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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 contains newsletters and papers of the Association's Committees that were issued in connection with the Fall Meeting in Oahu, Hawaii, in December 2011. That was a joint meeting with the Australian and New Zealand Maritime Law Association and the Canadian Maritime Law Association at which our President, Patrick J. Bonner, at the request of our antipodal friends, delivered the Frank Stuart Dethridge Memorial Address 2011. The Address has been published in *26-1 Australian and New Zealand Maritime Law Journal (2012)* and we have published it here with the Journal's permission.

With the objective of recording some of the significant changes in our maritime practice over the past half century, we have included a reminiscence by Daniel J. Dougherty, a longtime partner of Kirlin, Campbell & Keating in New York, concerning the development of Puerto Rico as a center of maritime litigation. Also, playing "catch-up", we have included the Spring 2011 newsletter of the Committee on Recreational Boating, *Boating Briefs – Vol. 20 No. 1,* and note that the Fall/Winter 2010 issue of *Boating Briefs* published in our Spring/Fall 2010 issue (Document No. 798) at pages 16099-16112) should bear the reference Vol. 19 No. 2.

In accordance with our practice, we honor our past-President, Kenneth H. Volk, who passed away on March 19, 2012, with an In Memoriam comprised of three articles, an obituary written by Ken himself and remembrances written by his partner and past-President, Lizabeth L. Burrell, and by his partner, Geoffrey J. Ginos.

We have had the benefit in the preparation of this issue, as well as our Spring 2011 issue, of proof-reading and cite checking assistance from the following members of the Committee on Young Lawyers: Corey R. Greenwald of Nourse & Bowles LLP in New York, Patrick J.R. Ward of Hand Arendall LLC in Mobile and Arthur Alan Severance of Sands Lerner LLC in Los Angeles. We very much appreciate their help.

As in the past, we remind readers that articles, case notes and comments published in this MLA Report are for informational purposes

only, are not intended to be legal advice, and do not necessarily represent the views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Kenneth H. Volk

Kenneth Hohne Volk, 89, was born in 1922, the son of Henry and Constance Brady Volk, and spent his early years in West Englewood, N.J. His college education at Cornell was interrupted by World War II, when he joined the U.S. Navy, and he was later appointed to the U.S. Naval Academy, graduating in 1946. After serving on a destroyer with the Sixth Fleet, he resigned his commission to study law. He graduated from Yale Law School with honors in 1953, then joined the law firm Shearman, Sterling and Wright in New York City. In 1954, he married Joyce Geary. In 1956, he joined Burlingham, Hupper and Kennedy in the city, a firm specializing in the practice of maritime law.

He spent the rest of his working life in admiralty law, participating in many notable cases, including representing the Italian Line in connection with the ANDREA DORIA-STOCKHOLM collision off Nantucket in July 1956; the SANTA ROSA-VALCHEM collision off New Jersey in January 1957; the TORREY CANYON grounding off England in 1967; the SEAWITCH-ESSO BRUSSELS collision in New York harbor in 1973; and the SALEM sinking off the west coast of Africa in 1980.

He was a frequent contributor to legal periodicals, writing and lecturing on many areas of maritime law. He was elected president of The Maritime Law Association of the United States from 1990 to 1992. He was also a member of the Tulane University Maritime Law Advisory Board, and belonged to many other professional organizations, including the American College of Trial Lawyers, and he was a Titulary Member of the Comité Maritime Internationale. He was a life member of the American Bar Foundation.

When he retired from the Burlingham firm in 1992, he and his wife moved to Portsmouth, where he continued his practice of law as counsel to the firm of McLane, Graf, Raulerson and Middleton. While there, he was appointed by Lloyd's of London as one of three arbitrators in their dispute with Exxon over the extent of insurance coverage regarding the 1989 EXXON VALDEZ oil spill in Alaska. He resigned as counsel to the McLane firm at the end of 2010.

He is survived by his wife, Joyce; their son, Christopher and his wife, Hollis, and their two children, Emma and Chambers; and their

daughter, Cynthia, and her three children, Charles, Clementine and Della Sainty.

By: Kenneth H. Volk

Remembrance

Ken Volk was one of the best of our bar, but his exceptional virtue was seeing the best in our bar and laboring quietly but tenaciously to preserve it.

It was, of course, a labor of love, but Ken, with his matter-of-fact style, would never have put it that way. He expressed his passion for the traditions and tenor of maritime practice through the kind of work that brought no personal glory, but provided an immense and enduring benefit to our Association, such as preserving and cataloguing our chronicles, resisting efforts to make admiralty the subject of state certification, and strengthening the MLA's requirements for proctor status so as to recognize and reward competence in our field of law and thus sustain the special pride we feel in our common practice.

Ken was able to look both backward and forward, wanting both to conserve the Association's past and to ensure that its values would be maintained in the future. Looking to the past, he perceived the potential loss of our history in the physical deterioration of our archives, and, as a superb and meticulous administrator, he effectuated the preservation of MLA documents, creating a treasure from which we are just beginning to draw. Recognizing the importance of the MLA's role in developing important legislation and aware of the lamentable loss of underlying committee records, Ken created and maintained files documenting all contemporary committee activities. Looking to the future, he strove to perpetuate the honorable values he found in our Association and our practice by actively bringing others into Association work and fostering their active participation.

His colleagues in these endeavors were his friends, and his friends were his colleagues. These friendships endured to his dying day without the least diminution in affection and respect. The strength of the ties formed in common cause showed itself in his last days, when all who had worked with Ken in any context called and wrote, and some visited Ken's bedside.

Always at that bedside in their historic home in Portsmouth was Joyce, their mutual devotion reflecting that rare complementary couple whose differences create harmony rather than friction. Ken's well-modulated manner was spiced with Joyce's abundant and visible enthusiasm. While Ken seemed to find it easiest to connect with others through shared professional interests, Joyce always kept their circle vibrantly diverse by her unhesitating immersion in any society in which she found herself.

Throughout his illness, Ken was his charming and agreeable self, declaring that he had had a long and wonderful life and was content to meet his end. His remarkable tranquility and acceptance both eased and whetted the sorrow of all who came to honor him at the memorial service. The North Church overflowed with family and friends, from a cadre of MLA presidents and Burlingham colleagues who came from afar to his Portsmouth fishing buddies.

I think Ken saw himself as more of a trustee than a trailblazer and the trust corpus was the character of our bar. He was ardent in his wish to keep honesty, courtesy, and respect in our relations with our colleagues and the diligence, insight and dispassionate counsel in our service to our clients. This devotion was dyed in the wool: After he had retired from Burlingham, after he had moved to New Hampshire, Ken called me regularly to make sure that the tenets of the Association were continuing to guide its activities and to quell any threat to its honor. He saw and, by example, brought out the best in all of us. I greatly miss him as a friend and as a continuing guide for the Association he so loved.

By: Lizabeth L. Burrell

Remembrance

I first met Ken Volk when he interviewed me for a summer job at Burlingham, Underwood & Lord.

That interview nearly did not take place. I had already met with many Wall Street firms, but although the corporate, finance and tax practitioners I met were all highly accomplished, they were also so incredibly boring that I began to think that I had made a huge mistake in

going to law school. As I was telling this tale of woe to a good friend over a beer, he suggested that I sign up for a Burlingham interview. "I never heard of them," said I. "Oh they do admiralty," said he. "Boats?" said I. Frowning slightly he replied, "**No, SHIPS... you'll love it**," and so I did and I have.

Ken greeted me with a big smile and a hearty handshake and within minutes I was swept up by his obvious love of maritime practice. "I just got back from investigating a collision in Singapore," he announced, launching into an enthusiastic account of facts and legal issues, the collision, the screw-ups leading to it, the colorful crewmen's even more colorful accounts of what **really** happened, radar, course recorders, surveyors, P&I Clubs, the fascinating intricacies and interconnections of marine insurance, maritime laws regulations and practices. He spoke of the history of maritime law, particularly its character as the first truly international body of law, and its origins in Byzantine Rhodian sea law and the Rolls of Oléron. He regaled me with stories of TITANIC and the ANDREA DORIA, and how he carried old man Underwood's trial bag. At one point he turned and tipped his hat to the savvy marine lawyers from Haight Gardner, Freehill's, Phelps Dunbar and many other U.S. and foreign maritime law firms, whom he described as tough opponents but also people whom he was happy and proud to count as close friends and colleagues at the maritime bar.

Naturally, our first conversation included my introduction to the MLA, including a fervent and heart-felt account of the Association's work for the industry it served and the social and professional network that it provided to maritime lawyers all around the world. Ken held this enthusiasm and love for the MLA to the very end. I left that interview with a fire in my belly and an eagerness to work with Ken and his colleagues that has never left me.

Ken was very much my mentor at Burlingham, claiming me as "his associate" from day one at the firm. He knew that he could not monopolize me, but, he always saw to it that I had plenty to do on cases that he was handling, always explaining not only what I was supposed to do, but exactly why I was doing it, what alternatives were available, and what consequences were likely to flow from all of those courses of action. He never once turned me away when I had a question and he was one of the finest teachers that I have ever had.

Ken also had ESP. I swear he did. He would seem to delegate everything to me and yet he knew EXACTLY what was happening at all time. I remember once handing him a brief that I'd written and proofed repeatedly to be sure that it would survive his always close scrutiny. Smiling at me pleasantly, he asked, "Is this ready for me to sign?" "Yes," I assured him with absolute confidence, only to have him open it randomly to some page half way through, look down and find the only typo in it. "Are you sure you meant to say, 'should the mother go to trial'? You mean 'matter' don't you?" With a slightly disappointed look on his face, he handed the brief back to me, gently admonishing me to proof it again.

My mentor Ken taught me that you got out of a case or an associate only what you were willing to invest, that leading and teaching were both best accomplished by example, that you owed your clients and yourself the very best that you could give, that meticulous, hard work, clear and succinct thought and communications were a lawyer's bread and butter, that patience, civility and kindness almost always paid off and were necessary even when they did not, that error should be admonished gently, and that one should demand much but never more than one was willing to deliver oneself. I can attest to the fact that Ken lived by these principles.

Ken and I spoke just a few weeks before his death. He was at home, surrounded by his loved ones, calmly awaiting what he knew was coming. When he told me that he'd written his own obituary, I smiled and was not surprised, for he had taught me that some things you should do yourself and not delegate away. He told me that he'd had a great life and had no regrets, and that, most important of all the blessings that he had received were his loving wife and family, who made him the luckiest of men.

Just a few hours before I spoke at Ken's memorial service, Ken's beloved wife Joyce sat with Liz and me in her living room and told us that near the end, Ken, lying in his bed at home, was no longer responsive but had a peaceful look on his face and was in no apparent pain. And so, it was with considerable astonishment that a day or two after he had lapsed into this state, she heard Ken's voice coming from the bedroom. Rushing to his side, Joyce had difficulty in making out just what he was saying since his voice was low and somewhat slurred, but, it was clear that he was addressing some court. He paused, and said finally, "I rest my case." Those were his last words.

Ken was always my friend and my teacher, a role model and close colleague. I count myself the luckiest of men to have known him and will miss him always. If I somehow manage to sneak into Heaven, I hope that I will be permitted to be his associate again.

By: Geoffrey J. Ginos

FRANK STUART DETHRIDGE MEMORIAL ADDRESS 2011

Maritime Law - Twelve Years Into The Century

Patrick J. Bonner*

Introduction

When Sarah Derrington asked me to speak during the Australian CLE Program, I readily agreed. She mentioned something about a Frank Dethridge or some name like that. Even though I had no idea what she was talking about, I said fine. When I read up about Mr. Dethridge and saw the formidable list of past, distinguished speakers of the Memorial Address, I had the same reaction that Honorable Mr. Justice Waung of the Hong Kong High Court had in 2004. I wanted to back out. However, I thought that if I tried, this might put this entire joint meeting in jeopardy. Not wanting to rupture the good relations between the United States and Australia, I decided to soldier on. However, I must start with some caveats. I am not an Australian lawyer and know very little about Australian law. I realized that I would bore you death if I spoke about American law and American cases so I had to come up with a topic that I thought would be relevant to you and might even hold your interest.

A few years ago, I read a book called *Crazy 08* by Cait Murphy[1]. I thought it was going to be about Hillary Clinton, Barack Obama and the Presidential race in 2008. However, it was about the New York Giants, the Chicago Cubs and the Baltimore Orioles and the baseball pennant race of 1908. I took her idea to heart and

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* The Frank Stuart Dethridge Memorial Address 2011, delivered by Patrick J. Bonner, President of The Maritime Law Association of the United States, at its joint meeting with the Australian and New Zealand Maritime Law Association and the Canadian Maritime Law Association in Hawaii in December 2011. Also published in 26-1 2012 *Australian and New Zealand Maritime Law Journal* (2012) and published here with permission of the Australian and New Zealand Maritime Law Association.

[1] Cait Murphy, *Crazy 08: How a Cast of Cranks, Rogues, Boneheads and Magnates Created the Greatest Year in Baseball History* (2007).

decided to speak about maritime law twelve years into the century. Not the 21st Century but the 20th Century. Yes, 1911 and 1912.

I think the years 1911 and 1912 mark the start of the modern era in maritime law. The sinking of the TITANIC and subsequent investigations and conventions led to some semblance of international uniformity and eventually the establishment of the IMO. The TITANIC was responsible for the birth of the International Ice Patrol and indirectly for the birth of the United States Coast Guard. The Coast Guard remains the prime regulator of maritime commerce in the United States. During this time in Australia, you enacted the Navigation Act, the Lighthouse Act and the Seamen's Compensation Act, all passed during these years. This era may be the start of Australian nationalism in maritime law and also the supremacy of the Federal Government over the states in maritime law. In the United States, we also had *The Jason*[2] case which in effect allows parties to contract away protections given by maritime legislation. In the forefront as usual, New Zealand's maritime law was largely settled by 1911 and 1912 but I will discuss some important maritime developments involving New Zealand during these years later on in the program.

Titanic

We all know the basics of the TITANIC story. A British flagged ship, operated by White Star Line, she was the largest passenger steamship in the world. She was on her maiden voyage from Southampton to New York when she hit an iceberg four days into the crossing. She hit the iceberg at 11:40 PM on April 14, 1912 and sank at 2:20 the following morning. The sinking resulted in 1,517 deaths, one of the deadliest peacetime maritime disasters in history.

Many wealthy Americans were onboard including John Jacob Astor, Meyer Guggenheim, Joseph Hays, President of the Grand Trunk Railroad, John Thayer, President of the Pennsylvania

[2] *The Jason*, 225 U.S. 32, 2004 AMC 2387 (1912).

Railroad, and of course, the Unsinkable Molly Brown.[3] A first class parlor suite supposedly cost about $69,000 in today's dollars[4]. In addition to the stewards and crew, 41 of the passengers brought their own personal maids. Traveling third class was not as pricey with the cost being $172- 640 in today's dollars.

Following the sinking, there were investigations in the United States and Great Britain. In the United States, the investigation was chaired by the junior Senator from Michigan, William Alden Smith, who had absolutely no maritime background. Smith started out as a popcorn salesman and then moonlighted as a correspondent for a newspaper. Prior to the TITANIC investigation, his main claim to fame was that he was the nation's first paid game warden. After obtaining his law license, he became a recognized expert in railroad law. This apparently led to the U.S. House of Representatives andeventually the Senate.[5] When he heard of the casualty, he reviewed the existing legislation and saw that there was very little regulating passenger vessels in the trans Atlantic trade. He quickly introduced a resolution in the Senate authorizing the formation of a sub-committee from the Committee on Commerce and naming him as its Chairman. He was quick enough to get the Senate to agree to the resolution and he was off to New York on April 18, 4 days after the casualty. He met the CARPATHIA in New York as many of the TITANIC survivors were leaving the ship. He boarded the vessel and confronted Bruce Ismay, the managing director of White Star. Ismay promised to appear the next morning as the first witness in the inquiry. Smith's investigation lasted six weeks during which time he called eighty-two witnesses, including 59 British subjects. Many in Britain questioned his right to subpoena and detain British citizens. His naiveté and inexperience with maritime matters made him a laughing stock in the British press. In fact, the Hippodrome offered him $50,000 to appear there and give a one hour lecture on any subject he chose. What we would call the tabloids of the day in Britain referred to him as Senator Watertight Smith because he

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[3] Daniel Butler, *Unsinkable - The Full Story of the RMS Titanic* (1998) 23-32.

[4] The History on the Net Group, *The Titanic - First Class Passengers* (2000) History on the Net http://www.historyonthenet.com/Titanic/firstclass.htm at 8 October 2011.

[5] Butler, *supra* at note 3, 180-184.

asked one of the witnesses whether watertight compartments were meant to shelter passengers. One newspaper said that a schoolboy would blush at his ignorance. Another said that British seamen know something about ships; Smith does not.

In England, the Board of Trade conducted an inquiry. Lord Mersey, formerly President of the Admiralty Division of the High Court chaired the English proceedings whose members included a number of admirals, a professor of Naval Architecture and the senior engineer assessor to the Admiralty. However, in effect, the Board of Trade was investigating itself because it had approved many of the practices that lead to the disaster. Senator Smith caustically pointed this out and said "we shall leave to the honest judgment of England its painstaking chastisement of the British Board of Trade, to whose laxity of regulation and hasty inspection, the world is largely indebted for this awful fatality."[6]

The many causes of the casualty came out in the investigations. Senator Smith was especially hard on the TITANIC's Captain Smith. He stated "his indifference to danger was one of the direct and contributing causes of this unnecessary tragedy." Captain Lord of the Steamship CALIFORNIAN, sent a message to the TITANIC that Sunday night stating that he stopped his ship because he was surrounded by ice. The TITANIC operator replied to "shut up" and that he was "busy."[7] In all, six messages were sent to the TITANIC from other vessels about the ice. One asks- why were they ignored? A simple answer is that Bruce Ismay was a passenger and he wanted the publicity in New York that would surround the ship after making a fast passage across the Atlantic. In fact, he had given Captain Smith a list of the speeds he wanted the vessel to make during various parts of the passage. Ismay wanted the TITANIC to make a quicker passage than her sister ship, the OLYMPIC.[8] A slower passage would be comparable, in today's world, for a computer company to bally-ho a new model that turned out to be slower than the model it

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[6] Report of William Alden Smith to the United States Senate - May 28, 1912.
[7] *Id*.
[8] Butler, *supra* at note 3, pages 58-59.

was replacing. Imagine Bill Gates announcing a new version of a program that was slower than the previous one.

The total lifeboat capacity on the TITANIC was for 1,178 people, about a third of the TITANIC's total capacity of 3,547. The vessel was in compliance with the most recent British law dating from 1894 that required a minimum of 16 lifeboats for ships over 10,000 tons. In fact, the White Star Line actually exceeded the regulations by including four more collapsible life boats. Many of the lifeboats were not filled and only 704 people made it onto the lifeboats. There was criticism about discipline loading the life boats and Senator Smith said "it is said by some well meaning persons that the best of discipline prevailed. If this is discipline, what would have been disorder?"[9]

The CALIFORNIAN was close to the TITANIC as the TITANIC was sinking. In fact, crewmembers on the CALIFORNIAN saw flares shot by the TITANIC but the CALIFORNIAN Captain thought them to be ship identification signals. The wireless operator on the CALIFORNIAN had gone to bed for the night and therefore was not at his station to receive the distress signals from the TITANIC. The CALIFORNIAN Captain did not contact the TITANIC once he was told about the flares since it would have meant waking up the wireless operator.[10]

The TITANIC sank despite having a double bottom and sixteen internal bulkheads that allowed for the rupture of the side hull and subsequent flooding in up to three compartments. Unfortunately, the TITANIC had ruptured and flooded more than three of her compartments and she slowly filled with water. The bulkheads only went up to about three meters above the water line so once she started to lean forward due to the flooding in the forward compartments; it was inevitable that she was going to sink.

The U.S. Senate report was blunt and direct. They recommended that there be lifeboats onboard the ship for every

[9] Smith, *supra* at note 6.
[10] *Id*.

person on the ship. Each ocean steamer carrying a hundred or more passengers should be required to carry two electric searchlights. There must be a radio operator on duty at all times, day and night. The firing of any flares or rockets at sea for any other than an emergency will be a misdemeanor. Finally, they recommended specific measures regarding water tight integrity and water tight bulkheads.[11]

The British report was not as direct. They appointed a bulkhead committee to study water tight integrity. In general, there should be life boats for everyone onboard but the Board may modify this requirement "as the Board may think right."[12] They required radios and a continuous service by night and day. The Board's most important contribution though and the game changer came in paragraph 24, "that (unless already done so) steps should be taken to call an International Conference to consider as far as possible to agree upon a common line of conduct in respect of a) the subdivision of ships; b) the provision in working of life-saving appliances; c) the insulation of wireless telegraphy and the method of working the same; d) the reduction of speed or the alteration of course in the vicinity of ice, and e) the use of searchlights."[13]

I think the English Board recognized that shipping was on its way to becoming a truly international business. Although the TITANIC was built in Belfast, Ireland, flew the British flag and was crewed primarily by English seafarers, the registered owner was U.K. White Star Line that was controlled by the American industrialist, J.P. Morgan, and most of the passengers were American. Thus, both countries had a strong interest in the casualty. Both countries had set up high level, totally independent investigations. The recommendation of the British Board was a large step towards uniformity.

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[11] *Id*.
[12] British Wreck Commissioner's Inquiry Report on the Loss of the Titanic (1912) - paragraph 8.
[13] *Id*. at Recommendations, paragraph 24.

Thirteen countries accepted the invitation of the British Board and the first International Conference on the Safety of Life at Sea convened in London on November 12, 1913. This Conference produced the first Safety of Life at Sea Convention (SOLAS) in 1914. The Convention was to enter into force in January 1915 but by then, World War I had broken out in Europe. The Convention did not enter into force but many of its provisions were adopted by individual nations. In 1927, proposals were made for another conference which was held in 1929. This time eighteen countries attended and a new SOLAS Convention was adopted. It entered into force at 1933. There have been subsequent SOLAS Conventions and the large majority of the world's shipping nations have ratified the most recent SOLAS Convention. When the United Nations set up IMCO in 1958, its purpose was to update SOLAS. IMCO became the IMO which is now the major worldwide regulatory body in the maritime field.

The other important program established at the 1914 Convention was the International Ice Patrol. It was agreed that the International Ice Patrol would consist of two ships which would patrol the traveling routes on the Atlantic to warn ships of possible ice hazards. All countries that had ships traveling to and from the United States would finance this patrol. The United States Navy had started to patrol the Atlantic for ice after the TITANIC disaster. Due to its experience, the United States Government was invited to undertake the management of this service with the expense to be defrayed by the thirteen nations who attended the London Convention. The International Ice Patrol was founded on February 7, 1914 in Groton Connecticut.[14] This service eventually became the United States Coast Guard. Thus, in addition to SOLAS and all the other maritime conventions that followed, the U.S. Coast Guard also owes its birth to the TITANIC.

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[14] U.S. Coast Guard, *International Ice Patrol History* (2011) www.uscg-iip.org.general / history (last visited on October 8, 2011).

Navigation Act 1912

The years 1911 and 1912 were key years in the development of Australian Maritime Law. Prior to this paper, I had not studied much Australian history and this may be an advantage or a disadvantage depending upon your point of view. We New Yorkers think of New York as the center of the world but after checking a number of libraries in the city, I found only one book on Australian maritime law. It had articles by Sarah Derrington and Ron Salter, who are in the audience. Obviously, I could not speak to them about what they wrote so I had to find something else. Luckily, there was a friendly woman from New Zealand who was at the Library of Congress in Washington D.C. She found many original documents for me and had them waiting for me when I visited the Library. Some of them looked like they had not been touched since 1912.

I think in the years leading up to 1912, the country wanted to assert its own identity, apart from that of the United Kingdom and it also wanted to assert the authority of the central Government over the states in many matters, including navigation. What was later known as the Navigation Act of 1912 furthered both of these aims.

The Navigation bill was originally drafted in 1902 under the direction of Charles Cameron Kingston and was first introduced into the Senate in 1904. It was withdrawn that year and a Royal Commission was appointed to examine the proposed legislation and to report to the Governor General of Australia, Henry Stafford Northcote.[15] It seems that a Royal Commission is the preferred way to bury controversial proposals. The Royal Commission was composed of the Minister of State, five members of the House of Representatives and three members of the Senate. The reason for the controversy seems to be the cabotage sections in the bill. The power of the British Shipping Companies was greatly resented in Australia around this time.[16] The British controlled shipping in Australia at the time. However, one would not necessarily know this

[15] Report of Select Committee on the Navigation Act, 1924 p. 2.
[16] Frank Broeze, *Island Nation: History of Australians & the Sea*. (1998).

from reading the 1906 Report of the Commissioners.[17] Most of the report deals with seamen issues.

An indication of the controversy is contained on pages 5 and 6 of the 1906 Report.[18] The Report states that due to the wide range of inquiry and number of suggested alterations, the Commissioners had to redraft the 1904 Bill. However, they put in the following pithy statement that says a lot. They stated "this redraft, which has largely added to their labors, they had proposed to attach to this report; but, in view of the suggestion of the Imperial Government, that delegates from Australia and New Zealand should attend a conference to be held in London, at which the whole question of navigation as it affects the empire might be discussed, its revision has been postponed for the present." In other words, the Imperial Government said: "don't bother."

In the 1906 Report, the Commissioners tried to put a good spin on the Navigation Bill. The first point, which takes up over two-thirds of the report deals with decline in the number of British seamen and the increase of foreign seamen on vessels. The Report states "a radical change is urgently needed."[19] The Report said that seaman must be treated more like workers ashore. This was the lynch pin for the provisions in the Navigation Bill that governed accommodations, provisions, cooks, wages, etc. in the Bill.

The Bill was again introduced into the Senate in September, 1907 but lapsed. It was introduced again in 1908 and in 1910 and it was ultimately agreed to by both Houses in 1912. However, there had been a change in the interim. The British had adopted the Merchant Shipping Act in 1906 which improved the conditions for seamen on British vessels. During the second reading of the Navigation Act on July 16, 1912, Representative Frank Tudor recognized that since the amendment of the Merchant Shipping Act regarding crew

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[17] Report of the Royal Commission on the Navigation Bill of the Australian Commonwealth (1906).
[18] *Id*.
[19] *Id*. at 8.

accommodations, there had been an increase of British seamen and a decrease of foreign seamen working on British ships. So one would ask- why bother with the new bill? I think there are two reasons they bothered- Frank Tudor and the cabotage provisions.

Tudor was a staunch union man and prior to entering Parliament had been President of the Victorian Trades Hall Council. He was a felt hat maker by trade and he was one of the driving forces behind the bill. From the House debates, it seems clear that he wanted to improve the lot of seamen and also wanted to protect Australian trade. Although he led the fight in Australia against conscription and was the leader of the Labour Party, he never became Prime Minister.

The Navigation Act of 1912 goes further than the British Merchant Shipping Act of 1906. In the British Act, the space allotted to each seaman for his own use was increased from 72 cubic feet. (Tudor described this as the size of a grave)[20] to 120 cubic feet. Section 236 of the Navigation Act increased this to 140 cubic feet. In addition, the Navigation Act includes requirements that each ship have a separate mess room for the taking of meals by seaman and apprentices, bathrooms with an adequate supply of fresh hot water for the use of all members of the engineering gang and that the berthing accommodations not be below the water line of the ship.

Both the British Act and the Navigation Act required certified cooks. The British Act required certified cooks for foreign going vessels while the Australian Act required cooks on all British ships, Australian ships and all ships engaged in the coasting trade. The debate in Parliament on this point is funny. Representative Paddy Glynn talks about a cook being the man the seamen must eventually swallow. Frank Tudor responded by quoting Gilbert & Sullivan's the *Bab Ballads* about a cook who is eventually eaten by the rest of

[20] Commonwealth, *Parliamentary Debates*, Legislative Assembly, 16 July 1912.

the crew and says that Glynn will have to recite the ballad during the final debate on the bill.[21]

Not all the sections of the Navigation Act are so benevolent. Section 280 states that no person shall engage or pay for a passage on any ship for a lunatic or bring or send a lunatic onboard ship as a passenger without informing the owner, master or agent of the ship that the person is a lunatic. The fine is 50 pounds. The definition of lunatic does not just cover lunatics but any person who is liable to become a lunatic or a person of unsound mind. I could find no comparable section in the British Merchant Shipping of 1906 or in American law.

Cabotage

I do not think anyone was fooled by the 1906 Commission's inference that the Navigation Bill was about the decline of the number of British seaman. The controversial sections were about cabotage.

I cannot say how much of the controversy was real or how much was stirred up by English ship owner interests. With the advent of iron hulls, British shipping companies dominated world trade at the time. In 1890, roughly 90% of American trade was carried on foreign vessels, primarily British flag. Due to this monopoly, owners were often able to contract out of all cargo liability. Thus, some places, such as the United States, Australia, Canada and New Zealand retaliated by enacting pro shipper cargo liability legislation. In the U.S., we enacted the Harter Act in 1893. In 1904, Australia enacted the Sea-Carriage of Goods Act which prohibited owners from contracting out from their negligence. New Zealand passed a similar law- in 1903- the Shipping and Seamen

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[21] *Id*. at 7. Gerald O'Collins, *Glynn, Patrick McMahon* (2012) Australian Dictionary of Biography, <http://adb.anu.edu.au/biography/glynn-patrick-mcmahon-paddy-6405>. I have no doubt Glynn could do this. Glynn was said to be extremely well read. He was from Galway and had difficulty attracting legal work when he first came to Australia. He wrote to his brother that "trying to get business here as a stranger is like attacking the Devil with an icicle."

Act. In 1910, Canada passed the Water Carriage of Goods Act also based on the Harter Act. [22] These pro cargo laws applied to domestic and outbound bills of lading only. [23] The English ship owners were thus fighting two battles- the cargo liability fight and the cabotage battle. After the U.S. enacted the Harter Act, there was little they could do in Parliament on the cargo liability front. This eventually led the British shipping interests to call for the International Law Association to do something. This led to the Hague Convention which enacted the Hague Rules in 1921. However, the British ship owners continued to fight on the cabotage issue.

On cabotage, there was an Imperial Conference in 1907 and the conference recommended that the coastal trade of the Commonwealth "be reserved for ships on the Australian register, i.e. ships conforming to Australian conditions and licensed to trade on the Australia coast." Although the Navigation Bill was eventually passed in 1913, there was no Royal assent until after World War I had begun and at the request of the British government, the operation of the Act was postponed. The coasting trade provisions did not come into effect until July 1, 1921. Even after that, there was still great controversy and another commission was formed in 1924 to study the Act.

The Navigation Act did not specifically close the coastwise trade to foreign vessels but it required that foreign vessels comply with Australian law. Thus, Section 288 states that no ship may engage in coasting trade unless it is licensed to do so. Every seaman employed on a ship engaged in coasting trade had to be paid at the current rate for Australian seaman engaging in the same trade. If a seaman on a British ship was not engaged in Australia, the Master had to sign a memorandum specifying that the seaman would be paid Australian wage rates. Those sections of the Navigation Act on special provisions and accommodations space applied also to coasting vessels. Similarly, the rule on a certified cook also applied

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[22] Raoul Colinvaux, *Carver's Carriage of Goods by Sea* (13 ed. 1957) 441-443.
[23] Joseph Sweeney, "COGSA and the Hague Rules", 22 *Journal of Maritime Law and Commerce* 18 (January 1991).

to coasting vessels. In effect, the Act made Australian law applicable on every vessel engaging in the coasting trade.

The speech of the Representative Tudor on July 16, 1912[24] sets forth the main reason for the coasting provisions. I am sure he was quite passionate (and maybe a little un PC), when he said "our aim is to ensure that the conditions prevailing in the coasting trade onboard foreign ships shall be the same as applied to our own people. This policy may be taken to be an example of the new protection. It must be recognized by everyone that if we desire to build up a mercantile marine, we must protect Australian shipowners against unfair competition from subsidized foreign ships or poorly paid crews from other countries. If there is unfair competition on part of vessels carrying colored crews, we have a right to protect ourselves against it.... Firemen receive about 9 pounds per month and it is not fair to expect shipowners who have to pay these wages to compete with ships employing colored labor at about 1 pound per month per man. The owners of these ships obtain practically the same rates for carrying passengers and cargo between Australian ports as to Australian Shipowners... that is not fair competition. There is no intention, however, to preserve this trade for the Australian shipowner alone, but it is intended that the men who worked the ships, and who imperil their lives in doing so, shall also receive a share of benefits in the shape of Australian rates of wages, adequate accommodations, good food and other advantages conferred by the Bill.... this bill affords protection to Australian shipowners by providing that every outside ship which engages in the coasting trade shall carry a certain crew, according to a scale laid down, shall provide the prescribed accommodation for the men and shall pay them Australian rates or wages."

What was the effect of this?

An issue wouldn't be controversial if there were an easy answer. The Commissioners who examined the Act in 1924 were

[24] Commonwealth, *Parliamentary Debates*, Legislative Assembly, 16 July 1912, 15 (Frank Tudor).

divided 2-3-2.[25] The Chairman and one commissioner stated that the interstate shipping companies of Australia were still to a great extent owned and controlled by British overseas shipping companies. The cabotage sections did not change this. Therefore, these two commissioners voted that the section on coastal trade be repealed. Three commissioners disagreed and found that the Navigation Act did not retard trade, industry or development of any of the states of the Commonwealth, and that there were few complaints in Australia about the application of the Act. These commissioners voted that the Act be maintained as it stands. The final two commissioners studied four companies and found that even though these companies had increased their fares and freights, the earnings were not matched because of the increases in crew pay and the costs of improving accommodations. These commissioners voted that the Coastal Trading Provisions of the Act be repealed and separate Tariff Acts be enacted against foreign shipping. There is a basis for their view as there was evidence given by the Melbourne Steamship Company that wages had increased by 65% over the 1914 figure and dockside labor was up 137%. A considerable sum was also paid making alterations to eight of its vessels to comply with the accommodation requirements of the Navigation Act.[26]

Wireless Provisions

The Navigation Act was amended after the TITANIC sinking to include wireless requirements. Every foreign going ship, Australian trade ship and coasting ship carrying fifty or more persons was required to be equipped with wireless communication that was capable of transmitting and receiving messages over a distance of at least 100 miles both day and night and to be powered by a battery in the event that the ordinary supply of electrical power failed. The Act also called for regulations prescribing the times and hours during which an operator shall be in attendance at the wireless ready to receive and send messages.

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[25] Report of Select Committee, *supra* at note 15.
[26] John Bach - *A Maritime History of Australia* (1982) 313.

Seaman's Compensation Act 1911

The original 1904 Act contained a provision for compensation of insurance for injured seaman. In the 1906 Report on the original Act, the Commissioners recommended that the workman's compensation system be extended to seamen. In addition, the commissioners pointed out that numerous nations, including Austria, France, Italy, Denmark, Switzerland and Belgium had statutory schemes of insurance to cover accidents to workers. The Commissioners were also in favor of compulsory insurance for seamen to cover deaths and injuries.[27]

This section was not included in the Navigation Act of 1912 but was in a separate act, The Seaman's Compensation Act of 1911. Under this Act, a seaman who was injured is entitled to compensation unless the injury was attributable to his serious and willful misconduct.[28] An employer was not liable under the Act for any injury which did not disable the seaman for a period of at least one week. If the injury was caused by a third party, the seaman could take action against the third party and also collect compensation but he would not be entitled to both damages and compensation.[29] If he had received compensation, the person who paid the compensation was entitled to indemnity from the person causing the injury. There were schedules in the Act. For instance, if a seaman died and left dependents wholly dependent upon his earnings, they were entitled to a sum equal to his earnings during the three years prior to the death or 200 pounds, whichever is larger. There is an upper limit of 500 pounds for a death. For total or partial incapacity for work, a seaman would be paid not less than 50% of his average weekly earnings during the previous year. The employer was entitled to require a medical examination by a duly qualified practitioner, and if the seaman refused to submit himself to such an examination, his right to compensation was suspended. Any disputes under the Act were to be settled by arbitration.

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[27] Report of the Royal Commission, *supra* at note 17, 23-24.
[28] Seamen's Compensation Act of 1911- Section 5(c).
[29] *Id*. at Section 10.

For many of you, this may not be too interesting because this system has been in effect for so long. However, it was quite revolutionary at the time. Indeed, in the United States we took a different course and remain on it to this day. In the United States, a seaman can sue his employer under the Jones Act and is entitled to have a jury decide not only his lost compensation but his pain and suffering for the injury. Although one would think it made common sense to have worker's compensation system for seamen, there has never really been a push to do so in the United States. In the U.S., the vast majority of workers are covered by Workmen's Compensation Laws but due to an anomaly, seamen and railroad workers can sue and have juries hear their injury cases.

Lighthouse Act 1911

There was a section in the 1904 Act about the Commonwealth taking over lighthouses, beacons and buoys except those within the limits of ports. The 1906 Royal Committee was unanimous in favor of this. The result was the Lighthouse Act of 1911. This Act authorized the Commonwealth to enter into an agreement with the Governor of any State or any person for the acquisition of any lighthouse or marine mark that was the property of that state of person. Why would the Governor of a State turnover a light house or marine mark to the Commonwealth when there may be money to be made by retaining the lighthouse or mark? Well, the Act gave the Commonwealth the right to inspect any marine mark which may affect the safety or convenience of navigation. No one could obstruct the inspector and the Commonwealth could require the owner of the lighthouse or marine mark to remove it, move it to some other position, to modify it or alter its character to cease from exhibiting the light or to refrain from lighting it for such a period as the Commonwealth may direct. If the owner of the light did not comply with the order, the Commonwealth could then take possession of the lighthouse or marine mark. Thus, the Commonwealth gained control over all the lighthouses and marine marks. This is another example of the Federal Government assuming control in maritime matter.

The Jason Clause

The year of 1912 was also an important one in U.S. maritime law. In May of 1912, the U.S. Supreme Court issued a landmark case on general average. Prior to the Harter Act, shipowners did not have a right to general average if the peril arose through their fault. There was also public policy that did not allow clauses exonerating the vessel owner from liability to cargo for negligence. Section 3 of the Harter Act exonerates the ship owner from liability under certain conditions for cargo damage due to the negligence in the navigation and management of the vessel. Some argued that this section of the Harter Act also removed the bar to ship owners collecting general average from cargo if the peril arose through the ship owner's fault. In *The Irrawaddy*, 171 U.S. 187 (1898), our Supreme Court rejected this argument and said that nothing in general average had changed due to the Harter Act. As might be expected, the next step of the ship owners was to include a clause in bills of lading that if the general average situation arose through negligence of the ship, from the effects of which she would be exonerated by the Harter Act, her owners having exercised due diligence to make her seaworthy, general average was to be payable. The Supreme Court allowed the clause in the famous case of *The Jason* 225 U.S. 22 (1912). The Court held while Section 3 of the Harter Act did not change the law on general average, it had in effect abolished the public policy against contractual stipulations relieving the ship from the consequence of her own negligence in navigation and management.

In charter recaps you will often see reference to the "Jason Clause" and also reference to the "New Jason Clause" which covers liability under the Carriage of Goods by Sea Act. I am sure we are all waiting anxiously to draft new and improved Jason clauses to cover liabilities under the Rotterdam Rules.

New Zealand

The maritime law in New Zealand was largely settled by 1911- 1912. However, no paper about 1911 or 1912 would be

complete without two amazing stories from New Zealand. The first is about the launching of the TSS EARNSLAW. Everything about this ship from her construction to her operation is unique. She is named after Mount Earnslaw which is a peak at the head of Lake Wakatipu. Shipbuilders in Dunedin built the vessel and then took her apart. All the quarter inch steel hull plates were numbered for reconstruction like a jigsaw puzzle. Then the parts were taken by rail from Dunedin to Kingstown at the south end of Lake Wakatipu. The vessel was then rebuilt and on February 24, 1912, the EARNSLAW was launched and began her lengthy career. She continues in operation to this day, almost 100 years since her launching, and reportedly is the only coal fired ship in Lloyd's Register. Harrison Ford recognized the star power of the ship and the EARNSLAW made a cameo appearance in the movie *Indiana Jones and the Kingdom of the Crystal Skull*. It is safe to say that the New Zealanders know how to make things that last.

I am breaking one of the cardinal rules of public speaking. I am sure I broke many today already. They say you should always end on a high note. I will not be doing that and the second story is a sad one. It is about the disappearance or death of Pelorus Jack in 1912. Pelorus Jack was a Risso's dolphin that was famous for meeting and escorting ships between Wellington and Nelson through the Cook Strait between 1888 and 1912. He was first noticed in 1888 when he appeared in front of the schooner BRINDLE when the ship approached French Pass, a channel located between D'Urville Island and the South Island. The area is dangerous to ships with rocks and strong currents but no shipwrecks occurred when Jack was present. He would guide the ships by swimming alongside for twenty minutes at a time. If the crew could not see Jack at first, they would often wait for him to appear. Many sailors and travelers swore by Pelorus Jack and he was mentioned in local newspapers and depicted in post cards.

Over the years his fame grew. However, his celebrity attracted not only well wishers but others who did not have his best interests in mind. In 1904, someone aboard the SS PENGUIN tried to shoot Pelorus Jack with a rifle. Despite the attempt on his life,

Pelorus Jack continued to help ships although according to folk lore, he would no longer help the PENGUIN. The PENGUIN was shipwrecked in 1909.

Following the shooting incident, a law was proposed to protect Pelorus Jack. He became protected by order in counsel under Sea Fisheries Act on September 26, 1904. He remained protected by that law until his disappearance in 1912. It is thought that Pelorus Jack was the first individual sea creature to be protected by law in any country.

There are many rumors about his death. Some believe that he was harpooned by Norwegian whalers in late April 1912. There is also an account of an anonymous death bed confession by a man who said he helped his father kill a dolphin stranded after a storm. They later realized that it had been Pelorus Jack. The man was haunted by his actions for the rest of his life.

In New Zealand, his legend lives on. There was a chocolate bar named after him and he is the subject of a number of songs.

So it is on this sad note that I end. If you are having a beer or a glass of wine with lunch, raise a toast to Pelorus Jack.

