fall off. That leg breaking wave was "not bound to occur in the way it did on any normal voyage around the Cape of Good Hope." That in turn had led to the other legs being at greater risk and then breaking off. It was not certain that this would happen. The Court accepted that with the benefit of hindsight "it was known that it was highly probably that that risk would happen" but that high probability was not known to the claimants. It was a risk they had insured against and they should be able to claim under the policy.

[Our sincere thanks for the foregoing article to Linda Jacques, Partner, LA Marine, - Lester Aldridge LLP, Solicitors, Tel: + 44 (0) 23 8082 7416, Fax: + 44 (0) 23 8082 7452, Mobile: + 44 (0) 7747 040642, E-mail: linda.jacques@LA-law.com. – Eds.].

[**Update** – As we went to press, our ever-vigilant Chairman, Jonathan Spencer, called to advise that the Supreme Court had granted permission to appeal in the above case. As summarized on the web site of Stone Chambers, Barristers, the Court of Appeal decision "has set a new test which seems to have considerably narrowed the scope of the standard exclusion of inherent vice which appears in almost all marine cargo policies." See http://www.stonechambers.com/news-pages/04.03.10-supreme-court-intervenes-to-review-the-court-of-appeal-decision-on-inherent-vice.asp]

RECENT CASES OF INTEREST

CGL Policy's LHWCA Exclusion Inapplicable

Bayou Steel Corporation, et al. v. Evanston, 2009 WL 3753538 (5th Cir. 11/10/09).

A steel manufacturer arranged for the transportation of certain steel bundles by barge from Louisiana to Illinois, where an employee of the stevedoring company was badly injured during efforts to unload the cargo. He sued the steel manufacturer and its insurers. The steel manufacturer's primary wharfinger insurer accepted coverage and defense but the wharfinger's excess insurer, the primary general liability insurer and the excess general liability insurer all initially denied coverage. Eventually the excess wharfinger insurer agreed to fund a substantial portion of the settlement of the employee's claims and took an assignment and subrogation of the insured's claims against the other two insurers. Their denial of coverage had been based upon an exclusion within the primary policy for "claims made or suits brought against you or any indemnitee pursuant to the United States Longshoreman & Harbor Workers' Compensation Act." The coverage issue was submitted on cross-motions for summary judgment.

The assured and the excess wharfinger insurer contended that the employee's claim was not brought "pursuant to" the LHWCA, but rather was a claim "grounded in negligence under the general maritime law." The primary and excess general liability insurers countered that the plaintiff's claim could only have been brought under Section 905(b) or Section 933 of the LHWCA, and in this situation, the employee had chosen not to pursue a 905(b) claim, only a Section 933 claim.

The Fifth Circuit first distinguished an earlier Fifth Circuit decision raised by the defendants, *Beaumont Rice Mill, Inc. v. Mid-American Indemnity Insurance Co.,* 938 F.2d 950 (5th Cir. 1992), as the exclusion in that matter dealt with any losses arising out of injuries "covered under" the United States Longshore & Harbor Workers' Compensation Act, not "pursuant to" as in the case at bar. The Fifth Circuit also found that the employee's claim was actually based upon the general maritime law and did not arise under the LHWCA. More specifically, the court held that Section 904 of the LHWCA "makes it clear that the longshoreman's general maritime law claim against third parties is unaffected by Section 904," as that section simply "preserves" all claims against third parties. For these reasons the exclusion did not apply. The court then concluded that the excess wharfinger insurer was properly subrogated under Louisiana law, and could therefore recover from the other two insurers.

Ship Mortgagee Entitled to Recover Market Value of Loss from Insurer.

First American Bank v. First American Transportation Title Insurance Co., 2009 AMC 2537 (5th Cir. 2009).

Plaintiff bank loaned $28 million dollars to a cruise line to support its operations of a gaming vessel. As security for the loan, the bank received a first preferred ship mortgage on the gaming vessel, as well as on two high speed catamarans used to shuttle customers back and forth to the vessel. A title insurer had then issued two separate title insurance policies to the bank, one for the gaming vessel and the other for the two catamarans. The policies together covered the entire amount of the bank's $28 million dollar loan.

The primary insuring clause of the policy provided that the insurer would be liable for "actual loss or damage . . . sustained or incurred by (the bank) for a reason of" any of nineteen specifically enumerated risks which included "unmarketability of the title" and "the failure of the insured mortgage to have the equivalent priority of a preferred mortgage." One year later, the owner filed for bankruptcy by which time all three vessels were heavily encumbered by liens for necessaries. The bankruptcy court approved the sale of the gaming vessel; but the proceeds were used for the most part to pay the maritime liens and not the mortgage. Meanwhile, one of the catamarans sank at its mooring and was later raised, seized and sold at public auction for a fraction of its pre-sinking value. Likewise, the second catamaran was seized by another shipyard and sold at public auction for a fraction of its market value.

In the subsequent litigation filed by the bank against the insurer, the insurer filed a motion for summary judgment requesting a declaratory judgment that the measure of indemnity was limited by the policy language to the amount by which the payment of the holders of the priming liens for necessaries reduced the bank's recovery on its mortgages, and the District Court agreed. On appeal the Fifth Circuit Court reversed, holding that under Louisiana law, interpreting the plain language of the policy, the bank's recovery would not be limited to the proceeds recovered from the foreclosure sale. Instead, the Fifth Circuit required that because it was a title insurance policy, under Louisiana law, the court must take into consideration all other relevant information when valuing losses under a title insurance policy, including information based upon any appraisals, the foreclosure proceedings, and other market data.

Faulty Workmanship Not "Property" Damage to Yacht.

St. Paul Fire & Marine Insurance Co. v. Sea Quest International, Inc., 676 F.2d 1306, 2009 WL 5067791 (M.D. Fla. 12/17/09)

A company contracted with a boat builder for the construction of a 117 foot luxury yacht. Thereafter, disputes arose between the company and the builder regarding various aspects of the construction, including

the timeliness of the construction and whether the vessel was being built in accordance with the plans and specifications. As a result, the company demanded arbitration. The builder then filed for bankruptcy. The bankruptcy court lifted the automatic stay in place to allow the company to pursue litigation against the builder to the extent of available insurance. The company obtained an award of $3,543,155.30 in damages and prejudgment interest and recovery was limited to the insurance proceeds available to the bankrupt builder.

In response, the builder's insurer filed a declaratory action seeking to have the court declare that no coverage existed under the applicable MGL and bumbershoot policies that for the cost of repairing the builder's defective workmanship as the damages awarded to the company were not "property damage" as defined in the policies. The company cross-claimed for breach of the insurance policies and for enforcement of the judgment against the builder. Cross-motions for summary judgment were filed.

The parties agreed that Florida law would apply and that both faulty workmanship and negligent construction might constitute an "occurrence" under the policy. But the issue remained as to whether "faulty workmanship" and "intentional conduct" resulted in "property damage" covered under the policies. The insurer argued that the company's damages were solely for the cost of correcting, removing or repairing the builder's defective work, as opposed to damage resulting from that work. The court initially noted that policies such as those at issue were generally designed to provide coverage for tort liability for physical damages and not for contractual liability of the insured for economic loss because the product or work was not that for which the damaged person bargained. Referring to the "broad public policy" associated with the interest behind such insurance language, the court held that the risks associated with the faulty workmanship at issue were "appropriately borne by the contractor and are not covered losses." As to the bumbershoot policy, the court concluded that coverage was excluded under that policy as well as the policy language indicating that if coverage was excluded under any underlying policy, coverage was also excluded under the bumbershoot policy.

[15700]

Uberrimae Fidei Displaced by State Law.

Black Stallion Enterprises v. Barry Ocean Marine, LLC, 2010 WL 1333272 (E.D. La. 3/30/10).

A tank barge owner sought to recover for physical damages to the tank barge from a tug owner which had provided towing services for the barge. The tug owner responded that the tow was unseaworthy or that the damage was caused by an Act of God. Meanwhile, in a somewhat unusual theory, the tug's hull/collision insurer filed a declaratory action, asserting that its coverage for both hull and collision liability was limited to scheduled vessels, including the tug, but not the tank barge which had been previously owned just prior to the voyage by the other co-defendant and insured. The insurer also contended that the policy's express warranty of seaworthiness, along with any warranty implied at law, included not only the tug, but also the tank barge.

Needless to say, the fact situation which prompted the insurer's argument is somewhat unusual. The co-defendant, when it still owned the tank barge, had previously requested the same hull insurer to add the barge to the policy's schedule. To do so, the insurer required the assured to have the barge undergo a marine survey to confirm it was capable of traversing the Gulf of Mexico and the Caribbean Sea as was the owner's intent. The insurer maintained that the co-defendants knew the barge was not suitable for that voyage. The defendant then proceeded with the voyage without obtaining the survey, the tank barge was never scheduled, and the tank barge sustained damage. The insurer also claimed that the defendants had breached their duties under the doctrine of uberrimae fidei since they knew of the unseaworthiness of the tank barge and the request for the survey, but proceeded with the voyage anyway.

The court first held that there was no legal authority to extend a warranty of seaworthiness of a hull policy beyond the scheduled vessels. Second, the court held that the parties' communication concerning the necessity for a marine survey prior to the voyage did not modify the insurance contract under Louisiana law, which requires specific written

documentation to do so. Next, the court held that the implied warranty of seaworthiness associated with hull policies only applies to the vessel actually insured. Finally, and most importantly, the court held that Louisiana law has displaced the doctrine of uberrimae fidei. Quoting from La. R.S. 22:860, the court held that no oral or written misrepresentation or warranty made in the negotiation of an insurance contract by the insured or on its behalf shall be deemed material unless the misrepresentation or warranty is made "with the intent to deceive", an entirely different analysis from the maritime doctrine of uberrimae fidei. On this basis, the court dismissed the insurer's claims.

No Coverage for Yacht Sinking at Dock.

Axis ReInsurance Co. v. Henley, 2009 WL 3416248 (N.D. Fla. 10/22/09).

The 19 year old daughter of a retired CPA and her family friend purchased a 34' Fountain open hull, T-Top recreational fishing boat in 2004 and used it for recreational fishing in Georgia. Approximately three years later, the retired CPA began to use the boat and kept it at his dock in Florida. He obtained a yacht policy for the boat which specifically required that the boat be used for "PRIVATE PLEASURE USE ONLY." Nevertheless, the retiree offered the boat on his charter fishing website together with another boat he owned for that purpose. The retiree later testified that he never used the boat for charter fishing.

Nevertheless, on a particular day he took some business acquaintances out on a fishing trip. The retiree claimed he received no payment for the trip. During the trip, while offshore, the boat began taking on water which was initially pumped out successfully, through the use of the boat's electronic bilge pump system. Eventually, the boat took on water again and this time the boat's batteries became submerged which required the passengers to dump some 25 gallon buckets of water over the side by hand as the boat slowly returned to the dock. The retiree then dropped off the other fisherman together with their fish at their dock of departure and then tied the boat off at his own dock behind his house,

and went inside. A few hours later the retiree's neighbors reported to him that the boat was rolling over in its slip and it eventually capsized and sank.

In investigating the loss, the insurer's claims adjuster noted that the boat was featured on the retiree's charter fishing website, at which time the retiree promptly deleted any reference to the boat from the website. He also continued to deny that the boat was ever chartered for commercial purposes. The insurer thereafter filed a declaratory action seeking to deny coverage. In a lengthy opinion (apparently based upon the magistrate's copious notes since there was, strangely, no transcript), the magistrate found that there was no coverage.

First, the magistrate ruled that the retiree had deliberately concealed the material fact that the boat was to be used in the charter fishing business. As a result, under the doctrine of uberrimae fidei, as well as the "Concealment, Misrepresentation or Fraud" clause in the policy, there was no coverage. Next, the magistrate ruled that the loss was not covered because it was simply not fortuitous. The water had not entered the vessel by waves over the sides and the proximate cause of the loss was the wear and tear of the two bilge pumps and the siphoning of water through the boat's discharge hoses. Third, the magistrate held that there was also no coverage because of the policy's exclusion for "wear and tear, mechanical breakdown," again, because the loss occurred due to the wear and tear of the bilge pumps. Finally, the court concluded that there was no coverage because of the breach of the negative implied warranty of seaworthiness because the assured had knowingly sent the vessel to sea in an unseaworthy condition. Despite those findings, the magistrate then noted, apparently, for the completeness of the record, that under Florida law, the retiree as a "bailee" who had contributed substantial sums toward the maintenance of the boat, did have an insurable interest. Nevertheless, there was still no coverage.

[Our sincere thanks to Andrew C. Wilson of Simon, Peragine, Smith & Redfearn, L.L.P., for the foregoing case summaries. – Eds.]