PORTO RICO AND ADMIRALTY LAW - A REMINISCENCE

Daniel J. Dougherty*

The época for this treatise is from the early to mid-1950's up to the end of the 1980's.

The unusual spelling in the title or caption is taken from the spellings of the Organic Acts subsequent to the cession of our island by Spain to the U.S.A. and from U.S. Supreme Court cases of that era; from the Foraker Act; and from the case entitled *Lastra v. New York & Porto Rico S.S. Co.*, 2 F.2d 812 (1st Cir. 1924).

This article treats, briefly, the Jones Act (46 U.S. Code) – not Puerto Rico's Jones act; the Puerto Rico Longshoremen's and Harbor Worker's Compensation Act; a select few cases; it mentions a few "notables" of this época, etc.

At the subject time, "Operation Bootstrap" had only begun. The U.S. District Court for the District of Puerto Rico had only one Judge: Clemente Ruiz-Nazario. The court was in the Post Office building in Old San Juan.

Puerto Rico, an island in need of imports and an island rich in products desired on the mainland (hence in need of exporting), was on the verge of a big increase in merchant shipping.

The primary shipper was A.H. Bull Steamship Co. ("Bull Line") with Waterman S.S. Corp. of Mobile a distant second.

Sea-Land Service, Inc., based in Elizabeth, N.J. and contemplating a "takeover" of Waterman and contemplating "containerization" of cargo (to increase speed and volume in cargo-handling) and the construction of much larger port facilities

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and multi-million dollar, heavy cargo-handling equipment, placed Puerto Rico (especially San Juan and Mayaguez) in its sights.

Sea-Land commenced a regular, scheduled service ("only" three large vessels, at first) to and from Puerto Rico and the mainland, to and from Europe and Asia.

En esa época, many Puertorriqueños were emigrating to Nueva York, Nueva Jersey and to elsewhere.

The trend of Puerto Ricans returning to Puerto Rico had not yet begun. Hato Rey was somewhat "distant" – unless one owned a car.

Mientras, waterfront injuries had been occurring. Lawsuits were being filed in New York.

The federal "transfer statute," 28 U.S.C. 1404(a), was not yet very much in vogue. The federal caselaw was not yet "flooded" with 1404(a) maritime decisions.

A young N.Y.C. lawyer named Harvey B. Nachman was an employee of Golenboch & Komoroff – a Manhattan law firm specializing in personal injury litigation.

A young N.Y.C. lawyer named Dan Dougherty was an associate with Kirlin, Campbell and Keating – the largest exclusively maritime-admiralty law firm in the world. My caseload (pre-*Guerrido vs. Alcoa SS Co.*, 234 F.2d 349 (1st Cir. 1956))[1] was ordinary for a large (not "very large") firm: about 60 cases – all personal injury cases. [In N.Y.C. there were, then, several law firms that had more than 100 lawyers – a number then hard to imagine. "Maritime" law firms – "specialists" – had far fewer.] We also had 21 full-time investigators on our payroll: maritime cases generated wide-ranging facts (in particular did personal injury cases: surveillance

[1] *Guerrido* held that P.R. longshoremen were allowed to sue in maritime cases.

for feigning the seriousness of injuries, etc. "Background" was needed for "cross," etc.).

I had tried to verdict and judgment several P.I. cases with some success – one against Harvey Nachman, in Municipal Court, Manhattan – a court of $3,000 "max" civil jurisdiction.

I was sent to P.R. to (a) try cases (endeavor to obtain verdicts in order to discourage the filing of "Puerto Rican cases" in N.Y.C. – a very much higher verdict or "exposure" jurisdiction and (b) assess the capabilities of the P.R. law firm[2] favored by the largest shipowners that traded in P.R. (Bull Line and Waterman) and by their P.&I.[3] insurance underwriters – the "American Club," a creation of Johnson & Higgins, and several London P.& I. Clubs.

En esa época, the Hartzell, Fernandez y Novas lawyers were Rafael O. Fernandez, Jose Luis Novas Dueño, Sr. and Vincente M. Ydrach (Charles Hartzell had died); also Pedro Juvenal Rosa, Alberto "Sonny" Santiago Villalonga, Hector Lafitte, Jaime Pieras, Paco Bruno Rovira, and Joe Novas Jr. later joined the firm. Antonio Modesto Bird – soon thereafter – left Fuentes Fluviales to join Hartzell.

By late-1956 approximately 125 Puerto Rican waterfront injury cases had been filed in Manhattan in the U.S. District Court for the Southern District of New York - a very "high verdict" court. In most of these proctors for the plaintiff or libellant were Golenboch & Komoroff, respected in N.Y. as very capable P.I. attorneys. [Jerome Golenboch was President of the N.Y.S. Trial Lawyers Association and an excellent trial lawyer.][4]

I was advised (by my superior at the firm, Vernon Sims Jones) to file a "transfer" motion under 28 U.S.C. 1404(a) to try to transfer

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[2] Hartzell, Fernandez y Novas, Banco Popular, Old San Juan.

[3] Protection and Indemnity (Insurance), or simply marine insurance.

[4] The capability of a lawyer ought to be measured individually or personally – not on a firm-wide basis. Most of us (but not all clients) know this. I take a moment to note the difference between a "trial lawyer" and a "litigator" (who sometimes piles up the paper-work to build a fee).

one of these P.I. cases to the Puerto Rico Federal Court. Puerto Rico was (then-correctly) perceived as a "low-verdict" or "low-exposure" jurisdiction. I did so. My motion was granted by the Southern District. A libelant's proctor in the transferee jurisdiction was chosen by Golenboch & Komoroff. He was a young lawyer named Carlos Romero Barcelo. He later became Governor of Puerto Rico.

I went to San Juan to meet Carlos Romero. He had little or no maritime or trial experience. He was very amiable and sociable and well-connected. He told me that Golenboch & Komoroff (in particular one "Harvey Nachman") had instructed him to file a "remand" motion – to re-transfer the case back to New York.

We discussed the case at the Restaurante Mediterraneo. I suggested he might want to consider keeping the case in D.C.P.R. It might net him a reasonable fee; his longshore-client would certainly obtain justice here (with Romero as his lawyer); both parties may be satisfied, in the end. He said he would consider that. The motion to remand was not filed.

In due course, over a meal and a "tardecita" at Mediterraneo, we settled the case to everyone's satisfaction.

En esa época, there had not been any million-dollar verdicts in the U.S.A. nor in Puerto Rico. That began to change: first in S.D.N.Y. and "Supreme, New York" and, in swift order, in the Bronx, in Brooklyn federal and state courts, in Chicago, and on the U.S.A. West Coast. In the 1970's, the "highest-exposure court" in the world became the U.S. Federal Court in the Virgin Islands (the time of the "Fountain Valley Golf Club" massacre). It was said (I did not say it) that "whitey" could not get an impartial jury in the Virgin Islands.[5]

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[5] I fell victim to this in a P.I. case brought by a ship's pilot against Cunard Line and its M/V CUNARD PRINCESS *Lund vs. Cunard,* 1975 AMC 976 (D.V.I. 1975). The verdict was so high it was set aside on my motion for a J.N.O.V. At the scheduled new trial, we settled at the amount recommended by the District Judge.

The P.R.D.C. gradually moved toward the high verdicts (perhaps I should write, the juries did). Much credit for this should be given to Nachman, Feldstein & Gelpi. Gustavo Gelpi of San Juan, at this writing, is a well-known San Juan practitioner with McConnell y Valdés and his son is a P.R. Federal Judge.

This high-verdict trend paid off, ultimately, for Nachman, Feldstein and Gus Gelpi in the Condado-Ashford Avenue Hotel Fire case – about which today's readers need no reminder.

One of the most "notorious" cases of this época was the S.S. RUTH ANN. She was a W.W.II-vintage Liberty ship. [Most of those had been put in the laid-up or "mothball" fleets along the coasts.]

The RUTH ANN had five hatches, each with a lower hold, upper 'tween deck and lower 'tween deck.

She had been loaded with a cargo of potatoes or beans in a Great Lakes port. Those products usually were loaded in sacks, palletized, and stowed in piles. The RUTH ANN cargo, however, was simply dumped – as bulk cargo – into all the hatches, from main or upper deck to lower hold, port to starboard.

Liberty ships had no reefer facilities worth mentioning. Most had steam, not electric, winches (that will tell you her vintage).

Containerization as yet had not been invented. Puerto Rico, soon, would become a world-leader in moving cargo in vans. "Break-bulk" cargo was becoming passé.

The RUTH ANN steamed through the St. Lawrence Seaway and south, bound for Havana, Cuba.

Fidel Castro had just come into power in Cuba. Fidel was not a "favourite" of the President of the U.S. (That's a "chiste").

The President ordered an immediate EMBARGO on all merchant shipping into and out of Cuba.

San Juan was the closest major deep-water port to Havana.

The RUTH ANN tied up at one of piers 1-2-3-4 in Viejo San Juan.

The semi-tropical sun went to work on the cargo. [If ever you have smelled one rotten potato in a hot kitchen, you may be able to imagine the stench around the piers in Old San Juan – some of you readers may recall that.]

The mal-odor was not the worst part of it: the flies and mosquitoes and trillions of other insects were.

Judge Clemente Ruiz-Nazario's desk and chambers in the nearby Post Office building were uninhabitable. The Post Office shut down. Businesses closed down.

Viejo San Juan closed down.

Finally – it took two weeks or so – Don Clemente Ruiz-Nazario "condemned" the RUTH ANN; ordered the Coast Guard to tow her to the deepest part of the Atlantic; and sink her.

It took the Coast Guard a long time to carry out the sinking. She had a double-hull of 3/4-inch steel.

One of the most lengthy marine cases in the U.S.D.C.P.R. involved the M/V ZOE COLOCOTRONIS. A Greek tanker ran aground at Cabo Rojo, Bahia Sucia. The ship's captain ordered his crew to discharge the tanker's oil into the ocean, to float her. He thought the trade winds would take the petrol toward South America. They didn't. The oil damaged mangroves in Bahia Sucia. Judge Torreulla awarded very substantial damages after about 10-15 weeks of trial. *Commonwealth of Puerto Rico v. SS ZOE COLOCOTRONI*, 456 F. Supp. 1327 (D.P.R. 1978).

Defense proctors were Vicente M. Ydrach, Alberto (Sonny) Santiago Villalonga and myself.

The judgment, on First Circuit appeal, was affirmed on liability; but reversed and remanded on damages. *Puerto Rico v. SS ZOE COLOCOTRONI*, 628 F.2d 652 (1st Cir. 1980).

The ship's captain was convicted (and his ticket taken away) following trial in Piraeus, Greece.

Nick Jiménez and William Graffam were the proctors for the Commonwealth – recovering damages "for the benefit of Puerto Rico." Later, José Antonio Fusté became a Jimenez partner.

Another interesting case: Harvey Nachman's "Sunday Night Queen" case, *Viudad de Domingo Caballero Reina vs. M/V EVELYN and Bull Line*. Longshoreman Domingo Caballero was killed when he slipped and fell beneath the vessel's descending electric-powered cargo elevator.

The trial was lengthy and attended by many spectators. [Word had gotten around that Nachman, Feldstein & Gelpi had invested $10,000 to construct an exhibit made of wood and glass and tiny motors to simulate the ship's elevator.] Under a "personal injury contingent retainer" it was viewed as quite remarkable that lawyers would invest such a sum for a penniless widow on a chance or gamble of winning!

Defense lawyers were Vicente M. Ydrach of Messrs. Hartzell and myself. Harvey and Stanley and Gustavo Gelpi's client won the case with a very large jury verdict. We (for the shipowner) lost to the plaintiff-libellant but (a) we reduced the amount of the judgment on motion; and (b) we were granted "judgment over against" the stevedore contractor, Fred Imbert, Inc. On a J.N.O.V. motion the verdict was reduced and judgment ordered to be entered "unless," etc. The case was settled and judgment entered as stipulated and decreed. No appeal.

Aside from all that, here, to conclude M/V EVELYN, is what I recall above all else: All three parties "rested." The visiting judge[36] was Maris, J. of Boston's First Circuit. He had a well-earned reputation as a national authority on "tort law."

After all parties "rested," we noticed that Judge Maris, in a hurried and worried manner, called a familiar court figure to the bench. That figure was Mr. Gil, the Assistant U.S. Attorney of Puerto Rico.

We learned later that Judge Maris did not know which ought to come next after all parties "rested": the summations of counsel or the "charge" to the jury (the "instructions"). He was properly informed.

Another interesting case: The first "non-criminal jury" case in Puerto Rico's history (Judge Clemente Ruiz-Nazario told us) was *Pablo Marrero vs. SS KATHRYN*, in the mid-late 1950's. The libelant's attorney was Jerome Golenboch (Harvey Nachman had not yet moved to P.R.). Don Rafael Fernandez, the "head" of Hartzell, Fernandez & Novas, decided to be the respondent's trial attorney. I would assist him.

I had taken Pablo Marrero's E.B.T. or deposition before trial. Marrero had denied "any and all previous injuries to any part of his body." His D.C.P.R. trial testimony on the first morning of his trial alleged a "ruptured disc" at L-5–S-1. Dr. Anibal Lugo, the examining physician for the defense, had had x-rays taken and analyzed by a radiologist-specialist. Drs. Lugo and the radiologist testified immediately after Marrero. Marrero, in the 1940's, had sustained a ruptured disk precisely at L-5–S-1. Judge Ruiz-Nazario ordered a brief recess. When the parties returned to Court, Mr. Golenboch announced, "Your Honor, the Libelant (i.e., the plaintiff) voluntarily dismisses this action." Thus ended Puerto Rico's first federal jury trial. [The Golenboch firm, by then, thanks to the *Guerrido* case,

[6] Visiting judges became common during winter months, beginning about 1958-1959. They came from "unheard" of places such as Utah and Maine.

had filed a large number of P.R. cases. He knew that he could not afford a future "clouded" by Mr. Marrero's untruthful testimony.]

Puerto Rico's maritime-law status continued to grow until the 1972 Congressional Amendments to the Stateside Longshore Act were amended by the U.S. Congress, becoming the U.S. Longshoreman's and Harbor Worker's Compensation Act, 46 U.S. Code, 901 et seq.

Puerto Rico had its own Longshore Act.

Almost from the beginning of maritime litigation in Puerto Rico, the P.R. Supreme Court handed down decisions "tracking" U.S. decisional law. (Maritime law is largely judge-made law and *stare decisis*, although there is a surprising amount of legislature-made law and other codal law, both in P.R. and the U.S.A.)

Mientras, prior to 1972, a large number of cases ("filings") had developed.

I am writing about the Longshore cases and Jones Act cases, 33 U.S. Code 30104 (P.I. cases).

"Passenger" suits are not to be overlooked.

That large number of cases brought into play several new (to this field) Puerto Rico attorneys, noteworthy among whom were (and still are) Nicolas Jiménez, William Graffam, Gustavo Gelpi, and Charles Cordero.

Jiménez formed a partnership with José Antonio Fusté. They became favored lawyers for Sea-Land Service (later taken over by P.R.M.M.I.-Puerto Rico's "own" shipping company).

Gustavo A. Gelpi became a famous trial attorney with the law firm of Nachman, Feldstein y Gelpi of San Juan. His son, Gus Gelpi, Jr., is now a U.S.D.J. of the P.R. Federal Court. Mr. Gelpi, Sr. is with the firm of McConnell, Valdés.

Charles A. Cordero had, as a client, American International Underwriters – one of the world's largest insurers. A.I.U. insured many of Puerto Rico's stevedores and other waterfront or harbor employers (there are many such entities other than stevedores and steamship companies).

The build-up of cases prior to the 1972 Amendments to the LHWCA put Mr. Cordero in the "thick" of Puerto Rico's maritime litigation where he made a great name. He is now retired, after having become a Judge in Puerto Rico's Insular Court of Appeals.

On an overview, and to conclude, I would say that the increase in the number of maritime federal cases in Puerto Rico had at least these "visible" results:

a. There was an increase in the number of federal judges in the U.S. District Court for Puerto Rico (and likely also in the First Circuit).

b. There was increased public discussion of a new phenomenon in the federal courts called "calendar congestion".

Todo esta nurero. Everything is new.

COMMITTEE ON ARBITRATION AND ADR

Maritime Justice: New York "Freezing Orders" in Aid of Arbitration [*]

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This paper will address the authority of a court in New York (1) to issue a preliminary injunction in aid of a maritime arbitration outside of the United States (referred to herein as a "New York Freezing Order") and (2) to issue an order of attachment in aid of arbitration, and related issues.

In English jurisprudence, injunctions have been routinely issued in maritime cases since 1975 when English courts recognized an injunctive remedy that initially was known as a Mareva injunction but today is called a "freezing order." Maritime attachments are not available under English law. In the United States, the preferred provisional maritime remedy has been a Rule B maritime attachment because it gives the attaching party a priority in the defendant's property and there is no bonding requirement, as opposed to a U.K. freezing order that only enjoins the transfer of the defendant's property and includes a bonding requirement. In the United States, at an earlier time, district courts sitting in admiralty did not have authority to issue injunctions, but today admiralty courts do have the power to issue injunctions.[1]

As admiralty lawyers, we are familiar with the process of obtaining "security" for our clients. Maritime attachments and vessel arrests are some of the unique aspects of our practice. Since most charter parties provide for arbitration of disputes, we are also familiar with Federal Arbitration Act ("FAA") Section 8 (Proceedings Begun by Libel in Admiralty and Seizure of Vessel or Property), which permits a party to seek a maritime attachment

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[*] This paper was presented at the Committee's meeting in Oahu, Hawaii on December 5, 2011.

[1] *Farrell Lines Inc. v. Ceres Terminals Inc.,* 161 F.3d 115 (2d Cir. 1998).

before commencing an arbitration proceeding. What if a maritime attachment is not available because the defendant's property is not within the district or the defendant is "found within" the district? Is injunctive relief or a state court attachment available?

A. Injunctions and Enforcement of Judgments

Recent New York case law has expanded the reach of injunctions in judgment enforcement cases. New York courts have the power to require a garnishee present in the state to bring out-of-state assets under the garnishee's control into the state. *Koehler v. Bank of Bermuda, Ltd.*, 12 N.Y.3d 533 (2009). Relying on *Koehler*, the district court in *J.W. Oilfield Equipment, LLC v. Commerzbank, AG,* 764 F. Supp. 2d 587 (S.D.N.Y. 2011) determined that since the court had jurisdiction over the garnishee bank based on its presence in New York, the court had authority to order the garnishee bank to turn over funds in a German account to a New York based account. *Id.* at 595-96. In a case seeking to enforce a judgment, if a New York court maintains personal jurisdiction over a garnishee, the court may order the garnishee to bring into New York the judgment debtor's property located elsewhere. *See McCarthy v. Wachovia Bank, N.A.*, No. CV 08-1122, 2008 WL 5145602, 2008 U.S. Dist. LEXIS 98586 (E.D.N.Y. Dec. 4, 2008).[2]

B. New York Courts' Traditional Lack of Authority to Issue an Attachment in Aid of Foreign Arbitrations

In *Cooper v. Atelieres de la Motobecane, S.A.,* 57 N.Y.2d 408 (1982), the New York Court of Appeals concluded that a pre-arbitration attachment in anticipation of a Swiss arbitration award would violate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 21 UST. 2517 (reprinted as note following 9 U.S.C. § 201) (the "New York Convention"). After *Cooper*, courts in New York held that the New

[2] English "freezing" orders have adapted provisions in the standard form of the world-wide freezing injunction to enable third parties to the freezing order (banks) to comply with what they reasonably believe to be their obligations under the law where the assets are located. *Bank of China v. NBM, LLC*, All. E.R. 717.

York Convention precluded the judicial grant of provisional remedies in support of foreign arbitration proceedings. *See Corcoran v. Arda Ins. Co.*, 77 N.Y.2d 225, 230 (1990).

C. Recent New York Developments in Aid of Arbitration

In New York, there have been relatively recent statutory changes that permit a court to grant an order of attachment or a preliminary injunction in aid of an arbitration outside of the United States. The only ground for such relief is that a final arbitration award may be "rendered ineffectual." N.Y. C.P.L.R. 7502(c).[3] A recent case pursuant to N.Y. C.P.L.R. 7502(c) held that a creditor could constitutionally attach assets in New York, for security purposes only, of a debtor whose principal place of business was in India in aid of an anticipated Singapore arbitration where the Indian debtor had no connection with New York by way of subject matter or personal jurisdiction. *See In re Sojitz Corp.*, 82 A.D.3d 89, 921 N.Y.S.2d 14 (1st Dept. 2011).

Most of the legal "chatter" has been focused on obtaining New York State court orders of attachment in aid of arbitration, which is a new development in a non-maritime context but is "old news" for maritime lawyers because 9 U.S.C. § 8 always permitted a party to obtain a maritime attachment before commencing arbitration.

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[3] What is the "rendered ineffectual" standard? Courts have granted an application for provisional remedies in aid of arbitration based on one or other of a number of factors, including but not limited to the respondent's: (i) non-domiciliary status; (ii) potential insolvency; (iii) breaches of contractual obligations; (iv) possession of few assets other than those sought to be attached; and (v) historical failure to pay creditors. *See, e.g., SiVault Sys., Inc. v. Wondernet, Ltd.*, No. 05 Civ. 0890 (RWS), 2005 WL 681457, at *4, 2005 U.S. Dist. LEXIS 4635, at *13 (S.D.N.Y. Mar. 25, 2005) (no property other than that sought to be attached and respondent's potential insolvency satisfied "ineffectual" standard); *Matter of 217 Second Ave. LLC v. J.P. Friedman & Assoc., Inc.*, N.Y.L.J., Apr. 17, 2000, at 26 (col. 6) (N.Y. Sup. Ct. Apr. 17, 2000) (individual's non-domiciliary status and contract breaches satisfied "ineffectual" standard); *Habitations Ltd. v. BKL Realty Sales Corp.*, 160 A.D.2d 423, 424, 554 N.Y.S.2d 117, 118 (1st Dept. 1990) (respondent non-domiciliary's status as sole shareholder of corporation operating as a shell, lack of appreciable liquid assets, and historical failure to pay creditors among factors that met "ineffectual" standard); *In re Russian-Brazilian Holdings, Inc.*, 197 A.D.2d 391, 391-92, 602 N.Y.S.2d 352 (1st Dept. 1993) (respondents' alleged breach of contracts, non-domiciliary status, and undercapitalization satisfied "ineffectual" standard).

I would like to focus on obtaining preliminary injunctions from a New York State court against "garnishee banks" in aid of a non-U.S. maritime arbitration (i.e., a New York Freezing Order).

1. New York's C.P.L.R. 7502(c)

N.Y. C.P.L.R. 7502 was amended in October 2005 to permit New York courts to grant attachments or preliminary injunctions in connection with an arbitration inside or outside the state by providing in relevant part as follows:

> The Supreme Court ... may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

2. *In re Sojitz Corp.*, 82 A.D.3d 89, 921 N.Y.S.2d 14 (1st Dept. 2011)

N.Y. C.P.L.R. 7502(c) provides that New York courts may grant attachments or preliminary injunctions "in connection with an arbitration that is pending or that is to be commenced inside or outside this state." *See Sojitz*, 82 A.D.3d 89, 921 N.Y.S.2d 14 (affirming pre-award attachment in aid of foreign arbitration even though the target of attachment had no connection to New York by way of subject matter or personal jurisdiction, other than the fact that a customer who owed money to debtor was located in New York; holding that court need not have personal jurisdiction over target of attachment in order to issue an attachment under N.Y. C.P.L.R. 7502(c)). The *Sojitz* court also explained that the 2005 amendments to N.Y. C.P.L.R. 7502 overruled *Cooper v. Ateliers de*

la Motobecane, S.A., 57 N.Y.2d 408 (1982), which had held that New York courts did not have authority to issue an order of attachment in aid of foreign arbitration.[4]

D. What is the Reach of Injunctive Relief in Aid of Arbitration?

As a preliminary matter, it is black letter law that injunctive relief is not available for a contract claim for money damages.

1. Federal Law: In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond First, Inc.*, 527 U.S. 308, 1999 AMC 1963 (1999), the U.S. Supreme Court held that:

> The District Court lacked the authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages because such a remedy was historically unavailable from a court of equity.

(**Author's Note:** The decision includes an interesting discussion of *Mareva* injunctions, which have been called the "nuclear weapon of the law." I can't imagine what the Supreme Court would have called the Rule B attachment of EFTs!!)

2. New York Law: In *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2006), the New York Court of Appeals cited *Grupo Mexicano* and concluded that the general rule in New York is that the grounds for injunctions (N.Y. C.P.L.R. 6301) were intended to embody the traditional principles of equity jurisdiction of *Grupo Mexicano*. Significantly, the court recognized two exceptions to the general rule: (1) when equitable relief is

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[4] An argument can be made that the New York Legislature does not have the authority to tell New York courts what federal law means. *See* Robert P. Knapp, III, *"The New C.P.L.R. 7502(c): Can the Legislature Interpret Federal Law for New York?",* N.Y.L.J., July 25, 2006, at 4.

granted under procedures independent of N.Y. C.P.L.R. 6301[5] or (2) when the suit involves claims of the plaintiff to a specific fund, rightly regarded by the court as "the subject of the action" (N.Y. C.P.L.R. 6301), making a preliminary injunction appropriate under the express wording of the statute.

Conclusion: The general rule under both federal and New York state law is that injunctive relief is not available for a contract claim for money damages, but there are limited exceptions under New York state law.

Injunctive Relief is Available in Aid of Arbitration

1. Federal Law: The circuits may be split whether injunctive relief is available under federal law. *See* 26 Mealey's International Arbitration Report # 10 (Obtaining Injunctions in Aid of Arbitration in the United States Federal Courts: Addressing a Potential Threshold Jurisdictional Ban); *Janvey v. Alguire*, 647 F.3d 585 (5th Cir. 2011) (holding that a district court has the power to grant a preliminary injunction to maintain the status quo pending its resolution of a motion to compel arbitration); *Roso-Lino Beverage Distrib. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984) (explaining that the fact that a dispute is to be arbitrated does not absolve the court of its obligation to consider the merits of a requested preliminary injunction).[6]

2. New York Law: In *In re XTF Global Asset Mgmt. LLC*, No. 60365/09, 2010 WL 1116450, 2010 N.Y. Misc. LEXIS 2488 (Sup. Ct. N.Y. Co. Mar. 1, 2010), the court granted a preliminary injunction in aid of arbitration and ruled that the respondent's reliance on *Credit Agricole* in arguing that an injunction was improper since the petitioner was an unsecured creditor seeking money damages was misplaced, stating that "*Credit Agricole* did not involve an

[5] N.Y. C.P.L.R. 6301 sets forth the grounds for a preliminary injunction and temporary restraining order.

[6] The Eighth Circuit in *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) reviewing the district court's issuance of injunctive relief, found the dispute arbitrable and that the issuance of an injunction was an abuse of discretion.

application in aid of arbitration" and that "[a]pplying *Credit Agricole* would give no effect to the language" in N.Y. C.P.L.R. 7502(c).

Conclusion: Under New York law, you can obtain a preliminary injunction in aid of arbitration if you meet the requirements of N.Y. C.P.L.R. 7502(c). This is an exception to the general rule in *Credit Agricole* that preliminary injunctions are unavailable to secure money awards. Thus, *Credit Agricole* is not necessarily a basis for denying a motion for a preliminary injunction in aid of arbitration.

E. What are the Obstacles to Obtaining Injunctive Relief?

The obstacles to obtaining injunctive relief in aid of arbitration are obtaining jurisdiction over the "garnishee," and, if the garnishee is a bank, the jurisdictional limitation imposed by the "separate entity" rule.

When a court has jurisdiction over a person (defendant or garnishee), a preliminary injunction can be an effective provisional remedy equivalent to a U.K. "freezing order." If an injunction is issued against the defendant, the assumption is it may not be obeyed by the defendant. When a garnishee/bank is subject to the court's jurisdiction, the court has authority to enjoin the garnishee bank from transferring the defendant's property even if such property is located in another state or country. *See Abuhamda v. Abuhamda*, 236 A.D.2d 290, 654 N.Y.S.2d 11 (1st Dept. 1997) (affirming a preliminary injunction enjoining a bank from paying out funds from an account in Jordan, where the bank engaged in business in New York and was subject to New York's jurisdiction).

When a court has jurisdiction over property of the defendant, even property in the hands of a garnishee, the attachment of such property is effective. A debt owed by a third party (garnishee) to the defendant is property of the defendant subject to attachment.

- What is the situs of a debt owed to the debtor? If you are seeking to attach a debt, what is the situs of the

> debt? That question was answered in *Harris v. Balk*, 198 U.S. 215 (1905). Harris owed money to Balk, and Balk owed money to Epstein. Epstein served Harris with attachment papers while Harris was in Maryland, and Harris paid Epstein the money he owed to Balk. Balk later sued Harris to recover the debt, and Harris argued that the action in Maryland was a bar to recovery. The Court ruled in favor of Harris. Quasi in rem jurisdiction can be exercised upon debt and other intangible property. (This was later overruled in *Shaffer v. Heitner*, 433 U.S. 186 (1977))[7]. The situs of the debt is wherever the debtor is present. (This is still good law.)

In *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303 (2010), the New York Court of Appeals relied on the seminal case of *Harris v. Balk*, 198 U.S. 215 (1905), for the principle that where a creditor seeks to attach a debt for security purposes, "the situs of the debt is wherever the debtor is present." *Hotel 71,* 14 N.Y.3d at 315. This principle is of course also applicable in the garnishee context, as it was held in *Harris* that "if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that State." *Harris*, 198 U.S. at 222 (finding that Maryland creditor who had a money claim against a North Carolina debtor could attach a debt owed to the debtor by a third party garnishee from North Carolina while such garnishee was temporarily in Maryland). Further, as stated by David Siegel, "[f]inding the garnishee is just another way of finding the asset's 'situs': if the garnishee has a New York presence, the debtor's asset in the garnishee's hands will usually be found to have a New York situs as well." David D. Siegel, New York Practice § 491 (4th ed. 2005).

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[7] In *Shaffer,* the Supreme Court ruled that a proceeding in rem must satisfy the minimum contacts standards set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

- What is needed for jurisdictional purposes for an attachment or injunction in aid arbitration? The *Sojitz* court reasoned that the debtor needs no connection to New York by way of personal or subject matter jurisdiction, and the plaintiff without demonstrating minimum contacts to the state of any kind may attach property located in the state "as security" for a judgment being sought in another forum where litigation can be maintained consistently with *International Shoe Co. v. Washington,* 433 U.S. at 210 (1945). What about *Shaffer v. Heitner* ?

In *Shaffer v. Heitner*, the U.S. Supreme Court found that a court cannot obtain personal jurisdiction over a party merely on the basis of that party's ownership of property in the forum state. *Quasi in rem* jurisdiction is subject to the constitutional due process requirement of minimum contacts. In short, a person's rights in property may be adjudicated only in a jurisdiction with which that person has at least minimum contacts in accordance with *International Shoe*.

In *Sojitz*, the court relied on the "security" exception, recognized in *Shaffer*, to the requirement of minimum contacts for quasi in rem jurisdiction. The *Sojitz* court found that New York's attachment statute does not run afoul of *Shaffer* when it is used for purposes of security in aid of arbitration rather than to confer personal jurisdiction.

- When does the "separate entity" rule apply? The original rationale of the separate entity rule was that a depositor's account records were located only at one branch, and to require any other branch to handle an attachment order relating to that account would place "an intolerable burden upon banking and commerce." *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (N.Y. Sup. Ct. 1950),
- , 282 A.D. 940 (1st Dep't 1953). Courts have questioned the viability and applicability of the

> separate entity rule, given the realities of modern day banking, and have carved out limitations to the rule. *See Digitrex, Inc. v. Johnson*, 491 F. Supp. 66, 67-69 (S.D.N.Y. 1980) (upholding a freezing of assets in a bank account of a debtor even though the restraining notice was served on the garnishee bank's main office instead of the branch office at which the debtor's account was maintained (acknowledging that banks "have become largely computerized"); *Motorola Credit Corp. v. Uzan*, 288 F. Supp. 2d 558, 560 (S.D.N.Y. 2003) (noting that New York courts have begun to "re-examine the separate entity rule and loosen its strictures," but concluding that a federal court may not alter an established New York rule of law without indications from New York lawmakers that the rule should be changed).

The viability of the separate entity rule is questionable. Most major international banks have advanced centralized computer technology and access to accounts worldwide. The post-*Digitrex* authorities upheld the separate entity rule prior to the amendment to N.Y. C.P.L.R. 7502(c), authorizing attachment in aid of arbitration. (If an exception for the separate entity rule was intended, it should have been included in the statute.)

In *JW Oilfield Equip., LLC v. Commerzbank AG*, 764 F. Supp. 2d 587 (S.D.N.Y. 2011), the plaintiff filed an action in New York under N.Y. C.P.L.R. 5225(b) seeking to enforce a judgment against a debtor, and sought the turnover and freezing of assets in debtor's bank accounts with a German garnishee bank, including accounts located in Germany. The court, relying on *Koehler* and holding that the separate entity rule was not applicable, determined that because the court had personal jurisdiction over the garnishee bank based on its presence in New York, the court had authority to order the garnishee bank to turn over the funds in a German account to a New York-based account. *Id.* at 595-96. [*The court relied on* Koehler *for the principle that New York courts will not apply the separate entity rule in post-judgment execution proceedings, but noted in a*

footnote that the separate entity rule may still have application in prejudgment attachment proceedings. Id. at 595 & n.3]

In *Samsun Logix Corp. v. Bank of China*, 929 N.Y.S.2d 202, 2011 AMC 1551 (N.Y. Sup. Ct. 2011), the separate entity rule was applied.

In *Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234 (S.D.N.Y. 2011), Judge Hellerstein, in a post-judgment enforcement case, stated that because the Bank of India is subject to general personal jurisdiction in New York, "I conclude that the separate entity rule has no application here."

In one recent maritime attachment case, the Second Circuit upheld the applicability of the separate entity rule, holding that an account of the debtor at a Paris branch of BNP Paribas could not be attached in New York even though BNP Paribas has a New York branch. *See Allied Maritime, Inc. v. Descatrade SA*, 620 F.3d 70, 2011 AMC 54 (2d Cir. 2010).

Bonding Requirements

Federal Law: The amount of the bond is in the discretion of the court.

New York Law: The general practice for a temporary restraining order and preliminary injunction is a bonding requirement for 5% of the amount being restrained.

Conclusion

The limitations upon the jurisdictional reach of orders of attachment do not apply to injunctions against the transfer of property. New York's C.P.L.R. 7502(c) can be extremely useful in obtaining injunctions in aid of a foreign arbitration, and its full potential is only starting to be explored.

COMMITTEE ON CARRIAGE OF GOODS

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-ALOHA-

COGSA DOES NOT DEFINE "CUSTOMARY FREIGHT UNIT," BUT B/L DOES….

American Home Assurance Co. v. Wallenius Wilhelmsen Lines A.S., 445 Fed. App'x 371, 2011 AMC 2968 (2d Cir. 2011)

An action was commenced in the federal district court in New York for damages to four vehicles shipped on separate ocean voyages between ports in Savannah, Georgia; Australia, Germany and Japan. Defendants moved for partial summary judgment to limit liability to $500 per unpackaged vehicle. The district court capped any liability to $2,000 ($500 per automobile). After entry of judgment, the plaintiff subrogated underwriter appealed.

In a Summary Order **(Rulings by Summary Order do not have precedential effects, but they may be cited),** the Second Circuit Court of Appeals initially noted the four vehicles were shipped pursuant to bills of lading which included a clause providing for the application of U.S. COGSA and limiting the carrier's liability to $500 per package, or for goods not shipped in packages, per customary freight unit, unless a higher value was declared. It further provided that "each unpackaged vehicle or other piece of unpackaged cargo on which freight is calculated constitute one customary freight unit."

The court noted the purpose of COGSA was to "limit liability of common carriers for damage to cargo where the value of the cargo is not known to the carrier." *Id. quoting General Motors Corp. v. Moore-McCormack Lines, Inc.*, 451 F.2d 24, 26, 1971 AMC 2408, 2410 (2d Cir. 1971). It stated that if a company such as Caterpillar wants to avoid the $500 limit, it could declare a higher value for its cargo. Caterpillar did not make such declaration.

The parties agreed that COGSA applied and the vehicles were shipped unpackaged. Also, the freight for each automobile was calculated by cubic meter. The single question on appeal was whether the customary freight unit for each of the four vehicles shipped was the vehicle itself or the freight rate as calculated by cubic meter.

The court noted that COGSA does not define the term "customary freight unit" and referred to a prior decision in *FMC Corp. v. S.S. Marjorie Lykes*, 851 F.2d 78, 1988 AMC 2113 (2d Cir. 1988):

> To determine the customary freight unit for a particular shipment, the district court should examine the bill of lading, which expresses the 'contractual relationship in which the intent of the parties is the overarching standard'. (citations omitted). In short, the intent of the parties, as discerned from the bill of lading, controls. "Absent any ambiguity" in the bill of lading, "the inquiry is ended, and both parties are bound to the freight unit therein adopted." (citation omitted)

The court then referred to the specific clause of the bill of lading (Clause 10) and stated the most natural reading of it was that each unpackaged vehicle is a customary freight unit, regardless of whether the vehicle's freight charge was determined by reference to its volume. *Am. Home,* 45 Fed. App'x at 373, 2011 AMC at 2971. (citations omitted): "Moreover, nothing in the service contract or the bills of lading suggests that occupied space, as measured by cubic

meter, constitutes the CFU. That lump sum totals are based on the ton or cubic meter does not render the ton or cubic meter the CFU", referring to *Moore-McCormack, supra*.

The court further commented that the phrase "on which freight is calculated" in the clause defining customary freight unit made it clear that the parties intended the unpackaged vehicle to be the customary freight unit.

The court affirmed the district court's decision limiting liability to $500 per vehicle.

OVERNIGHT ODORS….

Fireman's Fund Insurance Company v. Seaboard Marine Ltd., Inc., No. 10-23882-CIV-TORRES, 2011 WL 5325464, 2011 U.S. Dist. LEXIS 127482 (S.D. Fla. Nov. 3, 2011)

A containerized shipment of perfumery products was carried to the port of Miami. It was released from the port terminal for ultimate delivery to the consignee's warehouse. After leaving the port terminal, the shipment arrived at an intermediate terminal where it was stored overnight. The following morning, it was delivered to the consignee's terminal where, upon unloading, it was discovered that approximately 309 cartons of perfumery products were missing. Suit was brought by the subrogated underwriter against the ocean carrier and the intermediate truckers/terminal operators.

The court treated two separate motions for summary judgment, the first made by the ocean carrier and the second made by the trucker involved.

THE OCEAN CARRIER'S MOTION:

The bill of lading described the shipment as a "'40' dry container S.L.W.C.; 55 cartons; perfumery products; 25 pallets with 776 cartons; 30 carton". The subrogated underwriter paid $292,234.00 in settlement of the consignee's claim; however, the

ocean carrier argued that, because the perfumery products were listed as being bundled in "25 PALLETS", any liability should be limited to $12,500 ($500 per pallet). The plaintiff took the position that the cartons referred to in the bill of lading should be considered the COGSA package. In reply, the ocean carrier argued, alternatively, that should the court not accept pallets as the "package", the maximum amount of recovery should be limited to the product of $500 multiplied by the 309 alleged missing cartons, or a total of $154,500.

The court noted that both the cartons and pallets as enumerated in the bill of lading could fit within definitions of "package" which were referred to. In the event of any ambiguity in the description of "package", "… in the Eleventh Circuit the ambiguity must be resolved in favor of the shipper or consignee." The court referred to previous decisions dealing with descriptions in bills of lading of pallets and cartons and found, as a matter of law, that the cartons listed in the bill of lading should be considered the COGSA "package".

As the subrogated underwriter was claiming a loss of 309 cartons, the potential liability of the ocean carrier, as a matter of law, was limited to $154,500.

THE INLAND TRUCKER:

The inland trucker also moved for limitation of liability to $.50 per pound pursuant to a Florida Statute (§677.309(2) (2010)) which allows limitation by a term in the bill of lading in a transportation agreement if the carrier's rates are dependent upon value and "the consigner is afforded the opportunity to declare a higher value and the consigner is advised of the opportunity." The bill of lading also contained a "DECLARED VALUE" provision.

The plaintiff underwriter maintained that its assured was never afforded an opportunity to declare a higher value as required by the statute as the trucker's bill of lading was not delivered until after delivery to the consignee was completed. The trucker contended

that "post delivery" of the shipment of the bill of lading was inconsequential because the consignee had a long term arrangement for the movement of containers as evidenced by several bills of lading which it presented in reply.

The court stated there was authority that "a prior course of dealing may show the practice of limitation of liability in transactions for the shipment of goods" and noted the trucker's argument that the consignor had never declared a higher value on any shipments prior to the one in question and never declared a higher value for any shipments subsequent to it and, thus, the course of dealings evidenced that a higher value would not have been declared even if the B/L had been presented beforehand.

Noting the lack of Florida authority on the particular issue, the court distinguished the authority relied on by the trucker (*Rational Software Corp. v. Sterling Corp.*, 393 F.3d 276 (1st Cir. 2005) as a case where the court found, after a bench trial, that the parties' course of dealing involving 200 prior transactions, limitation was required and that the cargo interest was on notice of the limitation. However, the record in this case evidencing the course of dealing was described as "far more scant":

> The Court finds it difficult to determine, as a matter of law, that these twelve shipments establish a course of dealing that mitigates against the fact in this record that the bill of lading was not presented until after the shipment.
>
> Clearly, the inference that can be drawn even from these limited number of shipments is that Miami Perfume Junction was on notice of the limitation of liability and had implicit opportunity to alter that course for this particular shipment. On summary judgment, however, the inferences must be drawn in Fireman's favor. Though certainly a close call, we are loathe to find that summary judgment is

warranted where inferences could be reasonably be drawn differently by the trier of fact.

The court considered summary judgment not to be the appropriate vehicle to resolve the issue, leaving it for the trier of fact to make the ultimate decision.

SOMETIMES A SHOTGUN CAN BE A HOUSEHOLD ITEM….