[15703]

Duty to Defend/Single vs. Multiple Occurrences

McGrath v. Chesapeake Bay Diving, et al., 2010 U.S. Dist. LEXIS 2776 (E.D. La., January 14, 2010)

This case arose out of salvage operations in the Gulf of Mexico in 2006 for the purpose of recovering platforms owned by the Rowan Companies, Inc. that had been toppled during Hurricanes Katrina and Rita. Diver McGrath was fatally injured and divers Bradford and Pope were injured trying to rescue him.

The Court granted the motions for partial summary judgment of plaintiff Bradford and his employer, defendant 2-W Diving, Inc. (a subcontractor that supplied additional divers to the main salvage contractor, Bisso Marine, LLC).

2-W's insurer, State National, had previously terminated its defense of 2-W, claiming the limits of its $1 million per occurrence (including costs of defense) policy had been reached, because all the accidents amounted to one "occurrence" and the "eroding policy" limit had been reduced by attorneys' fees and costs.

Bradford and 2-W argued that there were multiple "occurrences," because while both Bradford and Pope suffered decompression sickness, the causes were separate and distinct. Bradford claimed that he was ordered to ascend from a dive too quickly and then not properly decompressed. Pope attributed his sickness to unnecessary decompression when he was "dirty" and his subsequent improper decompression. Both men suffered carbon monoxide poisoning, allegedly because the air intakes for the decompression chambers were placed too close to the exhaust source of the vessel. In addition, the two divers were not provided with prompt emergency hyperbaric treatment, and Bradford alleged that once his treatment was begun, it was prematurely terminated.

The parties agreed that maritime law governs interpretation of the policy in question, but the insurer argued that absent controlling federal precedent, the law of the state with the most significant relationship to the substantive issue applies, in this case South Carolina, where the policy was issued. It also claimed its policy was only an excess policy, and that its duty to defend or indemnify 2-W cannot be determined until 2-W's role in the accident and its liability are determined by a trial on the merits. It claimed the policy limits were exhausted, and that once limits are exhausted, the duty to defend expires. It further argued that certain claims cannot constitute occurrences under the policy because 2-W's negligence was not implicated; because McGrath was not 2-W's employee; and because the Pope settlement did not result from 2-W's negligence, because no factual determinations were made since the case did not proceed to trial. The court labeled this argument circular because the insurer defended, and presumably exhausted some of its coverage on the Pope claims.

Bradford responded that under South Carolina law, the duty to defend is more expansive than the duty of coverage, and an insurer has a duty to defend when there are questions as to the appropriateness of coverage. Further, South Carolina courts have accepted definitions of "occurrence" that either focus on the cause of the occurrence, or on the effect, broadening the meaning of the term.

2-W argued that the insurer assumed liability for the lawsuit by initially providing a defense, and was estopped from later denying coverage because it did not reserve its rights before doing so. It further argued that any ambiguities in the insurance contract should be construed against the drafter and that the policy in general, and the duty to defend clauses in particular, should be liberally construed in favor of the insured. 2-W further argued that it could not be established that the policy limits had been exhausted until there was a determination as to the number of occurrences. Finally, it argued that characterization of the insurer as an "excess insurer" is misleading since it was the only insurer, and the so-called primary insurance was actually a $25,000 deductible for which 2-W was responsible.

Applying South Carolina law in the absence of controlling federal law, the court concluded:

1. The insurer owed 2-W a defense because the insurance contract was ambiguous and should be construed in favor of the insured, and the insurer, having assumed the defense without a reservation of rights, could not withdraw without causing prejudice.

2. The duty to defend is broader than the duty to indemnify, and arises if the insured shows that the plaintiff's claims could fall within the boundaries of the policy.

3. There are sufficient allegations in the Bradford complaint against 2-W to constitute separate "occurrences" under either the "cause test" or the "effect test," so that the insurer had a duty to defend them all. The duty is triggered when, as here, the claims are not "unambiguously excluded" from coverage.

Scope of Insurer's Ability to Void Coverage

New Hampshire Ins. Co. v. Diller, Kopp/NIA, et al
2009 U.S. Dist. LEXIS 120836 (D.N.J., December 23, 2009)

The issue in this case was whether an insurer may draft and enter into a marine insurance contract that allowed it to only void coverage for intentional misrepresentations, but later, when the issue of intent is unclear, rely on a common law doctrine to deny coverage which deems intent irrelevant. The court concluded that it may not.

Plaintiff New Hampshire Insurance Company ("NHIC") sued its insured, Diller, requesting a declaratory judgment denying coverage of his 60-foot yacht. Diller counterclaimed against NHIC and filed a third-party complaint against his insurance broker, Kopp, and the broker's employer, NIA Group Associates LLC ("Kopp/NIA").

On cross-motions to dismiss and for summary judgment by the parties, the court found that at Diller's request, Kopp/NIA sought a quote for marine insurance on Diller's boat from NHIC through its intermediary MGA. The application form requested information on the claims history for the preceding five years. On the basis of the answers, the MGA provided a quote and application for coverage from NHIC. The case centered on the absence of certain information from the loss history, as well as other alleged misrepresentations or omissions relating to the application.

The application did not reveal a 2001 grounding that resulted in damage to the vessel and injuries to a mate; misstated the amount of damage sustained in a 2002 striking; failed to mention hull damage in 2004 that required a "Mayday" call and Coast Guard escort back to port; stated that the vessel was operated by a licensed captain although Diller was not licensed (but claimed that one of his employees was); and misstated the vessel's total horsepower as 1,350, when it was 2,700.

Diller had questioned omission from the application of the 2001 and 2004 events, and Kopp explained that the first was over 5 yeas old, and the second did not have to be reported because Diller had not made an insurance claim. Diller signed the application and NHIC issued a policy for a one-year period.

After Diller submitted a claim for hull damage sustained in August of 2006, NHIC began an investigation and took his examination under oath ("EUO"). Diller revealed the 2004 incident and said he had not made an insurance claim. Documentation indicated that a claim was made but later withdrawn.

NHIC denied coverage in a letter claiming the Diller "intentionally concealed and/or misrepresented material facts" in his application and EUO, specifically the failure to disclose the 2001 and 2004 incidents and the amount of damages sustained in 2002, as well as the "licensed captain" misrepresentation. NHIC further claimed that the vessel was not seaworthy either at the inception of the policy or at the time of the

2006 incident. It then filed the instant action seeking rescission of the policy; declarations that it was void ab initio and did not cover the 2006 incident; and reimbursement of costs and expenses for storage, survey, salvage and hauling of the vessel in connection with that casualty.

NHIC's summary judgment motion alleged that Diller's concealment and misrepresentations of material fact breached his duty of utmost good faith under the uberrimae fidei doctrine, constituted equitable fraud under New Jersey law and violated the terms of his policy, voiding coverage. NHIC reserved other policy defenses, including breach of the warranty of seaworthiness of the vessel.

Diller responded that genuine issues of material fact existed, and also that the language of NHIC's policy circumvented the doctrines of uberrimae fidei and equitable fraud and allowed NHIC to void the contract only if any material information was intentionally concealed or misrepresented – a higher standard that NHIC cannot meet.

The court noted that uberrimae fidei is "well entrenched" in the Third Circuit, citing *AGF Marine Aviation & Transp. v. Cassin,* 544 F.3d 255, 263, 50 V.I. 1134 (3d Cir. 2008), and that failure to disclose material facts allows the insurer to void the policy. Moreover, a party's intent to conceal is irrelevant – whether "by virtue of calculated deceit or by innocent mistake…the insured's failure to disclose voids the contract and its coverage."

Diller claimed the terms of the policy amount to a contractual agreement to modify uberrimae fidei and permit NHIC to void the policy only if it is proven that Diller intended to misrepresent or omit material facts, a burden he contended it could not carry on summary judgment.

The policy language read as follows:

> Any relevant coverage(s) shall be voided if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance, or your insurance application, before or after a loss.

The court framed the issue as: "in what way if at all, a marine insurer and a marine insured may contractually abandon, modify, or otherwise circumvent the doctrine of uberrimae fidei."

Reviewing conflicting authority, the court ruled that if well established principles of federal admiralty law exist, it must apply them to resolve the issue. If no such well established maritime principles exist, it must apply state law as the federal rule of decision. Since it could not conclude that "an absolute bar on a contractual modification of uberrimae fidei" is a well established principle of federal admiralty law, the court looked to New Jersey law to determine the effect of the policy language.

Under New Jersey law, clear and unambiguous terms of an insurance policy should be enforced in accordance with their ordinary meanings. Ambiguous terms should be enforced in favor of the insured to sustain coverage, if possible, since the law disfavors forfeitures. Here, the language is clear, and NHIC "may void the policy only if Diller or Kopp concealed or misrepresented a fact, which they knew to be material, with an intent to deceive." An issue of material fact existed as to their intentions in responding to the loss history questions on the insurance application as well as the "licensed captain" question.

Misrepresentation of a vessel's horsepower is not inherently immaterial, but since it was not cited in the termination letter as reason for denying coverage, there existed a genuine issue as to its materiality in this case. Any misrepresentations by Diller at his EUO were post-loss and in order to void a policy must be "knowing and material" or "willful." Again, a genuine issue of fact as to his intent precluded summary judgment.

The Kopp/NIA motion for summary judgment argued that any negligence by Kopp in completing the insurance application did not proximately cause NHIC to deny coverage to Diller, because NHIC relied exclusively on the MGA website form, not the application, when issuing the policy. The NHIC underwriter who issued the policy testified

that he would not have done so if he had been aware of Diller's misrepresentations, and that he had reviewed and relied on the application submitted by Kopp on Diller's behalf when deciding to insure Diller and provide him with a quote. Thus an issue of material fact precluded granting both Kopp/NIA's motion of summary judgment and Diller's cross-motion for partial summary judgment.

The court denied the motions for summary judgment of NHIC and Kopp/NIA, and Diller's cross-motion for partial summary judgment. Kopp/NIA's motion to dismiss Diller's claims for professional negligence, breach of contract, and breach of fiduciary duty was granted, but the dismissal was without prejudice on condition that Diller refile his third-party complaint and an affidavit of merit (as required by a New Jersey statute) within 60 days, failing which his third-party claims against Kopp/NIA would be barred.

[Our sincere thanks to Michael Marks Cohen of Nicoletti Hornig and Sweeney for calling these cases to our attention. – Eds.]

No Insurer Bad Faith

Federal Insurance Company v. PGG Realty, LLC,
2010 WL1253176 (S.D. N.Y., March 24, 2010)

Following a bench trial[2], the court awarded judgment in favor of defendants PGG Realty and its owner, Mr. Ashkenazy ("PGG"). PGG moved for attorneys' fees on the ground that plaintiff Federal Insurance Company ("Federal") had pursued the litigation in bad faith. The court stayed the motion while the underlying decision was on appeal.

Following summary affirmance the District Court considered PGG's claims that Federal manifested bad faith by failing to adequately investigate the conditions that led to PGG's insurance claim; filing suit prematurely; obstructing discovery; and soliciting underwriter witnesses to proffer false testimony at trial.

[2] Reported in this Committee's Spring 2008 Newsletter

The court denied the motion, noting at the beginning of its memorandum order that in admiralty the general rule is that the award of fees and expenses is discretionary upon a finding of bad faith, and that marine insurers are subject to this rule. *Ingersoll Milling Machine Co. v. M/V Bodena,* 829 F.2d 292, 309 (2d. Cir. 1987). It is not bad faith for an insurer to fight liability when policy coverage is unclear. *American Nat'l. Fire Ins. Co. v. Kenealy,* 72 F.3d 264, 271 (2d. Cir. 1995).

As to PGG's specific claims, the court found:

1. Filing suit without proper investigation – PGG claimed that Federal filed a preemptive suit in New York in response to PGG's claims under the policy to avoid treble damages available under Florida's bad faith laws. However, Federal showed that it hired a law firm to conduct the investigation, which in turn hired a reputable surveyor who reported that the boat was unseaworthy, which the court concluded was evidence that its suit was neither premature nor preemptive. Moreover, New York was an appropriate forum because Federal's principal office is there and the policy was placed through a New York broker.

2. Obstructing discovery – PGG claimed that Federal delayed for six months before producing requested documents, did not transcribe all of its crewmember examinations under oath, and interfered with its deposition of one Lt. Wong. However, the documents were produced before the close of discovery and the court found that the delay was not prejudicial. PGG produced no evidence that the examinations under oath were significant enough to require transcription. As to Lt. Wong, once the court found unpersuasive Federal's letter to the Air Station challenging the need for his deposition, Federal promptly withdrew the letter and the deposition was held as scheduled. (There was nothing wrong with writing about Wong.)

3. Soliciting false testimony – The court found nothing untoward in any of the circumstances surrounding the testimony of the underwriters, and no obstruction or bad faith.

The court concluded that this was a hard fought and difficult case, handled professionally on both sides, notwithstanding PGG's "overwrought assertions to the contrary."

[*Newsletter Editors' Note:* Our sincere thanks to David L. Mazaroli of the Law Offices of David L. Mazaroli for calling this case to our attention. Items for future issues may be submitted to:

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COMMITTEE ON MARINE TORTS AND CASUALTIES

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Spring 2010

Admiralty Jurisdiction

Primera Maritime Limited v. Jiangsu Eastern Heavy Industry Co. Ltd., 355 Fed. Appx. 477 (2d Cir. 2009)

Plaintiffs appealed dismissal of their complaint concerning a contract to build a ship for lack of admiralty jurisdiction. Appellants argued that the Supreme Court's decision in Kirby overruled the long-standing rule that contracts to build a ship were not maritime. The court disagreed, finding that until such time as the Supreme Court declares otherwise, disputes arising from such contracts do not give rise to admiralty jurisdiction.

Sea Village Marina, LLC. v. A 1980 Carlcraft houseboat, Hull Id no. LMG37164M80D, et al., 2010 AMC 404 (D.N.J. 2009)

The owner of a marina filed a complaint to enforce a maritime lien against a number of houseboats for failure to pay dockage and other necessaries. Defendant houseboat owners argued that their homes were used primarily as dwellings and that plaintiff's use or threatened use of state law remedies should prevent creation of a maritime lien. The court viewed the question of whether the houseboats were vessels as jurisdictional. The court, in finding the houseboats capable of use in marine transportation, noted that every court that had considered the question found that houseboats were vessels, and that the particular houseboats were still afloat and capable of being towed to a new marina without substantial effort or preparation – the critical "capability" factors. The court also held that the houseboats were not permanently moored where

only standard lines were used for moorings and the ship-to-shore utilities could be disconnected at any time without special tools. Notably, citing the split of authority on the issue and the fact that the Third Circuit had not yet decided the issue, the court declined to take into account the intention and expectations of the houseboat owners to permanently moor the houseboats at the marina. Citing cases from the Eleventh Circuit, Eastern District of Virginia and Eastern District of Pennsylvania, the court held that the owner's intentions could not be used as evidence on the question or practical possibility. The court did not foreclose the possibility of a contrary decision on the merits once more evidence was presented.

In re MLC Fishing, Inc., 2010 U.S. Dist. Lexis 13030 (E.D.N.Y. Feb 16, 2010)

A recreational fisherman was injured when he slipped descending a metal ramp leading from shore to a floating dock while on his way to board a fishing vessel. The floating dock led to the vessel where stairs were used for boarding. The vessel owner filed a Complaint for Exoneration or Limitation of Liability claiming, inter alia, admiralty tort jurisdiction, and jurisdiction under the Admiralty Extension Act. The claimant moved to dismiss for lack of admiralty jurisdiction. The court declined to extend admiralty jurisdiction by defining a gangway as including a ramp separated from the vessel by floating docks. The court, likewise, declined to find jurisdiction under the Admiralty Extension Act despite the fact that the vessel's crew maintained the ramp.

Landry et al v. Columbia Gulf Transmission, Co., 2009 U.S. Dist. Lexis 109209 (E.D. La. 2009)

Although defendants' pipeline canal was privately owned and maintained, and was blocked on both ends, because two or three navigable waterways open into the canal, it is nevertheless navigable for purposes of establishing admiralty jurisdiction of a tort occurring in the canal.

Forum non conveniens

Sandria Saqui v. Pride Central America LLC, 595 F. 3d 206 (5th Cir. Tex. 2010).

Forum in Texas is not convenient when locus of injury took place on oil rig located in Mexican waters, rig had Mexican charter, crewed by Mexican company, all employees were Mexican citizens, Mexican courts were available for litigation, and rig owner agreed to submit to Mexican jurisdiction.

Shull v. United Barge Lines, 2010 U.S. Dist. Lexis 24369 (E.D. La. Feb 26, 2010)

As a condition of receiving maintenance and cure, plaintiff signed an application provided by his employer that included a forum selection clause. Plaintiff initiated suit outside of the forum required in the application and defendant moved to transfer the case for improper forum. Plaintiff responded by asserting that he was in effect forced to sign the application to receive maintenance and cure and that the forum selection should be void as a matter of public policy and, separately, that forum selection is void under the Jones Act. The court granted defendant's motion for transfer not on the basis of above, but because defendant's forum choice was where its primary base of operations were located and there was sufficient connection there to the subject of litigation.

The court previously held that recent amendments deleting venue selection provisions in the Jones Act did not preclude employers from enforcing forum selection clauses in seafarers' employment contracts, but the court chose not to dismiss the case on the basis of such clause because it would be unfair to require the seaman to litigate in the selected forum. Plaintiff would be inconvenienced by her physical condition, and was in a dire financial situation so that forcing her to litigate there would render her unable to fairly and effectively pursue her claims against the shipowner. *Utoafili v. Trident Seafoods Corp., et al.,* 2009 U.S. Dist. Lexis 110644 (N.D. Cal. 2009)

Statute Of Limitations

Reichert v. Mon River Towing, Inc., 2010 U.S. Dist. LEXIS 7491 (W.D. Pa. January 29, 2010)

Brendan Reichert asserted a claim in the federal court in Pennsylvania for negligence under the Jones Act alleging that, while serving as a crew member aboard a Mon River vessel, he suffered injuries during the course of his employment due to a faulty locking mechanism on a winch. Reichert, however, asserted his claim more than three years after the event allegedly took place. Mon River moved to dismiss the claim pursuant to FRCP 12(b)(6) premised upon a statute of limitations defense. Plaintiff countered that the limitations period should be equitably tolled due to his prior filing of a claim alleging the same injuries in an Ohio state court, which was dismissed for lack of personal jurisdiction. Mon River argued that the limitations period is tolled only when a plaintiff's case is dismissed for improper venue, and is not available when a case is dismissed for lack of personal jurisdiction. The court concluded that even assuming, arguendo, that the limitations period may be tolled even though the state court lacked personal jurisdiction, the jurisprudence would not support tolling the statute of limitations under the facts and circumstances of the case. The court found that it was unreasonable for Reichert to rely on his inappropriate lawsuit in Ohio, since the claims involved a Pennsylvania plaintiff, a Pennsylvania defendant, and an accident that occurred in Pennsylvania, over 50 miles from Ohio. The court found that tolling is inappropriate to preserve a claim when a party has failed to act reasonably. In addition, Mon River did not receive actual notice of the other action until after the statute had expired. Thus, Mon River's right to be free from Reichert's stale claim outweighed Reichert's interest in prosecuting it. Mon River's motion to dismiss was granted.

Insurance

Shepard v. Foremost Insurance Co., 2009 U.S. Dist. Lexis 21110 (W.D. Wash. Mar. 11, 2009)

[15716]

Marine insurance policy excluding coverage for "lack of reasonable care or due diligence in" maintenance of watercraft is unambiguous and is to be enforced.

Damages

Ramirez v. American Pollution Control Corp., 364 Fed. Appx. 856 (5th Cir. 2010).

Seaman's failure to disclose prior injuries may result in reduction of damages for claim based on contributory negligence.

Negligent Infliction of Emotional Distress

Stepski v. M/V NORASIA AYLA, 2010 U.S. Dist. LEXIS 16602 (S.D. N.Y. January 14, 2010)

Spouse of fisherman involved in collision at sea brought negligent infliction of emotional distress claim. The court granted summary judgment for defendant ship owner holding that the plaintiff spouse could not meet "zone of danger" test adopted by the Supreme Court in *Gottshall*. Further, the court noted that even if plaintiff spouse could meet the zone of danger test, her alleged emotional injury lacked the requisite manifestation of physical injury.

Note: The court also granted summary judgment to defendant ship owner on plaintiff spouse's claim for loss of consortium under maritime law where the collision occurred on the high seas.

Punitive Damages

Borkowski v. F/V Madison Kate, 599 F. 3d 57 (1st Cir. 2010)

Punitive damage award was denied in an appeal by commercial fisherman against their vessel and employer who admittedly, but

unknowingly, violated 46 U.S.C. § 10601 by failing to commit the fisherman's wage agreements to writing. All but one fisherman was paid a full share. The District Court held that the sole remedy for violation of § 10601 is §11107 which limits recovery to the greater of the highest wages paid in the port of engagement or agreed to by the parties, and ordered that the fisherman who was paid a ¾ share be paid a full share. In denying the claim for punitive damages, the Court of Appeals noted that punitive damages do not automatically follow every statutory violation and that the prevailing rule in American courts limits punitive damages to cases of enormity – where the defendant's conduct is outrageous, owing to gross negligence, willful, wanton or showing of reckless indifference to the rights of others.

Stepski v. M/V NORASIA AYLA, 2010 U.S. Dist. LEXIS 16602 (S.D. N.Y. January 14, 2010)

In a collision case occurring in zero visibility, the plaintiffs sought punitive damages from the ship owner under the theory of vicarious liability. The District Court, assuming that the Supreme Court's decision in Townsend made punitive damages available under general maritime law, held that in order to recover punitive damages against a ship owner under general maritime law based upon the acts of an agent, the plaintiff must show either (1) that the owner ratified or authorized the agent's actions, (2) that an agent acting in a managerial capacity within the scope of his employment acted egregiously and that the principal shares blame for the wrongdoing, or (3) that the owner himself acted recklessly in employing the agent. In granting defendant's motion for summary judgment, the court held that although the master had orders from charterers to proceed to New York at full speed, the owner and charter had instructed the master to obey the COLREGS and there was no evidence that the ship owner knew of the "full speed" order.

Retaliatory Discharge

Baetge-Hall v. American Overseas Marine Corp., 624 F.Supp. 2d 148 (D. Mass. 2009)

A seaman who was terminated after refusing a vaccination because of a contraindicated pre-existing medical condition may not sustain a retaliatory discharge action on the basis that she was terminated because she notified her employer that she would seek legal remedies to resolve her employment discrimination claims as those rights did not already exist under maritime law.

Limitation of Liability

In re Vulcan Materials, 674 F. Supp. 2d 756 (E.D. Va. 2009).

Exoneration or limitation of liability was denied where a tug pushing barges ahead at night, in a narrow channel, in choppy seas, with a 600 foot blindspot forward of the tow ran over a U.S. Navy RHIB (rigid hulled inflatable boat), killing its operator. The tug's master utilized the deckhand as a second observer in the wheelhouse. The court found that the owner was in privity in that it should have known that a flotilla traveling under such circumstances, at a location known to have small boat traffic, required a forward lookout and the owner, not the master, was required to provide a third individual to perform the forward lookout duties.

In re Donjon Marine Co., Inc., 2009 U.S. Dist. Lexis 93638 (D.N.J. Oct. 6, 2009)

Exoneration or limitation of liability was denied where claimant's counsel sent a representation letter to the vessel's owner claiming personal injuries due to the negligence of the owner. The owner replied almost a year later, providing medical information that the claimant suffered only soft tissue injuries that were fully healed. Claimant filed a complaint eight months later alleging negligence and seeking damages in excess of $75,000. The owner filed a Complaint for Exoneration from or Limitation of Liability and argued that the representation letter was insufficient as a notice of claim and thus the six month limitation period did not begin to run until the complaint was filed. The owner stated the value of the vessel at the time of the alleged injury at $17,950. The

court found that although the claimant's initial letter did not specify the amount of damages sought, the owner had a duty to investigate whether the amount of the claim could exceed the value of the vessel.

Procedural Issues

In re Eckstein Marine Services, LLC, 2010 U.S. Dist. LEXIS 8893 (S.D. Tex. Feb. 3, 2010)

Plaintiff was injured when his foot caught in a rope aboard a tug and brought suit in state court. Defendant responded in federal court under the Limitation of Shipowners' Liability Act and Supplemental Admiralty Rule F, and sought a stay of plaintiff's state court action. The court held that the single-claimant exception applied because the nature of the injury (the foot getting caught in rope) inhered that there would not likely be other plaintiffs, and held that defendant failed to provide a basis for maintaining the stay in light of the single-claimant exception.

Right to Trial by Jury

Endicott v. Icicle Seafoods, Inc., 167 Wn. 2d 873 (Wash. 2010).

A Jones Act suit brought in state court allows for trial by jury. Plaintiff's election to base an action on the Jones Act permits the right to elect the jurisdictional basis of the suit, however, "procedural rights flow as normal incidents of the suit." Therefore, because procedural issues are based on state law in such proceedings, the "Washington Constitution affords Jones Act litigants a jury trial right," and either the plaintiff or defendant may request a jury trial.

Stevedoring

Jones v. Cooper T. Smith Stevedoring, 354 Fed. Appx. 143 (5th Cir. La. 2009).

Longshoreman may not bring suit against stevedoring employer in the capacity of vessel owner when negligence alleged is based solely

on loading and unloading of vessel because such alleged acts lack basis of liability in its ownership capacity.