Smallwood v. Allied Van Lines, Inc., 660 F.3d 1115, 2012 AMC 370 (9th Cir. 2011)

Smallwood, a U.S. Citizen, contracted with defendant to ship some of his belongings to the United Arab Emirates (where he was to be employed) and store the remainder in California. Defendant's representative met Smallwood at his home, took notes of which goods were destined for shipment and which were for storage in California and then packed up Smallwood's belongings. The goods were boxed separately but loaded into one truck. Smallwood then moved to the UAE.

Smallwood did not receive a bill of lading; instead he received two forms- one entitled "Local Household Goods Descriptive Inventory" that listed the goods destined for storage and one entitled "Descriptive Inventory" that listed the goods destined for the UAE. After he moved to the UAE, Smallwood received a document entitled "Acceptance of Quotation". The Acceptance of Quotation included an arbitration clause calling for arbitration in accordance with Dubai Chamber of Commerce and Industry Commercial Conciliation and Arbitration Regulations. The Acceptance of Quotation was the last written agreement between the parties before Allied International allegedly shipped some of the storage goods, including the box of firearms, to the UAE. When UAE officials discovered the firearms, Smallwood was arrested when he arrived at the port, later interrogated, imprisoned, convicted of gun smuggling and subject to deportation.

Smallwood filed suit in the California state court and defendants removed the case to Federal court on the theory that the Carmack Amendment preempted Smallwood's state law claims. In Federal court, the defendants moved to dismiss Smallwood's state law claims as preempted by the Carmack Amendment. The district court disagreed in part, dismissing certain counts but giving Smallwood leave to amend his complaint to reinstate these claims under Carmack. The court concluded that the contract claim was preempted only insofar as it related to the agreement to ship his goods to the UAE, not to the extent it related to the agreement to store goods in California. The court found his remaining claims of intentional infliction of emotional distress, defamation and fraudulent deceit not preempted.

Defendants also moved to compel arbitration. The district court found the arbitration clause unenforceable with respect to Smallwood's Carmack claims. Defendants appealed that decision.

On appeal, the defendants argued the Carmack Amendment permits foreign arbitration clauses and the Federal Arbitration Act requires enforcement of the arbitration clause even if it conflicts with the Carmack Amendment.

As to the Carmack Amendment, the court noted its purpose has always been to "relieve cargo owners 'of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods'" and part of the relief guaranteed was "the right of the shipper to sue the carrier in a convenient forum of the shipper's choice". It found Carmack's statutory scheme to be clearly intended to protect shippers from being forced to submit to foreign arbitration as a condition of contracting with a carrier of household goods. Therefore, AVL as a carrier of household goods, was prohibited from contracting around Carmack. The court found, under the plain meaning of the statutes, the shipper cannot be forced to arbitrate claims as a condition precedent to contracting with a household goods carrier. After a dispute arises, the shipper may either accept a carrier's offer to arbitrate or decline arbitration and sue in one of Carmack's enumerated venues. At

the time of contracting, however, a carrier of household goods may not force a shipper to relinquish his right to sue in one of those venues.

In response to defendant's argument that COGSA and the *M/V Sky Reefer* decision permitted foreign forum selection clauses, the court found *Sky Reefer* and COGSA inapposite here:

> Whereas, Carmack explicitly guarantees shippers certain venues to seek recourse against their carriers, COGSA only generally prohibits ocean carriers from using contracts, relieving [their] liability for loss or damages to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability.

The court considered *Sky Reefer* as interpreting COGSA's prohibition on contracts lessening liability to apply only to the liability explicitly covered in COGSA and not to extend to procedural issues affecting the shipper's ease of recovery. Because Carmack expressly prohibited carriers of household goods from contracting around its venue provisions, and because Smallwood did not rely on a general prohibition on lessening carriers' liability, *Sky Reefer* and its interpretation of COGSA was inapposite to the court's interpretation of Carmack.

As to the defendants' argument that the Federal Arbitration Act required enforcement of the arbitration clause, (arguing that the Federal Arbitration Act's mandate in favor of arbitration implicitly repealed Carmack because the FAA was more recently enacted), the court rejected this argument because it found relevant provisions of Carmack were enacted after the FAA and the Convention Act (Convention on the Recognition and Enforcement of Foreign Arbitration Awards). The court noted the FAA was codified in 1925 and the Convention Act was enacted in 1970. Since 1970, the Carmack Amendment has been reenacted twice and materially amended. Carmack was first enacted in 1907 and then reenacted in

1978 and then amended by the Staggers Rail Act of 1980. It was finally reenacted and recodified in 1995:

> Although Carmack as a whole is older than the FAA, the relevant language in Carmack was enacted more recently than the FAA. Thus, we infer that Congress intended Carmack be a minor exception to the FAA.

According to the court, the plain text of Carmack prohibits household carriers from forcing a shipper to agree to arbitrate his claims as a condition precedent to contracting.

The court affirmed the district court's decision, finding the arbitration clause unenforceable.

CRISS-CROSS ISN'T THAT SIMPLE….

Y-TEX Corporation v. Schenker, Inc., 2011 AMC 2512, 2011 WL 2292352, 2011 U.S. Dist. LEXIS 61267 (W.D. Wash. Jun. 8, 2011)

The plaintiff arranged for two shipments to be sent from Wyoming, one to Brazil and the other to Argentina. The shipments were physically weighed, detailed packing lists were prepared and each container was sealed with different numbered seals. The ocean carrier issued bills of lading; however, the destinations were criss-crossed and the Brazilian shipment wound up in Argentina, while the Argentina shipment went to Brazil.

The plaintiff sued the intermediary who arranged for the shipment and the intermediary impleaded the actual carrier. The actual carrier filed a motion to dismiss pursuant to a forum selection clause in its bills of lading.

The intermediary argued that enforcement of the forum selection clauses would lessen the remedies available to it under COGSA because German law does not recognize the doctrine of deviation or the doctrine of false bills of lading.

The court found that COGSA applied and that the central guarantee of COGSA was that terms of a bill of lading should not relieve a carrier of the obligations or diminish the legal duties specified by COGSA.

The court addressed the doctrine of deviation which survived the enactment of COGSA, but noted that courts agree the doctrine should be sharply limited. Nevertheless, it found a carrier is reasonably expected to be aware of its own action, including whether or not it has loaded cargo. Referring to the *Berisford Metals* decision, 779 F.2d 841, 1986 AMC 874 (2d Cir. 1985), the court adopted the reasoning of that decision and found issuing a false bill of lading may be considered as an unreasonable deviation.

The court stated the intermediary had made a compelling argument that the ocean carrier was responsible for verifying the contents before loading the containers and issuing a clean on board bill of lading or, at a minimum, for checking the seal which was visible from the outside. The alleged resulting damage was discharging of the containers at the wrong ports. Accordingly, the court found the intermediary would likely be able to demonstrate an unreasonable deviation.

It went on to consider the impact under German law. It considered an affidavit from a German lawyer experienced in maritime law in Germany to the effect that applicable German law does not recognize the doctrine of deviation or doctrine of false bills of lading. The ocean carrier did not dispute this representation of German law as being inaccurate. It argued that the doctrine of deviation would not affect liability and it will only affect the quantum of recovery. The court disagreed; noting that COGSA "guarantees" that a carrier will not insert in a bill of lading a provision which attempts to avoid its liability for "loss or damage arising from negligence or fault in loading, stowage, custody care, or proper delivery".

The court found if it forced the intermediary to litigate in Germany pursuant to the forum selection clause, the ocean carrier

would likely be relieved of its COGSA obligation. Accordingly, the court found if German law would be applied, it would reduce the ocean carrier's obligation to the intermediary and denied the motion to dismiss.

THOU SHALT NOT IGNORE A TICKING CLOCK…

5K Logistics, Inc. v. Daily Express, 659 F.3d 331, 2012 AMC 1074 (4th Cir. 2011)

Two "tube bundles" were shipped from a warehouse in Pennsylvania to a facility in Maryland. Arrangements were made by a broker who subcontracted with the actual carrier. The relevant bills of lading also incorporated the terms and conditions set forth in the carrier's published tariff which required that claims for damage to cargo to be filed within nine months of delivery and that any lawsuit for cargo damage be filed within two years from the written denial of a claim.

While enroute, one of the two bundles fell off the highway and was damaged. As a result, the consignee refused to accept delivery.

The broker (approximately two and half months later) sent a letter to the actual carrier notifying it that the consignee was claiming some $192,072 for damages to the two bundles and that, in the event it was required to pay, it would seek to recover from the actual carrier. The actual carrier responded approximately two weeks later that it had completed its investigation and that any claims "will be denied."

Approximately two years and nine months after the accident, the consignee commenced an action against the broker and four months later (three years and one month after the accident) the broker filed its answer and filed a third-party complaint against the actual carrier.

The district court granted the consignee's motion for summary judgment finding that the broker was liable for breaching a Master Service Agreement between it and the broker and awarded damages plus fees and costs for a total of $135,973.53. In the third-party action between the broker and the actual carrier, the district court granted summary judgment to the actual carrier on the broker's breach of contract claim and also held that the broker's state law indemnity and contribution claim was preempted by the Carmack Amendment. After a bench trial, the district court rendered a judgment against the actual carrier in favor of the broker.

The district court concluded that the broker had never filed a formal claim as required by the Carmack Amendment and that the limitation period for bringing a lawsuit therefore never began to toll. The district court further concluded that the broker could not have filed a claim for indemnity and contribution against the actual carrier until its liability to the consignee had been fixed so the limitation period did not applied to that claim. The actual carrier appealed.

The court referred to the Carmack Amendment as a "comprehensive exercise of Congress' power to regulate interstate commerce." As a result, the Carmack Amendment has long been interpreted to preempt state liability rules pertaining to cargo carriage, either under statute or common law.

In creating this uniform nationwide scheme of statutory remedies, Congress legislated with "remarkable care", striking a precise balance between the rights of shippers and carriers. The court further noted that Congress narrowly limited application of this section entitled "Apportionment" to "carriers," which was a term expressly defined in the statute. There was no overlap in the statute between "carriers" and "brokers," who are defined as "persons, other than a motor carrier or an employee or agent of a motor carrier."

It was undisputed that the actual carrier's tariff contained statutorily permissible, contractually negotiable minimum time

limitations for a cargo damage claim. It noted that the parties did not challenge the district court's determination that no claim was filed, much less one within the specified window. The broker's claim was merely notice of an intention to file a claim rather than the required claim itself. The court found neither the nine month nor the two year limitations period "both of which were contemplated by statute and incorporated into the contract" was observed. Thus, any suit against the actual carrier under that bill of lading should have been dismissed as time-barred.

As to an argument by the broker that its claim for indemnity and contribution did not arise until the shipper's suit had been reduced to judgment, the court found the Carmack Amendment clearly preempts any state statutory or common law claim for indemnification, a conclusion properly reached by the district court and with which the broker does not disagree.

It stated the broker had every opportunity to protect itself through the terms of its contracts. It also noted that the broker could have negotiated for longer time periods to be included in the bill of lading. The nine month/two year structure of Carmack is a statutory floor and limitation periods under it are terms to be bargained over.

Finally, the broker might have at least attempted to file a protective action. The court said it did not need to opine on the validity or outcome of such precautionary action because, after all, the broker chose not to take it. "It is merely illustrative of the fact that [the broker] is not being unreasonably put upon after exhausting every option to comply with the contract's filing window."

> Where, as here, a broker and carrier have negotiated a bargain within the boundaries of a careful statutory scheme, we cannot ignore the terms of their agreement merely because the broker is subject to an entirely separate contract that gives rise to separate liability.

The court of appeals reversed the judgment in favor of the broker and remanded with directions to dismiss the action.

[16512]

STRICT INTERPRETATION….

St. Paul Travelers Insurance Company Limited v. Wallenius Wilhelmsen Logistics A/S, 433 Fed. App'x 19, 2011 AMC 2701 (2d Cir. 2011)

The subrogated underwriter of a yacht, damaged when a crane toppled over while the yacht was being offloaded, brought an action against the ocean carrier, crane owner and operator and discharging stevedore, seeking to recover some $4,179,938. Defendants moved for summary judgment. The United States District Court for the Southern District of New York granted the motions, dismissing the claims against the crane owner-operator and stevedore and directing that judgment be entered against carrier in amount of $500. The subrogated underwriter appealed.

In a summary order, the court of appeals agreed with the district court that the service contract between the ocean carrier and the shipper's freight forwarder did not cover the yacht in question because the bill of lading for the yacht did not include the service contract number. The service contract itself required its number to be included in any bill of lading to be applicable. The service contract also failed to specify a freight rate for this particular yacht. Additionally, the complaint relied exclusively on the bill of lading to assert jurisdiction in the Southern District of New York; although the service contract provided that all disputes were to be settled through arbitration in London.

The subrogated underwriter also argued that the Himalaya Clause in the bill of lading would not cover the crane operator; however, the circuit court did not reach the arguments put forward because any action against the crane operator and the discharging stevedore was precluded by an independent, covenant-not-to-sue clause contained in the bill of lading. The subrogated underwriter forfeited any challenge to the validity of such clause by failing to raise it in the district court and, moreover, abandoned the issue on appeal. Thus, it could not resurrect the claim in post-argument filings.

As to the ocean carrier, the circuit court considered "in the absence of any contrary evidence, the bill of lading's unambiguous statements that the "No. of units or packages" is "1" and that the "Total no. of containers or packages received by the Carrier" was also "One", evidenced the parties' intent that the yacht was to be treated as a single package.

The decision of the district court dismissing the claims against the crane operator and stevedore and limiting the ocean carrier's liability to $500 was affirmed.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

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

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UPDATE ON THE IMPLEMENTATION OF THE CRUISE VESSEL SECURITY AND SAFETY ACT OF 2010 (CVSSA)

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In July of 2010, Congress enacted the Cruise Vessel Security and Safety Act of 2010 (CVSSA), 46 U.S.C. §§ 3507, 3508 (the "Act"). This Act applies to all passenger vessels that are authorized to carry at least 250 passengers, have onboard sleeping facilities for each passenger, are on a voyage that embarks or disembarks passengers in the United states and are not engaged in a coastwise voyage. 46 U.S.C. § 3507(k)(1). The Act was designed to improve vessel security and safety based upon findings by Congress that "[p]assengers on cruise vessels have an inadequate appreciation of their potential vulnerability to crime while on ocean voyages, and . . . lack the information they need to understand their legal rights or to know whom to contact for help in the immediate aftermath of the crime." See Congressional Findings, Pub. L. No. 111-207 §2, 124 Stat. 2243 (2010).

In implementing the Act, Congress set forth various vessel design, equipment, construction and retrofitting requirements. 46 U.S.C. § 3507(a). The Act imposes guidelines for video recording, 46 U.S.C. § 3507(b), requirements for making safety information available to passengers, 46 U.S.C.A. § 3507(c), specific duties for dealing with sexual assaults including the availability of medical care and access to properly trained professionals, 46 U.S.C. § 3507(d) and (e), and restrictions governing crewmember access to passenger staterooms, 46 U.S.C. § 3507(f). In order to assist in

developing reliable crime related data and making the information available to the public, the Act also includes reporting guidelines and records maintenance requirements. See 46 U.S.C. § 3507(g). The Act also establishes mandates for crime scene preservation training for passenger vessel cruise members. 46 U.S.C. § 3508.

In order to implement these new requirements, the Act empowers the Secretary of Transportation to develop and issue any necessary "guidelines, training curricula, and inspection and certification procedures . . . ." 46 U.S.C. §§ 3507(i), 3508(a). The United States Coast Guard has since issued CG-543 Policy Letter 11-09 for the purpose of "provid[ing] guidance to the U.S. Coast Guard inspectors for compliance verification of CVSSA requirements by cruise vessels during the course of scheduled safety and security inspections." While this Policy Letter is not a rule or a substitute for applicable legal requirements, it represents the Coast Guard's current thinking on this topic and can assist the industry and the general public in applying statutory and regulatory requirements.

This Policy Letter describes in detail how a Port State Control Officer (PSCO) shall examine a vessel to ensure compliance. This includes spot check measurements to ensure proper railing heights and placement of peepholes. For example, it notes that peepholes in compliance should be constructed of metal housing, be made of glass and limited to a frame outside diameter of not more than 1 inch (25 mm). It also discusses other spot checks, such as to ensure that the vessel's security guide is available to passengers in their staterooms and posted in areas readily accessible to the crew.

In addition to spot checks, the Policy Letter recommends that the PSCO also question shipboard medical personnel to ensure compliance with their credentialing, proper documentation of incidents and maintenance of adequate and in-date supply of medications. For example, it directs the PSCO to ask questions such as "Does the ship maintain an adequate and in-date supply of anti-retroviral medications and other medications designed to prevent sexually transmitted diseases?" or " Does the patient have free and immediate access to contact information for specified law

enforcement authorities and national assault sexual hotlines?" (A complete copy of this Policy Letter can be obtained on the USCG website or at Leesfield.com.)

As required by the Act, in July of 2011 the USCG, U.S. Merchant Marine Academy and the FBI have issued a Model Course CVSSA 11-01 entitled *Crime Prevention, Detection, Evidence Preservation and Reporting*. This provides a detailed course outline and teaching syllabus to be used in training personnel to obtain the certification as required under 46 U.S.C. § 3508. Within two years of the issuance of the standard, ship owners/operators are required to have at least 1 crewmember onboard who is certified as having successfully completed this training. (A complete copy of the Model Course can be obtained on the USCG website or at Leesfield.com)

The Act also requires the reporting of crime statistics. 46 U.S.C. § 3507(g)(4)(A). As of January 1, 2010, crime statistics for the major cruise lines have been posted on the USCG website. (A complete copy of the crime statistics can be obtained on the USCG website or at Leesfield.com)

Interpreting the scope and mandates of the new requirements under the Act will likely produce a wave of litigation as many questions have been raised. For example, will the new requirements change the duty of care owed by the cruise operator to their passengers?

One longstanding principle under maritime law is that a ship owner cannot be held vicariously liable for the negligence of the ship's medical doctor under the theory of respondeat superior. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1988 AMC 2650 (5th Cir. 1988). This holding is based upon the rationale that cruise ship owners are not required to have doctors aboard their vessels. Now, however, the Act requires ships under its auspices to carry a medical provider. Accordingly, the question now arises whether this statutory change will also remove the rationale for the existing rule of non-liability. This is only one of many questions that will likely arise in the future as a result of the changes in the law imposed by the new Act, which will have to be answered over time.

ELEVENTH CIRCUIT LIMITS APPLICATION OF PRIOR OPINIONS PRECLUDING ARBITRATION OF SEAMEN'S SUITS

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In a long awaited opinion, the Eleventh Circuit reinforced its prior adherence to the enforceability of arbitration provisions in seamen's contracts, while significantly limiting the effect of its prior decision invalidating such clauses where they precluded a seaman from seeking recovery under a statutorily defined remedy. In *Lindo v. NCL (Bahamas), Ltd*., 652 F.3d 1257, 2012 AMC 409 (11th Cir. 2011), a 2-to-1 panel decision of the Eleventh Circuit held that arbitration provisions were enforceable even as to statutory claims, such as those arising under the Jones Act.

Previously, the Eleventh Circuit had followed the Fifth Circuit's earlier recognition of the validity of such provisions in *Bautista v. Star Cruises*, 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005). Subsequently, however, the court cast some doubt on the ultimate enforceability of such clauses in its later opinion in *Thomas v. Carnival Corp*., 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009), in which it refused to give effect to an arbitration agreement which would have precluded the plaintiff's statutory Seaman's Wage Act claim by requiring the application of Panamanian law. In a lengthy opinion, the majority sought to harmonize its prior decisions.

Lindo, a crew member aboard NCL's NORWEGIAN DAWN, injured his back while performing duties during a shoreside excursion on one of the company's private islands. After Lindo filed suit in state court seeking recovery under the Jones Act, NCL removed the case to federal court based upon the provision in its Collective Bargaining Agreement requiring that all personal injury claims, including those asserted under the Jones Act, were to be exclusively resolved by arbitration under the auspices of the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("Convention").

Following the removal, Lindo dropped all of his claims except for those arising under the Jones Act and sought to remand the action back to state court. Since the CBA further provided that the substantive law to be applied to the arbitration would be that of the flag state, Lindo argued that he would be deprived of his statutory Jones Act cause of action and instead be relegated to the remedies provided by Bahamian law. As a result, Lindo contended that the arbitration clause was void as against public policy, because it operated as a prospective waiver of his Jones Act claim under the rationale previously utilized by the court in *Thomas*. In a contentious 2-to-1 opinion, the Eleventh Circuit panel rejected Lindo's arguments and held that such public policy defenses could only be raised after the arbitration at the award enforcement stage.

The majority opinion focused upon the concept that the Convention contemplates "two stages of enforcement," which each have separate defenses. The first stage relates to the court's power to compel arbitration in the initial instance and the second arises thereafter in the form of an action to confirm an arbitration award. The defenses to the first stage (compelling arbitration) are contained in Article II, which require the court to compel arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." 9 U.S.C. § 206. The majority reiterated the proposition asserted in *Bautista* that this "null and void" defense was confined to "standard breach-of-contract defenses" and that it therefore encompasses only those situations "such as *fraud, mistake, duress and waiver*," that can be applied *neutrally on an international scale*." (emphasis by the court). It further reiterated the statement contained in *Bautista* that economic hardship and unconscionability arguments are not available defenses under Article II of the Convention at the initial arbitration stage.

Article V, on the other hand, sets forth seven defenses, which are applicable for courts to consider in determining whether to *recognize* and *enforce* the arbitral award. Therefore, the majority held that these seven defenses apply only at the later "award enforcement stage."

In analyzing Lindo's claims in this context, the court concluded that the "public policy" defense was only contained in Article V of the Convention and therefore only applies at the award-enforcement stage. As a result, it held that the issue of whether the arbitration clause violated public policy by precluding a seaman from recovery under the Jones Act could not be raised as a defense to requiring arbitration in the first instance, but only afterwards when one of the parties sought to enforce the award.

In retrospectively analyzing its prior opinion in *Thomas*, the majority viewed its prior decision as crafting "a new public policy defense, providing that arbitration is unenforceable if foreign law applies because the plaintiff cannot assert U.S. statutory claims." Since the arbitration agreement itself in *Thomas* expressly provided that Panamanian law would apply, the court viewed its prior decision as limited to those situations where there is no possibility that U.S. law will apply and there is a lack of later review, which would deprive the seaman of having the opportunity to raise the Convention's affirmative defenses at the later "award-enforcement stage."

In its strict holding, Lindo did not significantly digress from the court's prior two-stage approach adopted in its original *Bautista* case. In its broader sense, however, the majority opinion sought to emasculate the effect of the earlier opinion in *Thomas* by strongly criticizing its holding and rationale. In this regard, the majority went so far as to state "to the extent *Thomas* allowed the plaintiff seaman to prevail on a new public policy defense under Article II, *Thomas* violates *Bautista* and our prior panel precedent rule." It also attacked *Thomas'* rationale concluding that it had violated the Supreme Court's prior "admonition that a court should not speculate about arbitration outcomes at the initial arbitration-enforcement stage."

The panel's criticism of the plaintiff's public policy defense, however, was also not limited to merely its timing and instead went to its very substance. Although noting that there were differences between recovery under the Jones Act and Bahamian law, the panel

concluded that they were not sufficiently different to deprive the plaintiff of an adequate remedy. In this regard, the panel concluded that prior Supreme Court cases had set down the following rules:

> (1) U.S. statutory claims are arbitrable, unless Congress has specifically legislated otherwise;
>
> (2) choice–of–law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law; and
>
> (3) even if the contract expressly states that foreign law governs . . . courts should not invalidate an arbitration agreement at the arbitration-enforcement stage on the basis of speculation about what the arbitrator will do, as there will be a later opportunity to review any arbitral award.

The dissent, written by Judge Rosemary Barkett, took strong issue with the main points set forth by the majority. Judge Barkett argued that prior U.S. Supreme Court decisions, particularly *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, n.19 (1985), had set forth the principle that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." Accordingly, Judge Barkett argued that *Thomas* had been correctly decided and should be given its stated effect.

The dissent further questioned the logic of requiring a seaman to wait until after arbitration had been completed in order to raise public policy defenses, terming the wasted time and expense as "needless." Judge Barkett further argued that requiring a seaman to wait until after arbitration might operate to prevent him from having any remedy whatsoever. Finally, Judge Barkett argued that

the differences between recovery under the Jones Act and Bahamian law were sufficient to deprive the seaman of his statutory remedy.

In a subsequent decision, another panel of the Eleventh Circuit cast additional doubt on the continued viability of *Thomas* in a case involving the rape of a female crew member by a group of male co-workers. *See Doe v. Princess Cruise Lines, Ltd*., 657 F.3d 1204, 2012 AMC 342, n.14 (11th Cir. 2011). The crew member alleged that her male co-workers gave her a drink spiked with a date rape drug rendering her unconscious, after which she was raped by multiple individuals. It was further alleged that "when she reported to the officials of the cruise line what had happened to her they treated her with indifference and even hostility, failed to provide her with proper medical treatment on board, and interfered with her attempts to obtain medical treatment and counseling ashore."

Subsequently, a 10 count complaint was filed against Princess in which the first 5 counts were based upon violations of the Jones Act, doctrine of unseaworthiness, failure to provide maintenance and cure and wage statute violations. The remaining 5 counts included claims based upon false imprisonment, intentional infliction of emotional distress, spoliation of evidence, invasion of privacy and fraudulent misrepresentation as a result of the alleged actions of the cruise line subsequent to the plaintiff's report that she had been raped. In reliance upon the Fifth Circuit's decision in *Jones v. Halliburton*, 583 F.3d 228 (5th Cir. 2009), which refused to require one of the defense contractor's employees to arbitrate claims involving very similar facts, the district court denied the cruise line's request for arbitration of all 10 counts.

The Eleventh Circuit upheld the district court's conclusion that the last 5 counts were not subject to arbitration under the specific clause in question, which provided for arbitration of "any and all disputes, claims, or controversies whatsoever . . . relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company . . . ." The court concluded that these later claims "do not arise from, do not relate to, and are not connected with the parties' Crew Agreement."

In this regard, the court noted that each of these claims could have been brought by a passenger, as well as a crew member, unlike the first 5 claims, which were based upon remedies particular to seamen. Accordingly, it went on to hold that the 5 claims based upon seamen's remedies arose out of the plaintiff's employment and were subject to arbitration.

Although the court specifically did not address the issue of whether the arbitration clause as to these 5 counts would be pre-empted by its prior decision in *Thomas*, it noted in a footnote that it's more recent opinion in *Lindo* had called the parameters of *Thomas* into question.

CASE LAW UPDATE

JONES ACT

CSX Transportation, Inc. v. McBride, 131 S. Ct. 2630, 2011 AMC 1521 (2011)

In a contentious 5-to-4 decision, the United States Supreme Court reaffirmed the applicability of the reduced standard of causation for F.E.L.A. cases, which is equally applicable to seamen under the Jones Act. Section 1 of the F.E.L.A. provides that all railroads shall be liable for damages to their employees for injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier …. " 45 U.S.C. § 51.

In the landmark decision of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), the Supreme Court upheld the use of a jury instruction containing the statutory language to define the plaintiff's burden on causation. Over the next 50 years, a continuous stream of unbroken federal court decisions thereafter held that the standard for causation under the F.E.L.A. (and Jones Act by extension) differed from the stricter proximate cause standard established by the common law.

In *McBride*, the railroad argued that these decisions misconstrued both the F.E.L.A. and the court's prior decision in *Rodgers*. The railroad argued that Congress's reference to injuries resulting in whole or in part from the negligence of the railroad was to be read in conjunction with its simultaneous elimination of contributory negligence. Therefore, it claimed that this phrase referred to liability where there was concurrent negligence between the employer and employee under the then newly adopted principles of comparative negligence. The majority of the Court rejected this argument, concluding that *Rodgers* had gotten it right the first time in determining that Congress had intended to establish a reduced standard of causation in F.E.L.A. (and Jones Act) cases, because of the particular hazards and risks faced by railroad workers (and seaman).

Barrette v. Jubilee Fisheries, Inc., 2012 AMC 1062, 2011 WL 3516061, 2011 U.S. Dist. LEXIS 89514 (W.D. Wash. Aug. 11, 2011)

In a departure from long recognized law, the court concluded that while a seaman's wife could not maintain a loss of consortium claim under the Jones Act, such a claim was not precluded under the doctrine of unseaworthiness. In *Miles v. Apex Marine Corp*., 498 U.S. 19, 32-33 (1990), the Supreme Court held that limitations on recovery under the Jones Act apply equally to claims asserted under the doctrine of unseaworthiness, "since it would be inconsistent with this Court's place in the constitutional scheme to sanction more expansive remedies for the judicially created unseaworthiness cause of action, in which liability is without fault, than Congress has allowed in cases of death resulting from negligence." The district court in *Barette*, however, concluded that the Supreme Court's more recent decision in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561 (2009) "drastically limited the scope of *Miles*, leaving this court free to award remedies in general maritime claims beyond the remedies available under the Jones Act." Accordingly, it concluded that *Townsend* was to be read to preserve common law maritime remedies, which existed prior to the adoption of the Jones Act.

Barclay v. Cameron Charter Boats, Inc., No. 2:09 CV 462, 2011 WL 2690399, 2011 U.S. Dist. LEXIS 72502 (W.D. La. Jul. 5, 2011)

In a suit brought by a cook, who was injured when he tripped over an extension cord that had been used to run electricity into the galley of the vessel after an electrical breaker failed, the court concluded that sufficient facts existed for the plaintiff's Jones Act claim to go to the jury, however, granted summary judgment in favor of the defendant on his accompanying unseaworthiness claim. The court reasoned that the alleged negligent act was in placing the extension cord in the walkway of the galley, which was a single isolated one, regardless of the length of time that it had remained. As a result, it relied upon the line of cases holding that acts of operational negligence will not give rise to an unseaworthiness claim. *See, e.g., Usner v. Luckenbach Overseas Corp*., 400 U.S. 494 (1971).

MAINTENANCE AND CURE

Giron v. Americas Marine Management Services, Inc., 62 So. 3d 1141 (Fla. 3d Dist. Ct. App. 2011)

An intermediate Florida state appellate court, which hears many cruise line cases, concluded that while a shipowner could seek to require a seaman to undergo a compulsory physical examination under the Florida Rules of Civil Procedure (Rule 1.360), it could not compel such an examination under the principles of maintenance and cure.

JURISDICTION OVER THE PERSON

Colindres v. Port City Steamship Services, Inc., No. 10-23321-CIV-Cooke, 2011 WL 1458088, 2011 U.S. Dist. LEXIS 44102 (S.D. Fla. Apr. 15, 2011)

In a suit brought by a Florida seaman against a Michigan shipowner, which operated its vessels in the Great Lakes, the court

held that there was a lack of personal jurisdiction to maintain suit in Florida, even though payments for maintenance and cure were due to be made to the Plaintiff in state. The court held while the obligation to make such payments might satisfy Florida's long arm statutes, the seaman was still required to establish the existence of sufficient minimum contacts to maintain jurisdiction. In support of this conclusion, the court noted that there were only three contacts with the state of Florida, which it found were insufficient to constitute minimum contacts: (1) a phone call to the SIU Union Hall in Fort Lauderdale, (2) an email to an employee of the Union Hall and (3) a subsequent telephone call to confirm receipt of the email. Significantly, the court observed that none of these contacts gave rise to Plaintiff's cause of action.

SERVICE OF PROCESS

Balachander v. NCL (Bahamas) Ltd., 800 F. Supp. 2d 1196 (S.D. Fla. 2011)

Service upon a ship's physician in a case pending in federal court may be made in compliance with Rule 4(f), which provides for service "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt." *See* Fed. R. Civ. P. 4(f)(2)(C)(ii).

SHORE EXCURSIONS

Belik v. Carlson Travel Group, Inc., No. 11-21136-CIV-Altonaga/ Simontan, 2011 WL 2221224, 2011 U.S. Dist. LEXIS 60337 (S.D. Fla. Jun. 6, 2011)

The plaintiff sailed on a cruise aboard the CARNIVAL VALOR, which had been organized by the defendant Carlson Travel Group for the tour operator SinglesCruise. During the course of the SinglesCruise trips, the operator would offer certain "exclusive events", put on by "professional cruise directors." One such event was the "Cozumel Beach Party Excursion," which took place at Señor Frogs restaurant and bar.

According to the complaint, the "event" was advertised as having a "waterslide directly into the ocean and unlimited drinks for 2 solid hours." It was further alleged that patrons were "allowed and encouraged to slide, jump and dive into the waters below the seawall on and surrounding the Señor Frogs premises." The complaint also claimed that while the water around the restaurant was "deceptive" in that it appeared "deeper than it actually was," there were no warnings regarding the dangers from participating in these activities. The plaintiff was injured when he dove off of the seawall surrounding the restaurant and broke his neck in the shallow water.

In denying Carnival's motion to dismiss the passenger's negligence claim, the court rejected the argument that the plaintiff was merely seeking to hold the carrier liable for failure to warn of the shallow water, which was an open and obvious condition. After holding that the issue of whether the hazard was open and obvious was a question of fact for the jury, the court went on to further state that even if the danger was open and obvious, this is not a total bar to recovery. In reliance upon Florida's state law, the court concluded that when a person is engaging in a non-contact sport such as diving, the issue of whether the condition is open and obvious goes to comparative negligence, so long as "the elements of the tort have been proven."

The court also added to the growing list of opinions which impose a duty to warn upon a cruise ship for known specific conditions and dangers occurring off the vessel in places where passengers are expected to visit. *See, e.g., Carlisle v. Ulysses Line Ltd. S.A.,* 475 So. 2d 248, 1986 AMC 694 (Fla. 3d Dist. Ct. App. 1985); *Koens v. Royal Caribbean Cruises, Ltd.*, 774 F. Supp. 2d 1215, 2012 AMC 721 (S.D. Fla. 2011).

Joseph v. Carnival Corp., No. 11-20221-CIV-Huck/Bandstra, 2011 WL 3022555, 2011 U.S. Dist. LEXIS 80238 (S.D. Fla. Jul. 22, 2011)

In another case refusing to impose liability upon a carrier for injuries occurring during a shoreside activity which it had not promoted, the court dismissed the claim of the plaintiff who had been injured in a parasailing accident that occurred in Cozumel. Although recognizing the principle that port stops are "the sine qua non of the cruise," the court followed earlier decisions which have held that the carrier has no duty to warn a passenger of dangers in a port, unless it has knowledge of the specific danger which caused the plaintiff's injury. As a result, the court concluded that the cruise line had no legal duty to warn the passenger of the potential dangers of parasailing "in general," when it had no relationship to the specific vendor involved.

EXPERTS

In December of 2010, significant changes were made to Federal Rule of Civil Procedure 26 regarding discovery directed to experts. The most significant changes are that draft reports and most correspondence with an expert are now protected from disclosure as work product. See Fed. R. Civ. P.26 (b)(4)(B)(C). Under the newly amended rule, the only correspondence with the expert that is now discoverable is that which:

(1) relates to compensation for the expert's work,

(2) identifies facts or data that the party's attorney provided and that the expert considered in formulating the opinions to be expressed, and

(3) identifies assumptions that the party's attorney provided and that the expert relied on in formulating the opinions to be expressed.

Rosenfeld v. Oceania Cruises, Inc., 654 F.3d 1190, 2011 AMC 2838 (11th Cir. 2011)

The Eleventh Circuit reversed the trial court's rejection of the plaintiff's "slip and fall expert" in an opinion suggesting a more restricted gate-keeper role for the trial court in performing its *Daubert* analysis. While noting that the expert must meet the *Daubert* criteria, the Eleventh Circuit went on to further hold "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence. . . quite the contrary, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." As a result, the court concluded that "a qualified expert who uses reliable testing methodology" should be permitted to testify as to the defendant's choice of floor surface based upon a comparison of coefficients of friction.

Samuels v. Holland American Line-U.S.A., Inc., 656 F.3d 948, 2011 AMC 2441 (9th Cir. 2011)

The Ninth Circuit took a somewhat different tack from its sister court by upholding the exclusion of the plaintiff's experts in a case where a passenger was seriously injured by turbulent wave action on a beach during a port stop. At the time of the accident, the passenger was swimming in a beach that he had selected, which was not part of a ship's sponsored excursion. Nevertheless, the suit claimed that the cruise line should have been aware of the dangerous currents and advised its passengers of the currents. In support of this claim, the plaintiff produced experts, who testified that it was common knowledge in the industry that portions of the beach were extremely dangerous. Upon deposition, however, the experts were unable to provide any specific evidence documenting their opinions or the existence of prior similar accidents. Accordingly, the court concluded that the expert's opinions were merely unsupported conclusions and struck them.

PUNITIVE DAMAGES

Lobegeiger v. Celebrity Cruises, Inc., 2012 AMC 202, 2011 WL 3703329, 2011 U.S. Dist. LEXIS 93933 (S.D. Fla. Aug. 23, 2011)

In a very significant decision, the district court concluded that the Supreme Court's decision in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561 (2009), which had upheld the application of punitive damages in the maintenance and cure context, also permitted the award of punitive damages in a passenger claim where the carrier's conduct was "wanton, willful or outrageous." The court construed *Atlantic Sounding* as holding "punitive damages are available as damages in all actions under general maritime law unless specifically limited by Congress." Lobegeiger, 2012 AMC at 213, 2011 WL 3703329, at *6, 2011 U.S. Dist. LEXIS 93973, at *19. *But c.f. Boney v. Carnival Corp.,* No. 08-22299 - CIV - Seitz/ O'Sullivan, 2009 WL 4039886, 2009 U.S. Dist. LEXIS 113879 (S.D. Fla. Nov. 20, 2009). Accordingly, the court went on to further conclude that the opinion in *Atlantic Sounding* had rendered invalid the Eleventh Circuit's prior conclusion that punitive damages were not recoverable under general maritime law in *In Re: Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997).

In Re: Oil Spill by the Oil Rig "Deep Water Horizon", 808 F.Supp. 2d 943, 2011 AMC 2220 (E.D. La. Sept. 30, 2011)

In an extensive opinion covering many different issues arising out of the Deep Water Horizon oil spill, the district court utilized the same rationale as the court in *Lobegeiger* to conclude that the U.S. Supreme Court's earlier decision in *Townsend* recognized the existence of punitive damage claims under general maritime law, except where expressly prohibited by an act of Congress.

MEDICAL MALPRACTICE

Lobegeiger v. Celebrity Cruises, Inc., 2012 AMC 202, 2011 WL 3703329, 2011 U.S. Dist. LEXIS 93933 (S.D. Fla. Aug. 3, 2011)

The court upheld the plaintiff's apparent agency claim against a cruise line for the medical malpractice of its ship's doctor at the pleading stage based upon the allegations that the carrier had held out the doctor as an officer of the ship's crew, including his use of an officer's uniform, a ship's name tag, medical forums containing the company's logo and the provision of living quarters aboard the vessel. The court further rejected the cruise line's argument that the disclaimer of responsibility for the ship's physician contained in the passenger's ticket was sufficient as a matter of law to prevent the plaintiff from stating a cause of action for apparent agency at the pleading stage.

Balachander v. NCL (Bahamas) Ltd., 800 F. Supp. 2d 1196 (S.D. Fla. 2011)

The court construed the "so-called *Barbetta* rule", which precludes a carrier from being held vicariously liable for the negligence of a ship's physician under respondeat superior, to include all forums of vicarious liability, including apparent agency, joint venture and agency by estoppel. *See also Wajnstat v. Oceania Cruises, Inc.*, No. 09-21850-CIV-Cooke/Turnoff, 2011 WL 465340, 2011 U.S. Dist. LEXIS 76058 (S.D. Fla. July 14, 2011). *But see contra Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 2005 AMC 2971 (S.D. Fla. 2005)(allowing apparent agency claim); *Hajtman v. NCL (Bahamas) Ltd.,* 526 F. Supp. 2d 1324, 2008 AMC 1145 (S.D. Fla. 2007)(allowing apparent agency claim); *Suter v. Carnival Corp.*, 2007 AMC 2564, 2007 WL 4662144, 2007 U.S. Dist. LEXIS 95893 (S.D. Fla. Jul. 20, 2007)(apparent agency).

PASSENGER EXPULSION

Johnson v. Holland America Line, No. C11-0435JLR, 2011 WL 2976886, 2011 U.S. Dist. LEXIS 79585 (W.D. Wash. Jul. 21, 2011)

The decision of a ship's captain as to the expulsion of passengers for participating in a fight with other passengers is not to be judged by whether the decision was the correct one, but rather whether it was reasonable under the circumstances.

DISCOVERY

Balu v. Costa Crociere S.P.A., No. 11-60031-CIV-Ungaro/Torres, 2011 WL 3359681, 2011 U.S. Dist. LEXIS 85299 (S.D. Fla. Aug. 3, 2011)

The court reiterated the well-recognized rule that a defendant, who has not asserted any claims in the forum of the litigation, has the right to insist upon being deposed in its home forum where it is headquartered. This rule applies to corporate representatives as well as individuals.

Although various exceptions to this rule were spelled out by the court in its opinion, it concluded that none of them were applicable, particularly since the depositions could be taken "inexpensively by internet video (e.g. Skype) or through somewhat more expensive, but still efficient video-conferencing facilities." In the event that the plaintiff chose to utilize such means, the court held that it was permissible for the court reporter back in Miami to swear in the oversees witness using the video transmissions, so long as reliable identification information was transmitted by the witness prior to the start of the deposition.

DOHSA

Balachander v. NCL (Bahamas) Ltd., 800 F. Supp. 2d 1196 (S.D. Fla. 2011)

The court applied DOHSA to the death of a passenger who nearly drowned while swimming at the beach of the cruise line's private island and subsequently died 11 days later as a result of complications from the incident. Although the plaintiff had filed separate counts against the cruise line seeking to distinguish its liability as the operator of the vessel from its liability as the operator of the beach resort, the court refused to accept "this distinction between torts committed at sea and torts committed during a cruise ship stop at a port of call . . . ."

The court also rejected the plaintiff's claim that 46 U.S.C. § 3036 (f/k/a 46 U.S.C. § 764) allowed the plaintiff to assert Bahamian law which covered the resort. The court concluded that this section, which allows for the supplementation of DOHSA by foreign law, is inapplicable "once a court determines that U.S. law governs an action." *See also Dooley v. Korean Airlines Co., Ltd*., 117 F.3d 1477, 1485, 1998 AMC 178, 189 (D.C. Cir. 1997).

ADMIRALTY JURISDICTION

In Re: Oil Spill by the Oil Rig "Deep Water Horizon", 808 F. Supp. 2d 943, 2011 AMC 2220 (E.D. La. 2011)

In sorting through the applicability of federal maritime, state and federal statutory law to be applied to the various claims arising from the Deep Water Horizon disaster, the court reiterated the principle that "with admiralty jurisdiction comes the 'application of substantive admiralty law.'" As a result, it concluded that where both the Outer Continental Shelf Lands Act and general maritime law both apply, "the case is to be governed by maritime law."

COMMITTEE ON FISHERIES

Chair: Keven J. Thornton
Editor: Terence G. Kenneally

FISHERIES CASE BRIEFS

December 2011

City of New Bedford v. Locke, CV No. 10-10789-RWZ, 2011 WL 2636863, 2011 U.S. Dist. Lexis 70895 (D. Mass. June 30, 2011).

Parties

The Department of Commerce introduced a trio of rules and regulations, Amendment 16, Framework 44, and the sector operations rule (collectively "A16"), that regulate fishing off the coast of New England and the mid-Atlantic states. The City of New Bedford along with other parties (collectively the "New Bedford Plaintiffs") challenged A16 and one of the Plaintiffs filed a similar suit in the District of New Jersey. The NJ suit was consolidated with the New Bedford litigation. The Secretary of Commerce (the "Secretary"), the National Oceanic and Atmospheric Administration and its administrator, and the National Marine Fisheries Service ("NMFS") (collectively the "Agency"), are named as defendants, joined by intervenor the Conservation Law Foundation, Inc.

Regulation at Issue

The three measures collectively referred to as Amendment 16 constitute the Agency's revisions to the New England Fisheries Management Plan [NEFMP] to restore these overfished stocks to health. A key part of this amendment, and a focal point of contention in this lawsuit, is an expansion and revision of the "sector" program introduced in A13. Sectors are an alternative to days-at-sea effort controls, whereby a group of fishermen jointly form a sector and are collectively assigned a catch limit called an "Annual Catch Entitlement" ("ACE"). Fishermen who do not join sectors continue

to operate in the "common pool," subject to days-at-sea constraints. For two stocks, Amendment 16 also considers the annual catch of recreational fishermen.

Under Amendment 16, each multispecies fishery permit holder is allocated a "potential sector contribution" ("PSC") based upon its landings history. This is a proportional measure of the vessel's landing history relative to the total landings over a given period of time for each stock. PSC is not a limit on how much a permit holder can catch. If permit holders choose to join a sector, their PSCs are aggregated to constitute the sector's ACE, a proportion of the total "Annual Catch Limit" ("ACL") for the entire commercial fishing sector which *is* a cap on annual harvest. ACE may be traded between sectors. Sectors operate under various reporting requirements to ensure they do not exceed their ACE.

Plaintiffs disputed the Agency's conclusion that Amendment 16 does not create either a limited access privilege program ("LAPP") or an individual fishing quota ("IFQ"), two labels appearing in the MSA statute which, if applicable, trigger certain procedural and substantive protections.

Analysis and Holding

The court held "that the Agency's conclusion that Amendment 16 implements neither a LAPP nor an IFQ, reached as part of the rulemaking process, is manifestly contrary to statute." The agency reasoned that fishermen are issued permits with an associated PSC, but that the PSC never operates as a limitation on how much the permit holder may catch and only acquires meaning when aggregated with other PSCs in a sector. While a sector is, arguably, limited by an ACE to a quantity of fish within the meaning of the LAPP and IFQ definitions, sectors are "temporary, voluntary, fluid associations of vessels" that are not issued permits. Accordingly, there is no "permit ... to harvest a quantity of fish."

The permit and the quantity limitation are assigned to different entities, but plaintiffs responded that it is a distinction

without a difference: fishermen will, as a practical matter, be limited to the PSC they bring to a sector, making it a *defacto* quantity limitation, and to the extent a sector is so limited by regulation, it is the equivalent of a permit. The effect on small-scale fishermen, plaintiffs reasoned, will be the same, and as the referendum requirement evidences a concern for these individuals, the sector program should be considered a LAPP. The Agency viewed the sector program as introducing flexibility compared to a quota or days-at-sea approach because input/effort restrictions are lifted and permit holders can allocate ACE however they prefer within a sector or transfer ACE between sectors.

The court is bound by the Agency's informed conclusion, reached at Congress' express direction after an extended and formal administrative process including a notice-and-comment period. The court concluded that the Agency's position that Amendment 16 is not an IFQ, subject to a referendum, bound the court for the additional reason that the statute excludes "sectors" from the referendum requirement, 16 U.S.C. § 1853a(c)(6)(D)(vi), and the Agency reasonably interpreted the exemption to apply to the A16 sector program. The sector exemption was introduced as part of a 2007 amendment to the MSA, after A13 was implemented. While "sector" is not defined in the statute, the court stated that it was reasonable to infer Congress was referring to the existing A13 sector program, as it was the only sector program then managed by the NEFMC. The court concluded that it was not manifestly contrary to law to construe the "sector" exclusion as a reference to the quota-like limits applicable to these sectors.

Plaintiffs raised a second issue of statutory interpretation. They argued that, contrary to the Agency's position, MSA requires a fishery to be managed only as an aggregate quantity, rather than in respect to individual stocks, when it comes to measuring maximum sustainable yield (MSY) and the determination of overfishing. MSA makes clear that the Agency must manage the health of individual stocks. National Standard 8 identifies "rebuilding of overfished stocks" as a conservation requirement. Id. at § 1851(8). A FMP "shall" contain conservation measures "necessary ... to

prevent overfishing and rebuild overfished stocks," and "may" establish limitations necessary for conservation based on "species." The Secretary is required to notify Congress when a fishery is overfished, and within one year the relevant Fishery Management Council must prepare a plan "to rebuild affected stocks of fish." 16 U.S.C. § 1854(e)(3). The fishery must be rebuilt as quickly as possible, taking into account various factors including "the biology of any overfished stocks of fish," not to exceed 10 years, except where one of several conditions, including "the biology of the stock of fish," dictate otherwise. §1854(e)(4). The Secretary is required to review such a plan at intervals not to exceed two years to determine if there has been adequate progress "rebuilding affected fish stocks." § 1854(e)(7).

The court found that the Agency's interpretation is longstanding and codified in regulation, and deserving of deference. The court supported the Agency's conclusion that the sector program, which is not a conservation measure, would increase fishing efficiency and could ameliorate some of this harm. Furthermore, the court decided that the record showed that the Agency's allocation method was rational.

Martha's Vineyard / Dukes County Fishermen's Ass'n v. Locke, 811 F. Supp. 2d 308 (D. D.C. 2011).

Parties and Background

Plaintiffs Martha's Vineyard/Dukes County Fishermen's Association ("the Association") and Michael S. Flaherty (collectively "Plaintiffs") brought an action challenging the management of river herring and shad along the East Coast of the United States against two sets of defendants: (1) United States Secretary of Commerce Gary Locke, the National Oceanic and Atmospheric Administration ("NOAA"), and the National Marine Fisheries Service ("NMFS" or "Fisheries Service") (collectively, "Federal Defendants"); and (2) the Atlantic States Marine Fisheries Commission ("ASMFC"), along with individual citizens acting in their official capacity as Commissioners of the ASMFC (collectively, "State Defendants").

Plaintiffs were comprised of fishermen and "other active participants in local, state, regional and federal fisheries management, with direct interests in maintaining abundant populations of river herring and shad." The Association alleged that it observed a "drastic decline" in the number of river herring that return to Dukes County. River herring and shad often swim in mixed-stock schools of fish, including Atlantic herring or mackerel. Industrial mid-water trawlers who use small mesh nets to target other species, such as the Atlantic herring or mackerel, regularly catch as bycatch river herring and shad, which are discarded dead at sea. Plaintiffs contended that the decline correlates to the increase of mid-water trawling for herring and mackerel. The Association and its members relied upon the river herring and shad as part of their economic base.

Regulations at Issue

In 1942, Congress approved the ASMFC Compact, an agreement among the fifteen Atlantic coastal states, which formed the ASMFC. The purpose of the Compact is "to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause."

In 1993, Congress adopted the Atlantic Coastal Fisheries Act, 16 U.S.C. §§ 5101–08 (2006), "to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of the Atlantic coastal fishery resources." 16 U.S.C. § 5101(b) (2006).

The Magnuson–Stevens Act was enacted in 1976 "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. §§ 1801(b)(1), (3) (2006).

Analysis

Plaintiffs alleged that the State Defendants violated the Atlantic Coastal Fisheries Cooperative Management Act ("Atlantic Coastal Fisheries Act"), the ASMFC Compact and Charter, and the Administrative Procedure Act ("APA") by failing to adopt adequate measures to protect river herring and shad.

The court held that the ASMFC is not a quasi-federal agency. Furthermore, the ASMFC does not fall within the quasi-federal agency doctrine. Plaintiffs cited to a district court case in the Eastern District of New York, which, relying on *dicta* from cases in the Third and Eighth Circuits, identified three factors to determine whether a compact authority warrants a quasi-federal agency classification: "(1) whether the originating compact is governed, either explicitly or implicitly, by federal procurement regulations; (2) whether a private right of action is available under the compact; and (3) the level of federal participation."

However, Plaintiffs conceded that the originating compact is not governed by federal procurement regulations and that *a private right of action is not available under the compact*, and that, therefore, the analysis depends on the level of federal participation. The Federal Government's participation in the Compact was minimal; its role was simply to support the member States. The Compact itself existed between the contracting States. The Commission is an entity created by and composed of States, and its authority is not federal in nature. Thus, ASMFC is neither a quasi-federal agency nor a federal agency. Therefore, ASMFC was not a federal agency subject to suit under Administrative Procedure Act (APA), and ASMFC was not a quasi-federal agency subject to suit under APA.

Fulton v. Rebecca Irene Vessel, LLC, No. C10-369RSM, 2011 WL 5075644, 2011 U.S. Dist. Lexis 123354 (W.D. Wa. October 25, 2011).

Parties and Factual Background

Plaintiff, Eugene Fulton, brought this seaman's injury action pursuant to the Jones Act, and general maritime law. He alleged that he was injured while working aboard the F/T REBECCA IRENE, owned by defendant Rebecca Irene Vessel, L.L.C., while the vessel was on a fishing voyage in the Bering Sea. Defendant has denied liability for plaintiff's injuries.

F/T REBECCA IRENE fishes for bottom fish by dragging a net on the sea bottom. When the deckhands haul back the net, they may find discarded crab pots caught in the net, along with fish.

As plaintiff attempted to tie a crab pot that got caught in the net, it lifted up and over the rail, swinging toward him. Plaintiff testified that he jumped into a nearby burn basket (used to burn trash on the deck) to escape being hit, but found it too small to provide safety. With the crab pot swinging toward him, he jumped down to the next deck below to escape. Plaintiff tried to land on his feet but his legs gave out. He felt a "little bit" of pain in his right knee and then, when asked by counsel to describe it, said he felt a sharp pain on the inner side. Nevertheless, he got up and went back to work. He did not fill out an injury report until February 15, 2008, when he left the vessel. He testified that he did not realize that this was more than a minor incident until the beginning of the next trip.

Analysis and Holding

The court determined that the plaintiff was a seaman within the meaning of the Jones Act at the time of the incident. However, the court found that he failed to meet his burden of proof that the defendant was negligent. The procedures used aboard the F/T REBECCA IRENE for handling the crab pot were consistent with practice throughout the trawling industry and were safe under usual

conditions, including heavy seas or winds of forty miles per hour. The wave that lifted the crab pot up and carried it over the rail, causing it to swing toward plaintiff, was a highly unusual and unforeseen event over which defendant had no control. As such, it was a "peril of the sea" against which ordinary care and prudence cannot guard. *The court concluded that where the cause of the accident was an act of God or peril of the sea, there can be no finding of negligence*. The court also found that the plaintiff failed to prove that the vessel was unseaworthy. The court concluded, as a matter of law, that the crab pot which came back over the rail did not represent an unseaworthy condition on the F/T REBECCA IRENE.

Barrette v. Jubilee Fisheries, Inc., 2012 A.M.C. 1062, 2011 WL 3516061, 2011 U.S. Dist. Lexis 89514 (W.D. Wa. Aug. 11, 2011).

Parties and Factual Background

Plaintiff Christian Barrette was employed by Jubilee Fisheries, Inc., as a longline deckhand on the F/V ZENITH, which experienced numerous freon leaks due to blown and damaged hoses. (One such incident resulted in the death of the ship's engineer.) Despite higher than normal readings of freon levels, the Captain ordered the crew to continue working for several days before returning to port. As a result, Mr. Barrette began to exhibit symptoms of prolonged exposure to unsafe levels of freon. A respiratory specialist determined that Mr. Barrette had suffered permanent damage to his lungs in the form of chronic dyspnea.

Analysis and Holding

Plaintiff's wife made a claim for loss of consortium. The defendant argued, and plaintiffs conceded, that the Jones Act prohibits recovery for loss of consortium. *See Nygaard v. Peter Pan Seafoods,* 701 F.2d 77, 79 (9th Cir. 1983). Thus, Mrs. Barrette's claim may only attach to the unseaworthiness claim. The defendant argued, however, that recovery for loss of consortium is also unavailable under general maritime law. *Miles v. Apex Marine Corp*., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); and

Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993). The plaintiffs argued that recovery for loss of consortium remains available under general maritime law. They argued that a recent Supreme Court case, *Atlantic Sounding,* drastically limited the scope of *Miles,* leaving this court free to award remedies in general maritime claims beyond the remedies available under the Jones Act.

The court found that the limitation on damages in the Jones Act does not preclude recovery for loss of consortium in an unseaworthiness claim. The court determined that *Townsend* limited the application of *Miles,* and has reined in the "broad reading of *Miles* previously espoused by the lower federal courts." Both the cause of action (unseaworthiness) and the remedy (loss of consortium) existed in general maritime law before the enactment of the Jones Act. *Thus, the Jones Act does not preclude recovery for loss of consortium in an unseaworthiness action*. To the extent that *Smith* is irreconcilable with the reasoning of *Townsend,* the court declined to apply *Smith* to bar Mrs. Barrette's claim and considered itself bound by the reasoning of *Townsend*.

Furthermore, *Miles* sought to limit recovery where general maritime law and the Jones Act necessarily overlapped. *See Miles,* 498 U.S. at 33. The court concluded that because the Jones Act does not necessarily cover an unseaworthiness claim, the uniformity principle espoused in *Miles* did not direct the court to deny recovery for loss of consortium. *Smith* determined that the spouses of Jones Act seamen were limited to damages available under the Jones Act, even if brought under the general maritime law. To the extent that *Smith* holds otherwise, the court found that the reasoning in *Smith* is irreconcilable with *Townsend,* and *declined to apply Smith*.

Because the court determined that *Miles* and *Smith* are not dispositive in this case, and that *Townsend* is binding on the reasoning of this court, application of the analytical framework of *Townsend* was necessary to determine if recovery for loss of consortium remains available in a general maritime action. Engaging in the same analysis, *the court found that loss of consortium damages*

have long been available at common law, and that the common-law tradition allowing recovery for loss of consortium extends to general maritime claims. As such, the court found that *recovery for loss of consortium remained available to Mrs. Barrette, in conjunction with her husband's unseaworthiness claim*. The court held that the Jones Act did not preclude recovery for Mrs. Barrette's loss of consortium claim.

McCarty v. NOAA Fisheries Serv., No. C11-1393, 2011 WL 4571893, 2011 U.S. Dist. Lexis 113211 (W.D. Wash. Sept. 30, 2011).

Parties

Plaintiff is Michael B. McCarty as Chapter 7 bankruptcy trustee of the bankruptcy estate of Northern Orion, Inc., a Washington corporation. The defendant is NOAA.

Factual Background and Regulations:

The rights to fish various species of crab in the Bering Sea and Aleutian Islands are governed by a shifting and often complicated scheme of permits and regulations promulgated by the National Marine Fisheries Service ("NMFS") under the Magnuson–Stevens Fishery Conservation and Management Act ("the Act"). In 2000, fishing rights were allocated through License Limitation Program permits ("LLPs").

In general, the more that a vessel had harvested in the past, the more it would be allotted in the future. To prevent the issuance of permits to dormant vessels, these regulations were amended to require demonstration of a single documented harvest from a qualifying vessel during the Recent Participation Period, between January 1, 1996 and February 7, 1998. The regulations included an exception to the recent participation requirement for vessels that were lost or destroyed, but only if the lost or destroyed vessel were merged with a vessel that had made a documented harvest during the recent participation period. Under these rules, the NMFS issued

Northern Orion, Inc. two LLP permits, one based on the fishing history of the vessel F/V NORTHERN ORION and one based on the fishing history of the vessel F/V ST. MATTHEW, which sank in 1994 (merging it with the recent participation period of the F/V NORTHERN ORION).

The "Crab Buyback Program" was implemented in December 2000, which authorized NMFS to pay vessel owners in exchange for surrendering their LLP permits and permanently revoking all fishery licenses, permits, catch histories, and other privileges issued to the vessel.

Northern Orion, Inc. submitted a bid to sell back the fishing history and LLP license for F/V NORTHERN ORION for $5,150,000. NMFS accepted the bid and, on instruction from Northern Orion, wired the funds to PG Alaska, a creditor of Northern Orion, as partial payment for a debt

Then NMFS made an error. After payment to PG Alaska, F/V NORTHERN ORION's fishing history was supposed to be permanently revoked *including* that vessel's history that had been merged with the LLP license associated with the F/V ST. MATTHEW. This history was not to be used in calculating any future quota share. But *NMFS failed to remove the fishing history of the F/V NORTHERN ORION from the LLP license associated with the F/V ST. MATTHEW.*

When NMFS implemented a new regulatory program in 2005, the Bering Sea and Aleutian Island Crab Rationalization Program, this error had real consequences. The purpose of the new program was to replace the old LLP system with a quota share system. A quota share reflects a fishery participant's percentage share of a fishery, based on past records, rather than a specific amount of crab. As a result of NMFS's earlier error, *Northern Orion was issued a quota share that was based largely on the relinquished fishing history of F/V NORTHERN ORION*. Northern Orion filed for bankruptcy in 2006. Northern Orion's bankruptcy estate received individual fishing quota permits in four successive crab fishing

years, from 2007–2011. In June 2009, NMFS was informed of the erroneous issuance of quota share to Northern Orion and NMFS issued an initial administrative decision revoking the quota share.

Analysis and Holding

This case involves a crab-fishing quota given in error. A plaintiff seeking estoppel against the government must also show "affirmative misconduct going beyond mere negligence;" even then, "estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Id*. In general, courts look for "extreme circumstances" to support estoppel against the government. Here, everything about the erroneous issuance of the quota share appears to be due to a single, simple error. Plaintiffs have made no showing that anyone within the NMFS had any knowledge that Northern Orion's quota share was in violation of the rules. There is no evidence of a "deliberate lie or a pattern of false promises that would satisfy the requirement of affirmative misconduct."

Not only does the MSA make it clear that quota shares are revocable, but the parties agreed that the quota share was issued in violation of the Act. There was no apparent intention in the MSA to limit revocations to specifically enumerated circumstances. Accordingly, NMFS had express statutory authority to revoke quota shares and permits that have been issued in error.

Duckworth v. Locke, 808 F. Supp. 2d 210 (D. D.C. 2011).

Parties

Commercial fisherman (Gregory N. Duckworth, F/V Reaper, Inc., and F/V Twister, Inc.) brought action against the Secretary of the United States Department of Commerce, NOAA, and NMFS, seeking to appeal a final decision of the Secretary regarding Notices of Violation and Assessment and Notices of Permit Sanction issued to plaintiffs for alleged violations of the Magnuson–Stevens Fishery Conservation and Management Act.

Factual Background and Regulations

The first of the eight counts at issue pertained to a claim that Duckworth and F/V Twister, Inc. made a false statement in connection with a fishing permit application in violation of 50 C.F.R. §648.14 (the "False Statement Case"). The remaining seven counts pertained to allegations that Duckworth and F/V Reaper, Inc. unlawfully fished for lobster by leaving lobster traps at sea after their fishing permits were suspended due to a prior federal fisheries violation (the "Lobster Traps Case").

The case was heard by Administrative Law Judge ("ALJ") Michael Devine, who issued an Initial Decision and Order on October 6, 2008, finding that NOAA had established by a preponderance of reliable and credible evidence that plaintiffs had violated federal fisheries laws and regulations by submitting a false statement in a permit application and by fishing for lobsters without a valid permit. The ALJ adopted the sanctions proposed by defendants: a civil penalty of $130,000 and a revocation of operator and vessel permits for Duckworth and F/V Twister, Inc. for the False Statement Case and a civil penalty of $910,000 and a revocation of operator and vessel permits for Duckworth and F/V Reaper, Inc. for the Lobster Traps Case.

A report issued by the Department of Commerce Office of Inspector General ("OIG") on September 23, 2010 entitled "Final Report–Review of NOAA Fisheries Enforcement Programs and Operations." This report presents the results of the *OIG's examination of 27 specific complaints raised by fishermen alleging unfair treatment and overzealous enforcement by NOAA's Office for Law Enforcement ("OLE") and Office of General Counsel for Enforcement Litigation ("GCEL")*. The OIG found that individual enforcement attorneys had significant discretion and only minimal guidance, and the OIG recommended that NOAA strengthen its policy guidance, procedures, and internal controls to address a common industry perception that its civil penalty assessment process is arbitrary and unfair. OIG concluded that the fine assessments and the number of charged violations in the Northeast Region appeared

to be excessive and intended to force respondents into settlement. *The OIG criticized one senior enforcement attorney in the Northeast Region whose statements "foster[ed] a perception of predisposition against certain fishermen and their counsel."*

The OIG identified 19 complaints as appropriate for further review and recommended that NOAA establish an independent process to provide equitable relief in past enforcement cases where appropriate; make appropriate changes to its regulations, policies, procedures, and practices; and/or timely address and remedy employee performance or conduct matters.

According to defendants, the Secretary has decided that the Special Master will not review any complaint related to an enforcement case that has been adjudicated in federal court. NOAA also changed its penalty schedule so as to place the burden of justifying a particular civil penalty or sanction on NOAA rather than on the respondent in cases presented to ALJs. NOAA also reassigned several personnel who were in GCEL's Northeast Region office, including Charles Juliand, the attorney who issued the NOVAs and NOPSs to Plaintiffs. Plaintiffs contend that Mr. Juliand is the senior enforcement attorney referenced in the OIG's September 2010 report. Plaintiffs point to evidence that Mr. Juliand's average penalty assessment for a NOVA was substantially higher than the other enforcement attorneys in the Northeast Region.

Analysis and Holding

Plaintiffs contended that the court should set aside its prior judgment because the final report released by the OIG in September 2010 demonstrated that the enforcement attorney who issued the NOVAs and NOPSs to plaintiffs engaged in prosecutorial misconduct that fundamentally tainted plaintiffs' enforcement action. However, the court was not persuaded by plaintiffs' argument, for two reasons. First, the court concluded that the September 2010 OIG report did not contain any new evidence specifically relating to plaintiffs' enforcement action. Second, the court stated that, even assuming that the enforcement attorney engaged in some form of misconduct,

the ALJ independently concluded that plaintiffs had violated MSA regulations and the NOAA Administrator did not adopt the penalties recommended by the enforcement attorney. Therefore, the court found that the September 2010 OIG report did not call into question the conclusion that the final agency action was supported by substantial evidence.

Oceana, Inc. v. Locke, 670 F.3d 1238 (D. D.C. 2011).

Parties

Oceana, Inc. brought this suit against the National Marine Fisheries Service challenging as unlawful the methodology it uses to track bycatch in the fisheries off the Northeastern coast of the United States.

Factual Background and Regulations

Oceana contends the Fisheries Service has not "established" a standardized by-catch reporting methodology, as the term is used in the Fisheries Act, § 1853(a)(11).

The Magnuson–Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act, 16 U.S.C. §§ 1801–1884 (Fisheries Act), requires the Secretary of Commerce, through the Fisheries Service, to adopt policies that "to the extent practicable," reduce the volume of bycatch, §1851(a), that is, fish that are inadvertently or unavoidably captured by nets or other gear and then discarded, see § 1802(2) (defining bycatch as the "fish which are harvested in a fishery, but which are not sold or kept for personal use"). The Fisheries Act further instructs the agency, in conjunction with eight regional councils, to "establish a standardized reporting methodology to assess the amount and type of bycatch" in each fishery in each region. §1853(a)(11). The councils then use the reports to develop policies to minimize bycatch and bycatch mortality. See 50 C.F.R. §600.350(d). The Amendment requires the Service's regional officials to fund and allocate independent observers to gather data on bycatch from each "fishing mode," or

combination of vessel type and fishing gear. See id. at 4738. The Service must fund enough observer voyages to generate statistically reliable data.

Analysis and Holding

Because the Fisheries Service has merely described but has not, as the Fisheries Act requires, "established" a "standardized reporting methodology" to assess bycatch in the Northeastern fisheries, the court reversed the judgment and instructed the district court *to vacate the rule adopting the methodology* and to remand the matter to the agency for further proceedings.

Oceana argues the Amendment is not consistent with § 1853(a)(11) because, instead of establishing a methodology by which the agency will proceed, the Amendment describes "an optional methodology" that applies "in some years and not in others."

The agency must adequately define the circumstances that "trigger" the case-by-case analysis, and it must set an "identifiable standard" to guide its judgment when operating under that procedure. The agency has broad discretion to use general terms for the "trigger" and the "identifiable standard," however, unless the statute requires the agency to be more specific or the rule reflects an unreasonable interpretation of the statute. A rule is "impermissibly vague" when the statute is silent is "always a difficult burden for a petitioner to overcome."

The court determined that the Amendment at issue failed to survive this indulgent standard of review because it created an exception so vague as to make the rule meaningless: The Fisheries Service had apparently given itself complete discretion to determine when an "external operational constraint prevents [it] from fully implementing the required coverage levels." As Oceana observed, nothing in the Amendment prevented the Service from announcing a constraint" applies in any or indeed every year.

Oceana argued that "key elements" of the methodology, including the standard of precision, are in fact "optional" because the agency may disregard them at will, the agency has responded, in effect, that the key elements and the methodology as a whole are binding upon it—except of course in the years when they are not. The agency appears to mean the methodology is "established" in some Platonic sense, serving as the model to which the agency will aspire, though it is never itself fully realized. The court found that the Amendment grants the Fisheries Service substantial discretion both to invoke and to make allocations according to a non-standardized procedure and held that the Service did not "establish" a standardized methodology under the Fisheries Act. The court concluded that at best, the rule set a benchmark from which the agency freely can and apparently does significantly depart in its annual allocation of observers.

Coastal Conservation Ass'n v. Blank, Nos. 2:09-cv-641-FtM-29SPC, 2:10-cv-95-FM-29SPC, 2011 WL 4530544, 2011 U.S. Dist. Lexis 111813 (M.D. Fla. Sept. 29, 2011).

Parties

Plaintiffs include: Brian E. Lewis, Troy Fussell and the Coastal Conservation Association (CCA). Defendants are Gary Locke, in his official capacity as Secretary of the United States Department of Commerce, the National Oceanic and Atmospheric Administration, and The National Marine Fisheries Services ("Federal Defendants").

Factual Background and Regulations

Plaintiffs challenge the Final Rule of the National Marine Fisheries Service (NMFS) implementing Amendment 29 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico ("Reef Fish FMP"). Amendment 29 is mainly concerned with the grouper and tilefish fisheries, and establishes a system of individual fishing quotas (IFQ) for the commercial sector of the Reef Fish Fishery for the Gulf of Mexico Exclusive Economic Zone (the

Reef Fish Fishery). Recreational fishing in the Reef Fish Fishery is not included in the Amendment 29 IFQ system, and therefore Amendment 29 does not limit or otherwise regulate recreational fishing.

Analysis and Holding

The court began its analysis by deciding whether or not CCA had standing to sue. The relevant showing for Article III standing purposes "is not injury to the environment but injury to the plaintiff." While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." In this case, the injury in fact that CCA asserted was a procedural injury only, i.e., the failure to comply with the obligations set forth in Title 16, United States Code, Section 1853(a)(9). "To show a cognizable injury in fact in a procedural injury case, a plaintiff must allege that the agency violated certain procedural rules, that these rules protect a plaintiff's concrete interests and that it is reasonably probable that the challenged action will threaten these concrete interests."

The court concluded that CCA met the constitutional test for injury in fact. CCA had shown that the Federal Defendants violated a procedural rule, i.e. failing to assess, specify, and analyze the affect of Amendment 29 on recreational fishing, as required by 16 U.S.C. § 1853(a)(9). The record also established, without contradiction, that the members of the CCA use the Reef Fish Fishery for recreational fishing purposes and that Amendment 29 potentially impacts the recreational sector. The recreational fishing interests of the CCA members were sufficient to establish a concrete interest that was affected by Amendment 29.

CCA argued that Amendment 29 should be set aside because it was an agency action which was "otherwise not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). CCA argued that the federal agencies were required by the Magnuson–Stevens Act, 16 U.S.C. § 1853(a)(9), to "assess, specify, and analyze the

likely effects" of Amendment 29 on the recreational sector of the Reef Fish Fishery, but failed to do so.

CCA argued that Amendment 29 was issued in violation of the MSA because the Federal Defendants failed to consider the effect of Amendment 29 on the entire fishery; failed to consider its effect on the recreational sector; failed to comply with National Standards 1, 2, 8, and 9 of the MSA; and finally Amendment 29 violated National Environmental Policy Act (NEPA). Defendants' failure to consider impacts upon the entire fishery and their failure to consider impacts upon the recreational sector are one and the same because the recreational sector is a party of the fishery. The court recognized that a violation of Section 1853(a)(9) can be a free-standing and legally sufficient basis to set aside agency action and rejected the Defendants' position that "Section 1853(a)(9) does not mandate any analysis of the recreational sector.

The court determined that CCA was correct that the Federal Defendants merely described the current state of the recreational fishing sector, rather than address the likely effects of Amendment 29, which it described as an entirely new regulatory framework which was "a seismic shift" from the prior forms of regulations. However, the court agreed with the Federal Defendants that the case did involve special scientific and technical expertise by the agencies. While assessing fishing regulations for grouper and tilefish may not have the consequences of assessing the long-term effects of nuclear waste storage, the court found the statement in *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) persuasive: "[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."

In this case, the issue before the court in the Section 1853(a)(9) challenge by CCA was not whether the conclusions on how Amendment 29 will likely affect the recreational fishing sector are correct. Rather, the issue was *whether the Federal Defendants*

arrived at the answer only after complying with the obligation to assess, specific, and analyze how Amendment 29 would likely affect the recreational fishing sector. The court concluded, as did the magistrate judge, that the record established that the Federal Defendants sufficiently assessed, specified, and analyzed the likely impact of Amendment 29 on the recreational fishing sector.

The Lewis plaintiffs argued that the Report and Recommendation failed to correctly evaluate the plain language and purpose of 16 U.S.C. § 1853a(c)(6)(D)(i) and failed to properly apply the two part *Chevron* test, and as a result improperly failed to declare defendants' "substantially fished" voter eligibility criteria to be illegal. These plaintiffs further argued that the Report and Recommendation misapplied step two of the *Chevron* test, and erroneously failed to find the Federal Defendants' construction of 16 U.S.C. § 1853a(c)(6)(D)(i) to be impermissible and arbitrary and capricious.

Chevron "set up a two-step framework for evaluating whether a court must defer to an agency's construction of a statute it is charged with administering. Deference from the court is due if (1) Congress has not spoken directly on the precise question at issue and its intent is unclear, and (2) the agency's interpretation is based on a permissible construction of the statute."

The Federal Defendants determined that participants were deemed to have "substantially fished" the reef if they landed 8,000 pounds of grouper and/or tilefish per permit within each of the years between 1999 and 2004, with the ability to drop one year if it fell below the 8,000 pound limit. This criteria allowed thirty-one percent of the reef fish permit holders to vote, but they accounted for approximately ninety percent of the annual harvest. The court concluded that the Report and Recommendation did not err in any of the respects argued. The Report and Recommendation did not fail to correctly evaluate the plain language of the statute, and did not err in its application of the *Chevron* test to the facts of this case. The court ultimately concluded that while the definition of "substantially

fished" could have been different, it was clearly not arbitrary or capricious.

Coleman v. Omega Protein, CV No. 10-1977, 2011 WL 4018973, 2011 U.S. Dist. Lexis 26351 (E.D. La. Sept. 9, 2011).

Parties and Factual Background

This case arises out of injuries plaintiff Joseph Coleman allegedly sustained while employed as a seaman by defendant Omega Protein, Inc. onboard the F/V MISSISSIPPI SOUND, a vessel owned and operated by defendant. Plaintiff alleged that on the day in question, he passed out while returning from the restroom on the vessel, hitting his head and landing on the floor. Plaintiff stated that as a result, he suffered serious injuries. Plaintiff filed suit under the Jones Act and general maritime law, seeking to recover damages for the alleged negligence of defendant and the alleged unseaworthiness of the vessel, as well as maintenance and cure. In its answer, defendant denied liability. With respect to plaintiff's maintenance and cure claim, defendant specifically asserted the affirmative defense of willful misconduct, alleging that plaintiff's injuries were caused by his use of illegal drugs.

Analysis and Holding

The court reasoned that only willful misconduct, defined as "willful misbehavior or [a] deliberate act of indiscretion," is sufficient to constitute an affirmative defense of the shipowner to the maintenance and cure obligation. The court determined that courts have held that injuries received as a result of intoxication arose out of willful misconduct. *Des Jardins v. Foss Maritime Co*., 1993 A.M.C. 2233 (W.D. Wash. 1993); *Blouin v. American Export Isbrandtsen Lines, Inc*., 319 F. Supp. 1150 (S.D.N.Y. 1970); *Smith v. Isthmian Lines, Inc*., 205 F. Supp. 954 (N.D. Cal. 1962). Recently, the Fifth Circuit has extended this conclusion to include illegal drug use, *Silmon v. Can Do II, Inc*., 89 F.3d 240, 243 (5th Cir. 1996), and a district court has found that the use of cocaine in

particular constitutes willful misconduct. *Napier v. F/V Deesie,* 360 F. Supp. 2d 195, 201 (D. Mass. 2005). In *Silmon*, the Fifth Circuit further explained that it is irrelevant if the drug use occurred prior to boarding the ship. *See Silmon*, 89 F.3d at 242 (noting that a sailor is not entitled to maintenance and cure "when he, being in a diseased state, ships as an able man, the master and owners being ignorant of his condition."

The court found that the plaintiff intentionally used cocaine 24–48 hours before the incident and that his fall and resulting injuries were caused by the use of cocaine. In light of the evidence and case law, the court concluded that plaintiff engaged in willful misconduct, and that this willful misconduct caused the injuries at issue. Accordingly, defendant was not obligated to pay maintenance and cure.

Fishing Rights Alliance, Inc. v. Nat'l Marine Fisheries Servs., Nos. 8:09-cv-00916, 01544, 02265-T-30 AEP, 2011 WL 3897891, 2011 U.S. Dist. Lexis 100031 (M.D. Fla. July 15, 2011).

Parties

The Fishing Rights Alliance, Inc. challenges the NMFS's ability to carry out certain regulatory measures pursuant to amendments to the Fishery Management Plan for each case's relevant fishery.

Factual Background and Regulations

The plaintiff alleged that the regulatory measures under the relevant amendments are unsupported by reliable data on fishing effort and mortality and should be set aside. Specifically, the plaintiff alleged that the NMFS may not lawfully implement these amendments prior to instituting improvements to data collection procedures under the Marine Recreational Fishery Statistics Survey ("MRFSS"), which is used by the NMFS in forming regulatory measures.

The NMFS has relies on the MRFSS to obtain statistics about marine recreational fisheries for use in formulating an FMP for a given fishery. The MRFSS has two major components: an onsite component, in which anglers are intercepted and interviewed on the water or at sites such as at marinas; and an offsite component, in which anglers are contacted and surveyed by telephone after their trips are completed.

The MRFSS endured criticism over the nature and use of its sampling data. Critics also questioned the quality of the MRFSS data used in FMP formulation. As a result of this criticism, in 2004, the NMFS requested the National Research Council of the National Academy of Sciences (the "NRC") to conduct an independent, scientific review of the MRFSS. Specifically, the NMFS requested the NRC to: (1) Assess existing surveys and their suitability for monitoring effort and catch in the shorebased, private boat, and for-hire boat recreational fisheries; (2) Evaluate how well these methods were providing the quality of information required to support accurate stock assessments and responsible fisheries management decisions; and (3) Recommend improvements to ensure more accurate and precise estimates of recreational effort and catch. In April 2006, after a two-year review of the MRFSS, the NRC published its *Review of Recreational Fisheries Survey Methods* (the "NRC Report"), making several key findings and recommendations regarding the collection and use of recreational fishing data under the MRFSS.

The NRC noted initially that "marine recreational fishing is a significant source of fishing mortality for many marine species and that adequate scientific information on the nature of that mortality in time and space is required for successful management of those species." NRC Report found that the MRFSS suffered from a lack of financial resources, technical and practical expertise, and uniformity in use among coastal states. NRC recommended that the MRFSS be "completely redesigned to improve its effectiveness and appropriateness of sampling and estimation procedures, its applicability to various kinds of management decisions, and its usefulness for social and economic analyses."

On June 19, 2006, the Senate passed Sen.2012, with the addition of Senate Amendment 4310, which notably inserted language referencing the NRC Report, and established a deadline for the implementation of the improved MRFSS program of within 24 months after the date of enactment of the MSA Reauthorization Act of 2006.

Under the MSA, any FMP prepared by any council must contain conservation and management measures that are "necessary and appropriate for the conservation and management of the fishery ... and ... consistent with the national standards, the other provisions of this chapter, ... and any other applicable law." *See* 16 U.S.C. §§1853(a)(1). Based on this provision of the MSA, the Plaintiff alleges that the NMFS unlawfully promulgated certain Annual Catch Limits ("ACLs") and Accountability Measures ("AMs") pursuant to the following FMP amendments without first satisfying its statutory obligations to improve data collection under the MSRA.

The relevant question before the court was whether the NMFS complied with the relevant provisions of 16 U.S.C. § 1881(g) of MSA, and if not, what remedy must be imposed.

Analysis and Holding

The court found that *the NMFS complied with the language of the relevant provisions of the Magnuson–Stevens Fishery Conservation and Management Reauthorization Act of 2006*, and therefore recommended that the plaintiff's motions for partial summary judgment be denied, and the NMFS's cross–motions for partial summary judgment be granted.

16 U.S.C. §1881(g)(3)(D) requires that the NMFS "complete the program under this paragraph and implement the improved Marine Recreational Fishery Statistics Survey not later than January 1, 2009." The plaintiff argues that the NMFS has not complied with 16 U.S.C. §1881(g) of MSA because the NMFS "knowingly failed to heed a Congressional deadline and should be enjoined from basing closures on data Congress expressly found was no longer useful."

In determining whether the NMFS "complete[d] the program under this paragraph," the court must determine what Congress meant by the "program," and whether the release of the MRIP Implementation Plan in October 2008 constituted the program's completion. The MSRA states that the NMFS shall "establish a program to improve the quality and accuracy of information generated by the [MRFSS], with a goal of achieving acceptable accuracy and utility for each individual fishery." 16 U.S.C. § 1881(g)(3)(A). The NMFS argues that since the language of the MSRA "plainly indicates its intent for a framework ... to be in place by January 1, 2009," the establishment of the MRIP through the MRIP Implementation Plan, published in October 2008, satisfies the MSRA's program completion requirement.

The court agreed with the NMFS. Under § 1881(g)(3)(B), Congress made sure that the program "take[s] into consideration and, to the extent feasible, implement[s] the recommendations of the [NRC Report] ...." 16 U.S.C. § 1881(g)(3)(B). The MRIP Implementation Plan discusses a number of recommendations made in the NRC Report, including reducing potential bias, establishing a universal sampling frame of saltwater anglers, and achieving a greater degree of standardization among surveying. (Supp. Admin. R. at 00213.) In response to these recommendations, the MRIP Implementation Plan outlines steps towards reaching the goals of the NRC Report, thus satisfying §1881(g)(3)(B) of the MSRA.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Chair: Joseph G. Grasso
Editor: Gene B. George

Newsletter - Fall 2011

RECENT CASES OF INTEREST

P&I Club Not Required to Indemnify Insured where Insured Failed to Comply with Prompt Notice Requirements Contained in Certificate of Entry

Weeks Marine Inc. v. Am. Steamship Owners Mut. Prot. and Indem. Ass'n, Inc., et al., No. 08-9878 (NRB), 2011 AMC 2477, 2011 U.S. Dist. Lexis 95358 (S.D.N.Y. Aug. 25, 2011)

This coverage dispute arose from an injury suffered by a Weeks Marine crew member, Maximino Garza. On February 15, 2006, while working on a barge, Mr. Garza was struck on the head by a steel bar. That same day, he went to a hospital for treatment and was diagnosed with a concussion. On May 17, 2006, Mr. Garza filed suit against Weeks Marine in the 381st Judicial District Court of Starr County, Texas. In January of 2008, Plaintiff's counsel made a settlement demand before trial of $850,000 which was rejected. On February 5, 2008, following a trial, the Court entered a judgment in favor of Mr. Garza for $3,715,620.36. Two days later, the American Club received its first notice of the claim from Weeks Marine.