Unseaworthiness

Juliussen v. Buchanan Marine, L.P., 2010 U.S. Dist. LEXIS 1406 (S.D.N.Y. January 6, 2010)

After allegedly falling on a stairwell on board the ship on which he worked as a mate, and thereby injuring his right knee, Reidar Juliussen filed this action for relief under the Jones Act and under general maritime law, against his employer, Buchanan Marine, L.P. At the time he fell, Juliussen was wearing low-top sneakers that had rubber, rather than nonslip, soles. Buchanan moved for summary judgment, arguing that both the primary duty doctrine and the effect of Juliussen's own negligence required the court to conclude that, as a matter of law, Buchanan cannot be held liable for Juliussen's injuries. Further, Buchanan claimed that Juliussen has failed to provide evidence that a dangerous or unseaworthy condition caused his injuries. Although Juliussen mentioned nothing about inadequate lighting in his original report of the incident, at deposition he claimed that lighting on the stairwell was inadequate because Buchanan had removed a fluorescent light bulb and substituted it with a nightlight. Accepting Juliussen's testimony and evidence as true and drawing all factual inferences in his favor, the court found that a genuine issue of material fact remained as to whether the stairwell's darkened condition in fact constituted an unreasonably dangerous condition, and that a question therefore existed as to whether Buchanan breached its duty to provide a reasonably safe workplace. Similarly, the court found that genuine issues of material fact existed as to whether the conditions of the stairwell constituted deficient equipment rendering the vessel unseaworthy, and whether the conditions of the stairwell played a substantial part in causing Juliussen's injuries. Finally, because there was a genuine issue of material fact regarding Juliussen's primary duties as mate on board the vessel, the court decline to determine as a matter of law that Juliussen breached such duties so as to render applicable the primary duty rule. Buchanan's motion for summary judgment was denied in all respects.

Aljalham v. American Steamship Co., 2010 U.S. Dist. LEXIS 19486 (E.D. Mich. Mar. 4, 2010)

Plaintiff cook claimed to have injured his back when he carried a box of stores weighing over 90 pounds into the galley approximately 10 feet and set the box on the deck. Plaintiff claimed that the operator breached its duty by failing to maintain safe loading practices and that a verbal warning did not constitute a sufficiently safe loading practice. Defendant moved for summary judgment on Jones Act negligence and unseaworthiness claims. The court denied defendant's summary judgment on the negligence claim as there was a genuine issue as to whether the operator's procedures were uniformly enforced or sufficient. The court granted summary judgment for defendant on the unseaworthiness claim, finding that the incident was a single incident of operational negligence and that mere suggestion of a safer or better loading procedure could have been implemented did not support a claim of unseaworthiness.

Unseaworthiness – Duty Owed To Others

Mceuen v. Lower Illiois Towing Co., et al., 2010 U.S. Dist. LEXIS 12027 (C.D. Ill. Feb. 11, 2010)

Plaintiff, non-crewman, was injured on vessel. Court granted defendant's motion for summary judgment on plaintiff's unseaworthiness claim based on no duty owed to provide seaworthy vessel to persons not members of the crew.

Michael S. Powell v. American President Lines, Ltd., et al., 2009 U.S. Dist. Lexis 111213 (W.D. Wash. 2009)

A seaman has a negligence claim under the Jones Act against only his employer. Thus, there is no claim against the master of a ship whose owner is the employer. Similarly, there is no unseaworthiness claim against a master.

Unseaworthiness – Claim Based On Violence

Smith v. Weeks Marine, Inc., et al., 29 So. 3d 1269 (La.App. 3 Cir. 2010)

Plaintiff was attacked by two crew members, severely beaten, and brought an action against the barge owner under the Jones Act for negligence and unseaworthiness, and sought, inter alia, maintenance and cure benefits. Upon reviewing the lengthy and violent criminal background of the assailants, and the barge owner's admission of the criminal background of the assailants, the appellate court held the barge owner liable for unseaworthiness. The appellate court emphasized that liability is not excused by mere due diligence, and because the facts here supported actions of a savage and vicious nature, the judgment in favor of plaintiff was affirmed.

Caraska v. State of Washington Dep't. of Transp., 2010 Wash. App. LEXIS 271 (Wash. Ct. App. Feb. 8, 2010)

Seaman aboard a state-owned ferry was attacked by an inebriated passenger. After appellate court remanded an earlier dismissal to the trial court based on ferry operator's adoption of a policy that addressed management of inebriated and violent passengers, the trial court held against seaman's Jones Act claim based upon the credibility of witnesses, and dismissed seaman's claim. Appellate court affirmed.

Seaman Status

Collier v. Ingram Barge Co., 2010 U.S. Dist. LEXIS 1461 (W.D. Ky. January 8, 2010)

David Collier worked for Ingram Barge Company as a tankerman trainee for a little over a year. After Collier ceased working for Ingram he filed this personal injury lawsuit against Ingram, alleging that he was injured when he tripped over a lock line on the deck of fuel flat. Collier further claimed status as a seaman who worked for Ingram as a

crew member. Collier sued Ingram for negligence under the Jones Act, unseaworthiness under general maritime law, and (in the alternative) under §905(b) of the LHWCA. Ingram moved for summary judgment on the basis that Collier cannot recover under any asserted theory. First, Collier cannot recover because he is not a "seaman" under the Jones Act. If he is not a seaman, Collier also cannot recover for unseaworthiness under general maritime law. Finally, Ingram asserted that Collier alleged only employer negligence under the LHWCA, for which there is no recovery. Collier, on the other hand, argued that Ingram breached its "turnover duty," asserting that Ingram failed to keep the work area where he was working free from debris and other trip hazards, and Collier argued that this allegation of negligence is sufficient to withstand summary judgment. Ingram also maintained that Collier's duties were land-based, and he was not exposed to the perils of the sea while employed by Ingram. In contrast, Collier asserted that the majority of his duties were not land-based, and his position as a tankerman trainee exposed him to maritime hazards on a regular basis. Neither party challenged the fact that Collier spent more than 30 percent of his time in service of the vessel in navigation. After reviewing each party's position, the court found that a genuine issue of material fact existed as to whether Collier qualified as a seaman under the Jones Act. The parties disagreed as to Collier's shoreside duties, the amount of time he spent on shore, the frequency and procedures for midstream servicing, the hazards Collier faced, and the training he received. Viewed in a light most favorable to the non-moving party, the court was of the opinion that a reasonable jury could find that Collier qualified as a seaman. Turning to the §905(b) claim the court acknowledged Ingram's argument that Collier admitted it was daytime when he tripped, and he should have seen the lock line had he looked down. Nevertheless, the court also noted Collier's counter that his view was obstructed by a lube oil tank, and he could not have seen the lock line until he tripped over it. Viewing the evidence in a light most favorable to the Collier, the court found that a genuine issue of material fact existed as to whether the lock line hazard was obvious or anticipated by a reasonably competent longshoreman, or if the lock line was an unreasonable hazard for expert and experienced longshoremen exercising reasonable care. Ingram's motion for summary judgment was denied in all respects.

Martin v. Matt Canestrale Contracting, Inc., 658 F. Supp. 2d 668 (W.D. Pa. 2009)

Blaine Martin worked as a ticket collector for Matt Canestrale Contracting, Inc. (MCCI), which was a laborer position. As a ticket collector, Martin's job consisted of taking tickets from truck drivers and facilitating and assisting truck drivers in the loading of coal from the trucks into a hopper, for conveying coal to a barge. On the date of his death, MCCI asked Martin to check the security of some barges due to high water conditions. Martin was later found dead on one of the barges. Martin's widow sued MCCI, asserting claims of unseaworthiness, Jones Act negligence, vessel negligence under §905(b) of the LHWCA, and negligence/maritime tort. MCCI moved for summary judgment with respect to all of the widow's claims. claims. The court held that Martin was not a seaman because he spent only 30% of his time on a vessel and did not have a merchant mariner's document, and as such, the unseaworthiness and Jones Act negligence claims failed. As to the §905(b) claim, the widow offered evidence sufficient to create genuine issues of material fact as to whether Martin met the status requirement of the LHWCA where the employee physically handled cargo as part of an overall loading process and handled paperwork for incoming cargo. Additionally, the situs test of the LHWCA was met because the accident occurred on navigable waters. Whether the barge qualified as a vessel under §905(b) and 1 U.S.C. §3 was at issue because there was evidence that the barge could practically be used as a means of maritime transportation. Finally, because the question of whether the barge was a vessel remained disputed, it could not be said that the court lacked jurisdiction over the negligence/maritime tort claim. The court grant MCCI's motion for summary judgment as to the claims for unseaworthiness and Jones Act negligence but denied summary judgment as to the claims for vessel negligence under § 905(b) and negligence/maritime tort.

Maintenance And Cure

Harrington v. Atlantic Sounding Co., 602 F.3d 113 (2d Cir. 2010).

Over a vigorous dissent, the U.S. Court of Appeals for the Second Circuit ruled that an agreement by a seaman to arbitrate his claim for maintenance and cure and any potential claim under the Jones Act was not prohibited by law and was not, in the circumstances, unconscionable. Plaintiff seaman was injured while working on defendant's vessel. Defendant paid maintenance and cure. When plaintiff sought an increase in payments, defendant agreed to the increase for a fixed term providing that plaintiff agreed to arbitrate his claims and potential claims relating to the injury. When payments ceased at the end of the fixed term, plaintiff brought suit in federal court. Plaintiff contended that the agreement was void as a matter of law and unconscionable because it was misleading and he had been drinking when he signed it. On appeal, the court ruled that arbitration agreements in seaman personal injury cases are not void as a matter of law and that the terms of the agreement were not unconscionable.

Collick v. Weeks Marine, Inc., 680 F. Supp. 2d 692 (D.N.J. 2009)

Joseph Collick was employed by Weeks Marine, Inc. as a dockbuilder involved in the construction of a Navy pier, when he fell twelve to fifteen feet to the deck of the pier. In the fall, Collick suffered a fracture dislocation of his right ankle. Immediately after Collick's injury, Weeks began voluntarily paying him medical and compensation benefits under the LHWCA. Collick then brought an action stating that he was a seaman and asserting claims under general maritime law and the Jones Act. Weeks discontinued paying LHWCA benefits to Collick and controverted the claim based upon Collick's assertion that he was a member of the crew of a vessel, precluding coverage under the LHWCA. Upon receiving Collick's demand for maintenance and cure benefits under general maritime law, Weeks refused to pay maintenance and cure benefits contending that Collick had already attained maximum medical improvement. Although Weeks established that Collick had returned to work and was able to perform this work without limitation, at oral argument Collick maintained that Weeks's refusal to pay either LHWCA benefits, or maintenance and cure benefits under general maritime law, has resulted

in impending financial ruin. Collick moved the court for an injunction to preliminarily enjoin Weeks from failing to pay maintenance and cure benefits under general maritime law. Collick contended that he was "assigned to the crew" of a spudded down barge that served as a work platform at the pier construction project. Despite numerous factual disputes, including the amount of time Collick spent on the barge, whether he had reached maximum medical improvement, whether proposed surgical intervention was curative or palliative and the extent of Collick's residual disability, the court granted Collick's request for preliminary injunction. Based on Collick's description of his work day, the fact that he was regularly and consistently assigned to work on a particular crane barge, and the nature of that work – which included assisting in handing lines to move the crane barge several times per week – the court concluded that the parties' differences in opinion as to the percentage of each workday Collick spent physically on the crane barge did not preclude the court, at this juncture, from finding that Collick had shown a reasonable probability of success in showing that his connection to the vessel was substantial in both duration and nature. The court also found that Collick had shown a substantial likelihood of success on the merits of his claim that he is a seaman entitled to maintenance and cure benefits and that he will suffer irreparable harm if the preliminary injunction is not granted with respect to both maintenance and cure. As to maintenance, the court noted that Collick had fallen into dire financial straits due to Weeks' discontinuation of payment of benefits and his inability to work as a dockbuilder. With respect to cure, the court concluded that Collick's condition apparently continues to worsen without medical care and that the worsening condition and unnecessary decompensation pose a clear and currently existing threat of irreparable harm if his injury continues to go untreated. In granting Collick's motion for preliminary injunction, the court waived the security requirement.