Weeks Marine's Certificate of Entry with the American Club provided a coverage limit of $3 million for claims by crew members, subject to a self-insured deductible of $1,000,000.00. The Certificate of Entry contained a Crew Claims Procedure which permitted Weeks Marine to investigate, settle and defend any crew claim brought against it. However, the Crew Claims Procedure also required Weeks Marine to give prompt notice to the American Club of certain types of claims, including any claim involving a brain

injury, or any claim exceeding 50% of Weeks Marine's self insured retention. The American Club moved for summary judgment on the ground that Weeks Marine had failed to comply with the notice requirements in the insurance contract by failing to provide notice of Mr. Garza's claim involving a brain injury, and thus was not entitled to indemnification. Weeks Marine argued that it was entitled to indemnification despite its failure to provide prompt notice for several reasons. First, Weeks Marine argued that the Crew Claims Procedure was not a condition precedent to coverage. Second, Weeks Marine contended that even if compliance with the notice requirements in the Crew Claims Procedure was a condition precedent to coverage, the American Club was required to show that it was prejudiced by the late notice. Third, Weeks Marine argued that a concussion was not a brain injury and that the term "brain injury" is ambiguous. Fourth, Weeks Marine argued that there was a question of fact as to whether defendants were estopped from denying coverage for the Garza claim. In granting the defendants' motion for summary judgment, the court rejected all four arguments and held that:

1. New York's recent legislative change to the "no prejudice" rule did not apply in this case for two reasons. First, the recent statutory amendments to the "no prejudice" rule expressly state that they do not apply to policies which were issued and delivered before January 17, 2009. Second, maritime insurance contracts are exempted (by the marine exception) from the applicability of the section of New York insurance law which changed New York's "no prejudice" rule. Accordingly, defendants were not required to show prejudice.

2. Weeks Marine does not fall into the narrow exception to the "no prejudice" rule applicable to reinsurers. Despite Weeks Marine's high deductible and initial responsibility for investigating and defending claims, no basis exists to depart from New York's traditional "no prejudice" rule, and apply the exception

applicable to reinsurers, where the American Club was the primary insurer.

3. The term "brain or spinal cord injury" is unambiguous. Further, it is beyond dispute that a concussion is caused by trauma to the brain. Accordingly, Weeks Marine was required to provide prompt notice of the Garza claim under the Crew Claims Procedure.

4. Under the American Club's Rules, all of the American Club's rights and defenses are preserved by an anti-waiver clause. The clause operates to bar the assertion of any estoppel claim by Weeks Marine based on the handling of prior claims.

Based on the foregoing, the court granted the American Club's motion for summary judgment and dismissed the action brought by Weeks Marine.

[Our sincere thanks to John M. Woods and John R. Stevenson of Clyde & Co. US LLP for the foregoing case summary and additional analysis – Eds.].

Work Order May Incorporate by Reference Defense and Indemnity Terms Found on Company Website

One Beacon Ins. Co. v. Crowley Marine Servs., Inc. v. Tubal-Cain Marine Servs., Inc., 648 F.3d 258, 2011 A.M.C. 2113 (5th Cir. 2011).

The suit involved a dispute between a ship repair contractor (Tubal-Cain), barge owner (Crowley) and insurer (One Beacon) over the terms of the ship repair service contract and a marine insurance policy. The contractor appealed the district court's ruling that it had breached its contractual obligation to procure insurance coverage for the barge owner and was contractually obligated to defend the barge owner against damages resulting from a workplace

injury during the repairs. The barge owner cross-appealed from the district court's ruling that it was not entitled to additional coverage under the repair contractor's policy. The Fifth Circuit affirmed in all respects.

In 2007 Crowley orally contracted for repair work on one of its barges to be performed by Tubal-Cain, later issuing to Tubal-Cain its standard repair service order ("RSO") for the job. Tubal-Cain in turn hired Rio Marine as a subcontractor to perform lighting and electrical work on the barge. A Rio Marine employee allegedly sustained serious injuries due to an electrical shock and resulting fall while performing repairs on the barge. He sued Crowley and Tubal-Cain in state court, alleging negligence.

Crowley made a demand for defense and indemnity from Tubal-Cain, and sought indemnity from One Beacon, asserting that it was an additional insured under the policy that One Beacon had issued to Tubal-Cain. One Beacon denied coverage and brought a declaratory judgment action in federal court, seeking a finding that Crowley was not entitled to coverage, because Tubal-Cain had never requested that Crowley be named as an additional insured, and there was no "insured contract" between Tubal-Cain and Crowley that would entitle Crowley to coverage under the policy's terms.

Crowley filed a third-party complaint against Tubal-Cain in the declaratory judgment action, alleging that the terms of Crowley's RSO required Tubal-Cain to defend and indemnify Crowley against any claim by a contractor's employee relating to the work performed under the RSO, and to carry policies naming Crowley as an additional insured. In the alternative, Crowley asserted claims for fraud and negligent misrepresentation, claiming that Tubal-Cain falsely led it to believe it had obtained the requested coverage. The district court found for Crowley on its claims for contractual defense and indemnity, as well as its claim for breach of the contractual obligation to obtain insurance coverage. The court found that Crowley did not qualify as an additional insured and entered judgment in favor of One Beacon on its declaratory judgment claim.

The court of appeals concluded that Crowley and Tubal-Cain agreed they had a contract for repair services, but disputed whether they had a written agreement obligating Tubal-Cain to defend, indemnify and obtain insurance for Crowley. The court noted that Crowley had contracted with Tubal-Cain for work on other vessels both before and after the repairs in question. For each project it issued an RSO assigning a project number and outlining the scope of repairs, but containing no price terms and not signed by either party. Like all of the others, the RSO in question "contained the following notice prominently displayed on the first page":

> THIS IS A CONFIRMATION. DO NOT DUPLICATE.
>
> THIS RSO IS ISSUED IN ACCORDANCE WITH THE PURCHASE ORDER TERMS & CONDITIONS ON WWW.CROWLEY.COM/DOCUMENTS&FORMS, UNLESS OTHERWISE AGREED TO IN WRITING.
>
> THE ABOVE REPAIR SERVICE ORDER (RSO) NUMBER MUST APPEAR ON ALL BILLING INVOICES. FAILURE TO COMPLY WILL RESULT IN INVOICES BEING RETURNED.

The "terms & conditions" referred to were located on a subpage of Crowley's website. The terms and conditions did not appear on the Crowley home page, but could be accessed by taking several additional steps involving drop-down menus. Neither the location nor the content of the terms and conditions changed during the course of Crowley's working relationship with Tubal-Cain before, during and after the accident.

The posted terms and conditions required contractors to defend and indemnify Crowley for any claim brought against it:

> arising out of any injury (including death) or damage to any persons or property in any manner, caused or

> occasioned by any defect in the goods or services or any act, omission, fault, negligence or default of any person, firm, corporation or other entity…even if the same be, or is alleged to be, due to the sole active negligence of [Crowley] or anyone acting on its behalf.

They also required that the contractor procure, at its own expense, insurance policies including a commercial liability policy with limits of not less than $1 million per occurrence, with no watercraft exclusion, covering the work performed in accordance with the RSO, endorsed to name Crowley as an additional insured, and waiving all rights of subrogation against Crowley and "the Property," in this case, the barge undergoing repairs.

Crowley never gave Tubal-Cain a hard copy of the terms and conditions; they were never specifically discussed; and Tubal-Cain never visited Crowley's website nor investigated the RSO's reference to online terms and conditions. However, the invoice for the repairs in question, and every invoice submitted by Tubal-Cain to Crowley, provided that Tubal-Cain "reserves the right to review any and all purchase orders prior to their acceptance." Tubal-Cain never objected to Crowley's terms and conditions in connection with any repair job.

The district court had concluded that the 2007 oral agreement, Crowley's confirming RSO and Tubal-Cain's subsequent invoice together constituted one written contract for the repairs to the barge; that the RSO's issued for this and prior repair jobs contained identical notice previsions which "plainly and conspicuously" incorporated the terms and conditions of Crowley's website; and that the parties had established a course of dealings from which the court could infer that those terms and conditions were implied in every contract. By accepting the RSO and invoicing the work without objection, Tubal-Cain ratified the course of dealing and assented to the terms, which were "sufficiently legible and accessible" on the website so as not to be unconscionable.

Noting that oral contracts are generally regarded as valid under maritime law, the court of appeals held that the district court did not err in concluding that the RSO's terms and conditions supplemented the oral agreement between the parties, because "notice of the terms and conditions was clearly and conspicuously displayed in every RSO that Crowley sent to Tubal-Cain, the terms and conditions were at all times reasonably accessible and available to Tubal-Cain, and Tubal-Cain manifested assent by accepting the RSO's without objection to the terms and conditions." Under maritime law, terms and conditions contained in a subsequently issued purchase order may supplement an oral agreement if there is evidence of a prior course of dealing between the parties from which the court can infer that the parties were aware of and consented to those additional terms. The fact that a party chooses not to examine a contract, or terms and conditions, when it has the opportunity, does not negate the fact that it is bound by them.

The court noted that in the ship repair industry it is "not unusual" for parties to enter into an oral agreement for repair work, and for the contractor to send a purchase order or invoice containing terms and conditions after the repair work has begun or is completed. Citing a number of recent decisions, the court essentially concluded that *provisions incorporated by reference into a purchase order, readily available on an identified internet site, and plainly and clearly set forth therein, are binding even when the party has not read them. Maritime contracts may validly incorporate terms from a website in the same manner that they may incorporate by reference terms from paper documents. The chief consideration is whether the party to be bound had reasonable notice of the terms at issue and whether the party manifested assent to those terms.*

Texas law controlled as to the second issue, whether Crowley was entitled to coverage under the One Beacon policy issued to Tubal-Cain. The district court correctly concluded that in order to prove it was covered under the policy's "Additional Insured and Waiver of Subrogation Endorsement (Specific)," Crowley had the burden of establishing both (1) that Tubal-Cain was obligated by an "insured contract" to include Crowley as an additional insured

on the policy; and (2) that Crowley was specifically identified in the endorsement as an additional insured. In this case, the space below the endorsement permitting additional insureds stated only: "NAME AND ADDRESS TO BE ADVISED." The language of the endorsement, which unambiguously required that an additional insured must be specifically named in the policy, was not satisfied, so Crowley was not entitled to additional insured coverage. In affirming, the court of appeals noted that the endorsement expressly limited additional insured coverage to "the person(s) or organization(s) shown below." Crowley's name did not appear, so it was not entitled to additional insured coverage.

Excess Insurers Did Not Unreasonably Delay Interpleader/Did Not Owe Interest on Funds Deposited With Court

Gabarick v. Laurin Mar. (America) Inc., 649 F.3d 417, 2011 A.M.C. 1905 (5th Cir. 2011)

This suit arose out of a collision in the Mississippi River on July 23, 2008, between the M/V TINTOMARA and the tank barge DM-932, in tow of the tug MEL OLIVER, resulting in an oil spill. American Commercial Lines ("ACL") owned the barge and DRD Towing Company ("DRD") operated the tug. Several lawsuits were filed against ACL and DRD after the accident.

DRD had a P&I policy that provided coverage up to $1 million, issued by Indemnity Insurance Company of North America ("IINA"), which the court described as both the Primary Insurer and one of the excess insurers. DRD also had an excess insurance policy with a group of Excess Insurers that provided coverage of up to $9 million. ACL claimed in the trial court that it was an additional insured under the excess policy, but asserted in a separate appeal that it was a tort claimant, not an additional insured.

Due to the various claims against DRD and ACL, in August of 2008 the Primary Insurer, IINA, filed an interpleader complaint, seeking to deposit $985,000 (The policy limit, less deductible) with the court, and requesting a determination of the rights of the various

parties, including IINA, to the funds. IINA did not disclaim its interest in the funds, and it requested that the court declare specific policy defenses applicable, including:

(1) the DM-932 was not a covered vessel under the policy;

(2) losses caused by a breach of seaworthiness of the vessel were not covered;

(3) claims for punitive or exemplary damages were not covered; and

(4) many of the claims were not covered due to a pollution exclusion clause.

In January of 2009, the district court dismissed the first two coverage defenses, but declined to dismiss the declaratory relief request as to the latter two, concluding that coverage of certain expenses might be excluded under the punitive damages clause and pollution exclusion clause.

Thereafter, in March of 2010, the Excess Insurers filed their own interpleader complaint, seeking release from further liability upon deposit of the policy limit of $9 million with the court. ACL opposed the motion, asserting that the Excess Insurers should have to pay prejudgment interest on the funds in order to be released from liability, because the insurers had unreasonably delayed in depositing the funds with the court. Its argument was that had the policy limit been deposited in a timely manner, the interest would have accrued for well over 12 months to the benefit of the claimants, rather than the Excess Insurers. The district court concluded that the Excess Insurers should be required to pay prejudgment interest at the rate of 3.5% from January of 2009, for a total of $495,369.86.

The Excess Insurers filed a timely interlocutory appeal. The court of appeals found that the issue required it to interpret the insurance contract to determine whether the Excess Insurers'

obligations had been triggered. That is a question of law, subject to de novo review.

The Excess Insurers argued that their liability was not triggered in January of 2009, because the primary policy was not exhausted at that time, or at any time before they filed their interpleader in March of 2010. The court first had to determine what law applied to the issue of whether the primary policy had been exhausted. Finding no federal maritime rule on the issue, it applied Louisiana law, since the policy was issued in that state to DRD, a Louisiana company.

Under Louisiana law, the court found, excess insurance provides supplemental coverage that picks up where the insured's primary coverage ends, providing protection against catastrophic losses. Thus the very nature of excess insurance is such that the predetermined amount of primary coverage must be paid before the excess coverage is activated. Because coverage is only triggered after the primary policy is exhausted, excess insurance is available at a lower price than a primary policy, since the risk of having to pay claims is less than for the primary insurer.

ACL conceded at oral argument that the primary policy had not been exhausted, but asserted that the Excess Insurers' filing of the interpleader "took the case out of the policy," making the language requiring exhaustion of the primary policy in order to trigger Excess Insurers' liability "irrelevant." The court labeled that argument "somewhat circular."

The court considered, but did not apply, the 3-point analysis discussed in its unpublished opinion in *Aetna Casualty and Surety Co. v. Hood*, No. 95-60152, 1995 WL 581567 (5th Cir., August 24, 1995). There the court said that in evaluating whether interest should be awarded in an interpleader action, it could consider:

(1) whether the stakeholder unreasonably delayed in instituting the action or depositing the fund with the court;

(2) whether the stakeholder used the fund for its benefit or would be unjustly enriched at the expense of the claimants; and

(3) whether the stakeholder eventually deposited the fund into the court's registry.

The court had not expressly adopted the 3-part test in *Aetna*, and did not do so in the case before it. It did, however, reverse and remand the district court's ruling holding the excess insurers liable for prejudgment interest, explaining:

> Even assuming that the three-factor test should be used, we note that the question of "unreasonable" delay and "unjust" enrichment cannot be divorced from the source of the Excess Insurers' obligations which, in turn, comes from the language of their excess policy. ACL is not entitled to rewrite the policy to place a burden on the Excess Insurers that they did not bargain for in their contract. As noted above, excess insurance policies are less expensive than primary policies precisely because the excess insurer carries less of a risk than a primary insurer. *Samuels*, 939 So.2d at 1239; *see also* APPLEMAN, *supra*, §2.16. Because the primary policy had not been exhausted as of the time the interpleader was filed, the Excess Insurers neither "unreasonably" delayed nor were "unjustly" enriched by not filing the interpleader earlier. We thus conclude that the district court erred in holding them liable for prejudgment interest on the interpleaded funds.

Defense Costs Erode P&I Policy Limits

Gabarick v. Laurin Mar. (America) Inc. 650 F.3d 545, 2011 A.M.C. 1912 (5th Cir. 2011)

This suit also arose out of the collision in the Mississippi River on July 23, 2008, between the M/V TINTOMARA and the tank barge DM-932, in tow of the tug MEL OLIVER, splitting the barge in half and spilling its contents into the river. Numerous lawsuits were filed, including personal injury claims by crew members and class actions by fishermen. The primary insurer filed an interpleader action, depositing its policy limits with the court.

On this appeal, the Fifth Circuit reviewed the allocation of interpleader funds and the district court's finding that the marine insurance policy's liability limit included defense costs. The court of appeals upheld the ruling that defense costs erode policy limits, and concluded that the district court's orders allocating court-held funds among claimants were tentative and produced no appealable order.

The towing company was covered by a P&I policy providing $1 million in coverage for any one occurrence, with a $15,000 deductible. After receiving demands for defense and indemnity from the towing company and the barge owner, the insurer, IINA, filed an interpleader action for determination of its rights and obligations under the policy, depositing $985,000 into the registry of the court, representing the full liability limit less the deductible.

The barge owner argued that IINA could not avoid its obligation to defend by depositing its policy limits with the court. The district court denied its motion to dismiss the interpleader action and held that IINA had a duty to reimburse defense costs but no duty to defend. The towing company and barge owner then sought release of funds to recover defense costs. IINA responded that defense costs were included within the policy limits – that is, monies paid for defense costs would come from the funds capped by the policy limits. The district court agreed, finding that defense costs eroded the limits of liability. The court granted the towing company's motion for release of funds and denied the barge owner's motion.

The barge owner and the owner of the TINTOMARA timely filed notices of interlocutory appeal under 28 U.S.C.A. §1292(a)(3), challenging the district court's decision that defense costs eroded the liability limits and allocating interpleader funds. The court of appeals found that it had jurisdiction over the interlocutory appeals from orders that "determin[e] the rights and liabilities of the parties to admiralty cases."

After filing its notice of appeal, the barge owner sought and obtained a Rule 54(b) (final judgment as to fewer than all claims or parties – no just reason for delay) certification covering the issue, and also appealed on that basis. The court of appeals found that it had jurisdiction to review the issue, but concluded that there had been no final ruling on the release of funds. That was so because the district court's order had not permanently denied funds to the barge owner, but rather stated "payment [to the barge owner] at this time would not be equitable." The court of appeals concluded that allocation of funds was an ongoing matter that the parties were addressing with the district court. Hence, "the tentative character of the 'ruling'" was fatal to jurisdiction and the court of appeals declined to express any opinion regarding the allocation or denial of funds.

Coming to the insurance policy issues raised by the interpleader and deposit of funds by IINA, the court began by noting that, in the absence of a specific and controlling federal rule, the interpretation of a marine insurance policy is governed by state law. Here, there was "no entrenched maritime law addressing whether legal expenses are included within or in addition to a protection and indemnity policy's liability limit." Marine insurance commentators, however, "have recognized that defense costs are typically included within the P&I policy's liability limit." [*See* Stephen V. Rible, "A Juxtaposition of Hull and Protection & Indemnity Coverages," 83 *Tulane Law Review* 1189, 1199 (2009) ("Legal costs are a part of the policy limits included in the exhaustion of P&I policies.").] P&I policies do not ordinarily create a duty to defend, and are considered to be indemnity policies, not liability policies. Since there is no duty to defend, but only a duty to pay covered claims, "reimbursement of

defense costs must be footed on the indemnification which is limited to the agreed upon policy limit."

Louisiana law holds that words used in an insurance policy must be given their generally prevailing meaning. When those words are clear, explicit, and lead to no absurd consequences, the contract must be interpreted within its four corners. An ambiguous provision is to be construed against the drafter, which in the insurance context as a rule means in favor of the insured. The general rule in Louisiana is that legal expenses incurred in defending a liability covered by the policy are treated as part of the overall claim, which in turn is limited by the amount insured in the primary policy. After examining various clauses in the policy, the court concluded that it was "clear that defense costs were intended to be included within the policy limits." The policy was "unambiguously written against the backdrop of traditional principles of maritime law that defense costs erode P&I limits of liability."

Choice of New York Law Clause in Port of New Orleans Bumbershoot Policy Upheld

St. Paul Fire & Marine Ins. Co. v. Bd. of Comm'rs of the Port of New Orleans, 418 F. App'x 305 (5th Cir. 2011)[*]

The district court certified for interlocutory appeal its ruling in favor of the appellee excess insurance companies (collectively "St. Paul") against the appellant Board of Commissioners and primary insurers ("Port" and "Aon"). The court of appeals affirmed the lower court's grant of partial summary judgment in favor of the excess insurers, who had issued a bumbershoot policy to the Port. The appellate court agreed that the district court had admiralty jurisdiction because the bumbershoot policy was a maritime

[*] This was an unpublished opinion, bearing a footnote stating that pursuant to 5th Circuit Rule 47.5, the court had determined that it should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4, which provides that unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of *res judicata,* collateral estoppels or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like).

contract, and its choice of law clause designating New York law as controlling should be enforced. Under New York law, late notice of the underlying claim provided a complete defense to coverage for the appellees.

On appeal, the Port and Aon claimed the district court only had diversity jurisdiction, and should have applied the law of the forum state, Louisiana, to hold the choice of law clause ineffective. The court of appeals concluded that the district correctly found it had admiralty jurisdiction, which in turn meant that it should apply federal maritime choice of law rules, as it did.

The court of appeals reasoned that to determine admiralty jurisdiction in a contract action such as this, it must examine the nature and character of the contract, and that the true criterion is whether it has reference to maritime service or maritime transactions, citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24, 125 S.Ct. 385, 393 (2004). The boundaries of admiralty jurisdiction are conceptual rather than spatial, and the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce. Accordingly, the inquiry should focus on whether maritime commerce is the principal objective of the contract.

The court concluded that the policy before it was "mixed," covering both traditional maritime risks such as collision, towing and salvage liabilities, as well as the Port's general liability for personal injury and property damage. Looking at the type and terms of the policy, and the nature of the Port's business, the court of appeals agreed that the primary object of the policy was maritime commerce. It also noted that bumbershoot policies are widely recognized as a common type of marine insurance policy.

Furthermore, the terms of the bumbershoot policy before the court provided excess coverage to other marine insurance contracts and specifically included traditional marine insurance coverages. The fact that the coverages also included some land-based operations was not dispositive, since the "functioning and purpose of the Port show that the conceptual focus of the policy is

maritime commerce." The Port is charged by statute with regulating the "commerce and traffic of the port and harbor of New Orleans." (emphasis in original). Thus its operations, though partially land-based, "are inextricably related to maritime commerce." To that end, the Port owns 14 vessels to carry out its charge, all of them covered by the bumbershoot policy.

Having found that the policy's primary object was maritime commerce, the court also rejected Aon's argument that the dispute was "inherently local" and governed by Louisiana law since it involved a personal injury suit by a Louisiana resident for a land-based injury. It found that the "inherently local" inquiry does not directly determine the district court's admiralty jurisdiction, concluding that the lower court properly determined that the policy was a maritime contract and exercised admiralty jurisdiction.

The district court also correctly applied admiralty choice of law rules to enforce the New York choice of law clause. Under federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable, unless the chosen state has no substantial relationship to the parties, or the transaction or the state's law conflicts with the fundamental purposes of maritime law, none of which were the case. Here, New York had a substantial relationship to the parties because one of the plaintiff insurers, American Home Insurance Company, is a New York corporation. It was not named in the policy as an excess insurer, but the entity named in the policy was affiliated with American Home as its underwriting agent, and American Home was therefore properly included in the suit.

The New York law at issue, allowing late notice of a claim as a complete defense to coverage, has no federal admiralty counterpart and therefore is not contrary to any fundamental purposes of maritime law. The policy's notice provision, requiring that "notice shall be sent to Underwriters as soon as practicable," and defining "Underwriters" as "the insurer(s) subscribing to this Policy," was not complied with, where only two of the three underwriters received notice of the underlying claim.

For all of the foregoing reasons, "[t]he district court did not err," and the court of appeals affirmed.

Louisiana "Made Whole" Rule and Insurer Right to Subrogation

Global Int'l Marine, Inc. v. U.S. United Ocean Servs., LLC, No. 09-6233, 2011 A.M.C. 1568, 2011 WL 2550624, 2011 U.S. Dist. Lexis 59815 (E.D. La. June 27, 2011).

These consolidated cases arose out of a collision between the M/V TITAN and the T/B NICOLE C, owned and operated by plaintiff Global International Marine, Inc. ("Global") and the M/V NAIDA RAMIL and the T/B PEGGY PALMER, owned and operated by defendants U.S. United Ocean Services LLC and United Maritime Group LLC ("United"), in the Mississippi River on September 21, 2008. Plaintiffs National Union Fire Insurance Company and Continental Insurance Co. (the "Underwriters") were the subrogated hull insurers and collision liability insurers of Global.

Global and the Underwriters brought separate actions against United in 2009. Global alleged that United was liable for the uninsured losses that Global sustained, and the Underwriters sought to recover the amounts they had remitted to Global for property damages caused by the collision. United denied liability and filed counterclaims against Global and the Underwriters, alleging that they were liable for the damages it sustained as a result of the collision.

The parties reached agreement on the essential facts surrounding the collision, which were stipulated in a proposed pretrial order, but Global and the Underwriters could not agree on whether the Underwriters could enforce their subrogation rights under the circumstances. The matter was submitted to the court on stipulated facts in the proposed pre-trial order, together with memoranda addressing the subrogation dispute.

With the case in that posture, the court proceeded to enter findings of fact and conclusions of law pursuant to FRCP 52(a).

Among other things, the court found that the hull insurance portion of the policy covered physical damage to Global's vessels, but not loss of use. Under the collision liability portion of the policy the Underwriters assumed Global's responsibility for damages sustained by others as a result of collisions with the insured vessels, subject to a single deductible of $25,000 for all claims that arose out of one occurrence.

The policy further provided that the Underwriters "shall be subrogated to all the rights which the Assured may have against any other person…in respect to any payment made under this policy, to the extent of such payment…." As a consequence of the collision, Global sustained damages of $260,209.23, consisting of $172,429.23 in property damages and $87,780.00 in loss of use. The Underwriters paid Global $147,429.23 under the hull insurance provision of the policy, representing the amount of property damages sustained less the $25,000 deductible.

United sustained damages in the amount of $651,138.50 as a result of the collision. The court found the proportion of fault of Global in causing the collision to be 63%, and that of United to be 37%. Applying the proportional fault rule enunciated in *U.S. v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), and assuming that the Underwriters were not in the picture, the court concluded that United was liable for 37% of Global's damages, amounting to $63,798.82 for property damages and $32,478.60 for loss of use. Global was liable for 63% of United's damages, or $436,262.80.

The parties agreed, and the court found, that under the policy the Underwriters assumed Global's liability for the damages sustained by United, in the amount of $436,262.80. Global was also entitled to $32,478.60 in loss of use damages, but the Underwriters had not insured it for such losses, had not paid any sum to compensate Global for such losses, and hence made no subrogation claim over that sum. United was therefore required to remit that amount to Global. (The court rejected Underwriters' argument that there should be a single "net" judgment, reflecting only one sum to which United was entitled, concluding that the claims in a collision case

do not merge with one another – rather, each claim and counterclaim must be separately adjudicated).

Global and the Underwriters disagreed as to the allocation of the sum of $63,798.82, United's liability for Global's property damages. The Underwriters contended that in accordance with the hull portion of the policy, they paid Global all of its property damages less the deductible, or $147,429.23, and were therefore entitled to exercise their subrogation rights as to the sum of $63,798.82, because it would be improper to allow Global to retain more than the amount to which it was entitled, given its comparative fault.

Global countered that Louisiana law allows it to be "made whole" and obtain full compensation for all its losses before underwriters may step in. Global's losses totaled $260,209.23, toward which the Underwriters remitted $147,429.23 to cover property damage, and United was to remit $32,478.60 for loss of use, leaving a gap of $80,301.40. Global claimed the sum of $63,798.82 should be applied to cover that gap. The court reasoned that it could decide the issue despite the absence of formally asserted claims between Global and Underwriters in the pleadings, because the Underwriters' claim was premised on the very notion that they could exercise subrogation rights, which the court would inevitably have to decide in order to adjudicate the claim for relief.

The real issue the court confronted was what body of law to apply to the subrogation dispute. The court began by noting that in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), the Supreme Court concluded that the regulation of marine insurance is, in most instances, a matter properly left with the states. No question of marine insurance can be determined without first engaging in a choice-of-law analysis. In doing so, federal maritime choice-of-law rules, rather than the choice-of-law rules of the forum state, are to be applied.

Under Fifth Circuit precedent, if the parties to a marine insurance policy have chosen the interpretive law of a particular state, a court must recognize that choice as valid and enforceable,

and only set it aside if it is "unreasonable or unjust," because the state chosen has no substantial relationship to the parties or the transaction, or the state's law conflicts with the fundamental purpose of maritime law.

If the parties to the policy have not made a choice of law, the court must determine which state has the most significant relationship to the substantive issue in question, considering factors such as where the policy was negotiated and formulated, where it was issued and delivered, the domicile and place of incorporation of the parties, the location of the subject matter of the policy, and the location of the loss.

Once the court determines which state has the greatest interest in resolution of the issue, it must decide whether to adopt the state's rule or apply federal maritime law. The 5th Circuit has identified three factors that are relevant to that analysis:

1. whether there is a federal maritime rule that constitutes "entrenched federal precedent";

2. whether the state has a substantial and legitimate interest in having its law applied; and

3. whether the state rule is materially different from the federal rule.

Of these factors, the first is decisive. If there is no "controlling federal rule," cases involving marine insurance contracts are governed by state law.

In this case the insurance policy did not contain a choice-of-law clause. After reviewing the relevant factors, the court concluded that Louisiana was the state with the greatest interest in resolution of the issue. Global was organized and had its principal place of business there; the policy was issued and delivered there; and the loss occurred there. Since the court found that there is no single set of specific and controlling federal admiralty rules on the subject

of subrogation, it was not required to apply federal maritime law. There is more than one possible approach to determining priority in recovery between a subrogated insurer and the insured in obtaining recovery from a third-party tortfeasor. The Supreme Court had no occasion to articulate a full set of rules governing the subject prior to deciding *Wilburn Boat*.

In *Aetna Insurance Co. v. United Fruit Co.*, 304 U.S. 430 (1938), the Supreme Court gave effect to "the rule that the insurer is entitled to subrogation only after the insured is appropriately indemnified." *Id.* at 438. This suggests that the "made whole" rule applies to marine insurance, but the contours of the rule have never been delineated. No subsequent case law addresses how to define the loss for which the insured is entitled to be made "whole," nor whether the parties to a marine insurance policy may contract around the "made whole" rule.

The court considered further developing this "inchoate area of federal maritime law" by looking to state statutes, the common law, and English law, but doubted that it was free to do so in light of the Fifth Circuit's reading of *Wilburn Boat* as requiring application of state law in the absence of *existing* "specific and controlling federal rules," or of "[e]ntrenched federal precedent." On the other hand, the court opined, *Wilburn Boat* does not have to be read in that manner, since the Supreme Court *declined* to fashion a federal rule of decision in that case.

Ultimately bowing to the Fifth Circuit's directive, the court concluded that it must apply state law "whenever there is the absence of a full set of rules of decision addressing a marine insurance subject," and that therefore Louisiana law must be applied.

That did not solve everything, however. The court observed that a federal court normally looks to the final decisions of a state's highest court to determine its law, or if there are none, uses its best judgment to determine how the highest court of the state would rule if it faced a given issue. A state's intermediate appellate courts may supply rules of decision even though its highest court

had never passed upon them. However, Louisiana's unique Civil Code tradition changes this analysis. Judicial decisions are not an authoritative source of law in Louisiana. Rather each judge may consult the Civil Code and draw anew from its principles.

The Louisiana Civil Code provides that subrogation is "the substitution of one person to the rights of another." When it results from a third person's performance of the obligation of another, the obligation exists in favor of the third person, but is extinguished for the original obligee. Thus the third person is entitled to bring the same action that existed against the obligor since the inception of the obligation – he "steps into the shoes" of the original obligee. But the subrogee may not always enforce its right. Louisiana Civil Code Article 1826 (B) provides that "[a]n original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee." This provision embodies the "made whole" rule.

The "made whole" rule raises the question as to what constitutes the loss for which the insured is entitled to be made whole – whether the loss extends only to the element of damages covered by the insurance policy and over which the insurer asserts subrogation rights, or whether the loss encompasses all the elements of damages that the insured may have sustained. There is also the question of whether the insured is "made whole" when it receives all the damages it seeks, or when it receives all the damages to which it is legally entitled. The Civil Code is silent on these issues, beyond a reference in the former version of Article 1826 (B) to an obligee who "has been paid but in part," without specifying what constitutes the whole. Nor is there a line of cases stating what constitutes the whole for purposes of Article 1826 (B).

The Civil Code instructs that when the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. The court proceeded to summarize the history and purposes of the equitable doctrine of subrogation, one of which is the preclusion of

unjust enrichment, including in the realm of insurance. The goal of insurance, after all, is to put the insured in the same, but not better, position the insured would have been in had no loss occurred. Insurance should not provide a party with the means of realizing a net profit when an insured event occurs by first obtaining insurance proceeds from the insurer, and then securing damages from the tortfeasor. Thus subrogation is needed to preserve the principle of indemnity.

Subrogation is the mechanism by which the possibility of double recovery under the collateral source rule is reduced or eliminated. It has been said that one purpose of the collateral source rule is to preserve an insurer's right to subrogation. The collateral source rule and subrogation work in tandem to force third-party tortfeasors to pay for their conduct.

Global and the Underwriters took conflicting positions on whether the focus of the "made whole" rule should be on the element of damages covered by the insurance policy, and whether the key factor is the amount of damages sought by the insured or the amount to which it is legally entitled. In light of the purposes underlying subrogation, the answer to the first question is that the inquiry must focus on the element of damages covered by the insurance policy and over which the insurer seeks to enforce its subrogation rights. As to the second issue, given the fundamental purposes that underlie subrogation, the key factor cannot be the amount sought by the insured, Global, but rather must be the amount of damages to which the insured is legally entitled.

To allow an insured to recover all the damages it seeks, without regard to any contributory negligence on its part, would undermine the loss prevention rationale behind the principles of subrogation and comparative fault. In sum, the "whole" to which Article 1826 (B) of the Code refers is "the amount that an insured is legally entitled to recover with respect to the element of damages over which the insurer has provided insurance and over which it, consequently, has asserted a subrogation claim." An insurer

whose payment to the insured exceeds that amount may exercise its subrogation rights and proceed against a third-party tortfeasor, recovering the amount that the insured would be entitled to recover.

Under this rule, if an insurer pays an amount less than the amount to which the insured is legally entitled with respect to the covered element of damages, the insured can recover the remaining amount in preference over the insurer. This is consistent with the notion that subrogation should not hinder or jeopardize the satisfaction of the original obligee's remaining claim against the original obligor. "It is only when an insured has received from its insurer an amount that is more than the sum to which it is entitled to recover (sic) under the law with respect to the specific element of damages that the insurer may enforce its subrogation rights." The court therefore concluded that the Underwriters may enforce their subrogation rights over the amount in dispute - $63,798.82 in property damages. Global sustained $172,429.23 in property damages in the collision, but because it is 63% at fault, it is only entitled to recover 37% of its property damages - $63,798.82. The amount remitted by the Underwriters to Global exceeded that sum, so they may enforce their subrogation rights and recover from United the amount that Global could have recovered.

Case law cited by Global was distinguishable, and in any event, Louisiana jurisprudence merely constitutes persuasive or "secondary information." The obligation of a federal court applying Louisiana law is to the Civil Code. In line with that duty each judge may consult the civil code and draw anew from its principles, as the court here did in reaching its conclusions:

> In summary, the dispute as to whether the Underwriters may enforce their subrogation rights must be resolved in order for this Court to adjudicate the Underwriters' claim for relief. Under the Supreme Court's decision in *Wilburn Boat*, Louisiana law applies to the dispute. And in light of the purposes that underlie the subrogation articles of the Civil Code, the inquiry as to whether an insured has been made whole for

> the purposes of subrogation must be focused on the element of damages covered by the insurance policy and on the amount that the insured is legally entitled to recover. Thus, an insurer that has paid to an insured an amount that exceeds that which the insured is legally entitled to recover may exercise its subrogation rights and proceed against a third-party tortfeasor. In this case, the Underwriters have, by discharging their obligation under the hull insurance policy, remitted to Global a sum of $147,429.23 for Global's property damages. Because this exceeds the sum to which Global is entitled to recover for its property damages, the Underwriters may enforce their subrogation rights and recover $63,798.82 from United.

[Our sincere thanks to George W. Nowell of the Law Offices of George W. Nowell, San Francisco, California, for calling the foregoing case to our attention – Eds.]

COMMITTEE ON MARINE TORTS AND CASUALTIES

Chair: Mary Elisa Reeves

Fall 2011

RECENT CASES ADDRESSING LIMITATION OF LIABILITY ISSUES

Christina K. Schovajsa
Eastham Watson Dale & Forney LLP

Recreational Vessel Owner had Privity and Knowledge of Negligence When he Knew of Son's "Multi-Year History" of Recklessly Operating the Vessel but Took No Steps to Restrict Son's Access to the Vessel.

In re Dieber, 793 F. Supp. 2d 632, (S.D.N.Y. 2011).

Frank J. Dieber ("Dieber") was the owner of a powerboat which was involved in a collision with another vessel while being operated by his son, Frank Dieber, Jr. ("Dieber Jr."). Dieber, Jr. was allegedly intoxicated at the time of the collision. An injured passenger of the other vessel sued Dieber in state court alleging he was vicariously liable for the negligence of his son and that Dieber negligently entrusted the powerboat to his son. Subsequently, Dieber filed a complaint for exoneration from or limitation of liability.

In the limitation proceeding, the claimants asserted that Dieber could not limit his liability on the basis that: the powerboat was unseaworthy because Dieber Jr. was not a competent operator; Dieber Jr.'s negligence caused the collision; and, Dieber had privity and knowledge of this unseaworthiness and negligence. Dieber responded by claiming that he lacked privity and knowledge of any condition rendering the vessel unseaworthy and any operational negligence, and that his son did not have permission to use the powerboat on the date of the collision.

After a bench trial, the court held that Dieber had privity and knowledge of the negligence and unseaworthy condition of the vessel—namely that his son was an incompetent and irresponsible boat operator—that caused the collision at issue. The court pointed to evidence that showed: (1) Dieber Jr. had a long history of driving the powerboat recklessly by accelerating toward other vessels only to veer away at the last second; and, (2) there was substantial evidence that Dieber Jr. performed these acts while consuming alcohol and/or while intoxicated. The court also rejected Dieber's argument that he lacked privity and knowledge because he was unaware that his son had taken the powerboat that day. In connection with the foregoing, the court highlighted the fact that the vessel was the family boat, and Dieber had not taken any concrete steps to end his son's pattern of using the boat. Specifically, the court pointed to the fact that on the day of the collision the vessel was left unsecured on a trailer in Dieber's driveway with its keys in the ignition.

State Court Petition Did Not to Have to Specifically Allege that Petitioner Owned Vessel in Order to Provide Sufficient "Written Notice of a Claim."

In re Envtl. Safety & Health Consulting Servs., Inc., No. 11-588, 2011 WL 2142813, 2011 U.S. Dist. Lexis 57851 (E.D. La. May 31, 2011).

Avery Diaz ("Diaz") filed a state court action on July 19, 2010, naming the petitioner as a defendant and alleging that he was injured while "assigned to work in a small, unnamed boat and to perform various duties on said vessel in the abatement of the spill." The state court petition did not give the name of the boat or expressly state that the petitioner owed the vessel. The petitioner filed its complaint for exoneration from or limitation of liability more than six months after being served with the employee's state court petition, claiming ownership of the small boat. The employee filed a motion to dismiss or, alternatively, a motion for summary judgment arguing that petitioner had filed its limitation action outside the six month prescriptive period. In response, petitioner argued that because the state court petition did not explicitly state

that it was the owner of the small boat, it did not receive sufficient notice of a claim, and the six month period never began to run.

The court rejected petitioner's argument relying on *Complaint of Tom-Mac, Inc*., 76 F.3d 678, 683 (5th Cir. 1996) noting that sufficient notice under the Limitation Act "must reveal a 'reasonable possibility' that the claim is subject to limitation." The court also cited *Billot v. Dolphin Servs*., 225 F.3d 525, 517 (5th Cir. 2000) wherein the court held that the Limitation of Liability Act "does *not* require plaintiff to have identified the vessel in his underlying action." The court found that the state court petition was sufficient notice under the Limitation Act because it adequately informed petitioner that the employee; (a) thought petitioner was responsible for his alleged injuries; (b) was seeking damages from petitioner; and, (c) the incident occurred on a boat the employee was assigned to work on by the petitioner. The court dismissed petitioner's limitation action.

Petitioner Was Not Required to Mail Notice of Time to File to Claimant When Claimant Was Not "Known" to Have Made any Claim Against Petitioner, Received Notice Through Newspaper Publication and Was Represented by Attorney Representing Other Claimants Who Timely Filed.

In re Gulf South Marine Transp., Inc., No. 10-3140, 2011 WL 3268310, 2011 U.S. Dist. Lexis 83672 (E.D. La. July 28, 2011).

This case arose from a collision of two vessels on March 9, 2010, owned by the limitation petitioner, Gulf South Marine Transportation, Inc. ("Gulf South") and claimant, Crown Point, LLC ("Crown Point"). On September 16, 2010, Gulf South filed a complaint for exoneration from or limitation of liability. Shortly thereafter, the court entered an order that all claims with respect to Gulf South's complaint be filed with the clerk of the court before March 11, 2011, and stayed all other actions. In accordance with this Order, Gulf South published notice of the limitation proceeding in a local newspaper and also sent a copy of the notice to Crown Point's office address via certified mail.

On March 4, 2011, Crown Point filed suit against Gulf South in state court in violation of the court's stay order. Then, Crown Point filed an answer to Gulf South's limitation complaint on March 23, 2011, thirteen days after the default deadline. As a result, the court issued an order specifically recognizing the parties that had timely filed claims and defaulting Crown Point because it had filed its claim after the deadline. In response, Crown Point filed a motion for leave to file answer and claim. Crown Point alleged that it had never received actual notice of the limitation complaint before March 23, 2011, when it received an email from its counsel in the state court proceedings informing Crown Point that a motion for default judgment had been filed in the limitation proceedings. Further, Crown Point claimed that no member, manager, or employee had received the notice sent via certified mail from Gulf South.

The court rejected Crown Point's arguments and excuse for late filing. The court reasoned that, regardless of whether Crown Point received the certified letter, the record established that it received proper notice through publication in the newspaper. The court relied on Supplemental Rule F(4) which only requires that a limitation plaintiff mail a copy of the notice to every person "*known*" to have made any claim against the limitation plaintiff. As there was no evidence in the record that Crown Point had made a claim against Gulf South before filing its state court suit on March 4, 2011, the court held that the petitioner was not required to mail notice of time for filing to Crown Point.

Nonetheless, the court also found that Crown Point had actual notice of this proceeding prior to the deadline for filing claims. Crown Point's counsel had actual knowledge of the limitation proceedings and his knowledge could be imputed to Crown Point. Counsel representing Crown Point in its March 4, 2011, state claim against Gulf South also represented other claimants in the limitation proceedings who had all filed timely claims.

Claimant's Motion to Lift Stay Against Other Proceedings was Denied Because Monition Period Had Not Closed and "Merger" of Two Limitation Actions was Inappropriate Under Supplemental Rules.

In re Marquette Transp. Co., LLC, Nos. 10-4374, 10-4377, 2011 WL 1486119, 2011 U.S. Dist. Lexis 45228 (E.D. La. April 18, 2011).

Marlon Coleman ("Coleman") was allegedly injured while traveling from a towing vessel to shore in a twelve-foot aluminum skiff, both of which were owned by Marquette Transportation Co. ("Marquette"). As a result, Marquette filed two complaints for exoneration from or limitation of liability in two separate actions and deposited money into two limitation funds, one for the stipulated value of the aluminum skiff, $3,822.00; the other for the value of the towing vessel, $1,901,500.00. The two actions were consolidated, and the court issued two separate orders that all persons asserting claims against either vessel must file in the limitation actions before June 30, 2011. Coleman sought to increase the limitation fund for the skiff by adding the value of the towing vessel, or vice versa, or by a "merger" of the two limitation funds. Marquette argued that merging the two limitation actions would "effectively dismiss one limitation complaint in order to increase the limitation fund in the other" and such an action was not supported by the Supplemental Rules. Coleman also moved the court lift its stay against other suits.

The court denied Coleman's motions because Coleman had not shown the amount deposited in either action was insufficient to cover his claims or less than the value of the owner's interest in either vessel. Additionally, the court denied Coleman's motion to lift its stay against other suits as premature, because the monition period in the limitation actions had not run. In other words, parties could still make claims against the vessel giving rise to a multiple claimant situation. Finally, the court declined to "merge" the two funds because such an action is not supported by the Supplemental Rules.

Letters to Vessel Owners' Insurance Adjuster Asking for Policy Limits and Asserting Claimant Suffered "Severe and Permanent Injuries" and Would Seek Punitive Damages Was Sufficient Written Notice to Trigger Prescriptive Period.

In re Martinez, No. 8:11-cv-802-T-23MAP, 2011 WL 2516691, 2011 U.S. Dist. Lexis 67353 (M.D. Fla. June 23, 2011).

Jessica Cauble was seriously injured aboard a recreational yacht owned by William and Sandra Martinez ("Petitioners"). In September and October of 2009, Cauble's attorney sent two letters to the Petitioners' insurance adjuster requesting "documentation of the [Petitioners'] liability and homeowner insurance" and asking for the policies' limits. One letter stated that Cauble suffered "severe and permanent injuries" and that Cauble would "explore the applicability of punitive damages." Cauble's attorney further advised that he would "forward a complete demand package" as soon as Cauble's medical condition stabilized. Cauble's attorney did not send a formal demand letter to Petitioners until March of 2011. Thereafter, Petitioners filed a limitation of liability complaint with the Court. Cauble moved to dismiss the limitation action on the basis that the September and October 2009 letters were sufficient to constitute written notice of a claim under the Limitation of Liability Act such that Petitioners had filed their complaint outside the six month prescriptive period. The Petitioners argued the 2009 letters were insufficient to constitute notice of a claim because they contained no claim of right, no demand for an amount owed to the claimant, no supporting evidence, and no precise value of a claim.

The court dismissed the Petitioners' limitation complaint relying on *Paradise Divers, Inc. v. Upmal*, 402 F.3d 1087 (11th Cir. 2005) in which letters with similar content were held sufficient to put a vessel owner on notice. The two letters in *Upmal* sought information concerning the owner's insurance information, asserted the owner's liability, claimed "tens of thousands of dollars in medical bills," and promised a demand letter. The court opined that the promise of a demand letter notified the Petitioner of the claimant's intent to sue. Contrary to Petitioners' argument, the court

noted that there is no requirement that a claimant attach "supporting evidence" to her letters because such a requirement goes beyond mere "notice." Lastly, the court noted that a reasonable reader could conclude that Cauble's claims of "severe and permanent injuries" would exceed the $90,000 value of the Petitioners' yacht, thereby putting them on notice thereby triggering the prescriptive period for filing a complaint for limitation of liability.

Owner Held to Have Privity and Knowledge of Pilot's Negligence Where Owner Had No Policies or Procedures Regarding the Duties of Pilots, Provided No Training to the Pilots, and Failed to Properly Supervise Pilots.

In re Matteson Marine Serv., Inc., Nos. 08-cv-4023, 08-cv-4056, 2011 WL 2731340, 2011 U.S. Dist. Lexis 751168 (C.D. Ill. July 13, 2011).

Matteson Marine Services, Inc. ("Matteson Marine") is a harbor fleeting company whose business involves moving barges along the Mississippi River and keeping the barges secure in fleets. During high water conditions, Matteson Marine would assign pilots to watch the fleets at all times to ensure they remained tied to shore. In the early morning hours of May 1, 2008, Kenneth Martinson was assigned to watch several fleets from a vessel positioned at a point along the river. Martinson had the radar of the vessel set to a two mile range that would allow him to see any movement of a particular fleet, the 407-5, which was positioned a mile and a half upstream.

During Martinson's watch, unbeknownst to him, the barges of the 407-5 fleet broke free and floated down-river three and a half miles past him. Martinson admitted he was sitting in the pilothouse chair all night and that he did not keep a close eye on the radar. He claimed that the deckhand with him was sitting in a position that blocked his view of the radar screen. After learning of the breakaway from the company dispatcher, Martinson and others attempted to recapture the barges. During that effort, one of the barges was captured by a vessel; however, due to safety concerns caused by the strong currents of the river, the barge was released and allided

against a railroad bridge owned by BNSF Railway Company. Later, an attempt was made to remove the barge, but during the attempt the lines secured to the barge broke causing the barge once again to strike the bridge.

Shortly thereafter, on May 5, 2008, Matteson Marine filed a complaint for exoneration from or limitation of liability for the damage caused by the runaway barges including the damage to BNSF's bridge. After finding that Martinson's negligence in not carefully watching the barges was a proximate cause of the initial allision, as well as the second allision, the court held that Matteson Marine had privity and knowledge of Martinson's negligence, and thus was not entitled to limit its liability because Matteson Marine admitted that it had no policies or procedures regarding the duties of pilots who watched barges, there was no evidence that Matteson Marine provided any training to pilots regarding how to perform their duties and it was clear that Martinson was not properly supervised, as he always worked the night shift when the supervisors were not present. The court acknowledged the fact that Martinson admitted that he did not watch the radar closely despite claiming he knew that was his duty but opined that Martinson might have taken his duties more seriously if he and the other pilots had been expressly informed of their duty and had been properly trained and supervised in performing such tasks.

Possibility That Third Party Claims for Indemnification and Contribution Could be Made Did Not Preclude Lifting Stay When Stipulations Were Found to be Adequate to Protect Petitioner's Right to Seek Limitation.

In re Spirit Cruises, LLC, No. 10-cv-5438, 2011 WL 1838918, 2011 U.S. Dist. Lexis 52263 (N.D. Ill. May 12, 2011).

Margie Holmes ("Decedent") sustained fatal injuries as the result of a fall onboard a passenger cruise vessel owned by Spirit Cruises, LLC ("Spirit"). The Decedent's husband ("Holmes") filed a wrongful death action against Spirit in state court. Spirit then filed a complaint for exoneration from or limitation of liability. As

a result, the court stayed any related state court proceedings pending resolution of the limitation issue. Thereafter, Holmes filed a motion to dissolve the court's stay order arguing that the action was subject to the single-claimant exception to the Limitation Act. Holmes concurrently filed several stipulations conceding, among other things, that he would not enforce a judgment beyond the value of the limitation fund as determined by the district court. In response, Spirit asserted that the motion should be denied because there was a potential set of circumstances in which Spirit could be held liable in excess of the limitation fund due to indemnification or contribution demands by potential third-parties, such as the manufacturer of the instrumentality that caused Decedent's fall. Further, Spirit argued that Holmes' stipulations were inadequate because they failed to state Holmes would not seek to enforce a judgment over the precise *amount* of the limitation fund.

In support of his single-claimant argument, Holmes cited *In re McCarthy Bros. Co.*, 83 F.3d 821 (7th Cir. 1996) in which the Seventh Circuit held that the "mere possibility" of additional claims is not enough to preclude state court adjudication where the nature of the accident belies the possibility of multiple claims. The court distinguished *McCarthy* from the case at bar on its facts. The court noted that the Seventh Circuit had the benefit of a well-developed factual record in *McCarthy* and no other claimants had filed a claim in the limitation proceeding, whereas the current action before the court was in the early stages of litigation. Further, the court noted that Holmes' claim for wrongful death was based on allegations regarding a defective feature of the vessel, which was significantly different from the worker's compensation claim in *McCarthy* where the likelihood of other parties or claimants was minimal. In contrast, the court emphasized that there was a reasonable likelihood that Holmes would bring in third parties in this case, such as the manufacturer of the threshold on which Decedent tripped over, creating a multiple-claims situation. The court cited *Matter of Garvey Marine, Inc.*, 909 F. Supp. 560 (N.D. Ill. 1995), as analogous to the situation at hand. In *Garvey*, the single-claimant exception was inappropriate because there was a likelihood that the boat's manufacturer and repairman would become parties to the action.

Though there was a potential for multiple-claims in this case, the court ultimately dissolved its stay against other suits pursuant to the single-claimant exception because it found that Holmes' stipulations were sufficient to protect the ship owner. The court did, however, stay entry of judgment in any other proceeding pending the outcome of the limitation action. The court was concerned about the potential for third-parties to file cross claims against Spirit in the state court suit. In order to both protect Spirit's rights under the Limitation Act and also "heed the aims of the 'savings to suitors' clause," the court elected to follow the procedure adopted in *Garvey* and *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.,* 836 F.2d 750 (2d Cir. 1988). In those cases, the courts issued a stay against the entry of judgment and the consequent enforcement of any recovery achieved in any other proceeding pending the outcome of the limitation action.

The court rejected Spirit's argument that Holmes must stipulate to a specific amount of the limitation fund. Holmes' stipulation that he would not seek to enforce a judgment greater than the amount determined by the district court was sufficient. In addition, although Holmes' stipulations did not contain prioritizations regarding potential claims of indemnification, attorneys' fees and costs, or subrogation, the court determined that Holmes could not be expected to prioritize claims when no other claims existed at the time. Additionally, in the event that any other claims were filed in the limitation action, the court issued an order requiring Holmes to add a stipulation regarding prioritizations to adequately protect Spirit's rights.

Defendant's § 183 Limitation Defense Could Properly be Adjudicated Through Summary Judgment and Was Dismissed Because There Was No Genuine Issue of Material Fact Regarding Applicability of Flotilla Doctrine to Lifeboat of Drilling Rig.

Foret v. Transocean Offshore, Inc., No. 09-4567, 2011 WL 3818635, 2011 U.S. Dist. Lexis 96679 (E.D. La. Aug. 29, 2011).

Ricky Foret ("Foret") was injured while repairing a lifeboat aboard an offshore drilling rig and sued the rig owner, Transocean Offshore, Inc. ("Transocean"), in federal court. Transocean answered and asserted a defense under §183 of the Limitation of Liability Act, claiming that its liability should be limited to the value of the lifeboat involved in the incident. Foret filed a motion for summary judgment on Transocean's limitation defense arguing there was no genuine issue of material fact regarding the applicability of the "flotilla doctrine" and, thus, the value of Transocean's drilling rig and other lifeboats must be tendered to create a sufficient limitation fund. Transocean responded that the district court could not dismiss a §183 limitation defense through summary judgment because it had not created a limitation fund yet, the value of which would be an issue better resolved at trial. Transocean also asserted that a genuine issue of material fact existed as to whether the lifeboat at question and the drilling rig operated under a "single command" as required to apply the flotilla doctrine.

The court held that summary judgment was the appropriate method to adjudicate Transocean's §183 limitation defense because a Rule F(7) motion to increase the limitation fund would be inappropriate when no fund has been created. Moreover, Foret's motion for summary judgment did not seek to increase the fund, but rather sought to invoke the flotilla doctrine in order to dismiss Transocean's defense that its liability should be limited to the value of one lifeboat. The court dismissed Transocean's limitation defense finding that the drilling rig and its lifeboats constituted a flotilla for limitation purposes and that Transocean was, therefore, not entitled to limit its liability to the value the single lifeboat involved in the incident. Transocean conceded that both the lifeboat and the offshore rig were owned by the same entity and were engaged in common venture at the time of the incident, satisfying two of the three prongs to constitute a flotilla. However, Transocean argued that Foret could not establish the third prong of the flotilla doctrine; that the vessels were under a "single command." It argued the lifeboat and the offshore rig could not be under a "single command" because different persons controlled the onboard direction of both; the offshore installation manager ("OIM") controlled the rig and a

designated coxswain controlled the lifeboat. The court rejected this argument, finding that the lifeboat and the drilling rig were under the single command of the rig's OIM as the senior management person overseeing the rig's personnel, equipment and work.

District Court Lifted Injunction Against Other Suits Under "Single Claimant" Exception After 4 of 5 Claimants Settled.

In re Island Mar. Servs., Inc., No. 8:10-cv-1632-T-33TGW, 2011 WL 3585937, 2011 U.S. Dist. Lexis 25928 (M.D. Fla. Aug. 16, 2011).

Limitation petitioners were owners of a towing vessel that sank and injured multiple people. The district court entered a monition and five parties filed timely claims. The court closed the monition period and barred other persons from filing future claims. Four of the five claimants settled with limitation petitioner. The remaining claimant moved the court to dissolve its injunction restraining other actions and filed the appropriate stipulations saving the ultimate question of limitation for the admiralty court. As the claims period had closed and only one claim remained for adjudication in the limitation, the court found it was faced with a single claimant situation. As such, upon finding that the remaining claimant's stipulation was adequate to protect the petitioner's right to seek limitation, the court granted the motion to dissolve the injunction under the single-claimant exception to the Limitation of Liability Act reasoning, "[b]arring an inadequate stipulation, the Court must allow [claimant] to litigate in its chosen forum" pursuant to the "savings to suitors" clause. The court also determined that dissolving the injunction was appropriate even though there was a related limitation of liability action, filed by a separate petitioner, to limit its own liability with respect to the sinking of the same vessel.

Jones Act Seaman Not Entitled to Jury Trial in Limitation of Liability Proceeding.

In re Weeks Marine, Inc., No. 10-1794, 2011 WL 3273611, 2011 U.S. Dist. Lexis 84176 (E.D. Pa. July 29, 2011).

Michael Kilroy ("Kilroy") was seriously injured while moving the barge WEEKS 573 on the Delaware River. The barge was owned by his employer, Weeks Marine. Kilroy filed suit against Weeks Marine, and others, in Pennsylvania state court and demanded a jury trial. Subsequently, Weeks Marine filed its complaint for exoneration from or limitation of liability in the Eastern District of Pennsylvania seeking to limit its liability to the value of the WEEKS 573. Kilroy was one of multiple claimants who answered. The court entered an order setting a surety of $750,000 as security for Weeks Marine's interest in the vessel and also entered a stay that enjoined the prosecution of other lawsuits, including Kilroy's state suit. Kilroy filed a claim for determination of liability and requested a jury trial in the limitation proceeding based on his status as a Jones Act seaman. Weeks argued that a jury trial was inappropriate in a limitation proceeding and the action should proceed to a bench trial with the district court sitting in admiralty. Thus, the issue was, in the court's words, "[b]ench trial or jury trial?"

The court noted the inherent conflict between the admiralty court's exclusive jurisdiction over limitation of liability actions and the "savings to suitors" clause. The Limitation of Liability Act provides that a federal court, sitting in admiralty without a jury, may decide a ship-owner's negligence and whether its liability should be limited to the value of its interest in the vessel. While the "savings to suitors" clause otherwise saves a Jones Act seaman's, among others, right to have his case heard by a jury in a forum of his selection. The court also noted that neither of the well-established exceptions to Limitation of Liability Act's exclusive jurisdiction applied in this case to allow Kilroy to pursue his claims in state court with a jury. The "single-claimant" exception was inapplicable because there were multiple claimants and Kilroy had filed no stipulations to protect Weeks Marine's interest to limit its liability. The "adequate

fund" exception was also inapplicable because the total value of the claims exceeded the value of the limitation fund. In sum, the court held that, even if Kilroy was a Jones Act seaman (a disputed fact), "that status provides no basis for seating a jury to decide the limitation of liability action."

Court Denies Petitioner's Motion to Bifurcate Limitation of Liability Issues from Damages Because the Issues are Inseparably Intertwined.

In re Sortwell, Inc., No. C 08-05167 JW, 2011 WL 4896475, 2011 U.S. Dist. Lexis 121618 (N.D. Cal. Oct. 12, 2011).

Petitioner Sortwell, Inc.'s ("Sortwell") vessel allided against Tesoro Refining and Marketing Co.'s ("Tesoro") wharf causing property damage. Sortwell filed a complaint for exoneration from or limitation of liability and Tesoro answered. Before trial, Sortwell moved to bifurcate the limitation of liability issues from damages claiming that bifurcation would serve judicial economy because the evidence related to each issue was separate and distinct. Further, it argued that bifurcation could obviate the need for trial on damages. Tesoro opposed the motion arguing that the limitation of liability and damages issues were intertwined and thus, having two trials would be inefficient.

The court denied Sortwell's motion to bifurcate the limitation of liability issue from damages, noting that "bifurcation is the exception rather than the rule" in the Ninth Circuit. The court reasoned that because the claimant bears the burden of proving negligence or unseaworthiness of the vessel, it must show that it suffered injuries as a result of the alleged negligence or unseaworthiness. In other words, the claimant will have to present evidence of its injuries to prove both the limitation of liability issue and the damages issue. Thus, the court concluded that "there is necessarily an 'overlap' between the case that a claimant must prove regarding exoneration or limitation of liability and the case that a

claimant must prove regarding damages." Accordingly, the court denied petitioner's motion to bifurcate.

Petitioner Improperly Filed Limitation Complaint in District of Guam After Having Already Been Sued in the Southern District of Florida.

In re Majestic Blue Fisheries, LLC, No. 10-00032, 2011 WL 1748577, 2011 U.S. Dist. Lexis 49811 (D. Guam May 6, 2011).

Majestic Blue Fisheries, LLC's ("Majestic Blue") vessel, the F/V MAJESTIC BLUE, sank in international waters near the Tuvalu economic zone. Two crewmembers, including the captain, were still on the ship when it sank, and died. The survivors of the captain ("Claimants") filed a wrongful death and negligence action against Majestic Blue in the Southern District of Florida. In response, Majestic Blue filed a motion to dismiss for lack of personal jurisdiction and, alternatively, a motion to transfer venue. Thereafter, Majestic Blue filed a complaint for exoneration from and limitation of liability in the District of Guam. Claimants moved to dismiss Majestic Blue's complaint or transfer the limitation proceeding to the Southern District of Florida on grounds that the complaint was filed in Guam in contravention of Supplemental Rule F. Supplemental Rule F(9) states that:

> if the vessel has not been attached or arrested, then [the limitation complaint shall be filed] in any district in which the owner has been sued with respect to any such claim.

Majestic Blue acknowledged that it was aware of the pending litigation in the Southern District of Florida, but gave two explanations for filing its limitation complaint in the District of Guam. First, it argued that claimant's lawsuit in Florida was not a "suit commenced" within the meaning of Supplemental Rule F because the Southern District of Florida did not have personal jurisdiction over Majestic Blue and the lawsuit was filed in an

improper venue. The court rejected this argument relying on Federal Rule of Civil Procedure 3: "A civil action is commenced by filing a complaint with the court." Thus, for purposes of Supplemental Rule F, claimant had commenced a suit in the Southern District of Florida. Second, Majestic Blue argued that it filed its complaint in the District of Guam to toll the statute of limitations and preserve its argument that the Florida court does not have personal jurisdiction over it. The court held that while Majestic Blue was acting in good faith to preserve the statute of limitations, it did not cure the plain and obvious defect of venue under Supplemental Rule F(9). The court granted claimant's motion and transferred the limitation action to the Southern District of Florida.

Magistrate Recommends Remand Because Affirmative Defense Under Limitation of Liability Act Cannot Create Subject Matter Jurisdiction That Would Support Removal and the Court Otherwise Lacked Subject Matter Jurisdiction.

Stewart v. Atwood, No. 10-CV-00848S(F), 2011 WL 5120427 (W.D.N.Y. Oct. 27, 2011)(Magistrate's Report and Recommendation).**

Stewart was injured on Atwood's vessel on Lake Erie and filed suit in New York state court. Atwood removed the case to federal court asserting that Stewart's allegations comprise a maritime claim that was within the district court's admiralty jurisdiction. The parties were not diverse and there was no other basis for federal jurisdiction. Notably, Atwood did not challenge the removal and did not file a motion to remand. However, the magistrate noted that, regardless of whether the issue was raised by the parties, a district court is required to determine whether federal subject matter jurisdiction exists in a removed case.

The magistrate, *sua sponte*, recommended that the case be remanded to state court for two reasons. First, the court held that it lacked jurisdiction because "[c]ommon law maritime cases filed in state court are not removable to federal court, due to 28

U.S.C. § 133's 'saving to suitors' clause." Because plaintiff chose to file her claim in state court, it effectively deprived the federal district court of admiralty jurisdiction. Second, the court held that Atwood's pleaded defense under the Limitation of Liability Act was insufficient to create federal jurisdiction for removal purposes. The court cited *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 430-31 holding that "an anticipated or actual federal defense does not qualify a case for removal." The magistrate judge recommended the district court remand the case back to Pennsylvania state court.

[**](Editor's Note: On January 17, 2012, the Western District of New York (Chief Judge William Skretny) issued an order accepting the Magistrate's report and recommendation, denying the objections of Atwood and denying another party's motion to intervene. That order is found at 834 F. Supp. 2d 171 and will be discussed in more detail in the next issue of the newsletter).

Court Denies Claimant's Motion to Dissolve Injunction Against Other Suits Because Contribution Claimant Did not Join Stipulations to Protect Limitation Petitioner.

In re Edward E. Gillen Co., Nos. 09-cv-114, 09-cv-115, 2011 WL 1883997, 2011 U.S. Dist. Lexis 53000 (E.D. Wis. May 17, 2011).

Edward Grenier ("Grenier") was injured aboard a mobile crane barge owned by his employer, Case Foundation Co. ("Case" or "Owner") and operated by Edward E. Gillen Co. ("Gillen Co." or "Petitioner"). Gillen Co., as the operator of the barge, filed a complaint for exoneration from and limitation of liability in the Eastern District of Wisconsin seeking to limit its liability to the value of the vessel at $75,000. Both Grenier and Case answered the complaint. Case also made a claim against Gillen Co. for contribution and/or indemnification. Subsequently, Grenier filed a Jones Act negligence claim against his employer, Case, in the Eastern District of Illinois. In the Illinois lawsuit, Case filed a third-party complaint against Gillen Co. for contribution, presumably in violation of the injunction entered in the limitation action. Gillen Co. filed a motion to dismiss the third party complaint but the Illinois

District Court did not render a disposition. Instead, Grenier moved to have his Jones Act case consolidated with the limitation action, which was granted.

Once the case was consolidated, Grenier moved the court to dissolve its injunction against other suits pursuant to the "savings to suitors" clause and the single claimant exception to the Limitation of Liability Act. Grenier concurrently filed stipulations that he claimed protected Gillen Co.'s right to litigate the issue of limitation of liability in federal court and waived any claim of res judicata. Gillen Co. responded that dissolving the injunction was inappropriate because there were multiple, competing claims in the limitation action: Grenier's claim for personal injuries, Case's claim for contribution/indemnity, and, Zurich American Insurance Co.'s ("Zurich") intervening complaint against Gillen Co. for a worker's compensation lien.

The court denied Grenier's motion to dissolve the injunction because Grenier's stipulations could not shield Gillen Co. from being held liable for an amount greater than determined in the limitation action. Specifically, because Case (and Zurich) did not join Grenier's stipulations, Gillen Co. could be subject to liability greater than an amount in the limitation fund. In sum, the court could not dissolve its injunction against other suits under the single-claimant exception because multiple claims existed in this case and the other claimants were unwilling to join Grenier's stipulations protecting Gillen Co. under the Limitation of Liability Act.

COMMITTEE ON RECREATIONAL BOATING

Chair: Lars Forsberg
Editor: Daniel Wooster

BOATING BRIEFS

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INSURANCE

Policy Void Where Applicant Falsely Claimed Years of Boating Experience

Great Lakes Reinsurance (UK) PLC v. Morales,
760 F. Supp. 2d 1315 (S.D. Fla. 2010)

An application for hull insurance, signed by the insured and submitted by his broker, stated that the insured had "12+ years" of experience owning and operating boats. A policy was issued and renewed the following year based on a similar application. During the term of the second policy, the boat, while on a trailer, was stolen from an ungated residential driveway.

It developed that the insured, contrary to the statements in the insurance application, did not have any prior experience owning or operating boats. Moreover, the policy excluded coverage if the vessel was stolen "whilst on a trailer/boatlift/hoist dry storage rack unless the scheduled vessel is situate in a locked and fenced enclosure or marina and there is visible evidence of forcible entry . . . ." The court concluded that the statements on the application concerning the insured's boating experience were clearly material to the risk and that the policy was therefore void under the doctrine of *uberrimae fidei*. Moreover, given the circumstances in which the vessel went missing, the theft exclusion would have precluded coverage in any event.

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* NOTE: Although not so denoted, the Fall/Winter 2010 issue of Boating Briefs, published in the MLA Report for Spring/Fall 2010 (Document No. 798) was Volume 19, Number 2.

No "Permissive Use" Coverage where User Exceeded Allowed Use

N.H. Ins. Co. v. Carleton, No. 10-11152, 2010 WL 5174384, 2010 U.S. Dist. LEXIS 132604 (E.D. Mich. Dec. 15, 2010)

After a regatta on the Detroit River, a dingy towed two sailboats back to the Bayview Yacht Club. The dinghy belonged to a crewmember on one of the sailboats; he agreed to take the other sailboat in tow as a courtesy but he did not know its owner, Carleton. Once at the yacht club, the three vessels were moored side-by-side, with the dinghy next to the dock, Carleton's sailboat in the middle, and the other sailboat on the end. There was testimony that the understanding among sailors when boats are rafted together in this fashion is that one may traverse the inshore boat in order to reach one's own boat, but one is not supposed to linger there.

That evening Carleton attended a party at the yacht club and met a woman. The two left to go to Carleton's sailboat but never made it that far. They stepped into the dinghy moored next to the dock and had sexual relations there. At some point while the two were still in the dinghy, the woman asked Carleton to leave, and he did so. Two days later the woman's body was found in the harbor; she had drowned.

Her estate sued Carleton, whose marine insurer denied coverage. Applying the law of Virginia—the state where Carleton resided, where the sailboat was based, and where the policy was issued—the court granted summary judgment for the insurer.

Carleton's policy insured him against, among other things, liability for bodily injury arising out of his "permissive use" of any private pleasure vessel not owned by him. Carleton admitted that he did not have permission from the dinghy owner to use the dinghy for a sexual encounter. At most, he had permission to traverse the dinghy in order to reach his own sailboat, consistent with the custom among sailors. Such permission did not extend to any other use of the dinghy. Since the woman's death did not arise out of Carleton's

"permissive use" of the dinghy, there was no coverage under Carleton's policy.

Certificate of Title, Without More, Satisfied Policy's "Ownership" Requirement

Colley v. Reisert, No. 1:09-cv-00345, 2011 WL 53102, 2011 U.S. Dist. LEXIS 1164 (S.D. Ohio Jan. 6, 2011)

An umbrella policy defined the "insured" to include "any person using [a] watercraft [that] is owned by [the policyholder] and covered under this policy." The policyholder was the titled owner of a 29-foot Wellcraft Scarab, but she never used it, did not maintain it, and did not pay taxes on it. Rather, she held title as a favor to her son, who wished to protect the vessel from creditors. The son exercised all incidents of ownership apart from holding title.

During a high-speed maneuver, the son and another person were ejected from the vessel and killed, resulting in a suit against the son's estate. The mother's umbrella insurer argued that it had no duty to defend or indemnify the son's estate because the mother, though holding the title, was not the true "owner" and thus her son was not an "insured" as defined in the policy. In particular, the insurer relied on an Ohio Supreme Court case holding that a certificate of title is not determinative of ownership in the context of a vehicle sales transaction and that a court should look instead to the Uniform Commercial Code.

But in the court's view, the UCC did not apply since this case did not involve a sales transaction. Rather, the case was governed by a provision of the Ohio watercraft-titling statute, Or. Rev. Stat. § 1548.04, which provides that "[n]o court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any watercraft or outboard motor sold or disposed of, or mortgaged or encumbered" unless evidenced by a certificate of title or by an admission or stipulation of the parties. The certificate of title naming the mother as the owner therefore meant that she

was the vessel's "owner" within the meaning of the umbrella policy, even though she did not purchase, operate, or maintain the vessel.

The umbrella insurer also argued that there was no coverage by virtue of the policy's exclusion for boats in excess of "25 horsepower if the outboard engine or motor is owned by an insured." Yet the exclusion did not make clear that the word "outboard" modified both "engine" and "motor." It was therefore ambiguous and would be construed to apply only to boats with an outboard engine and not to boats like the Scarab, which had inboard engines and outboard drives.

No Coverage for Boat Not Listed in Policy

Contender Fishing Team, LLC v. Miami, 405 Fed. App'x 422 (11th Cir. Dec. 15, 2010)

A police boat owned by the City of Miami collided with a sportfishing vessel, resulting in a personal-injury suit against the city. The city had a marina operator's liability policy providing protection and indemnity coverage for watercraft operated by city employees "in conjunction with normal business operations." The city argued that coverage for the personal-injury claim was available under this section. The district court rejected the argument, and the Eleventh Circuit affirmed.

As an initial matter, the Eleventh Circuit held that it had jurisdiction to hear the appeal in accordance with the statute allowing interlocutory appeals in admiralty cases. *But see N.H. Ins. Co. v. Home Sav. & Loan Co.*, 581 F.3d 420, 2009 A.M.C. 2448 (6th Cir. 2009) (holding that a yacht dealer/marina's liability policy was not a maritime contract).

Next, the overall nature of the city's policy suggested that it was meant to provide coverage to the city in its capacity as a marina operator and not coverage for all vessels owned by the city regardless of their use. More importantly, the protection and indemnity entry on the declarations page listed only "5 Work Boats," and the police

boat was not among them. Therefore, according to the court, "the City's interpretation that this Policy includes all boats operated by a city employee acting in his or her capacity as a city employee for all city business is completely unreasonable."

Policy Wording Makes "Efficient Proximate Cause" Rule Inapplicable

Goodman v. N.H. Ins. Co., No. 09-1493 RSM, 2010 WL 4281682, 2010 U.S. Dist. LEXIS 11178 (W.D. Wash. Oct. 19, 2010), *aff'd* No. 11-35359, 2012 WL 1026775, 2012 U.S. App. LEXIS 6290 (9th Cir. 2012)

A yacht's aluminum fuel tank leaked diesel fuel into the bilges, and from there the automatic bilge pumps sent the fuel overboard. The insurer's surveyor arranged for removal of the fuel tank and determined that it had become holed by corrosion as a result of seawater leaking through the cockpit hatches over a period of many years.

The insurer paid about $20,000 to cover the cost of cleaning up the fuel and repairing the damage done by the insurer's surveyor in removing the fuel tank, but it declined to pay anything else because the policy excluded coverage for losses arising from corrosion.

The insured contended that the intrusion of seawater was due to a hidden defect in the construction of the hatch covers—namely, the absence of drainage channels—and that since losses resulting from hidden defects were expressly covered, the insurer had to cover all expenses arising from the incident. In particular, the insured relied on Washington's "efficient proximate cause rule," which provides that if a covered peril sets into motion other causes that produce the loss in an unbroken sequence, the loss will be covered even if the other events in the chain of causation are excluded from coverage.

The court rejected the insured's argument for two reasons. First, the alleged defect in the hatch construction (the lack of

drainage channels) was not "hidden" inasmuch as it was identified by the insured's expert by simply looking at photographs of the hatches. Moreover, because the corrosion exclusion was written broadly—coverage was excluded for "any loss or damage arising out of [corrosion]"—the efficient proximate cause rule did not operate. The term "arising out of" was broader than the concept of proximate cause, and the efficient proximate cause rule was therefore rendered inapplicable as a matter of contract. Nor could the insured claim that the corrosion itself was a covered "defect," since the policy clearly excluded coverage for damage arising out of corrosion.

The insurer also moved for summary judgment on the basis that the insured intentionally misrepresented the cost and scope of the repairs he undertook after the fuel leak. But in light of a declaration submitted by the insured denying any intentional misrepresentation or concealment, there was an issue of fact as to the insured's intent and hence summary judgment could not be granted.

The court did, however, grant summary judgment against the insured on his claims for bad faith and violation of the Washington Consumer Protection Act. The insurer's decision to deny coverage was reasonable, as confirmed by the court's own reading of the policy and its ruling that the efficient proximate cause rule was inapplicable. The insurer did not delay unreasonably in investigating the claim and denying coverage, and the basis for the denial was reasonably communicated to the insured even though specific policy provisions were not recited in the denial notice.

Question of Fact As to Whether Water Intrusion was "Sudden and Accidental"

Acadia Ins. Co. v. Cunningham, 771 F. Supp. 2d 172 (D. Mass. 2011)

A Mainship 400 was laid up ashore for the winter and covered by a canopy that protected the flybridge and upper deck but left the aft deck open to the weather. The vessel was winterized in a fashion, but the bilge plug was not removed. Over the winter,

the owner periodically visited the vessel and everything appeared normal to him, though he did not go aboard. On one visit in late spring, he discovered that water had inundated the bilge and lower cabin.

His insurance policy covered "sudden and accidental" damage but excluded coverage for "any latent defect in the hull or machinery" and the results of wear and tear. The policy also required the insured to maintain the vessel "in good repair so that [it] cannot be damaged by ordinary weather or the rigors of normal use." In light of these provisions, the insurer denied coverage and sought declaratory relief.

The court denied the insurer's motion for summary judgment, deciding that a report prepared by the insured's testifying expert was sufficient to create an issue of fact as to whether the water intrusion was "sudden and accidental." (The report was submitted late, and only after the insurer moved for summary judgment. Citing a lack of prejudice to the insurer, however, the court declined to strike the report.)

The insured's expert opined that the water entered the vessel through a disconnected hose in the bilge area. (Apparently, the hose was part of a drain line leading from the aft deck, but this is not clear from the opinion.) The expert characterized the infiltration as a "sudden burst of water," and in the court's view this was sufficient to create a question of fact as to whether the water intrusion was "sudden." Also, since the disconnected hose could be seen only by removing a deck plate, there was a question of fact as to whether the circumstances of the water intrusion were "accidental," *i.e.*, unexpected and unforeseen.

The insurer proffered photographs of water marks seeming to show that the water had risen in stages over the winter. But in view of the "sudden burst" scenario posited by the insured's expert, the court could not treat the photographs as conclusive evidence that the water entered the vessel over a long period of time. Finally, because the disconnected hose was not in plain view, there was also

a factual dispute as to whether the insured met his duty to maintain the vessel in good repair.

Michigan Appeals Court Upholds Criminal-Acts Exclusion

Auto Club Group Ins. Co. v. Smith, No. 294697, 2011 WL 222236, 2011 Mich. App. LEXIS 176 (Mich. Ct. App. Jan. 25, 2011), *appeal denied*, 799 N.W. 2d 560 (Mich. 2011)

A man operating his boat with his wife and children aboard collided with another vessel. He was charged with child endangerment and intoxicated boating and pleaded no contest.

The owners of the other vessel sued the man and his wife for personal injuries and property damage caused by the collision. The man's insurer sought a declaratory judgment on the grounds that there was no coverage by reason of the policy's criminal-acts exclusion. The trial court agreed with the insurer, and the appellate court affirmed.

The policy excluded coverage for "bodily injury or property damage resulting from [a] criminal act or omission." In the immediately preceding paragraph, the policy also excluded coverage for "bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage."

The claimants argued that the placement of the criminal-acts exclusion immediately after the intentional-acts exclusion meant that a criminal act could bar coverage only if it was "intended" or "reasonably expected" to cause injury or damage. But the court held that the criminal-acts exclusion stood on its own and was not limited by the wording of the intentional-acts exclusion.

Next, the claimants argued that the criminal-acts exclusion was contrary to public policy since negligent boating was a crime under Michigan law and any boat accident caused by negligence

could therefore deprive an insured of coverage. But the court rejected this argument because the language of the exclusion was clear, there was no evidence that the insured could not have obtained a policy without a criminal-acts exclusion from another insurer, and not all negligent boating was necessarily a crime in Michigan.

Finally, the claimants argued that the criminal-acts exclusion did not operate as to the boat operator's wife, who faced potential exposure under a Michigan statute imposing liability on the owner of a vessel if someone else negligently causes an accident while using it with her consent. But the court read the criminal-acts exclusion to preclude coverage for any loss resulting from a criminal act, whether committed by the owner or her permissive user. Accordingly, there was no coverage for the wife either.

Boat Owner's Personal and Business Relationships with Guests Create Issue of Fact as to Insurance Coverage and Vicarious Liability

In re Antill Pipeline Construction Co., Nos. 09-3646, 10-2633, 2011 WL 577352, 2011 U.S. Dist. LEXIS 12288 (E.D. La. Feb. 7, 2011)

A recreational vessel operated by a businessman allided against a moored barge, resulting in his death and the deaths of four of his passengers. The operator, Michael Carrere, was also one-third owner of Tarpon Rentals, which rented equipment to the oilfield industry. Tarpon had contributed $20,000 toward the purchase of the vessel, with the understanding that Carrere would use it to entertain business contacts. The four passengers killed in the allision were Carrere's friends in addition to business contacts.

Carrere insured the vessel with State Farm, whose policy excluded coverage for losses occurring while the vessel was being used for any business purpose. State Farm moved for summary judgment, claiming there was no coverage since Carrere had been entertaining Tarpon's current and potential clients at the time of the accident. Tarpon moved for summary judgment as well, claiming it

could not be vicariously liable because Carrere was the sole owner of the boat and had been using it in his personal capacity.

At issue was whether Carrere was acting on behalf of Tarpon when the allision occurred. There was some evidence that the trip on the boat was part of a simple outing among friends. But there was also evidence that Tarpon considered hunting, fishing, and boating with clients to be an important part of Carrere's job and had in the past treated Carrere's boating expenses as legitimate business expenses.

The court stated that "the relevant questions are how Carrere used the boat in practice and what motivated Carrere in using his boat on the night in question." On the existing record, there were genuine issues of material fact, and both motions were therefore denied.

FINANCE

Where Custodian Allegedly Discouraged Bidders Before Marshal's Sale, Vessel's Value to be Determined at Trial

Wilmington Trust Co. v. M/V MISS B. HAVEN V, 760 F. Supp. 2d 364, 2012 A.M.C. 394 (S.D.N.Y. 2010)

The Southern District of New York has ruled that, for purposes of calculating a deficiency, the winning bid at a Marshal's sale was not conclusive of fair market value.

A preferred mortgage on the yacht MISS B. HAVEN V went into default, and the mortgagee obtained a default judgment *in rem* and bought the vessel at Marshal's sale for $180,000 (presumably on a credit bid). The mortgagee then sought an *in personam* deficiency judgment of approximately $280,000, representing the mortgage indebtedness less the $180,000.

The mortgagor challenged the adequacy of the $180,000 sale price, claiming the auction had been tainted by the mortgagee's

substitute custodian. In particular, the mortgagor submitted an affidavit from a bidder attesting that the custodian refused to allow him to test the vessel's engines on the day of the auction. Without the opportunity to verify that the vessel's mechanical systems were working, this bidder was reluctant to outbid the mortgagee.

The mortgagee did not provide any of its own evidence as to what transpired before the auction. Instead, it argued that the mortgagor could not now challenge the sale price since he had failed to object to confirmation of the sale.

Agreeing with the mortgagor, the court held that the results of the Marshal's sale were not binding for purposes of determining the deficiency. Furthermore, the court said, it would have been "a minimal burden for the custodian simply to allow a bidder to start the vessel's motors." (It is unclear from the opinion whether the terms of the custodianship, the Marshal's practices, and the condition of the vessel would have allowed this to be done as a matter of course before the auction.)

"Stranger to the Vessel" Doctrine Inapplicable to Preferred Mortgage

L&L Electronics, Inc. v. M/V OSPREY, 764 F. Supp. 2d 270, 2011 WL 1651 (D. Mass. 2011)

The District of Massachusetts has held that absent fraud, unfair dealing, or other inequitable conduct, the mere fact that a mortgagee was the manager and 80-percent owner of the limited liability company that owned the vessel was insufficient to invalidate his preferred mortgage or subordinate his mortgage lien to later-accrued necessaries liens.

Borrower in the Dark Not Guilty of "Permitting a Lien"

Huntington Nat'l Bank v. Kelly, No. 292992, 2010 WL 4106693, 2010 Mich. App. LEXIS 1984 (Mich. Ct. App. Oct. 19, 2010) (unpublished)

The Michigan Court of Appeals affirmed the dismissal of a bank's deficiency claim arising from an installment contract for the purchase of a boat, holding that the borrower had not even breached the contract.

The contract stated that the borrower would be in default if he "permit[ted] a lien to be placed on the [boat]." The borrower's brother had been storing the boat at a marina and did not pay the storage bill, thereby allowing the marina to obtain a lien. But there was no evidence that the borrower was aware of the lien, or that he even knew where his brother was keeping the boat.