Seaman Settlements

Lamberger v. Inland Marine Service, Inc., 2009 U.S. Dist. LEXIS 114163 (W.D. Ky. December 2009)

Scott Lamberger was employed as a seaman by Inland Marine Service, Inc. Lamberger was allegedly injured while moving a 55 gallon drum aboard one of Inland Marine's vessels. Shortly after his accident, Lamberger met with an Inland Marine representative to discuss his injuries and settle his claim. The parties entered into a settlement agreement and Lamberger received $53,519.45 in exchange for agreeing to the settlement. Lamberger returned to work for Inland Marine following the settlement, but eventually was terminated for cause. Following his termination, Lamberger filed the present suit over his injuries, alleging Inland Marine was liable under the Jones Act and for breach of the warranty of seaworthiness. Inland Marine filed a motion for summary judgment based on the settlement agreement. Lamberger argued that Inland Marine had not met its burden of proving that he signed the release with a full understanding of his rights, citing to *Gueho v. Diamond M. Drilling Co.* in support of his argument. The court found Lamberger's case is distinguishable from *Gueho,* because Lamberger continued his employment for nearly two months after signing the release, and he was only let go after he left the vessel, without permission, nearly one week before his time aboard the vessel was to end. Lamberger did not allege that the consideration he received was inadequate. Rather, the main issue was the parties' understanding of Lamberger's continued employment. The court found that Lamberger's own deposition testimony clearly demonstrated that he knew he could still be terminated after he signed the release. The court held that Inland Marine had properly demonstrated that Lamberger had a full understanding of his rights and granted the Motion for Summary Judgment in favor of Inland Marine.

COMMITTEE ON RECREATIONAL BOATING

Chair: Frank P. DeGiulio

Boating Briefs, Spring/Summer 2010

JURISDICTION AND PROCEDURE

Yacht retains vessel status during overhaul

Crimson Yachts v. The Betty Lyn II, 2010 U.S. App. LEXIS 7447 (11th Cir. April 12, 2010)

The U.S. Court of Appeals for the Eleventh Circuit has held that a yacht undergoing extensive overhaul remained a vessel susceptible to a maritime lien for necessaries, because the yacht retained the ability to be towed through the water and the overhaul did not amount to new construction.

The vessel was a 132-foot yacht built in 1974. Its owner contracted with an Alabama shipyard to perform a refit, including extension of its decks and replacement of the engines, generators, electronics, plumbing, and wiring. The old equipment was removed and the yacht was towed to the shipyard, where it was hauled ashore and placed in a covered shed. Work continued for the next eighteen months, and although there were some payments made by the owner, the unpaid invoices allegedly exceeded $1.2 million.

The shipyard filed an action in rem against the vessel and in personam against the owner. An arrest warrant was issued, but later the district court held a hearing and determined that, given the extent of the work, the yacht was out of navigation and was no longer a vessel susceptible to a maritime lien. (We reported on the district court's decision in Boating Briefs Vol. 18:1.)

On interlocutory appeal, the Eleventh Circuit reversed. After a thorough discussion of the history and purpose of maritime liens and the

Federal Maritime Lien Act, the court determined that the yacht remained a vessel throughout the overhaul period. The yacht "need merely be capable of transportation on water to be a vessel," and it was sufficient that the yacht could have been put in the water and placed under tow on 24 hours' notice at any point during the overhaul. The fact that the work was done on land did not deprive the yacht of vessel status. And, since the hull remained intact, the work did not qualify as new construction. The yacht was simply being rebuilt, not constructed anew.

The district court's dismissal for lack of in rem jurisdiction was therefore erroneous, and the case was remanded for consideration of the shipyard's in rem claim on the merits.

Eleventh Circuit reverses forum non conveniens dismissal

Wilson v. Island Sea Investments, Ltd., 590 F.3d 1264 (11th Cir. 2009)

While vacationing at the Island Palm Resort in the Bahamas with her daughter, sister, and two cousins, Daisy Emory embarked on a banana boat ride operated by Paradise Watersports, LLC. She informed the Paradise Watersports employee charged with operating the boat that she and another in her party were unable to swim. During the course of the excursion, the banana boat capsized and Emory fell into the water and died.

Emory's daughter filed suit in the Southern District of Florida against several entities connected with the Island Palm Resort, but not against Paradise Watersports or the employee who operated the banana boat. Defendants collectively filed a motion to dismiss, arguing the case should be heard in the Bahamas. The district court agreed and dismissed the case on forum non conveniens grounds.

The Eleventh Circuit reversed and remanded for a more thorough forum non conveniens analysis. Specifically, the Southern District had erred by not considering the parties' contacts with the Middle Dis-

trict of Florida, where many of the witnesses and documents were located. On remand the Southern District would also be free to consider transferring the case to the Middle District.

In addition, the Southern District had erred by not considering the difficulties the plaintiff would face in prosecuting the case in the Bahamas, including the unavailability of contingency-fee arrangements, the high hourly rates of Bahamian attorneys, and the risk of fee-shifting under Bahamian law if the plaintiff lost the case. These and other similar "private interest factors" should have been taken into account in deciding whether to dismiss for forum non conveniens.

No admiralty jurisdiction over fall on floating-dock ramp

In re MLC Fishing, Inc., 2010 U.S. Dist. LEXIS 13030 (E.D.N.Y Feb. 16, 2010)

Julio Angel Velez was allegedly injured at Captain Mike's Marina in Howard Beach, New York, when, intending to board the "CAPT MIKE" to go on a fishing expedition, he fell due to an alleged "slippery, slick, greasy, oily, trap-like, dangerous and hazardous condition" of the "premises and ramp." To board the CAPT MIKE, Velez was required to descend a metal ramp that was neither attached permanently to the land nor to the CAPT MIKE. The ramp led to a floating dock, which itself had to be traversed to access the steps to the CAPT MIKE.

Velez filed an action in the Supreme Court of Queens County against the owner of the CAPT MIKE. The owner subsequently filed a limitation action, invoking subject matter jurisdiction in admiralty.

Velez moved to dismiss the action for lack of subject matter jurisdiction. Specifically, Velez argued that admiralty jurisdiction did not exist because accident did not occur aboard the CAPT MIKE. The owner in turn argued that the injury did not occur upon land but upon an appurtenance of the vessel because the ramp and floating dock served as the vessel's only means of ingress and egress, and was thus the equivalent of the vessel's gangway.

The Eastern District of New York determined that no admiralty tort jurisdiction existed to support the limitation action. The court drew a distinction between a gangway, which may be considered part of the vessel, and a case such as this, in which the ramp leads to floating docks, and cannot thus be considered an extension of the vessel for the purpose of establishing admiralty jurisdiction.

INSURANCE

Insurer denied summary judgment where materiality of misrepresentation was in dispute

Joseph v. Great Lakes Reinsurance (UK) PLC, 2010 U.S. Dist. LEXIS 24454 (N.D. Ohio March 16, 2010)

A high performance Baja Outlaw was allegedly stolen, and the marine insurer sought summary judgment on the basis that the person who applied for the insurance had, in filling out the insurance application, misrepresented himself as the vessel's "owner" and overstated the purchase price by a factor of two. Applying New York state law, the court denied the insurer's motion because there was an ambiguity in the insurance application and because the insurer did not conclusively establish the materiality of the applicant's misrepresentations. (Presumably New York law was applied due to a choice-of-law provision in the policy, but the opinion has no discussion on this point. Nor is there any indication why uberrimae fidei was not applied.)

The facts showed that the applicant was not the titled owner of the vessel but instead had paid $52,500 under a "partnership vessel agreement" that gave him custody and control of the vessel and responsibility for keeping it insured. The partnership agreement was the last in a chain of similar partnership or "conditional purchase agreements" by which the right to use the vessel had been successively conveyed to different people. In this manner, the titled owner was several layers removed from operational control of the vessel.

In reviewing New York insurance cases, the court stated that an answer to a question on an insurance application cannot be the basis for rescission under New York law if a reasonable person in the applicant's position could have interpreted the question as the applicant did. And, the court stated, the insurer's position on materiality should be corroborated by the insurer's own underwriting practices "such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application."

In this case, the application did not expressly require the applicant to identify the "owner" but simply asked for the name of the "insured." Further, the insurer's only factual support for the motion was an affidavit from an in-house senior underwriter, who stated that the policy would not have been issued had the applicant's "partnership" arrangement been disclosed. But the insurer did not offer any written guidelines to corroborate the underwriter's position or other evidence that applicants in a similar situation would not have obtained a policy from this insurer.

Secondly, the court determined that, at least for purposes of summary judgment, the insurer had not shown that the misrepresentation of the purchase price was material. The court indicated that the motion should have been supported by written underwriting guidelines or other evidence that the risk would have been rejected had the true purchase price been disclosed.

Intentional-acts exclusions bar coverage for alleged assault

Markel American Ins. Co. v. Staples, 2010 U.S. Dist. LEXIS 7148 (E.D. Va. Jan 28, 2010)

After an onboard altercation in which he allegedly assaulted a woman, a sailboat owner was sued for battery, false imprisonment, intentional infliction of emotional distress, negligent threats, negligent false imprisonment, and negligent infliction of distress. The owner sought

coverage from his marine insurer and his homeowners insurer. Each insurer sought a declaratory judgment, claiming there was no coverage on account of their respective policies' intentional-acts exclusions and because there had been no "occurrence" as defined in the policies.

The court agreed that the intentional-acts exclusions applied, notwithstanding the "negligence" theories listed in the underlying complaint. The victim's suit was clearly premised on an intentional assault allegedly committed by the insured, and the mere recitation of negligence in the complaint did not overcome the exclusion.

The court also agreed with the insurers that the alleged assault was not an "occurrence," which the policies defined as an "accident." Under Virginia law, an intentional act is neither an occurrence nor an accident, and the court again declined to allow unadorned assertions of negligence in the complaint to overshadow what was at bottom an allegation of intentional misconduct. Accordingly, both insurers were excused from any coverage obligation.

Powered-watercraft exclusion bars coverage for Kite Tube accident

Allstate Casualty Ins. Co. v. Warchol, 2010 U.S. Dist. LEXIS 2741 (N.D. Ohio Jan. 13, 2010)

An Allstate homeowners policy excluded coverage for injuries arising out of "loaning… watercraft… if the watercraft… is powered by one or more outboard motors with more than 25 total horsepower."

The insureds owned a Kite Tube, a circular inflatable that could skim across the water and become airborne when towed behind a powerboat. They loaned it to someone who began towing it behind a boat powered by a 120-horsepower engine. The person riding on the Kite Tube was injured and sued Allstate's insureds.

Allstate sought a declaration of no coverage based on the watercraft exclusion. The insureds conceded that the Kite Tube was a "water-

craft" but argued that the exclusion did not apply because the Kite Tube itself was not "powered by one or more outboard motors with more than 25 total horsepower" but was simply being towed by a motorboat that was so powered.

The court rejected this argument and concluded that the Kite Tube was "powered by" the motor on the towing vessel. "In this case the Kite Tube would have been stationery unless the boat was pulling it. Under the plain and ordinary, and entirely unambiguous meaning of the term 'powered by,'" the exclusion applied, and hence there was no coverage for the underlying incident.

SALVAGE

Court dismisses salvor's unjust enrichment claim against insurer

Absolute Marine Towing & Salvage, Inc. v. S/V INIKI, 2010 U.S. Dist. LEXIS 11772 (M.D. Fla. Feb. 10, 2010)

A salvor brought suit against the salved vessel and later amended the complaint to include a claim against the salved vessel's insurer. Based on the principle of unjust enrichment, the theory was that the salvor's services had provided a direct benefit to the insurer by preventing oil pollution and more extensive damage to the vessel, which the insurer otherwise would have had to cover.

The insurer sought dismissal on the grounds that Florida's non-joinder statute, Section 627.4136, does not permit anyone other than an insured to bring suit against a liability insurer without first obtaining a settlement or verdict against the insured. The insurer also argued that the salvor failed to state a legally cognizable claim.

The court determined that the non-joinder statute did not bar the salvor's claim because the salvor was not attempting to recover under the insurance policy per se but was instead seeking compensation for a benefit conferred on the insurer.

But the court agreed that the salvor's claim had to be dismissed. Although maritime law recognizes the theory of unjust enrichment, the salvor in this case did not allege that there was anything unjust or inequitable about the insurer's conduct. The court noted that the salvor "has not cited, and the Court's research has not uncovered, any case in which a party has been allowed to recover against an insurer for no other reason than because it did something that allowed the insurer to avoid having to pay out on its policy."

Res judicata precludes subsequent suit against underwriters

Blue Water Marine Services, Inc. v. All Underwriters Subscribing to Cover Note JY416008X, 2010 U.S. Dist. LEXIS 1521 (S.D. Fla. Jan. 8, 2010)

A yacht sailing off the coast of Florida, the Natalita III, struck a reef and grounded in shallow waters. The yacht sent out a distress call and requested the services of a specific towing company, but a towboat from Blue Water Marine Services ("Blue Water") arrived first and offered its services at a lower price. The Natalita III accepted Blue Water's offer. After Blue Water began towing the yacht, it demanded that the yacht's captain execute a contract purporting to entitle Blue Water to a pure salvage award, threatening to cut the Natalita III loose and adrift. The yacht's captain signed the contract.