Consulting the dictionary, the court noted that "[t]he pertinent definition of 'permit' includes 'to allow to do something,' 'to allow to be done or occur,' and 'to tolerate; consent to.'" Applying that definition, the court wrote that "[o]ne who 'permits' an action is at the very least aware of the action." Since it did not appear that the borrower was aware of the situation at the marina, he had not "permit[ted]" the lien to be placed on the boat, and there was no basis to foreclose in the first place.

LIMITATION OF LIABILITY

Contribution Claims Mean That Concursus Will Be Maintained

In re Aramark Sports & Entm't Servs., LLC, No. 2:09-cv-637-TC, 2010 WL 4791443, 2010 U.S. Dist. LEXIS 20160 (D. Utah Nov. 18, 2010)

A rented 20-foot powerboat sank during a day trip on Lake Powell. Of the six people on board, only two were able to swim ashore; the other four drowned.

The rental company owning the boat filed a limitation action, which the decedents' estates moved to stay so that they could sue the rental company in state court. There were indications that they also intended to sue the boat's manufacturer and the two people who survived the sinking, all of whom had appeared in the limitation

action and filed contingent claims for contribution or indemnity against the rental company.

In support of the motion to stay, the decedents' estates signed a stipulation by which they acknowledged the rental company's right to litigate the limitation issue in the federal court and agreed that the federal court would have exclusive jurisdiction to decide that issue. They also agreed to waive any preclusive effect that the decisions of another court might have on the limitation issue. They lastly agreed not to enforce any judgment against the rental company—or anyone else entitled to seek indemnity or contribution from the rental company—until after the federal court decided the limitation issue.

But the court deemed the stipulation deficient because it was not signed by the manufacturer and the two people who survived the sinking. Recognizing that there was disagreement among the appellate courts on this subject, the court ruled that parties asserting contribution claims must join in the stipulation before a limitation action may be stayed to allow state-court litigation. Since the manufacturer and the two people who survived the sinking had not agreed to the stipulation, there was a risk that they would rely on the preclusive effect of a state-court judgment and thereby undermine the vessel owner's attempt to limit liability with respect to all claims arising from the incident, including claims for contribution. The motion to stay was therefore denied.

In re RQM, LLC, No. 10 cv 05520, 2011 WL 98472, 2011 U.S. Dist. LEXIS 3000 (N.D. Ill. Jan. 12, 2011)

While attending an employer-sponsored outing on a yacht, a man fell from the top deck onto the well deck. He and his wife brought suit in state court against the yacht owner and the yacht manufacturer.

The yacht owner filed a limitation action in federal court, seeking to limit its liability to approximately $1.6 million—the proffered value of the yacht plus interest. The man and his wife

appeared in the limitation action, asserted a claim of $50 million, and moved to lift the stay so that they could resume their state-court suit. The manufacturer also appeared in the limitation action and asserted contribution and indemnity claims against the owner.

The husband and wife argued that this was the equivalent of a "single claimant" case in light of their agreement to consolidate their individual claims and their stipulation that their claims against the yacht owner would be capped by any liability limitation the federal court might ultimately decree.

In the court's view, however, the stipulation was insufficient because the yacht manufacturer was a claimant in the limitation action and had not agreed to limit its claim against the owner for contribution or indemnity. The motion to lift the stay was therefore denied, but without prejudice—allowing for the possibility of another motion if circumstances changed.

"Owner *Pro Hac Vice*" Withstands Motion to Dismiss

In re Tourtellotte, No. 09-2787(MLC), 2010 WL 5140000, 2010 U.S. Dist. LEXIS 130209 (D.N.J. Dec. 9, 2010)

A husband and wife, whose boat was involved in a collision while being operated by their son, filed a limitation action. The son was included as a limitation petitioner on the basis that he was an "owner pro hac vice" and therefore entitled to seek protection under the Limitation Act. 46 U.S.C. §§ 30501 *et seq*. A claimant in the limitation action moved to dismiss the petition as to the son, arguing that he was not an owner pro hac vice and that in any event he could not limit his liability since he was operating the boat at the time of the collision.

In denying the motion, the court wrote that "[t]itle ownership is not dispositive of the issue of who is an 'owner' for purposes of the Act." As alleged in the petition, the son "ensured the [v]essel was victualed," "communicated with the owners (his parents) on the status" of the vessel, and "interfaced" with the marina concerning

launching, hauling, and maintenance and repair of the vessel. There was also evidence that the son had free reign "to operate [the vessel] at [his] discretion" and that other family members did not use the boat without him being present. Although he did not pay for insurance, repairs, or fuel, and he did not make "ultimate decision[s]" about the vessel, the son's claim to status as an owner pro hac vice could not be dismissed on the existing record.

Further, under the holding of *In re Cirigliano*, 708 F. Supp. 101, 1989 A.M.C. 999 (D.N.J. 1989), the fact that the son was operating the vessel at the time of the collision did not necessarily prevent him from seeking limitation, and hence the motion to dismiss could not be granted on that basis either.

D. Mass. has Admiralty Jurisdiction over Rescue Attempt at Public Beach but Declines to Hear "Land-Based" Claims

In re Town of Chatham, No. 10-10441-GAO, 2011 WL 110351, 2011 U.S. Dist. LEXIS 3956 (D. Mass. Jan. 13, 2011)

A family was visiting a beach in the town of Chatham on Cape Cod. The children entered the water in an area of the beach known as "The Point" and stood on a sandbar. One of the children was pulled from the sandbar by the current, and her father, standing on the shore and seeing the girl struggling, entered the water to rescue her. He, too, became trapped in the current. The local harbormaster attempted to rescue the man using the town's patrol boat but was unable to save him. Meanwhile, the girl was pulled from the water by a Good Samaritan and survived.

The man's beneficiaries made an administrative claim against the town under the Massachusetts Tort Claims Act, alleging that the harbormaster negligently performed his rescue attempt and also that the town had inadequate emergency-response capabilities and was negligent by not posting signs to warn swimmers of the danger. The town, as owner of the patrol boat, filed a limitation action, and the beneficiaries moved for dismissal on the basis that there was no admiralty jurisdiction.

The court held that the negligent-rescue claim was subject to admiralty jurisdiction because it involved the operation of a vessel on navigable waters. The rescue operation also had the potential to disrupt maritime commerce since it took the harbormaster away from his usual duties of patrolling the harbor and assisting boaters.

At the same time, however, the court ruled that the claims for inadequate emergency-response capabilities and signage were beyond the scope of admiralty jurisdiction since these were "land-based" claims with no substantial relationship to traditional maritime activity. While recognizing that there might be supplemental jurisdiction over these claims, the court declined to hear them: "The limitation proceeding appropriately will focus on the harbormaster's actions. Additional land-based tort claims against the Town for actions or omissions unrelated to the harbormaster are beyond the scope of the true maritime proceeding and more appropriately tried in state court."

D. Nev.: No Admiralty Jurisdiction Over Houseboat Renter's Death on Navigable Lake

In re Seven Resorts, Inc., No. 2:10-cv-01149-PMP-LRL, 2011 WL 830107, 2011 U.S. Dist. LEXIS 23436 (D. Nev. Mar. 7, 2011)

A family rented a houseboat on Lake Mead. A few nights into their vacation, while the houseboat was moored to the shore, their son began playing on a raft tied to the back of the houseboat near a generator exhaust vent. The boy was later discovered floating face down in the water and could not be revived. An autopsy showed the primary cause of death to be carbon monoxide poisoning, most likely from the generator exhaust.

The owner of the houseboat filed a limitation action, which the family moved to dismiss for lack of admiralty jurisdiction and on the basis that it was untimely. (The limitation action was filed more than six months after the family's lawyer wrote to the houseboat owner's insurance adjuster advising of his representation and asking for insurance information.)

Without addressing the timeliness issue, the court ruled that admiralty jurisdiction was lacking. The court was bound by *H2O Houseboat Vacations Inc. v. Hernandez*, 103 F.3d 914, 1997 A.M.C. 390 (9th Cir. 1996), in which the Ninth Circuit held that carbon monoxide poisoning aboard a houseboat tied to the shore of a navigable lake had no potential to disrupt maritime commerce and thus could not support admiralty jurisdiction. Although Lake Mead was a navigable waterway, the circumstances of this accident were virtually identical to those in the *H2O Houseboat* case, and hence the limitation action had to be dismissed for lack of jurisdiction. (Arguably the Ninth Circuit's more recent decision in *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 2009 A.M.C. 1617 (9th Cir. 2009), would have counseled a different result, but that decision was not mentioned.)

The court also noted that under Ninth Circuit precedent the Limitation Act does not confer federal jurisdiction; rather, the court can hear a limitation action only if the underlying casualty is within admiralty jurisdiction.

TORTS

No Detention Damages for a Purely Recreational Vessel, Much to the Court's Regret

Northern Assurance Co. of Am. v. Heard, 755 F. Supp. 2d 295, 2011 AMC 258 (D. Mass. 2010)

The federal district court in Massachusetts has held, albeit reluctantly, that owners who use their vessels only for recreation are categorically barred from recovering loss-of-use damages.

A married couple, the Heards, purchased a Vagabond 47 ketch and spent several years rebuilding it. After the work was done and just one day before they were to begin using it for a 10-week vacation, the ketch was struck by a runaway vessel. Repairs could not be completed until months later—too late to save the vacation. They considered bareboat chartering a comparable vessel, but the

$5,000 weekly rate was more than they could afford. They sought damages for their inability to use the ketch.

The Conqueror, 166 U.S. 110, 2011 A.M.C. 566 (1897), remains the leading case on claims for recreational loss of use. There the U.S. Supreme Court considered the case of Frederick Vanderbilt, whose schooner-rigged steam yacht had been seized by the federal government and detained for five months in a dispute over customs duties. Ultimately, the Court held that no duties were owed, but it denied Vanderbilt recovery for the temporary deprivation of his yacht:

> It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure . . . . In other words, there must be a loss of profits in its commercial sense.

The Supreme Court's opinion was categorical, though the case could have been decided on narrower grounds since there was no indication that Vanderbilt had even planned to use the yacht during the period of detention. Also, his evidence on the measure of damages consisted only of conjectural opinions from witnesses who were "most friendly to the owner."

The Heards, by contrast, were unquestionably deprived of their planned vacation, and there was objective evidence of a charter rate for similar vessels. Nevertheless, after thoroughly considering all the authorities, the court concluded that the rule in *The Conqueror* admitted of no exceptions. But the judge was not without regret:

> I would be less than candid if I did not also register my sense that the categorical rule of *The Conqueror* finds its source in the resistance of the Supreme Court to enabling one of the richest men in late nineteenth

> century America to recover, on questionable evidence, for the "inconvenien[t]" loss of one of his many recreational diversions. That categorical rule has, however, a broad wake, depriving a working couple in this case recovery for a monetizable loss of the central recreational activity to which they have devoted considerable personal efforts over a number of years. In this, the categorical rule created for a Vanderbilt falls harshly on the Heards, calling to mind Anatole France's description of the "majestic equality of the laws, which forbid rich and poor alike to sleep upon the bridges . . . ."

No Liability in Wheel-Wash Case

Edington v. Madison Coal & Supply Co., No. 08-69-JGW, 2010 WL 3938370, 2010 U.S. Dist. LEXIS 107140 (E.D. Ky. Oct. 5, 2010)

A tow of fourteen barges, three across and five long with one gap, was downbound in the middle of the navigation channel of the 1200-foot-wide Ohio River. A 17-foot pleasure craft approached from ahead. It was operated by Danny Edington, a novice boater who had not taken any boating safety courses. Three of his four passengers were seated in the bow section of the vessel, causing a "bow down" effect.

The pleasure craft left the tow to port at a distance of about 150 feet, but then unexpectedly turned into the wheel wash behind the towboat. Likely, as a result of the wash combined with the "bow down" position of the vessel, two waves crashed over the bow, and the pleasure craft capsized. The towboat's crew rendered assistance, and everyone was rescued except for Edington, whose body was recovered the following day. The surviving passengers were Edington's widow, children, and second cousin by marriage, all of whom filed a negligence suit against the towboat owner. The court determined that the tow's speed of approximately 7.5 miles per hour was prudent in the circumstances and that the bow wake

and wheel wash did not present an unreasonable risk to the pleasure craft. Although the towboat did not sound any whistle signals, there was evidence of a "custom and practice of tow boats not to sound a horn or whistle when encountering pleasure craft on the Ohio River, so long as there is no apparent danger in passage." The legal cause of Edington's death was determined to be his own negligence in turning into the wheel wash. Judgment was entered for the defendant.

Owner of Boat Ripped from Mooring During Hurricane Katrina Acted Reasonably; Act of God Caused Loss

Simmons v. Berglin, 401 Fed. App'x 903 (5th Cir. 2010)

After Hurricane Katrina, property owners Sandra and Jack Simmons found a 47-foot sailboat in their backyard. They claimed that the boat damaged their pier, seawall, cabana, pool, fences, and sidewalks, and they filed suit against the sailboat owner. The sailboat's owner, Judy Berglin, had asked two very experienced mariners to make sure her boat was ready for the storm. The mariners determined that the seven one inch lines tying the boat to the pilings were already "overkill," but they added two extra lines on the bowsprit and one extra spring line from the bowsprit to an aft piling. They also gave the lines six inches of slack.

Hurricane Katrina devastated the marina where the sailboat was moored, destroying the docks and ripping every boat from the moorings (apart from one vessel that was dismasted, cut in two, and sunk during the onslaught). This devastation was far in excess of that experienced in prior hurricanes. The court determined that Berglin had acted reasonably and that the Simmons' property damage was the result of an Act of God. The district court's grant of summary judgment for the defendant was affirmed.

D.N.J.: Expert Not Needed to Prove Causation in Jet-Ski Accident

Dinenno v. Lucky Fin Water Sports, LLC, No. 08-5903 (JEI/JS), 2011 WL 689584, 2011U.S. Dist. LEXIS 16604 (D.N.J. Feb. 17, 2011)

Where a reasonable lay juror could find that a rental company's instructions were inadequate and contributed to a jet-ski accident, the claim against the company survived a motion for summary judgment.

A collision between two jet skis off the coast of New Jersey resulted in a negligent-entrustment claim against the jet-ski rental company. New Jersey law requires that jet-ski rental companies instruct customers on, among other things, safe speed and distance as well as the rules for meeting, crossing, and overtaking. The plaintiff claimed that the defendant rental company had provided instructions lasting only "30 seconds or so," presumably insufficient time to impart the information required by New Jersey law.

An experienced owner of a different jet-ski rental company provided an expert report on the plaintiff's behalf, opining that the defendant's instructions, riding area, and supervision were inadequate. The defendant claimed that the plaintiff failed to make out a *prima facie* case because the expert report did not address the issue of causation, *i.e.*, it did not state that the accident would have been avoided if the instruction, riding area, and supervision had been different.

The court noted that the expert report was addressing the standard of care in the jet-ski rental business, not watercraft collisions and their causes. The facts were not so complicated that the issue of causation would be beyond the understanding of a lay person, and the defendant's motion was therefore denied.

PRODUCT LIABILITY

East River (Again) Bars Product-Liability Claims Where Yacht Damaged Only Itself

Hunter v. Marlow Yachts Ltd., 2011 A.M.C. 746, 2011 WL 973356, 2011 U.S. Dist. LEXIS 28357 (M.D. Fla. Mar. 18, 2011)

A Marlow Explorer yacht caught fire and was severely damaged. Its owners and insurer brought suit against the seller, the builder, and other defendants on a variety of product-liability, negligence, and contract claims. The defendants moved for dismissal.

The court granted the motion in part, agreeing that the negligence and product-liability claims were barred by the economic-loss rule made applicable to admiralty cases by *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 1986 A.M.C. 2027 (1986). Since the fire had damaged nothing but the vessel itself, the only potential avenue of recovery was through contract. (The court noted that the result would have been the same under the economic-loss rule as applied in Florida and Washington, the two states that had a connection to the underlying sale transaction.) The fact that the contract claims might be barred by warranty disclaimers was insufficient to overcome *East River*.

As to the contract claims, the court decided that there was significant doubt as to their viability but that the allegations in the complaint were sufficient to survive a motion to dismiss.

In Colorado, Design of Steering Cable to Be Judged by Risk-Benefit Test, Not Consumer Expectation

Kokins v. Teleflex, Inc., 621 F.3d 1290 (10th Cir. 2010)

While patrolling a Colorado lake by boat, a park ranger was thrown overboard due to the sudden failure of the steering cable, caused by rust in the cable's inner core. She sued the manufacturer of the steering cable, claiming it should have had grease fittings or

O-rings to prevent water from entering the cable and that it should have been made of stainless steel rather than carbon steel so as to minimize corrosion.

The manufacturer argued that the cable was incorrectly installed and maintained and that carbon steel was preferable to stainless because it is stronger and also because it expands when it rusts, causing the cable to stiffen, making the boat difficult to steer, and thus alerting the operator that the cable needs replacing.

At trial, the jury was instructed on Colorado's "risk-benefit" test, under which a product is deemed defective if the plaintiff proves that the benefits of its design are outweighed by the risks. The jury was also instructed that under Colorado law there is a rebuttable presumption that a product is not defective if it has been on the market for at least ten years. The jury found for the manufacturer.

On appeal, the first issue was whether the jury should have been instructed not just on the risk-benefit test but also on the "consumer-expectation" test. Under the latter test, a product is deemed defective if the plaintiff proves that it is more dangerous than would be contemplated by an ordinary consumer who purchases it. The Tenth Circuit agreed with the trial court that in a design-defect case involving complex technical and scientific information, the proper test under Colorado law is the risk-benefit test, not the consumer-expectation test.

The second issue was whether the jury should have been instructed on Colorado statute (Colo. Rev. Stat. § 13-21-403(3)), under which a product is rebuttably presumed to be free of defects if ten years have passed since it was brought to market. Here again, the Tenth Circuit approved the trial court's instruction. Recently the Colorado legislature had amended the statute to mandate that juries be instructed on the presumption as long as the predicate facts are established. Since this was a diversity case governed by substantive Colorado law, the trial court had properly given the instruction.

SALVAGE

6% Award for Dockside Pump-Out, Temporary Fix, and Tow to Repair Yard

Port Everglades Launch Service, Inc. v. M/Y "SITUATIONS," No. 10-60571-CIV, 2011 WL 1196017, 2011 U.S. Dist. LEXIS 32903 (S.D. Fla. Mar. 29, 2011)

A 20-year-old, 100-foot Broward motor yacht began taking on water while docked on the canal behind its owner's house. Both the owner and his captain were out of state. A passerby noticed the problem and called the police, who arrived and decided that the yacht needed immediate assistance. The police telephoned a marine salvor, who came to the scene promptly , employed high-capacity pumps to dewater the yacht, and fashioned a temporary plug to stop the inflow of water from the air conditioner's raw-water pump, which was the source of the problem. The salvor's towboats then towed the yacht to a repair yard. From start to finish, the operation lasted approximately five hours. The weather was calm and no air bags were required, though the salvor did have a diver on the scene ready to enter the water if needed.

The court found that this was relatively "low order" salvage in light of testimony from the owner's expert that the vessel would not have gone under for another 27 hours. Also, there was other testimony that a broker who was listing the vessel for sale would have probably visited the vessel and summoned help in time to prevent a total sinking. The court declined to adjust the salvage award to account for the salvor's efforts at oil containment; there was conflicting evidence as to whether the salvor's oil booms were effective, and it was unclear whether any oil even entered the canal.

Weighing the testimony of each side's valuation expert, the court concluded that the yacht was worth approximately $700,000 before the incident and approximately $460,000 after it. Having considered all the circumstances, the court rendered a salvage award of approximately $27,500, or roughly five percent of the salved value

plus a one-percent uplift for the Plaintiff's status as a professional salvor. Prejudgment interest was allowed at the prime rate.

10% Award for Extracting Vessel Hard Aground

Reliable Salvage & Towing, Inc. v. 35-Foot Sea Ray, 2011 A.M.C. 712, 2011 WL 1058863, 2011 U.S. Dist. LEXIS 35515 (M.D. Fla. Mar. 21, 2011)

A 35-foot Sea Ray ran aground on a sandy shoal near Boca Grande, Florida. The owner hailed a passing boat operated by the plaintiff, a local salvage company, who assessed the situation and decided that two additional boats would be needed to pull the Sea Ray off the shoal. By this time, the Sea Ray was in about ten inches of water and heeled over at a 30-degree angle.

In the salvor's view, it would not have been prudent to simply wait for a higher tide because bad weather was predicted and tides for the next few days were expected to be lower than normal. In addition, it was Easter weekend and the Sea Ray would have been at greater risk of being hit by another boat due to the increased traffic on the water.

Before summoning its two other boats, the salvor presented the Sea Ray owner with a form of salvage agreement. Rates and costs were not discussed and were not filled in on the form. The owner signed the form but later professed not to have read its pre-printed terms.

The two other salvage boats were then called, and using their propeller wash they cleared a trench to allow the Sea Ray to be towed to deeper water. There was testimony that using the engines in this fashion causes significant wear and tear. During the course of the extraction, the Sea Ray also lost a bow cleat. The entire operation took several hours, and the Sea Ray departed under its own power.

The salvor calculated its bill based on the rate-per-foot approved by BoatUS, plus running time. The Sea Ray owner did not

dispute the reasonableness of the charges but still neglected to pay them (he had also allowed his insurance to lapse).

The court determined that the case presented a "pure salvage" situation inasmuch as there was no agreement—either oral or written—as to the terms of the salvor's compensation. Taking into account all the circumstances, the court awarded $14,000, or ten percent of the Sea Ray's value. This was slightly less than twice the amount the salvor had originally billed the Sea Ray owner.

Since the litigation was necessitated by the Sea Ray owner's failure to pay what was indisputably a reasonable bill, the court also awarded the salvor its attorneys fees and costs.

MARINAS

Court Will Not Enforce Ambiguous Exculpatory Clause

Albrecht v. Marinas Int'l Consol., LP, 2010-Ohio-5732
(Ohio Ct. App. Nov. 24, 2010)

A boater entered into a winter storage agreement with a marina and was allegedly assured by a marina employee that the boat would be fully winterized for a fixed price. When the boat was launched in the spring, it took on water because bolts on an intake strainer had frozen and broken during the winter. The boater's insurer paid the damage claim, and the marina was sued for negligence, breach of bailment, fraud, and violation of the Ohio Consumer Sales Practices Act (CSPA). The trial court granted summary judgment to the marina, but the Ohio Court of Appeals reversed.

> The storage agreement stated in fine print that the marina would not be responsible for or have any liability whatsoever for any loss, damage, personal injury or loss of life or property within the control of the Marina, its employees or its agents in connection with (1) the company's premises or the use of its storage space, (2) the owners [sic] vessel, motor,

> cradle, accessories, including outboard motors, dock box, fenders, tools, and associated equipment; (3) any loss due to fire, theft, vandalism, collision, marina equipment failure, windstorm, rain, tornado, or any other casualty loss. Owner agrees to cover the aforesaid risks by appropriate insurance coverage without subrogation against [the Marina]."

The Ohio Court of Appeals held that the waiver of subrogation in the last sentence did not necessarily apply since the term "aforesaid risks" could be read as encompassing only "fire, theft, vandalism," etc.—that is, the risks identified in the immediately preceding clause. Further, the exculpation for damage "in connection with . . . the owners [sic] vessel . . . and associated equipment" was "poorly drafted and confusing," did not clearly apply to the circumstances of this case, and in any event was not explicit enough to insulate the marina from the consequences of its own negligence as alleged in the complaint.

According to the appellate court, the trial judge also erred by invoking the economic-loss rule to dismiss the fraud and negligence claims, since the marina had not raised that argument in its motion papers. In addition, a genuine issue of material fact existed as to whether the marina exercised ordinary care in accordance with the duty of a bailee. Finally, since the written agreement contained no integration clause, the trial court should not have excluded parol evidence supporting the CSPA claim.

Summary judgment for the marina was therefore unwarranted, and the case was returned to the trial court for further proceedings.

Boatyard not Liable for Brazen Theft

Williams v. MarineMax of Cent. Fla., LLC, 773 F. Supp. 2d 1265, 2011 A.M.C. 1980 (N.D. Fla. 2011)

A boat was stolen overnight from a boatyard enclosed by a 7-foot-high chain-link fence with barbed wire on top. The theft was

discovered the next morning when a boatyard manager saw that a section of the fence had been either cut open or entered by force, as if the thieves had driven a vehicle through the fence. There was no evidence of any prior thefts from the boatyard or of significant criminal activity in the area. In these circumstances, the court granted summary judgment for the boatyard on the boat owner's negligence claim.

CRIMINAL LIABILITY

New York Prosecutes Yacht Captain for Having Handgun in Onboard Safe

People v. Guisti, 926 N.Y.S. 2d 345 (N.Y. Crim. Ct. 2011)

The New York City Criminal Court has declined to dismiss a gun-possession charge against the captain of a yacht operating in New York Harbor.

Flagged in the British Virgin Islands but based in Florida, the yacht was making a summer cruise along the East coast with the captain, owner, and several guests aboard. In the waters near the Statue of Liberty , the yacht was boarded by the U .S. Coast Guard—apparently as part of a routine check—and was directed to steer east in order to stay clear of traffic. When asked by the Coast Guard whether there were weapons on board, the captain advised that there was an unloaded handgun in the forward cabin. The Coast Guard located the unloaded handgun in its safe and accompanied the vessel to Jersey City, where New Jersey police investigated and declined to prosecute. NYPD harbor patrol officers were then called; they arrested the captain in New Jersey and took him to Manhattan for prosecution. There were no extradition proceedings.

The captain argued that he was immune from prosecution by virtue of the federal McClure-Volkmer Act, 18 U.S.C. § 926A, which provides that anyone not otherwise prohibited from doing so under federal firearms law may "transport a firearm for any lawful

purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible." The yacht was based on Florida, and there was no indication that the captain, a Florida resident, was in violation of Florida law. Nevertheless, the court concluded that the federal statute did not apply because the yacht was not traveling from Florida to another state in which possession of the handgun was legal; instead, it was making a "round-trip foray with a gun into states [where] the Defendant is not entitled to possess a gun. The plain language of the statute mandates application only if the Defendant was transporting the gun from one state to a different state."

The captain also argued that New York law was inapplicable since the yacht was in New Jersey waters when the Coast Guard located the handgun. But the prosecution alleged that the yacht had ventured into the waters "opposite of one 1 South Street, in the County and State of New York," and the court decided that the location of the vessel was a question of fact to be resolved at trial.

Next, the court declined to dismiss the case on account of the NYPD's having arrested the captain in New Jersey. While recognizing that generally "police officers from New York have no power to make arrests outside their geographic jurisdiction" and that the arrest was not aided by New Jersey police, the court stated that "the conduct of the NYPD, even if it violated New Jersey law, does not shock the conscious." In other words, regardless of whether the arrest was lawful where it occurred, the court held that the captain could still be prosecuted in New York.

Finally, the court declined to exercise its discretion to dismiss the case, noting that years ago the captain had three brushes with the law and that he presented no evidence supporting his argument that a conviction in this case could lead to the loss of his U .S. Coast Guard license and thereby end his career.

REGULATORY DEVELOPMENTS

Coast Guard Proposes to Mandate Engine Kill Switches

Installation and Use of Engine Cut-off Switches on Recreational Vessels, 76 Fed. Reg. 33,161 (June 8, 2011) (to be codified at 33 C.F.R. pts. 175 & 183)

As part of its unified agenda published in December 2010, the U.S. Coast Guard is proposing to require engine cut-offs (*i.e.*, man-overboard kill switches) on recreational boats less than 26 feet in length and to require their operators to use them. The proposal is now under review by the Office of Management and Budget. No proposed regulations have yet been released. Docket information may be found at http://www.reginfo.gov (RIN: 1625-AB34).

EPA Seeking Input on Clean Boating Act Standards

Stakeholder Input: Listening Session to Provide Information and Solicit Suggestions for Regulations Forthcoming Under the Clean Water Act, 76 Fed. Reg. 11,980 (Mar. 4, 2011) (to be codified at 40 C.F.R. ch. 1)

Under the Clean Boating Act passed in 2008, the Environmental Protection Agency is charged with developing management practices and performance standards for discharges incidental to the normal operation of recreational vessels (bilgewater, gray water, etc.). The rulemaking process is still at the early stage, and the EPA is accepting comments that will help it in developing management practices. Written comments should be delivered to the EPA by June 2, 2011. A public webinar is also scheduled for May 10, 2011. Further information is available at: http://water.epa.gov/lawsregs/lawsguidance/cwa/vessel/ CBA/

Recreational Boating Taken off NTSB's "Most Wanted List"

Press Release, NTSB, NTSB Adds Motorcycle Safety to Most Wanted List; Removes Recreational Boating (Nov. 16, 2010), *available at* http://www.ntsb.gov/news/2010/101116.html (last accessed Aug. 13, 2012)

Noting the proliferation of state laws mandating life jackets for children and training and licensing of recreational boaters, the National Transportation Safety Board has dropped recreational boating from its "most wanted list" of safety initiatives directed to state governments. The NTSB will, however, "continue to push for action" in those states that have yet to enact life jacket and training requirements.

BOATING BRIEFS

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MARITIME LIENS

Eleventh Circuit: A Floating House, Able to Leave the Dock Under Tow, is a Vessel

City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259, 2011 A.M.C. 2891 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 1543 (2012)

The U.S. Court of Appeals for the Eleventh Circuit has ruled that a floating house-like structure was a vessel and therefore subject to a maritime lien for unpaid marina fees.

The structure consisted of a two-story wood-frame living space built atop a rectangular fiberglass-coated hull. Used as the owner's primary residence, it was docked at a marina, moored with cables, and connected to shoreside utilities. It had no engine, bilge pumps, navigation equipment, lifesaving gear, or hull identification number, yet it was capable of being taken under tow. Indeed, the owner first purchased it on the Gulf coast of Florida and had it towed—presumably through the Okeechobee Waterway—to a marina near Sebastian Inlet on the Atlantic coast of Florida, where he lived on it. Three years later, he had it towed about 70 miles south to a marina operated by the City of Riviera Beach, where he continued living on it.

Friction ensued between the City and the owner. After a failed attempt to evict him in state court, the City decided that all marina customers would be required to sign new dockage agreements and comply with a new set of marina regulations. The owner of the floating house refused to sign the new dockage agreement, and the City sent him a notice directing him to comply with the new requirements or else leave the marina.

With the parties at a standoff, the City filed an admiralty action against the floating house, claiming a maritime lien for trespass and a necessaries lien for unpaid marina fees. The house was arrested by the U.S. Marshal, and the substitute custodian towed it down the Intracoastal Waterway to Miami, a distance of about 80 miles.

The trial court granted the City's motion for partial summary judgment on the trespass claim, holding that the house was a vessel and had committed a maritime trespass by remaining at the marina without the City's consent. After a trial, the court entered judgment against the house for about $3000, representing unpaid dockage and late fees and $1 in nominal damages on the trespass claim. To enforce the judgment, the house was sold at a Marshal's auction; the City was the winning bidder.

The former owner's principal argument on appeal was that—given its physical characteristics, its use as a primary residence, and the rarity with which it ever got underway—the house was not a vessel capable of incurring a maritime lien. But the appeals court held, in line with circuit precedent, that a structure does qualify as a vessel so long as it has the practical capacity to be used for transportation on water.

That the house rarely moved and was ill-suited for transporting passengers or cargo did not deprive it of vessel status. The applicable federal statute defines a "vessel" broadly as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. In the Eleventh Circuit, this means that a structure capable of being used for maritime transportation will be considered a vessel even if the owner intends never to use it for that purpose. Here, the floating house was capable of being taken under tow and in fact traveled many miles under tow, both in the past and immediately after the arrest.

The Eleventh Circuit acknowledged, however, that its conception of a vessel was perhaps broader than that in the Fifth and Seventh Circuit, both of which allow for the possibility that

a structure physically capable of maritime transportation may nevertheless not be a vessel if the owner intends that it never travel on the water.

Citing a split in the circuit courts on this subject, the former owner of the floating house has petitioned the U.S. Supreme Court to review the Eleventh Circuit's judgment. The case in the Supreme Court is *Lozman v. City of Riviera Beach, Fla.*, No. 11-626.

INSURANCE

Passenger was not "Operating" Boat and Therefore Not an "Insured" Under Policy

Mize v. Travelers Cas. Co., No. 4:09-cv-0076-TLW-TER, 2011 WL 891322, 2011 U.S. Dist. LEXIS 26129 (D.S.C. Mar. 10, 2011)

A passenger was rendered paraplegic when the vessel she was riding on—a 19-foot Maxum—was struck from behind by another boat whose owner was uninsured. She made a negligence claim against the Maxum's owner, who was at his vessel's helm when the collision occurred. His marine insurer settled the claim.

The passenger then brought suit against the same insurer, arguing that she was entitled to coverage under the policy's uninsured-boater provision, which covered damages that "any insured [is] legally entitled to recover from the owner or operator of an uninsured boat because of bodily injury caused by a collision/allision with the uninsured boat." The policy defined the word "insured" to include "any person or legal entity while operating [the Maxum] with an insured's permission and without a charge or fee."

The passenger claimed that she was an "insured" because the word "operating" was not defined in the policy and could be construed to refer to a passenger like her, who, though not steering or in command of the Maxum, may have had a duty to keep a lookout and assist the person at the helm.

But the court held that there was no ambiguity in the word "operating" and that the passenger could not reasonably be considered to have been "operating" the Maxum. The court observed that the dictionary definition of "operate" is to "perform a function" or "exert power or influence"; to "cause to function" or "work"; or to "run or control the functioning of."

The Maxum's owner was in command and at the wheel, and he was the only person to have steered or navigated the vessel that day. The fact that the passenger may have had a duty to keep a lookout did not mean that she was "operating" the vessel since she "was not performing a function to exert power or influence over the boat nor was she causing the boat to function." Accordingly, she could not be considered an "insured" under the Maxum owner's policy.

In Arbitration, Insureds Waived Challenge to Policy's Cooperation Clause

N. Assur. Co. of Am. v. Payzant, 952 N.E.2d 436 (Mass. Ct. App. 2011), *rev. denied*, 957 N.E.2d 241 (Mass. 2011)

A suspicious fire broke out on a yacht named, of all things, the BLAZE OF GLORY. The owners' insurance policy stated that there would be no coverage if the insureds breached the duties of cooperation listed in the policy unless the insureds proved that the breach did not prejudice the insurer.

After taking testimony from the insureds under oath and receiving numerous documents from them, the insurer denied coverage on the basis that the insureds had not sufficiently cooperated with the investigation of the loss.

Coverage litigation ensued, but at the insureds' request the dispute was referred to private arbitration in accordance with the policy's arbitration clause. The arbitrator decided that there was no coverage because the insureds insufficiently cooperated with the

insurer's investigation and failed to carry their burden under the policy of proving that the insurer was not prejudiced.

At the insureds' request, the trial court vacated the arbitrator's decision, holding that the policy's cooperation clause impermissibly imposed the burden of proof on the insureds to show lack of prejudice when, under Massachusetts law, it was the insurer's burden to show prejudice when disclaiming coverage on the basis of an insured's noncooperation.

But the appellate court held that the insureds had forfeited the right to contest the validity of the policy's cooperation clause because they did not raise this argument with the arbitrator and in fact conceded to the arbitrator that they had the burden of showing lack of prejudice. Accordingly, the arbitrator's decision was reinstated.

FINANCING

Under UCC, Borrower Need Not Be Given Notice of Time and Place of Private Repossession Sale

Barclays Bank PLC v. Poynter, No. 10-11187-RWZ, 2011 WL 3794890, 2011 U.S. Dist. LEXIS 95415 (D. Mass. Aug. 25, 2011)

A yacht mortgage gave the lender the right in the event of a default to repossess and sell the vessel "after first giving [the borrower] notice thereof ten (10) days in advance of the time and place of sale."

The borrower defaulted on the mortgage, and the lender repossessed the yacht and sent notice to the borrower that the vessel would be sold at a private sale. But the notice did not inform the borrower when and where the sale would occur. Since the notice did not comply with the 10-day-notice provision in the mortgage, the borrower argued that he was relieved of any obligation to pay the deficiency.

Separate from the 10-day-notice provision, however, the mortgage also stated that the lender would have "such other rights, privileges and remedies granted by applicable law." Since in this case the lender had elected self-help repossession instead of judicial arrest, the court determined that the "applicable law" was the Uniform Commercial Code as enacted in Florida, where the repossession sale was held. Under Florida's UCC, when a lender intends to sell collateral at a private sale, notice of sale sent to the borrower "10 days or more before the earliest time of disposition" is considered reasonable; the notice need not specify the time and place of the sale. *See* Fla. Stat. § 679.612. In this case, the notice was adequate since it complied with the UCC, even though it did not comply with the mortgage's more specific notice provision.

The court also observed that the lender's failure to advise the date and time of sale apparently did not prejudice the borrower, since there was no evidence that the borrower was prepared to cure the default before the sale or that any aspect of the repossession sale was commercially unreasonable. Accordingly, the borrower remained liable for the deficiency.

Lender Without Preferred Mortgage Had No Recourse in Admiralty

Home Sav. & Loan Co. v. Super Boats & Yachts, LLC, No. 11–60325–CIV, 2011 WL 2447641, 2011 U.S. Dist. LEXIS 63172 (S.D. Fla. June 15, 2011)

After a boat owner defaulted on a note and state-law security agreement, the lender filed a replevin action in state court and obtained an order of possession. In the meantime, the borrower conveyed the boat to a third party. The lender then filed an admiralty action in federal court against the boat and the third party, seeking the arrest of the boat, a judgment of possession, and an award of damages. But since the lender did not have a preferred mortgage or a maritime lien on the vessel and did not allege any breach of a

maritime contract, there was no basis for an arrest, and the federal court dismissed the action for lack of admiralty jurisdiction.

TORTS

New York Anti-Exculpatory Statute Preempted by Maritime Law

Brozyna v. Niagara Gorge Jetboating, Ltd., No. 10-cv-602-JTC, 2011 WL 4553100, 2011 U.S. Dist. LEXIS 111546 (W.D.N.Y. Sept. 29, 2011)

The plaintiff sustained a compression fracture in her lower back during a ride on a "Whirlpool Jet" excursion boat on the Niagara River. She had been seated in the bow of the boat as it made its way through Devil's Hole, an area of Class-5 whitewater rapids below Niagara Falls. The boat was part of a fleet of eight diesel-powered jet boats specifically designed to carry passengers in these conditions.

Before boarding the boat, she and all the other passengers signed a "Participation Agreement" acknowledging the "risks, hazards and dangers inherent in jet boating . . . including bumping and jolting of the boat," and releasing the excursion company from all claims, including claims of negligence. The passengers also attended a safety briefing, at which company employees described the risks and warned that the ride could be rougher for passengers who chose to sit in the front of the boat.

Plaintiff sued the excursion company, alleging negligent operation of the boat, inadequate warnings to passengers, and inadequate training of the boat operator. The court granted the company's motion for summary judgment, holding that the release barred her claims.

The case was governed by maritime law because the lower Niagara was navigable and the operation of the excursion boat was substantially related to traditional maritime activity. The judge

noted that other courts hearing similar cases have held that "a pre-accident waiver will absolve an owner or operator of liability for recreational accidents taking place on navigable waters where the exculpatory clause (1) is clear and unambiguous; (2) is not inconsistent with public policy; and (3) is not an adhesion contract." Here the Participation Agreement was worded clearly, and it was not a contract of adhesion since the excursion was a recreational pursuit and participation was entirely voluntary.

Nor was the agreement inconsistent with public policy. Although New York statute (N.Y. Gen. Oblig. Law § 5-326) provides that operators of certain recreational establishments may not exculpate themselves from the consequences of their own negligence when contracting with paying customers, the court held that the New York statute was preempted by maritime law. Pre-accident releases were commonplace and generally enforceable in the recreational marine context, and here the plaintiff did not show why "the interests expressed in General Obligations Law § 5-326 should be found to predominate over the long-recognized national interest in the development of a uniform body of maritime law."

The case was therefore dismissed.

Question of Fact Whether Jet-Ski Orientation Satisfied Florida Livery Statute

Straw v. Aquatic Adventures Mgmt. Group, Inc., No. 5:11-cv-102/RS-CJK, 2011 WL 5008359, 2011 U.S. Dist. LEXIS 121652 (N.D. Fla. Oct. 20, 2011)

The plaintiff was injured when she was thrown from a jet ski that she had rented as part of a guided tour near the waters of Panama City Beach, Florida. She sued the rental company on claims of negligence, violation of statutory duties, and vicarious liability.

Before renting the jet ski, the plaintiff had executed a release entitled "Assumption and Acknowledgement of Risks and Release of Liability Agreement." The release identified specific risks such

as tides, currents, wave action, wakes, collisions, equipment failure, and so on. It also provided that the plaintiff "agree[d] to assume responsibility for all the risks of the activity, whether identified or not (EVEN THOSE ARISING OUT OF THE NEGLIGENCE OF THE [DEFENDANT])" (capitalization in original).

The rental company moved for summary judgment, contending that the release barred the plaintiff's claims. She countered that that the company breached the Florida livery statute, Fla. Stat. 327.54(e), and that the release was therefore invalid.

The livery statute provides:

> A livery may not knowingly lease, hire, or rent a vessel [with a motor of 10 horsepower or greater] to any person . . . unless the livery provides prerental or preride instruction that includes, but need not be limited to:
>
> 1. Operational characteristics of the vessel to be rented.
> 2. Safe vessel operation and vessel right-of-way.
> 3. The responsibility of the vessel operator for the safe and proper operation of the vessel.
> 4. Local characteristics of the waterway where the vessel will be operated.

The Florida courts have held that a violation of this statute is negligence *per se* and renders a rental company's otherwise valid exculpatory clause unenforceable.

In this case, the rental company argued that it did comply with the statute by having the plaintiff review and sign a "PWC Renter Orientation Checklist." The checklist covered a variety of subjects and included detailed instructions concerning "protective clothing and equipment," three items for "PWC controls," and three items on "Avoid[ing] Collisions." The final item asked whether

the renter had any questions about the PWC or its operation. The plaintiff had signed the checklist and initialed each of these items.