Blue Water filed suit against the Natalita III, demanding a pure salvage award. Blue Water also sued Santam Insurance Co. Ltd. ("Santam"), an underwriter for the Natalita III, and Santam moved to dismiss for service reasons. The district court entered final judgment against Blue Water on the grounds that the contract was unenforceable and violated public policy. The Eleventh Circuit affirmed, remanding the case for Blue Water to pursue a pecuniary benefit claim against Santam. Rather than pursuing the claim against Santam in district court, Blue Water voluntarily dismissed Santam from the suit without prejudice and filed a new action in state court against Santam and Sagicor General Insurance Ltd. ("Sagicor"), another underwriter for the Natalita III. The under-

writers removed the matter to the district court and moved for dismissal based on res judicata and collateral estoppel.

The district court dismissed the matter. The court determined that all elements for a claim to be barred under res judicata, and for an issue to be precluded under collateral estoppel, were satisfied. Although neither Santam nor Sagicor were specifically involved with the original final judgment, the court found that the insurers and the vessel were in privity for these purposes, and their interests were aligned. With respect to claim preclusion, the court found that (1) there was a final judgment against Blue Water on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) since the insurers were in privity with the original defendants, the parties were effectively identical in both suits; and (4) the same cause of action was involved in both cases.

Similarly, the court found that collateral estoppels applied to the suit in question, as (1) the issue at stake was identical to that of the prior litigation; (2) the issue was actually litigated; (3) the determination of the issue was a critical and necessary part of the judgment in the prior litigation; and (4) Blue Water had a full and fair opportunity to litigate the issue in the first proceeding.

Salvage award for freeing vessels from sinking dock

O'Hagan v. M&T Marine Group, LLC, 2010 U.S. Dist. LEXIS 31154 (S.D. Fla. March 31, 2010)

As Hurricane Wilma came ashore in South Florida, two marine electricians whose apartments were adjacent to a marina noticed three brand-new vessels taking on water. The reason was that the vessels were moored to a floating dock which was itself on the verge of sinking. The two electricians headed out into the storm, cut the mooring lines, relocated the vessels to a sea wall a few yards away, and then took cover during the height of the hurricane. (The dock sank after the mooring lines were cut.) Once the weather subsided, they returned to the vessels to pump out the water. The total time expended was about three hours, and a portion

of the work was done during hurricane force winds with debris flying through the air.

Taking into account the usual factors, the court granted a salvage award of 15 percent of the post-casualty value. Since the vessels had a combined value of approximately $1.9 million, this amounted to an award of nearly $300,000, divided equally between the two salvors.

Salvage ends once immediate danger has passed

Lewis v. JPI Corp., 2009 U.S. Dist. LEXIS 104922 (S.D. Fla. Nov. 9, 2009)

Mr. and Mrs. Lewis, a married couple living in a condominium complex with a private marina, happened upon a docked vessel listing to its port side, with its swim platform under water and attached personal watercraft partially submerged. Mr. Lewis boarded the vessel and discovered several inches of water in the engine room, which he determined to be the result of a detached air conditioner hose. Mr. Lewis used his own screwdriver to reattach the hose, which took about ten minutes.

The following day, the couple spent $100 to have the water pumped out of the vessel. They subsequently recorded a $156,000 lien on the vessel, which was originally purchased for $1,445,000.

The district court determined that the couple satisfied their burden of demonstrating (1) a maritime peril from which the vessel would not have been rescued without their assistance; (2) a voluntary act by the couple without a pre-existing duty to render assistance; and (3) success in saving at least part of the property at risk.

However, the court ultimately determined that the vessel was no longer in peril once Mr. Lewis reattached the air conditioning hose, and the salvage therefore ended at that point. The pump-out and additional work was not considered when calculating the salvage to determine the couple's award.

The court evaluated the Blackwall factors to determine the amount of the award, finding that (1) the labor expended was minimal, and could have been less had Mr. Lewis simply unplugged the vessel from shore power and thereby shut down the air conditioner; (2) the couple was prompt and demonstrated a layperson's skill and energy; (3) Mr. Lewis employed only a screwdriver and thus the value of his property put at risk was nominal; (4) the risk incurred by Mr. Lewis personally was minimal and would have been less had he unplugged the vessel from shore power; (5) the value of the property saved was $434,000, the final purchase price of the vessel after the incident; and (6) the vessel was saved from a low to medium degree of danger, as the vessel was steadily but slowly taking on water in a shallow marina.

Mr. and Mrs. Lewis recovered a salvage award of 5% of the vessel's value—$21,700, plus prejudgment interest.

TORTS

Indemnity between owner and bareboat charterer for passenger injury

Wills v. One Off, Inc., 2010 U.S. Dist. LEXIS 34922
(D. Mass. April 8, 2010)

While attempting to board a yacht, a passenger (who was a guest of the charterer) fell from the gangplank into the water. Dislodged from its position, the gangplank then fell into the water and struck her. She sued the yacht owner, the charterer, and the captain, and the owner sought indemnification from the charterer.

Under the charter agreement, the yacht was "chartered on a demise basis," and the charterer was obliged to indemnify the owner against "any and all liability to third parties for loss or damage attributable to Charterer's acts or omissions." The agreement also specified that "during the charter term, Charterer shall have full authority regarding the operation and management of the Yacht and is solely responsible for retaining a master and crew."

The court determined that the agreement was clearly a demise charter because the owner had relinquished possession and command to the charterer. In this case the charterer had also engaged the captain pursuant to a services agreement that required the captain to follow the charterer's orders. Provisions in the charter party that constrained the charterer's use of the vessel— such as a provision restricting the use of the vessel to pleasure purposes and a limitation on the number of guests who could stay aboard—were typical in demise yacht chartering and did not invest the owner with operational responsibility.

Accordingly, the charterer would have to indemnify the owner to the extent the gangway incident was attributable to the acts or omissions of the charterer or his retained captain and crew. However, to the extent the incident was caused by a defect in the vessel that preexisted the commencement of the charter, the owner would not have a right of indemnification.

Owner denied summary judgment on injury claim resulting from encounter with another's wake

Reeves v. Coopchik, 2009 U.S. Dist. LEXIS 99920 (D. Conn. Oct. 27, 2009)

Nina Reeves suffered a spinal injury while a passenger aboard a boat owned by Scott Coopchik. At the time of the incident, Coopchik was a 57-year old retired businessman who had spent approximately 100 hours navigating the Rinker Cuddy Cabin Motorboat upon which the incident occurred. He was an experienced boater, having owned and navigated several boats in the Long Island Sound and Caribbean since the 1970s.

Coopchik navigated the boat slowly through Norwalk Harbor at about 5 miles per hour. The boat then entered a 200-feet-wide channel and Coopchik brought the boat to a planing speed of 16-18 miles per hour. Shortly after the vessel accelerated, the boat crossed the wake of a 30-35 foot fishing vessel traveling "swiftly" in the opposite direction.

Reeves stated that the boat went airborne and came down with a crash upon the water, at which point she screamed that she hurt her back.

Coopchik filed a motion for summary judgment, arguing that there were no material issues of fact to preclude the court from finding that he was not negligent as a matter of law in the operation of his vessel. Relying upon predictably conflicting reports from the experts for both sides, the court had no problem determining that a material issue of fact did exist as to whether Coopchik had navigated over the wake in a reasonably safe manner.

In Kentucky collision case, jury needed no instruction on the Rules of the Road

Kelley v. Poore, 2009 Ky. App. LEXIS 251 (Dec. 18, 2009)

Nineteen-year-old Kendra Kelley was injured when the personal watercraft(PWC) she was operating collided with a fishing boat owned by John S. Poore. The collision occurred on Kentucky's Lake Herrington, where Kelley was operating her boyfriend's PWC. After only a few minutes on the PWC, she became concerned for her safety. Kelley testified that she was near the middle of the lake in very choppy water when she decided to head for the shoreline. She indicated that she had been travelling parallel to the shore for approximately two to three minutes when she looked over her left shoulder; she was immediately struck by Poore's fishing boat. Kelley testified that Poore collided with her PWC on the left side and that she suffered a severe fracture of her lower right leg. Kelley denied that Poore's boat was trying to overtake the PWC at the time of the collision.

At trial, Kelley proposed jury instructions which set out the respective duties of vessels based on their relative bearings and on an overtaking vessel's intention to overtake. The trial court rejected the proposed instructions, instead instructing the jury on the general duty to exercise ordinary care for one's safety the safety of others. The jury returned a verdict against Kelley, and on appeal, the Court of Appeals of

Kentucky affirmed. The Court of Appeals stated that it was unnecessary for the trial judge to accept Kelley's "complex and technical proposed instruction defining Poore's duties," in light of Kentucky's policy that "there should not be an abundance of factual detail in jury instructions; instead, the instruction should provide only the "bare bones" of the question for the jury."

FINANCING

Interest on deficiency judgment to be calculated at statutory rate

Comerica Bank v. Stewart, 2009 U.S. Dist. LEXIS 114237 (E.D. Mich. Dec. 8, 2009)

In a ship-mortgage foreclosure action, the court declined to use the promissory note's "default interest rate" as the basis for post-judgment interest. Instead, post-judgment interest was to be based on the (lower) statutory rate.

The borrowers had executed a promissory note and preferred ship mortgage in connection with their purchase of a Sea Ray yacht. They subsequently defaulted, and the lender brought an action for possession in Michigan state court.

Relying on the preferred ship mortgage, the borrowers removed the case to federal court. The parties then agreed to sell the vessel to a third party, with the proceeds paid to the lender and the resulting deficiency reduced to a judgment entered by the federal court.

The parties could not, however, agree on the rate at which interest would accrue on the deficiency judgment. The lender argued that the "default interest rate" in the promissory note should apply. The borrowers contended that post-judgment interest should be based on 28 U.S.C. § 1961(a) because the action arose under federal law and the judgment was sought in federal court.

The court ruled that the statutory rate would apply. While some courts have allowed for the possibility of contracting around the federal post-judgment rate, in this case the promissory note's provision for "default interest" did not explicitly extend to post-judgment interest. Thus, if a ship mortgagee wishes to have post-judgment interest calculated at a contractual rate, at a minimum the loan documents will need to explicitly provide for this.

PRODUCTS LIABILITY AND WARRANTIES

Corporate owner, not beneficial owner, has standing to assert defect claims in Louisiana

Kelly v. Porter, Inc., 2010 U.S. Dist. LEXIS 5600 (E.D. La. Jan. 22, 2010)

To avoid Louisiana sales tax, John Kelly formed a Delaware limited liability company to purchase and hold title to a 2007 Formula powerboat. While performing the pre-departure check in preparation for a cruise with some friends, Kelly discovered that a number of the instruments and equipment that relied on batteries were not functioning. He nevertheless took the vessel out on the cruise and returned without incident. Noticing that the air conditioning system had also shut down and believing it was related to a dirty sea-strainer, he cleaned the strainer but failed to close the seacock to prevent water from entering the vessel. Kelly left the vessel for the evening, only to receive a call later that the vessel was taking on water. He returned and discovered that water had filled the engine compartment. Kelly filed a claim for several hundred thousand dollars for repairs with his insurer, Great Lakes, who paid the claim.

Kelly and Great Lakes then brought suit against the vessel manufacturer, the battery charger manufacturer, and the dealer who sold the vessel. Kelly asserted claims for loss of use and emotional damages, and Great Lakes sought recovery in subrogation for its payment to Kelly, as well as the civil-law remedy of redhibition. Kelly later amended his complaint to include his LLC as a plaintiff.

In deciding whether Kelly could bring an action in his own right, the court noted that ownership of the vessel was governed by Louisiana state law. Although the vessel's registration in the name of the LLC did not conclusively establish ownership, the court determined that under Louisiana law Kelly could not maintain an action for damages to the vessel. The LLC was a "separate juridical entity" that had the sole interest in the vessel and the exclusive right to sue for damages sustained in respect to the vessel. Kelly's claims were therefore dismissed. And, since the vessel was not operated for profit and the LLC, as an artificial entity, was incapable of suffering non-pecuniary loss, the LLC's claims for loss of use and emotional damages had to be dismissed as well.

Turning to Great Lakes' claims, the court noted that there were numerous questions of fact as to Kelly's understanding of the vessel's systems, their state of repair, and the existence of potential defects. One of the key questions was whether the vessel should have come equipped with a back-up battery charger. Thus, the defendants' were denied summary judgment on these claims. Nor did Great Lakes' status as a subrogee preclude it from asserting a claim for redhibition under Louisiana law.

Finally, the court dismissed Great Lakes' claim for punitive damages because, even assuming such a claim could theoretically be asserted in the case like this, there was no allegation that the manufacturers had acted willfully or wantonly.

Robins Dry Dock **bars charterer's claims against marina**

Green Turtle Bay, Inc. v. Zsido, 2010 U.S. Dist. LEXIS 18710 (W.D. Ky. March 3, 2010)

In an action arising from a dispute over modifications to a Carver 506 motor yacht, the district court for the Western District of Kentucky reaffirmed the continuing applicability of the *Robins Dry Dock* rule; held that claims for tortious interference with a maritime contract require proof of intent; and found that charter hire is appropriately considered as evidence of loss-of-use damages.

The Zsidos contracted with a marina to make modifications to their vessel. The Zsidos were dissatisfied with the work and a disagreement arose as to the marina's efforts to remedy the problem. The Zsidos hired another facility to make repairs and refused to pay the marina.

Consequently, the marina asserted a maritime lien on the vessel and had it arrested. The marina also filed in personam claims against the Zsidos. Various companies owned by the Zsidos intervened, claiming they had planned to use the vessel at boat shows to model a prototype "command chair" developed by Mr. Zsido. The Zsido companies cross-claimed for anticipated profit lost as a result of not having use of the vessel.

The marina moved for summary judgment on the Zsido companies' claims for breach of contract and tortious interference with contract, and to exclude evidence regarding charter hire as a measure of damages.

Finding that the Zsido companies' charter agreement with the Zsidos did not amount to a bareboat charter, the court concluded that the claims for economic damages had to be dismissed under *Robins Dry Dock* because the Zsido companies did not have a proprietary interest in the vessel. In addition, the Zsido companies' tortious interference claims were dismissed because there was no evidence that the marina had intentionally interfered with the charter arrangement. To the contrary, the marina was not even aware of it.

Finally, the court ruled that lost charter hire could be used as a measure of the Zsidos' personal (noncorporate) claims for loss of use. Although Mr. Zsido had executed the charter agreement both as owner of the vessel and as president of the chartering company, there was no showing that the chartering company was simply his alter ego.

Claim for inadequate warning dismissed where multiple existing warnings were not heeded

Smith v. The Coleman Co., 2010 U.S. Dist. LEXIS 9664 (M.D. Ala. Feb. 4, 2010)

In a product-liability action arising under Alabama law, brought by a plaintiff who was injured by a polypropylene utility line that parted while being used to tow her son on an inner tube, the District Court for the Middle District of Alabama granted summary judgment for defendants.

The operator of the vessel had failed to read the warning on the packaging insert, which stated that the working load limit of the rope was only 175 pounds. In addition, a cautionary message advising against placing knots in the line was either not read or not heeded by the operator. Similarly, the inner tube had a warning label recommending the use of a tow rope with a working load of at least 1500 pounds, and this too was either not read or not heeded.

Given the existing warnings that went unheeded, the court determined that there was insufficient evidence that any other warning would have been followed, and therefore the plaintiff's claim of inadequate warning failed under Alabama law. The express and implied warranty claims were also dismissed as a matter of law.

Repairer solely at fault for heater fire

Oswalt v. Resolute Industries, Inc., 2010 U.S. Dist. LEXIS 9383 (W.D. Wash. Feb. 4, 2010)

Plaintiff Oswalt smelled coolant coming from his onboard heater and contacted defendant Resolute Industries to repair the heater. Resolute's employee removed the defective heater and shut off the breaker to the heater before receiving a call to assist elsewhere. While the employee was away, the heater unit set fire to flammable materials onboard.

Oswalt's insurer paid the claim, and then filed this subrogated claim against Resolute. Resolute, in turn, filed a third-party action

against the Webasto Products, the heater's manufacturer, alleging negligence and breach of contract or warranty. Webasto moved for summary judgment on all claims against it.

Resolute set forth two theories against Webasto: (1) its repair instructions were deficient and (2) the heater should have had an automatic current cutoff.

Because Webasto was able to demonstrate that Resolute's employee had never attended manufacturer sponsored training, the court found that Resolute's claims asserting inadequate instruction were unsupportable; there was no evidence that the employee had reviewed any of Webasto's repair instructions before the fire. Accordingly, summary judgment was granted on that theory.

The court also found that Resolute's expert was unable to establish his expertise as to the defective-design claim; there was no evidence that other manufacturers employed an automatic cutoff as suggested by the expert, and no evidence that such a device would be feasible. Therefore, court granted summary judgment as to the negligent design claims, characterizing the expert opinion as mere speculation.

Finally, the court turned to Resolute's breach of contract and warranty claims against Webasto. Webasto's sole defense was that Resolute, as a third-party claimant, was not entitled to maintain such claims because it was not in privity with Webasco. The court denied Webasto's motion for summary judgment on this point, noting that a third-party plaintiff in an admiralty suit is permitted to assert the original plaintiff's claims in addition to its own.

In a later ruling following trial (2010 U.S. Dist. LEXIS 22218), the court concluded that the oral contract for repair between Oswalt and Resolute was an enforceable maritime contract and included an implied warranty of workmanlike performance. This warranty was breached by Resolute's employee, who was solely at fault for the fire because he failed to verify that the power to the heater was secured and that the unit was safely positioned before leaving it.

The court also ruled that comparative fault is not available as a defense in a breach of contract case and that Oswalt was entitled to recover the expenses of alternate living arrangements while the fire damage was being repaired. The rule in admiralty barring loss of- use claims for pleasure craft was inapplicable since Oswalt used the vessel as his home rather than purely for pleasure.

Propeller-guard claim against builder dismissed where boat did not come equipped with propeller

Regan v. Star Craft Marine, LLC, 2010 U.S. Dist. LEXIS 25045 (W.D. La. March 17, 2010)

In a product-liability action involving leg injuries caused by an unguarded outboard-motor propeller, the District Court for the Western District of Louisiana granted partial summary judgment for the defendant pontoon boat manufacturer, finding that the manufacturer had no obligation to give warnings or instructions about the advisability of installing a propeller guard.

Critical to the finding was the fact that the vessel manufacturer supplied the vessel with outboard motor installed, but without a propeller attached. The contract called for the purchaser to supply the propeller. Because the purchaser was so obligated, the court determined that the purchaser was in the best position to decide whether to install a propeller guard.

No tort claims for paperwork mix-up

Adcock v. South Austin Marine, Inc., 2009 U.S. Dist. LEXIS 104264 (S.D. Miss. Oct. 30, 2009)

In a case involving economic loss claims by the buyer of a recreational vessel against the seller of the vessel, the court ruled that tort claims against a seller for purely economic damage (without property damage or personal injury) are precluded by Mississippi law.

Adcock and South Austin Marine (SAM) discussed the sale of two very similar vessels and signed a sales contract as to one of them. SAM mistakenly delivered the wrong vessel, which Adcock accepted. Several months later, SAM was attempting to sell the other vessel when it realized that it had passed the incorrect title paperwork to the buyer of the first vessel sold.

Adcock initially agreed to exchange the mistaken paperwork with SAM for the correct paperwork, but subsequently disavowed this willingness and demanded either return of the sales price or reimbursement for the sales tax that he had paid, because he would have to pay sales tax on the "new" vessel because of the new paperwork. Ultimately, Adcock filed suit alleging fraud and negligence and seeking damages amounting to the vessel's purchase price, the sales tax and insurance paid, as well as loss of use damages.

In deciding plaintiff's claim for these alleged economic losses, the court found that Mississippi law would not permit recovery of economic loss damages in tort (absent personal injury or property damage claims) and that recovery for economic damages would only be allowed under Mississippi's enactment of the UCC. Because Adcock pled no cause of action based on contract theories or the UCC, summary judgment was granted in SAM's favor.

[15749]

COMMITTEE ON SALVAGE

Chair: Jason R. Harris

Spring 2010

RECENT DEVELOPMENTS IN SALVAGE LAW

Court lacks subject matter jurisdiction per FSIA over Spain's Nuestra Senora de las Mercedes

Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 2009 WL 4932724 (M.D. Fla., Dec. 22, 2009)

This action concerns competing claims over a shipwreck believed to be a Spanish frigate that exploded in an 1804 battle with the British, which Odyssey discovered in international waters off the Straits of Gibraltar. The Foreign Sovereign Immunities Act (28 USC 1602, et seq.) grants immunity to a foreign state's property from attachment, arrest and execution subject to limited exceptions. The court adopted the magistrate's report and recommendation which concluded that the FSIA applied and the exceptions were not applicable. In short, the object believed to be the Spanish warship was not subject to an in rem action for salvage. The rationales were the implication of Spain's patrimonial interests and a desire for reciprocal treatment of United States warships.

Peru unsuccessfully asked the Court to measure its interest against Spain's based on claims of exploitation by Spain, Peru's former colonial ruler. In addition to the jurisdictional problems, the court declined Peru's request under the "act of state doctrine," which precludes U.S. courts from inquiring into the validity of the public acts a recognized foreign sovereign power commits within its own territory.

Appellate court review is expected.

Georgia cannot assert sovereign immunity in an in rem claim absent actual possession of the res[3]

Aqua Log, Inc. v. State of Georgia, 594 F.3d 1330 (11th Cir. 2010)

In the nineteenth and twentieth centuries, logging operations used the rivers of Georgia to transport harvested logs to mills and market. On occasion, some of these logs would sink to the bottom of the river and many remain there to this day. These logs have features that are not present in modern lumber and, thus, have increased value. Georgia passed a statute in 1985 that gave it title to all "submerged cultural resources."

Aqua Log, Inc., a professional salvor, filed permits to raise and remove the logs pursuant to state law and then filed two in rem actions concerning logs in two sites. Georgia filed statements in both cases in which it made claim to the logs as submerged cultural resources and Georgia specifically stated that it did not waive sovereign immunity. Georgia filed a motion to dismiss the in rem actions for lack of subject matter jurisdiction pursuant to the Eleventh Amendment.

The 11th Circuit held that the Eleventh Amendment "does not defeat Federal Jurisdiction over all in rem admiralty claims." The state must have a "colorable claim to possession," and be in possession of the res, in addition to not waiving sovereign immunity. Because Georgia has not waived its sovereign immunity and it has asserted a colorable claim to possession, the issue to be decided was whether Georgia had possession of the logs lying at the bottom of the rivers.

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[3] This summary was prepared by Captain Michael G. Ankrum. Capt. Ankrum is actively serving in the United States Marine Corps and is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Following law school he will pursue a career in military justice with the USMC. Capt. Ankrum is enrolled in Mr. Harris' Ocean and Coastal Law course and has completed Mr. Harris' Admiralty Law course.

The court held that to satisfy the possession requirement a state must exert physical control over the res. Mere constructive possession was insufficient to meet the possession requirement under the Supreme Court's in rem admiralty jurisdiction. Therefore, Georgia's motion to dismiss was denied.

Employees not salvors

Solana v. GSF Development Driller, I, 2009 AMC 2884 (5th Cir. 2009)

Louis Solana and Brendan Lally were employees of Global-SantaFe (GSF) and worked on its Development Driller I (DDI), a semi-submersible drilling platform costing in excess of $350,000,000.00. Following Hurricane Katrina, GSF compiled a group of "volunteers," then ashore, including Solana and Lally, to save DDI which was listing and dragging anchors in the Gulf of Mexico. With additional assistance from a professional salvage firm, the effort was successful. Solana and Lally pursued salvage claims.

While their efforts were deemed voluntary, "both Solana and Lally expected to be compensated by GSF for their efforts to stabilize the DDI after she was damaged by Katrina, regardless of whether those efforts were successful. The Supreme Court has long recognized that a binding agreement to pay for salvage services irrespective of the success of the enterprise will defeat a claim for pure salvage." The court disagreed with the lower court's conclusion that the compensation for the voluntary services to rescue the DDI would be at the same rate of compensation as that prior to Katrina, thus opening the door for some form of increased compensation, though not a salvage award.

The court further analyzed the claim under the International Convention on Salvage of 1989. Without deciding if the Convention was enforceable, the court concluded that the agreement precluded a pure salvage claim.

Salvor's claim against insurer of salved vessel fails to state a claim

Absolute Marine Towing & Salvage, Inc. v. S/V INIKI, 2010 WL 555333 (M.D. Fla., Feb. 10, 2010)

The S/V INIKI broke free from her anchor and ran aground near Sebastian Inlet State Park. The vessel's captain contracted with the plaintiff to salve the vessel, which was battered by the surf and had taken on about four feet of water and sand. The salvor asserted a claim against the vessel's insurer, Markel American Insurance Company, contending that Markel would have been liable for the cost of clean-up under its pollution liability coverage provision absent the salvor's assistance. The court properly concluded that the salvor failed to state a claim upon which relief could be granted. Absolute Marine did not allege anything unjust or inequitable about Markel's conduct. The precedent relied on by the salvor (*Cresci v. The Yacht BILLFISHER,* 874 F.2d 1550 (11th Cir. 1989)) did not answer the question of whether an insurer owes a salvor compensation, but merely indicated that Florida's non-joinder statute did not bar a claim against an insurer. There was no case law raised in which a party was allowed to recover against an insurer for no other reason than because it did something that allowed the insurer to avoid having to pay out on its policy.

Insurer required to indemnify for explosion on barge[4].

Egan Marine Corp. v. Great American Ins. Co. of New York, 2010 WL 431661 (N.D. Ill., Feb. 1, 2010)

[4] This summary was prepared by Ms. Mary Jennings, of northeastern North Carolina. Ms. Jennings is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Ms. Jennings is enrolled in Mr. Harris' Ocean and Coastal Law course and completed Mr. Harris' Admiralty Law course.

Egan Marine Corp.'s (EMC) tug, the LISA E, was towing dump barge EMC 423 which contained clarified slurry oil. Both the LISA E. and EMC 423 were listed vessels under a Great American Insurance Company (GAIC) insurance policy which contained provisions requiring indemnity for costs and expenses associated with pollution, mitigation, and clean-up. An explosion occurred on EMC 423 causing one crewman to die and oil to be released into the Chicago Sanitary and Ship Canal. The LISA E. moved the barge to the side of the canal where it sank. EMC immediately notified GAIC of the incident. GAIC contacted Meredith Management Group, Inc. (MMG), its retained emergency response consultant, to support EMC in responding to the accident. MMG dispatched Thomas Neumann to the incident to act as "incident commander" on behalf of GAIC. Neumann agreed to have Dennis Egan (owner of EMC and its related entity Service Welding and Shipbuilding (SWS)) to act as the salvage master to attempt to raise EMC 423 from the canal. EMC engaged SWS to conduct the salvage operation.

EMC/SWS successfully raised the barge. EMC/SWS were using all of their resources to salve EMC 423, so they had little other work of significance for at least three and a half months. The Illinois Environmental Protection Agency gave notice that oil residue must also be removed. GIAC stopped making payments to EMC/SWS under the insurance policy based on their contention that the LISA E did not cause the incident, and therefore did not have to pay any of her expenses to EMC/SWS, or any expenses over $5,000,000.00 because only one (not two) listed vessel was involved. Thereafter, because EMC/SWS could no longer afford to continue cleanup efforts on EMC 423, IEPA cited EMC/SWS for violating its notice and the government brought actions against EMC stemming from the incident.

EMC/SWS sued GAIC for breach of the insurance contract arguing that GAIC failed to pay all of the amounts EMC/SWS claimed to have expended in responding to the barge explosion. The court found GAIC breached the contract by refusing to apply coverage for the LISA E because, among other things, the LISA E was the sole source of movement for EMC 423 and her crew served as the crew for the barge. Since the court determined that the LISA E was involved in the incident, the insurance payout was not limited to $5,000,000.00, but doubled since two listed vessels were involved. GAIC was responsible for unpaid defense

costs in the government's cases against EMC. The court further held that even though the USCG issued a notice to EMC that there was no longer a substantial threat of discharge of oil or a hazardous substance, EMC was still exposed to liability under OPA 90 and thus the policy continued to require indemnification.

Attorneys' fees award to vessel owners upon finding of bad faith by salvor[5].

Blue Water Marine Service v. M/Y NATALITA III, 2009 WL 1911719 (S.D.Fla., July 1, 2009)

Plaintiff, Blue Water Marine Services ("Blue Water"), assisted the 100' M/Y NATALITA III, which was stuck on a reef off the coast of Florida. Blue Water failed to discuss or disclose the terms of salvage with the yacht owners before pulling the yacht from the reef. Instead, Blue Water presented a contract to the vessel owners after rendering assistance and required their immediate signature or Blue Water threatened to abandon the vessel in a perilous situation.

Prior to trial, the vessel owner presented Blue Water with two offers of judgment. However, Blue Water refused the first offer and failed to respond to the second asserting the inapplicability of Florida's offer of judgment statute in admiralty actions.

Generally, attorneys' fees are not awarded in in rem actions; however, an exception to this rule exists upon a finding of bad faith by the losing party (here, Blue Water). The vessel owners sought an award of attorneys' fees because of Blue Water's misrepresentations at the time of the assist and because of exaggerations concerning the salvage award during litigation.

According to the court, Blue Water's behavior constituted vexatious and unnecessary litigation entitling the vessel owner to attorney's

[5] This summary was prepared by Mr. Clayton Byrd. Mr. Byrd is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Mr. Byrd is enrolled in Mr. Harris' Ocean and Coastal Law course.

fees ($18,162.25) and deposition costs ($13,105.09) after the first offer of judgment. The Court remanded the case back to the Magistrate Judge for another determination concerning the remaining attorneys' fees associated with pursuing the instant motion (i.e.: beyond victory of the merits of the salvage claim). On remand, the Magistrate Judge limited the vessel owners' recovery to the sum of the costs mentioned above ($31,267.34).

Close call on peril = low order salvage award

> *Baywatch RI Marine Towing v. M/V DeVOCEAN, et al.,* 09-0116, Boat Owners Assoc. of the U.S. Salvage Arbitration Plan (Sept. 30, 2009)[6]

THE THREES B'S, a 56' Cruisers Yacht valued at approximately $750,000.00 was anchored in Great Salt Pond on Block Island, Rhode Island. Rafted to her starboard was DeVOCEAN, a 37' Sea Ray valued at approximately $100,000.00 and to her port was a vessel not involved in the instant litigation. The ground tackle of THE THREE B'S was not sufficient to hold the raft. With winds gusting to 20 knots, the anchor dislodged while no one was aboard. The raft dragged into a prohibited anchorage. Competitors in the area's "active marine rescue industry" arrived. The panel was troubled by the plaintiff salvor's exaggeration of the conditions as photographs refuted the alleged condition and assessment of danger. The owners of DeVOCEAN and THE THREE B'S signed a Standard Form Salvage Contract; however, the owner of THE THREE B'S handwrote and initialed above his signature "For Reasonable Towing Fee Only." Upon hauling anchor, the raft dragged again but ultimately the vessels separated from each other. The plaintiff then guided THE THREE B'S to a Coast Guard emergency mooring. The operation took 20-30 minutes. The Panel gave a quantum meruit award (denying a salvage award due to the owner's notation) of $1,000.00 for assistance to THE THREE B'S. Although a "close call" on whether there was a peril, the panel gave a $5,000.00 award for the salvage of DeVOCEAN.

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[6] This case was brought to the attention of the author by colleague Mr. Patrick McAleer, Esq. of Boston who well represented his client, THE THREE B'S, in this matter.

Sales price of vessel considered in low order award[7]

Lewis v. JPI Corp., 2009 WL 3761984 (S.D. Fla., Nov. 9, 2009)

Around 4:30 p.m. on August 8, 2005, Teresa Lewis was walking her dog around the Oceanic Island Condominium Complex[8], near the marina, and noticed the M/Y VERONA DE CARDIAN listing to port with the swim platform completely submerged, and the attached Wave Runner partially underwater. Mrs. Lewis called her husband, Clive Lewis, down to the marina. Mr. Lewis boarded the vessel and determined that the hose from the air conditioning seawater pump to the air conditioning compressor had detached and was pumping water into the vessel, at a rate similar to an open faucet. The Lewis's arranged for the water to be pumped out the next morning. Mrs. Lewis attempted to contact the owner of the vessel by phone, but was unsuccessful. The Lewis' checked on the vessel twice that night. The next day, a crew arrived and pumped out the vessel. The pumping crew charged $100.00 for services rendered, which the Lewis' paid and the vessel interests, JPI Corp., reimbursed. A few months later, the Lewis' brought suit seeking a salvage award.

The court determined the Lewis's had a valid claim for salvage.[9] The court applied the six Blackwall factors to determine the size of the award. The court determined that the Lewis's expended minimal labor; the salvage required minimal skill and energy; the Lewis's exposed little

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[7] This summary was prepared by Ms. Taylor Riley of Morehead City, North Carolina. Ms. Riley is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Ms. Riley expects to return to the coast after law school. Ms. Riley is enrolled in Mr. Harris' Ocean and Coastal Law course and completed Mr. Harris' Admiralty Law course.

[8] The Lewis' own a condominium at the Oceanic Island Condominium Complex. They also keep their boat docked at the marina, a few slips down from the M/Y VERONA DE CARDIA.

[9] A marine survey showed bilge pumps were either inoperable or operating at a reduced capacity and had the water continued to be pumped into the vessel, she would have come to rest on the bottom causing the vessel to be submerged five feet above her normal draft, flooding most of the vessel.

of their own property to danger in completing the salvage (just a screwdriver); the risk to the Lewis's should have been low[10]; the value of the property saved was equal to the sales price (the vessel was sold October 16, 2006); and the degree of danger from which the property was rescued was low. The court determined the salvage award to be five percent (5%) of the $434,000.00 sales price of the vessel: $21,700.00.

Local rule requiring specificity of amount claimed yields to The BLACKWALL factors

O'Hagan v. M&T Marine Group, LLC, 2010 WL 503118 (S.D. Fla., Feb 8, 2010)

Plaintiffs contend they saved four vessels collectively valued at $2,204,000.00 tied to a floating dock that began to sink during Hurricane Wilma. Defendants sought to dismiss the claim as the complaint did not specify the amount claimed for salvage, thus, allegedly was not in compliance with Local Admiralty and Maritime Rule E(3). The court concluded that it was not necessary for the plaintiffs to establish the value for the vessels in question or apparently specify the amount claimed for the salvage. The local rule only requires that the amount claimed be specified "to the extent known" in order to state a cause of action for salvage. The court concluded that the value of the property salved is instead simply one of the six factors district courts consider when determining a salvage award.

Artist's claimed discovery of a treasure ship not successful under laws of finds or salvage

Nathan Smith v. The Abandoned Vessel, 610 F.Supp.2d 739, 2009 AMC 1413 (S.D. Tex. 2009)

[10] Mr. Lewis did not turn off shore power before reattaching the hose. He argued that his risk of electrocution was high. The court, however, determined that Mr. Lewis could have turned off shore power before attempting to reattach the hose, and as such, they did not increase the award for taking an unnecessary risk.

"[A] self-described 'musician by birth' turned movie director, music producer, and treasure hunter from Los Angeles, California" whose other ventures include creating websites for pawnshops and legalized marijuana sites claims to have found a lost barkentine treasure ship from the 1820s near a small lake in Texas. Evidence of the existence of an abandoned shipwreck included Smith's own testimony, a photocopy of a photograph of a small object Smith claimed was a piece of wood from the vessel (which he tested by placing in a microwave – it smoked so he concluded that the material was creosote, a wood used to build ships of the era) which he subsequently lost.

After concluding the water body under which the treasure was located was navigable and that the adjacent land owner had standing to intervene, the court first analyzed Smith's claim under the law of finds. Although the property was abandoned and Smith had the intent to reduce the property to possession, he lacked actual or constructive possession of the property required for finds. Next applying salvage law, the court concluded that there was no "success" because it did not believe Smith recovered any artifacts. Thus, Smith was not entitled to a salvage award.

Stay of a civil action because of parallel criminal case[11]

Lay v. Hixon, et al., 2009 WL 1357384
(S.D. Ala., May 12, 2009)

In August 2008, a 40' work barge belonging to Scott D. Hixon of Gulf Bay Marine Construction, LLC, disappeared from Long Bayou in Alabama and was reported stolen. It came to be in the possession of John Joshua Lay. Lay contacted Hixon on August 28, 2008 and indicated that he found the barge and sought a salvage award. Hixon called law enforcement to report Lay's request. The next day Lay was arrested and, along with Benjamin Hamilton and Carl Poole, subsequently indicted for theft of property. In February 2009, Lay filed a civil complaint, seeking

[11] This summary was prepared by Mr. Clayton Byrd. Mr. Byrd is a 2L at the Norman A. Wiggins School of Law at Campbell University in Raleigh, North Carolina. Mr. Byrd is enrolled in Mr. Harris' Ocean and Coastal Law course.

a salvage award (perhaps under the theory that the best defense is a good offense). According to this complaint, Lay discovered the barge adrift in Long Bayou, secured it, and endeavored to locate the owner and pursue a claim for salvage. Hixon requested that the salvage action be stayed until the conclusion of the related criminal case.

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, counsel, and litigants. The court assesses and balances the nature and substantiality of the injustices claimed on either side, as well as the interests of the parties, the courts, and the public. When there are parallel criminal and civil cases there is no mandate that one enter a stay awaiting the result of the other; however, district courts are vested with substantial discretion to stay the civil proceedings in deference to the parallel criminal action where the interest of justice favor doing so.

In this case, the factual overlap between the two cases was considerable in that the question of whether the vessel was stolen or salved was at the crux of both cases. If Lay were found guilty of misconduct, he would not be entitled to the benefits of a salvor and his civil case would be moot. Also, to require the vessel owner to defend against the civil suit while a criminal trial is pending may be inappropriate. If Lay were convicted, for Hixon to spend money and time defending a frivolous suit would heap insult upon injury. The testimony of the two criminal co-defendants would come much easier in civil court if the criminal case were concluded - the risk of self-incrimination would be non-existent, thus, a more thorough gathering of testimony would be possible.

After a careful balancing of factors, the court stayed the civil action until the conclusion of the related criminal case.

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