The court noted that waivers relieving a party of liability for its own negligence are generally disfavored but are valid if the waiver is clear and unequivocal. The court concluded that the waiver here was presumptively valid. However, while the livery statute did not expressly require that the customer be given live instructions or an interactive presentation, there were questions of fact as to whether the checklist satisfied the statute. The rental company's motion for summary judgment was therefore denied.

While the issue was not briefed by the parties, the court did say that the livery statute did not appear to create a private right of action as alleged by plaintiff.

Inner-Tube Rider's Suit Dismissed for Deficient Pleading

Brown v. Cox, No. 2:11CV184, 2011 WL 3269680, 2011 U.S. Dist. LEXIS 82743 (E.D. Va. July 27, 2011)

The plaintiff was being towed in an inner tube on the Intracoastal Waterway in Virginia when another boat allegedly crossed the towline, causing him to be thrown from the tube into the water. The crossing boat then struck the plaintiff.

The plaintiff sued the operators of both boats, as well as the owner of the boat that had been towing the inner tube. His complaint alleged negligence, negligence *per se* for violation of state and federal navigation rules, and a right to punitive damages. Defendants moved to dismiss the complaint for failure to state a claim.

A complaint in federal court must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A detailed recitation of facts is generally unnecessary, but the plaintiff must make enough factual allegations to form a "plausible" claim to relief.

The court observed that a negligence claim under maritime law consists of the same elements as a land-based negligence claim: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) injury to the plaintiff; and (4) a proximate causal link between the plaintiff's injury and the defendant's breach of duty.

Here, the complaint failed to show the nature of the duty the defendants allegedly owed to him, and it disclosed no facts showing how the defendants' conduct led to his injuries. The complaint contained little more than a "formulaic recitation of the elements of a cause of action," and in the court's view was insufficient to withstand dismissal. The defendants' alleged violations of the Inland Navigational Rules might constitute negligence *per se*, but such a violation by itself did not create a cause of action.

The plaintiff did prevail on one issue, however: the defendants argued that the Inland Navigational Rules applied only to instances involving collisions between vessels, not where a vessel hit a towline and then a person. But the court held that a collision between one vessel and the equipment of another vessel does constitute a "collision" under the Inland Navigational Rules, so that if the rules were violated then the plaintiff might be able to avail himself of the *Pennsylvania* Rule, *The Pennsylvania,* 86 U.S. (19 Wall.) 125, 1998 A.M.C. 1506 (1873). With or without the *Pennsylvania* Rule, however, he still had to state a plausible claim of negligence.

Lastly, the court noted that the complaint did not allege facts showing any willful and wanton misconduct by the defendants as would be necessary to warrant a claim for punitive damages.

The court dismissed the complaint in its entirety but granted the plaintiff leave to file an amended complaint correcting the deficiencies.

In Allision Case, Sailboat Owner Acted Reasonably in Preparing for Hurricane and Overcame Louisiana Rule

Hatt 65, LLC v. Kreitzberg, 658 F.3d 1243, 2012 A.M.C. 159 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2102 (2012)

Before it came ashore, Hurricane Dennis was expected to pass west of Gulf Breeze, Florida; this would have resulted in winds from the south and west, sparing the Gulf Breeze area from the worst conditions.

The defendant had recently purchased the sailboat ESCAPE and sought to properly secure the vessel in advance of the storm. Due to the height of the main mast, his mooring options were limited. He requested advice from a marina regarding the placement and type of mooring that had allowed a 42-foot catamaran to survive Hurricane Ivan the previous year. He then constructed a similar mooring out of concrete, metal rebar, and chain, and placed the mooring outside the marina. He did not obtain a permit before sinking the mooring.

He secured the vessel to the mooring using a 40-foot line to make a 20-foot bridle. He also set a Super Max storm anchor with a snubber by dropping it and reversing the engines. He also attached a line to another nearby mooring.

Meanwhile, in preparation for the storm, the plaintiff's 65-foot Hatteras convertible sportfisherman, the WEJ, was secured with two anchors and a number of mooring lines tied to freestanding pilings, a dock, and a tree on shore.

Hurricane Dennis did not take the anticipated path, and hurricane-force winds approached Gulf Breeze from the north and then the northwest rather than from the south and west. Although the testimony of the witnesses varied, it appears that the ESCAPE somehow broke free, crossed the WEJ's anchor line, and allided against the WEJ.

The WEJ's owner filed suit, alleging that under the *Louisiana* Rule, *The Louisiana,* 70 U.S. (3 Wall.) 164, 2008 A.M.C. 1811 (1865), the ESCAPE was presumptively at fault because it allided against a stationary vessel. The *Louisiana* presumption may be rebutted, however, where the defendant proves, by a preponderance of evidence, that (1) the allision was the fault of the stationary object; (2) the drifting vessel acted with reasonable care; or (3) the allision was an unavoidable accident.

Although there was some testimony that the ESCAPE was drifting several hours before the winds became dangerous, the court determined that the testimony from the ESCAPE's owner and his expert credibly showed that reasonable action had been taken to properly secure the vessel.

The WEJ's owner also asserted that, under the *Pennsylvania* Rule, *The Pennsylvania,* 86 U.S. (19 Wall.) 125, 1998 A.M.C. 1506 (1873), the ESCAPE's owner had the burden of proving that his failure to obtain a mooring permit as required by Florida law could not have been a cause of the allision. But since there was no indication that the purpose of the permitting requirement was to avoid incidents like the one that occurred here, the court determined that the Pennsylvania Rule did not apply.

The district court found in favor of the ESCAPE, and the judgment was affirmed by the appeals court.

Claimants Not at the Accident Scene Had No Emotional-Distress Claim Under Maritime Law

Ortiz v. Zambrana, 809 F. Supp. 2d 1, 2012 A.M.C. 712 (D.P.R. 2011)

A group of family and friends anchored their boats at a Puerto Rico beach. Some of the men separated from the group to go harpoon fishing and snorkeling. A couple of hours later, two of the men were struck by a passing boat. As a result of the impact with

the propeller, one man's leg had to be amputated above the knee, his remaining leg had to be repaired with ten skin staples, he required transfusions totaling 14 pints of blood, and he remained in a coma for four days. The man's common-law wife (a status not recognized by Puerto Rican law) and children made claims for emotional distress.

Under maritime law, the court wrote, a claim for negligent infliction of emotional distress requires that a plaintiff (1) suffer some physical contact or injury in addition to emotional distress; (2) be at risk of physical injury while witnessing the endangerment of another; or (3) be physically close to the scene, directly witnesses the incident, and be a close relation of the victim. Under any of these scenarios, a plaintiff must have been close enough to the scene to witness the accident.

The injured man's common-law wife was on one of the anchored boats and did not witness the accident. His children were all at the beach or on the main island, and none of them witnessed the accident. Accordingly, none of these plaintiffs could recover on an emotional-distress claim under maritime law.

The plaintiffs argued that Puerto Rico law permitted recovery for emotional distress in the circumstances of the accident, but the court held that the claim had to be assessed under maritime law and that the plaintiffs could not rely on Puerto Rico law to obtain a different result.

No Negligent Entrustment Where Owner Did Not Permit Son to Use Jet Ski; Family-Car Doctrine Did Not Apply

Pace v. Davis, 161 Wash. App. 1032 (Wash. Ct. App. 2011)

The plaintiff was operating his boat when three jet skiers asked to ride in his wake. He agreed. One of the jet skiers allegedly came alongside the boat, spraying the boat with water. Another allegedly approached from the other side at a high speed and cut the boat off, thereby requiring the plaintiff to make an abrupt turn to avoid collision. During this maneuver, a passenger on the boat fell

from his seat and struck the plaintiff, causing plaintiff to strike the side of the boat and sustain injuries.

The jet skiers left the scene, but the plaintiff recalled enough information to track down the owner of the jet ski that allegedly cut him off. It developed that the owner of the jet ski was not the person operating it during the incident, but rather his father. The plaintiff filed suit against the owner-father, claiming negligent entrustment as well as vicarious liability based on agency. The agency claim was premised on the "family-car doctrine."

The father moved for summary judgment on the grounds that there was insufficient evidence of negligent entrustment and that the plaintiff failed to establish liability under the family-car doctrine. The court granted the motion and dismissed the claims.

Based on the depositions and other evidence, there was no indication that the father even knew that his son was riding the jet ski that afternoon, much less that the son had his father's permission to use it. To the contrary, the father testified that he explicitly instructed his son not to operate the jet ski out of concern about the additional holiday boat traffic, and no other evidence was introduced to dispute that testimony.

The claim that the court should apply the family-car doctrine against the father was also rejected. That doctrine imposes responsibility on an automobile owner if a resident family member incurs liability for damages caused while operating the automobile with the owner's express or implied consent. The court saw no basis for extending the doctrine to include personal watercraft. Moreover, the son did not live with the father, so the doctrine would not have applied anyway.

PRODUCT LIABILITY

Fifth Circuit Affirms Judgment for Plaintiff in Propeller-Guard Case

Brochtrup v. Mercury Marine, 426 Fed. App'x 335 (5th Cir. 2011)

A young man was boating with friends on a Texas lake and entered the water to retrieve a tow line. The boat operator put the engine in reverse while the man was still in the water. The man's leg was severely lacerated by the spinning propeller and had to be amputated at the hip. The man sued the boat manufacturer, claiming that the propeller should have been fitted with a guard. Ultimately, a Texas jury agreed with the man and awarded him over $2.5 million. (Reported in Boating Briefs Vol. 19:2.)

The manufacturers appealed, contending that the plaintiff's evidence did not satisfy two of the elements of a design-defect claim under Texas law, namely (1) that the boat was unreasonably dangerous by virtue of a defective design, and (2) that a safer, feasible alternative design was available.

In the Fifth Circuit's view, however, the jury was entitled to conclude that the absence of a propeller guard rendered the boat unreasonably dangerous. First, the plaintiff presented evidence of other incidents in which unguarded propellers had caused injuries similar to the one suffered by plaintiff. Second, as an alternative to an unguarded propeller, the plaintiff's experts designed and built a shield mechanism around the spinning propeller—a design that, according to the plaintiffs' experts, did not sacrifice the boat's utility. Third, the plaintiff's experts testified that their shielded propeller was safer than an unguarded one, was not excessively expensive, and would have prevented the plaintiff's injury. Fourth, there was evidence that some buyers would pay more for a boat with a propeller shield. Taken together, this evidence was sufficient to allow the jury to conclude that the boat was defectively designed and unreasonably dangerous.

The manufacturers also argued that, given the costs of designing and building shielded propellers and installing shields on existing boats, the plaintiff had not proven the economic feasibility of his proposed shield mechanism. But the Fifth Circuit ruled that under Texas law a plaintiff is not required to present exhaustive evidence of economic feasibility. Here there was evidence that the cost incurred by the plaintiff's expert to build the shield mechanism was $300, plus an extra $100 to weld the mechanism to the sterndrive. According to the Fifth Circuit, this was enough evidence to allow the question of economic feasibility to go to the jury.

The judgment for the plaintiff was therefore affirmed.

No Claim for Inadequate Warning Where Plaintiff Did Not Read Label

Altman v. HO Sports Company, Inc., 821 F. Supp. 2d 1178 (E.D. Cal. 2011)

The plaintiff in this case was an avid wakeboarder who had been wakeboarding many hundreds of times and considered himself an expert. On one occasion, while performing a trick jump and wearing wakeboarding boots manufactured by the defendant, the plaintiff sustained a serious fracture to his ankle. His jump had progressed normally until the landing, at which point the boot bent sharply and the plaintiff's ankle snapped.

The plaintiff alleged that the boot was defective because it allowed his ankle to be bent while his foot was still strapped into the boot and the boot was still connected to the binding on the wakeboard. He also challenged the adequacy of the warnings accompanying the boots. The defendant moved for summary judgment.

The boots had a 1-inch by 2-inch warning label that read, in part: "WARNING—HIGH PERFORMANCE BINDING: FOR USE BY EXPERIENCED RIDERS ONLY. USE OF THIS PRODUCT AND PARTICIPATION IN THE SPORT INVOLVES INHERENT RISK OF INJURY OR DEATH. EVEN IF PROPERLY FITTED,

THE BINDING MAY OR MAY NOT RELEASE IN A FALL WHICH COULD RESULT IN INJURY. TO REDUCE RISK ... READ OWNERS MANUAL BEFORE USE." The owner's manual included the following warning: "The binding, even if properly adjusted, may or may not release in a fall which could result in injury to the ankle, knee, leg, or other parts of the body."

The plaintiff argued that he had no reason to read the warnings on the boots and in the owner's manual because the manufacturer had been supplying the same warnings with its boots for many years, thus making it less likely that a user would actually pay attention to them. But the plaintiff's testimony indicated that the real reason for his not reading the warnings was that "he felt that he knew enough about wakeboard boots and simply did not need to read the warnings." Applying California law, the court observed that when a plaintiff does not read a product's warnings, any alleged defect or inadequacy in the warnings generally cannot have been a substantial factor in causing the injury. Summary judgment was therefore granted to the manufacturer on the failure-to-warn claim.

But there was a genuine issue of fact as to whether the boots were defectively designed. The plaintiff's experts criticized the boots as having insufficient stiffness around the ankle and opined that more support in that area of the boot would have likely prevented the plaintiff's injury. Therefore, the design-defect claim could proceed.

Maritime Comparative Negligence Applied in State Product-Liability Suit

Hill v. Chaparral Boats, Inc., No. 54368, 2011 WL 5009413, 2011 Nev. Unpub. LEXIS 1437 (Nev. Oct. 18, 2011) (unpublished)

While operating his newly-purchased boat on Lake Mead, a man discovered that he was unable to put the engine into reverse due to a malfunction of the throttle assembly. He decided he could dock the vessel in this condition by putting the engine in neutral, walking to the bow, and then jumping onto the dock and grabbing the boat

in order to secure it to the dock. He shifted the throttle to the neutral position as he approached the dock, but the boat remained in gear and struck him as he jumped onto the dock. He required "global fusion" back surgery, and brought product-liability claims against the boat manufacturer and others. All except the boat manufacturer settled with him.

The trial judge instructed the jury on the principle of comparative fault, and the jury found for the manufacturer. On appeal to the Nevada Supreme Court, the man contended that the trial court should have instructed the jury according to Nevada law, which does not treat a plaintiff's comparative fault as a defense to a strict-product-liability claim.

Since the incident occurred on navigable waters and had the potential to disrupt maritime commerce (if, for example, the vessel's limited maneuverability had resulted in damage to the dock or other vessels), and navigating and docking a vessel is a traditional maritime activity, the Nevada Supreme Court readily concluded that the case was subject to maritime law. Apportioning liability according to the parties' respective degrees of fault was a characteristic feature of maritime tort cases, including maritime product-liability cases. The trial judge was therefore correct to instruct the jury on comparative fault rather than Nevada state law.

WARRANTY AND REPAIR

Claim for Breach of Workmanlike Performance Requires Proof of Causation

Fairest-Knight v. Marine World Distribs., Inc., 652 F.3d 94, 2012 A.M.C. 1200 (1st Cir. 2011)

A boat owner sued a marine repairer under admiralty law and Puerto Rico law, claiming that the repairer performed faulty workmanship and was responsible for a host of ongoing problems with the boat. After a bench trial, a federal magistrate judge awarded the owner about $20,000 in compensatory damages and $55,000

for emotional distress, plus legal fees and costs. The First Circuit reversed.

The owner had purchased the boat "as is" from the defendant repairer for $38,000. Over the next three years or so, the repairer performed a host of repairs at the owner's request, primarily mechanical work. The boat continued to experience problems and was out of service, either undergoing repairs or unusable, about one-quarter of the time.

It was undisputed that the repairer owned a warranty of workmanlike performance, yet the appeals court saw no evidence in the record that the ongoing problems were in fact caused by the repairer's work:

> The fact that multiple repairs were required, without more, cannot be taken to establish that it was [the repairer's] unworkmanlike conduct that brought about the need for the repairs. In other words, if the hypothesis is that [the repairer's] unworkmanlike performance caused the need for the repeated repairs, then the fact that the repairs were required cannot itself be adduced as evidence supporting that hypothesis—it is what *needs* explaining, and so cannot, on pain of circularity, be what *does* the explaining.

Since the problems could have just as likely been the result of design or manufacturing defects, abuse by the boat's previous owner, or something else, the judgment had to be set aside.

REGULATORY DEVELOPMENTS

Final Regulations on LHWCA's Recreational-Vessel Exclusion

Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Recreational Vessels, 76 Fed. Reg. 82,117 (Dec. 30, 2011) (to be codified at 20 C.F.R. pt. 701)

After receiving public input, the U.S. Department of Labor has now finalized regulations implementing the 2009 amendments to the Longshore and Harbor Workers' Compensation Act. Those amendments made the LHWCA inapplicable to workers employed to repair recreational vessels and to workers employed to build recreational vessels less than 65 feet in length. (*See* Boating Briefs Vol. 18:1.)

The statutory amendments did not define the term "recreational vessel," but the regulations generally adhere to the Coast Guard's view of what constitutes a "recreational vessel." A vessel will be deemed recreational under the LHWCA regulations if it is "[b]eing manufactured or operated primarily for pleasure" or "leased, rented, or chartered to another for the latter's pleasure."

The regulations clarify that a builder may treat a vessel as recreational for purposes of the LHWCA exclusion "if the vessel appears intended, based on its design and construction, to be for ultimate recreational uses," the burden being on the builder to show that this is the case. A government-owned vessel undergoing repairs will also be considered recreational for purposes of the exclusion if it "shares elements of design and construction with traditional recreational vessels and is not normally engaged in a military, commercial, or traditionally commercial undertaking." The complete final rule, with agency comments, is published in 76 Federal Register 82,117 (Dec. 30, 2011).

COMMITTEE ON YOUNG LAWYERS

Chair: Carolyn Elizabeth Bundy

The following papers were presented as part of the Association's Continuing Legal Education program at its meeting in Oahu, Hawaii, on December 4, 2011.

OMG, THAT COULD HAVE BEEN ME! A NEW FEDERAL STANDARD FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS?

Carolyn Elizabeth Bundy

The Ninth Circuit recently addressed the requirements for pleading a maritime cause of action for negligent infliction of emotional distress in *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033, 2010 A.M.C. 1782 (9th Cir. 2010). In so doing, the court arguably broadened the reach of this relatively recently recognized maritime cause of action.

I. Background: A Maritime Law Cause of Action for Negligent Infliction of Emotional Distress is Inadvertently Created by the Supreme Court

Historically, federal maritime law did not recognize a negligence claim for solely an emotional injury. Today, most federal courts recognize a general maritime cause of action for negligent infliction of emotional distress.[1] The genesis of this maritime cause of action is the Supreme Court's 1994 decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 1994 A.M.C. 2113 (1994), a case arising under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, a federal statute that allows railroad employees to sue their employers for injury or death resulting from the employer's negligence.

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[1] Negligent infliction of emotional distress is distinguished from pain and suffering in that it is an independent claim that is not the result of any physical injury. *Consolidated Rail Corp., v. Gottshall*, 512 U.S. 532, 544 (1994).

At the time *Gottshall* was decided, most states recognized some form of negligent infliction of emotional distress claim. Similarly, most states had developed a test designed to balance the goals of compensating individuals for meritorious emotional claims and, simultaneously, limiting the field of potential plaintiffs so as to avoid a flood of unwarranted, and possibly frivolous, emotional injury claims. *Gottshall*, 512 U.S. at 545. To this end, three common law tests had emerged: the "relative bystander" test, the "physical impact" test, and the "zone of danger" test. *Id*. at 537 (citing *Gottshall v. Consolidated Rail Corp*., 988 F.2d 355, 1994 A.M.C. 2698 (1993)). The relative bystander test essentially limits recovery for emotional distress claims to those individuals suffering injury that results from observing a physical injury to a closely related third person, which was negligently caused. *Id*. at 548-49. The physical impact test requires an individual to have sustained some physical impact or injury as a result of the alleged negligent conduct in order to recover. *Id*. at 547. The zone of danger test allows for recovery only when an individual has suffered an emotional injury as a result of being negligently placed in harm's way. *Id*. at 547-48.

After a detailed review of the various tests adopted by state courts, and consideration of the fact that FELA has been liberally construed to facilitate the goal of creating a safe work environment for railroad workers, the Supreme Court adopted the "zone of danger" test. *Id*. at 557. The Supreme Court described the test as follows:

> Perhaps based on the realization that a near miss may be as frightening as a direct hit, the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, those within the zone of danger of physical impact can recover for fright, and those outside it cannot.

Id. at 548-49 (internal citations and quotations omitted).

Gottshall was decided on appeal from the Third Circuit and involved the claims of two separate plaintiffs, James Gottshall and Alan Carlisle, who both sought recovery from Conrail for wholly emotional injury. Gottshall was admitted to a psychiatric institution after he witnessed a coworker die of a heart attack under allegedly hot and strenuous work conditions. Carlisle had a nervous breakdown as the result of allegedly long, erratic work hours and stressful work conditions. Interestingly, the Third Circuit did not apply any of the common law tests, but instead applied its own crafted "genuineness" test, which focused on a threshold for establishing the legitimacy of the alleged emotional injury and reverting to a traditional negligence analysis with a focus on foreseeability. *Id*. at 550-51. In so doing, the Third Circuit concluded that both Gottshall and Carlisle passed the genuineness threshold, such that they were entitled to pursue their claims for negligent infliction of emotional distress. The Supreme Court rejected the Third Circuit's approach and remanded Gottshall's claims for application of the zone of danger test.[2] As for Carlisle, the Court held that he categorically did not meet zone of danger test. *Id*. at 558.

The *Gottshall* dissent disagreed with the adoption of the zone of danger test, concluding that it is too restrictive and preferring the approach taken by the Third Circuit, which would encompass the claims of both Gottshall and Carlisle. Further, the dissent opined that the risk of a flood of illegitimate litigation could be remedied by requiring "objective medical proof" to substantiate a negligent infliction of emotional distress claim, rather than limiting the category of potential claims. *Id*. at 571.

While *Gottshall* was not a maritime case, the Supreme Court's holding has resulted in most federal courts recognizing a cause of action for negligent infliction of emotional distress under the general maritime law. The adoption is a natural one in light of the fact that the Jones Act, 46 U.S.C. § 30104, a federal maritime statute that allows seamen to sue their vessel-owning employers for

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[2] On remand, the Third Circuit concluded that Gottshall was not in the zone of danger as he was not "subjected to the threat of physical impact," nor was he "placed in immediate risk of physical harm." *Gottshall v. Consolidated Rail Corp*., 56 F.3d 530 (3d Cir. 1995).

negligence, explicitly incorporates FELA's liability standard. Thus, it is common practice for federal courts to rely on FELA decisions as precedent when deciding Jones Act matters. Once a standard is incorporated into the application of the Jones Act, courts appear to be inclined to extend any applicable principles to the general maritime law, for the sake of uniformity.

One month after the Supreme Court issued its decision in *Gottshall*, the Ninth Circuit in *Chan v. Soc'y Expeditions, Inc*., 39 F.3d 1398, 1994 A.M.C. 2642 (9th Cir. 1994), a case involving emotional distress claims of cruise ship passengers, held that claims for emotional injury should likewise be recognized by the general maritime law. However, while the Ninth Circuit concluded that a federal maritime cause of action for negligent infliction of emotional distress now exists, the court declined to explicitly adopt *Gottshall*'s zone of danger test, but instead concluded that none of the common law tests would allow recovery in *Chan*, and thus, left open the question of what test would be applicable to these claims.[3]

A few years later, the Sixth Circuit in *Szymanski v. Columbia Transp. Co*., 154 F.3d 591, 1998 A.M.C. 2868 (6th Cir. 1998), held that *Gottshall*'s zone of danger test applies to claims arising under both the Jones Act and under the doctrine of unseaworthiness,[4] which is governed by general maritime law. The basis for extending the test to claims for unseaworthiness found by the Sixth Circuit was that "[a] seaman's claim under either the Jones Act or the

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[3] It is noted that the Ninth Circuit contradicts itself in this regard. With respect to two plaintiffs that were not present at the scene of the subject accident, the court found that none of the common law tests for negligent infliction of emotional distress would allow recovery. However, with respect to a plaintiff that was present at the scene of an accident where another individual died, the Ninth Circuit concluded that the zone of danger test was met and allowed the claim for emotional injury to go to the jury. *Chan*, 39 F.3d at 1410. Thus, arguably the court implicitly adopted the zone of danger test, despite its attempt to leave the question open.

[4] Note that in the context of an unseaworthiness claim, the cause of action would presumably only be available when the alleged unseaworthiness resulted from negligence, such as that of a crew member. To the extent that some unseaworthiness claims do not require a showing of negligence, the extension of a negligent infliction of emotional distress claim arising out of a vessel's unseaworthiness would arguably be inappropriate.

unseaworthiness doctrine is fundamentally a single cause of action, and remedies under one must be congruent with remedies under the other." *Szymanski*, 154 F.3d at 596. However, the Sixth Circuit subsequently held that the standard does not apply to maintenance and cure claims, which are akin to workers' compensation claims and do not require a showing of negligence. *West v. Midland Enters*., 227 F.3d 613, 2001 A.M.C. 1214 (6th Cir. 2000).

II. The *Stacy* Decision

By the time the Ninth Circuit revisited the issue in *Stacy v. Rederiet Otto Danielsen, A.S*., 609 F.3d 1033, 2010 A.M.C. 1782 (9th Cir. 2010), it was accepted without question that federal maritime law recognized a cause of action for negligent infliction of emotional distress and that the *Gottshall* zone of danger test was the applicable standard for allowing recovery. *Stacy*, 609 F.3d at 1035. The primary issue that was decided in *Stacy*, however, was whether the zone of danger test implicitly required a plaintiff, who did not suffer any physical impact, to have actually witnessed an accident causing injury to another. *Id*. at 1036. The Ninth Circuit found that it did not. *Id*. at 1037.

Stacy involved an incident wherein a large cargo ship plowed through a group of vessels fishing in dense fog, with "near zero" visibility, ultimately colliding with one of the fishing vessels, destroying the vessel and killing the captain. *Stacy*, 609 F. 3d at 1034. Plaintiff, Brian Stacy, was the owner and operator of another fishing vessel in the area. Stacy had seen the cargo ship on his radar heading straight for him and he signaled to the ship his location. The cargo ship apparently adjusted course and avoided Stacy's vessel, but passed at "close quarters," such that Stacy could hear the engine and machinery and feel the cargo vessel's wake. *Id*. The collision occurred thereafter and Stacy did not allege that he "saw, heard, felt, or otherwise perceived the collision." *Id*. at 1038. Stacy learned that a collision occurred and assisted in a search for persons in the water, which was called off before anyone was found. *Id*. Four days later, Stacy learned that the captain of the other fishing vessel had died as a result of the collision with the cargo ship. *Id*. Plaintiff filed suit

against the owners and operators of the cargo ship alleging that the vessel's negligence put him in grave and imminent risk of death or great bodily harm resulting in emotional injury. *Id*. at 1034-35. The Ninth Circuit concluded that the allegation was sufficient to sustain a cause of action for negligent infliction of emotional distress under the *Gottshall* zone of danger test. *Id*. at 1037.

The majority opinion in *Stacy* is brief and concludes that nothing in *Gottshall* or *Chan* requires a "witness" element to the zone of danger test. Since Stacy claimed that he was in the zone of danger and suffered fright as a result of the negligence of the cargo ship, his cause of action was valid. *Id*. at 1035. The decision turned on the sufficiency of the complaint, rather than evaluation of whether the elements of the test were met under the facts of the case. Thus, there is little analysis in the majority opinion.

The dissent on the other hand offers a lengthy analysis. Although likewise focused on *Gottshall* and *Chan*, the dissent concludes that *Chan* mandates a witness element and the rationale in *Gottshall* supports the witness requirement for "stand-alone" negligent infliction of emotional distress claims, *i.e*., claims like Stacy's that do not result in physical impact. Contrary to the majority view, the dissent believed that the zone of danger test articulated in *Chan* could not be read as dicta despite the *Chan* Court's claim that it was not adopting the zone of danger test. This conclusion was based on the fact that the test was actually applied by the panel to the one plaintiff in *Chan* that was present at the accident scene. Thus, the Ninth Circuit had *de facto* adopted the test. Significant in this regard was the fact that, in *Chan*, a stand-alone zone of danger claim was defined to allow recovery "so long as the plaintiff (1) witnessed peril or harm to another and (2) is also threatened with physical harm as a consequence of the defendant's negligence." *Id*. at 1040 (citing *Chan*, 39 F.3d at 1409). The dissent viewed this iteration of the test as a mandate that a plaintiff witness harm to another to be in the zone of danger. *Id*. at 1040-41.

The dissent also emphasized language quoted in *Gottshall* stating that "those within the zone of danger of physical impact can

recover for *fright*, and those out-side of it cannot" as supporting this reading. *Id*. at 1041 (emphasis added). Further, in rejecting the Third Circuit's foreseeability test the Supreme Court focused on the fact that it may be foreseeable that individuals far removed from the scene of an accident would suffer emotional impact as a result, but that impact does not necessarily warrant the right to recover. The zone of danger test was intended to limit the field of potential plaintiffs, not to broaden it. Thus, the dissent felt that a plaintiff must allege that some psychological impact, *i.e*., "shock" or "fright," occurred while actually in the zone of danger, not at some later time. *Id*. at 1044.

The majority dismisses the dissent in one long, somewhat rambling, and conclusory footnote. Interestingly, the majority faults the dissent for failure to distinguish between "direct and derivative emotional harm." *Id*. at 1035, n. 2. The meaning of this distinction is not explained, but the majority apparently views "direct" emotional harm as that resulting from a "near miss" to the plaintiff himself; whereas a "derivative" emotional harm would result from witnessing injury to another. The majority presumably views the zone of danger test as allowing recovery for "direct" emotional harm, whereas a relative bystander test, such as those applied in some states and rejected by the Supreme Court, would result from "derivative" harm, i.e. witnessing harm to another. Thus, the majority appears to be saying that a "derivative" test would have a witness element, while the "direct" zone of danger test does not. While this may be a fair distinction to make, the majority's rationale would arguably allow an individual to recover even if no accident or injury occurred so long as plaintiff was placed in harm's way. Such a broad reading of the zone of danger test would seemingly conflict with the intent of the *Gottshall* Court to limit the field of potential plaintiffs, rather than to widen it.

As it stands, there is little doubt that the zone of danger test will apply to maritime claims for negligent infliction of emotional distress. As of this writing, no federal cases have cited the *Stacy* decision, nor have there been any notable maritime decisions on the issue of negligent infliction of emotional distress. The Supreme

Court has also denied the petition for *certiorari* in the *Stacy* case. It will remain to be seen whether other federal courts will follow the lead of the Ninth Circuit in broadening the zone of danger test or whether federal judges will be persuaded by the issues raised in the *Stacy* dissent. Thus, at least for the time being, negligent infliction of emotional distress claims in the Ninth Circuit will not require a plaintiff to have witnessed injury to another, so long as the plaintiff was physically in the zone of danger.

III. Objective Physical Manifestation Requirement

A peripheral issue remains as to whether "stand alone" claims for negligent infliction of emotional distress also include an objective physical manifestation requirement. While this issue is not addressed in *Stacy* or the other cases cited above, for the sake of completeness, it warrants mentioning. It appears to be undisputed that negligent infliction of emotional distress claims resulting from "physical impact," rather than the "immediate risk of physical harm," do not have a physical manifestation requirement.[5] However, federal case law is murky as to whether physical manifestation is required where emotional injury results exclusively from exposure to harm.

The Supreme Court touched on the physical manifestation requirement in *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 2003 A.M.C. 609 (2003), wherein it held that an individual can recover for negligent infliction of emotional distress for fear of developing cancer as a result of exposure to asbestos if it can be established that the emotional injury is genuine and serious. The Court referenced the physical manifestation requirement in passing, but only in the context of a pain and suffering attendant to a physical injury claim, in which case, the Court indicated that objective physical manifestation was not required. The Court did not, however, opine on the requirement in the context of a "stand alone" negligent infliction of emotional distress case. Notwithstanding, the Eleventh Circuit, reversing itself,

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[5] See *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 1997 A.M.C. 2309 (1997), the seminal case addressing what constitutes "physical impact" in negligent infliction of emotional distress cases. *See also Tassinari v. Key West Water Tours, L.C.*, 480 F. Supp. 2d 1318, 2007 A.M.C. 1304 (S.D. Fla. 2007).

viewed *Ayers* as binding precedent that precluded application of an objective physical manifestation requirement for purely emotional injuries. *Jones v. CSX Transp*., 337 F.3d 1316 (11th Cir. 2002). No other circuit court appears to have decided the issue.

The trend at the district court level, however, now appears to include a physical manifestation requirement in negligent infliction of emotional distress claims where there is no physical impact. Interestingly, the Southern District of Florida cites *Ayers* for the opposite proposition as *Jones*, concluding that where there is no physical impact, physical manifestation of emotional distress is required. *Tassinari v. Key West Water Tours, L.C*., 480 F. Supp. 2d 1318 (S.D. Fla. 2007); *see also Carrier v. Jordaan*, 746 F. Supp. 2d 1341, 2007 A.M.C. 1304 (S.D. Ga. 2010). The Southern District of New York has also held that stand alone negligent infliction of emotional distress claims require a showing of objective physical manifestation. *Stepski v. The M/V Norasia Alya*, No. 7:06-cv-01694, 2010 WL 6501649, 2010 Dist. LEXIS 16602 (S.D.N.Y. Jan. 14, 2010). Thus, even where an individual may meet the "zone of danger" test, if the plaintiff did not suffer some physical impact, a showing of some objective physical manifestation of emotional distress may be required.

IN THE WAKE OF *BAKER AND TOWNSEND*

Pamela L. Schultz*

I. The Supreme Court's Holdings in *Exxon Shipping v. Baker* and *Atlantic Sounding v. Townsend*

Over three years ago, the Supreme Court decided *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 2008 A.M.C. 1521 (2008) ("*Baker*"), which first held that the water pollution penalties of the Clean Water Act[1] did not preempt punitive damages awards in

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[1] 33 U.S.C. § 1321.

maritime spill cases. The Court then addressed whether the punitive damages assessed against Exxon of $2.5 billion in view of the $507.5 million in compensatory damages was excessive as a matter of maritime common law. The Court considered that a 1:1 ratio of compensatory to punitive damages in maritime cases was a fair upper limit where the conduct was not intentional or malicious and without behavior driven primarily by desire for gain. *Id*. at 512-3.

Following *Baker*, the Supreme Court decided the issue of an injured seaman's recovery of punitive damages as a result of his employer's willful failure to pay maintenance and cure in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2009 A.M.C. 1521 (2009) ("*Townsend*"), and held these damages were permissible. The Supreme Court based this decision on three principles:

- Punitive damages have long been available at common law;

- The common-law tradition of punitive damages extends to maritime claims; and

- No evidence existed that claims for maintenance and cure were excluded from the general admiralty rule.

Since the only statutory scheme which could serve as a basis for overturning the common law rule that punitive damages were available under maritime law was the Jones Act which permitted injured seamen the right to "elect" to bring a Jones Act claim, the seaman's exclusive remedy was not limited to the Jones Act or there would be no election to make. *Townsend*, 129 S. Ct. at 2570 (citing 46 U.S.C. §30104(a)). In the Court's view, the Jones Act, 46 U.S.C. § 30104, was enacted to enlarge protections of seaman, not narrow them and since repeated decisions of the court preserved common-law causes of action such as maintenance and cure, punitive damages remained available in maintenance and cure actions even after the Act's passage. *Id*.

The petitioners argued that the availability of punitive damages was controlled by the Jones Act because of the Supreme Court's decision in *Miles v. Apex Marine Corp*., 498 U.S. 19, 1991 A.M.C. 1 (1990), which considered whether general maritime law provided a cause of action for wrongful death based on unseaworthiness. In *Miles*, the Court found that the remedies for wrongful death which had been created under the Jones Act[2] and Death on High Seas Act ("DOHSA"),[3] displaced the general maritime rules that had previously denied recovery for wrongful death. But *Townsend* presented a different question – the remedy of maintenance and cure, which was established well before the passage of the Jones Act. *Townsend*, 129 S. Ct. at 2572. Since *Miles* did not address maintenance and cure or its remedy, *Miles* did not conflict with *Townsend* decision. *Id*. In a footnote, the Court stated "Because we hold that *Miles* does not render the Jones Act's damages provision determinative of the [seaman's] remedies, we do not address the dissent's argument that the Jones Act, by incorporating the provisions of the Federal Employers' Liability Act, . . . prohibits the recovery of punitive damages in actions under that statute." *Id*. at 2575 n. 12.

As one would expect, the plaintiff bar took advantage of these decisions, and defense attorneys were suddenly explaining to clients that previous reserves might need to be adjusted. The *Townsend* footnote also effectively invited additional claimants to seek damages for their loss of society and/or consortium. If the case was a bad one for the defense in the first place, it just got worse. For a plaintiff, the case just got better. The purpose of this paper is to provide a "cheat sheet" comprising a summary of the cases which follow *Baker* and *Townsend*, and to provide a guide of the issues that may be raised following these decisions.

Townsend made clear that punitive damages were available for failure to pay maintenance and cure. Accordingly, much of the recent litigation has focused on whether the defendant employer's

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[2] 46 U.S.C. § 30104.
[3] 46 U.S.C. §§ 30301-30306.

actions rise of the level of wanton, willful and outrageous, and if so, does the 1:1 ratio in *Baker* apply? Another string of cases involves whether *Townsend*'s footnote regarding *Miles* opened the door to the availability of non-pecuniary damages to seamen, longshoremen and non-seafarers. This paper focuses on the cases that follow *Townsend* and *Baker*, and its purpose is to provide the reader with insight into the ways in which litigants are utilizing the decisions. Attorneys who defend Jones Act employers should take particular note of the circumstances under which an employer will be held liable for punitive damages for failure to pay maintenance and cure. Those employers who believe the 1:1 *Baker* ratio is an upper limit for any maritime case may be surprised that, at least in the State of Washington, it is not. Others may be surprised that the only circuit court decision addressing the availability of non-pecuniary damages under maritime law is the Eighth Circuit, following an appeal from the District of Nebraska.

II. Availability of Punitive Damages in Maritime Law State Treble Damages Statutes Conflict with Baker (Fourth Circuit)

Norfolk & Portsmouth Belt Line R.R. Co. v. M/V MARLIN, No. 2:08cv143, 2009 AMC 1135, 2009 WL 1974298, 2009 U.S. Dist. LEXIS 61538 (E.D. Va. April 3, 2009), involved a claim for property damage following a vessel's allision with the railroad company's bridge. The court declined to permit a plaintiff to bring a claim under a Virginia statute, Vir. Code Ann. § 56-5, that would automatically provide for treble damages when a defendant's willful or grossly negligent conduct caused damage to the property of a public service corporation. The court found that the treble damages ratio was strict and inflexible, conflicting with the *Baker* Court's 1:1 ratio and the general maritime law's goal of uniformity.

No Punitives for Breach of Contract or Seaman's Wage Act Claims (Ninth Circuit)

In *Priyanto v. M/S AMSTERDAM*, No. CV 07-3811 AHM (JTLx), 2009 WL 1202888, 2009 U.S. Dist. LEXIS 40833 (C.D. Cal. April 30, 2009), a seaman's punitive damage claims for breach of contract and pursuant to the Seaman's Wage Act[4] were denied. With respect to the breach of contract claim, the plaintiffs' only support for punitive damages in a breach of contract claim dated back to 1861 and was contrary to more recent authority holding punitive damages are only available in actions relating to breach of contract if the defendant's actions constitute an independent tort. *Id*. at *3. The court found that the pleadings did not allege an independent tort and would not permit an amendment of the complaint at the late stage of the case. With respect to the Seaman's Wage Act claims, since the statutory scheme already provided for an award of penalties when an employer willfully fails to pay wages on termination, permitting punitive damages would result in an unlawful double recovery.

Injured Seamen May Recover Punitive Damages under the Jones Act (Ninth Circuit)

In *Larson v. Kona Blue Water Farms, LLC*, 2010 AMC 1230, 2010 WL 1277429 (Cal. Super. Ct. Feb. 8, 2010), the Superior Court for the State of California, County of Alameda, held that an injured seaman may recover punitive damages because the Federal Employers' Liability Act ("FELA")[5] provides two distinct and independent liabilities, one to the surviving employee and another to the deceased employee. The court found no uniform controlling federal jurisprudence. The court noted that liability to the personal representative of a deceased employee is limited to pecuniary losses but that limitation did not apply to an injured employee. Moreover, *Miles* did not address the issue of injured seamen. *Id*. at 1244. The court did not consider itself bound by the Ninth Circuit's decision in *Kopczynski v. THE JACQUELINE*, 742 F.2d 555, 1985 A.M.C. 769 (9th Cir. 1984) ("*Kopczynski*"), which failed to distinguish between injured and deceased employees and had relied on cases involving deceased employees. *Id*. at 1245-46. The court

[4] 46 U.S.C. § 10313.
[5] 45 U.S.C. §§ 51 *et seq*.

summarized "defendant conflates recovery of damages by a personal representative with damages recoverable by a surviving injured seaman. Further, such recovery is in large part based on *dicta*." *Id*. at 1249. The court continued "The smattering of inferior federal (and state court) authorities . . . falls far short of establishing the existence of a uniform federal jurisprudence . . . . Nor has defendant established how a request for punitive damages by the plaintiff seaman in this case would contravene the essential purpose of the Jones Act or any other federal statute, or interfere with the proper harmony and uniformity of general maritime law. Indeed, it appears that recovery of punitive damages by a surviving seaman in a Jones Act case is not contrary to the terms of the Jones Act and is entirely consonant with the right of a seaman to recover punitive damages in traditional maritime cases." *Id*. at 1250, citing *Townsend*.

Baker Did Not Establish a 1:1 Bright Line Rule for Conduct at the "Zenith of Reprehensibility" (Ninth Circuit)

In *Clausen v. Icicle Seafoods, Inc*., 2010 A.M.C. 793, 2010 WL 2011586 (Wash. Super. Ct., Mar. 2, 2010), *aff'd* 272 P.3d 827 (Wash. 2012), a Washington state court denied a motion for reconsideration to reduce a jury's punitive damage award as a result of the defendant's failure to pay maintenance and cure. The court held that *Baker* did not impose a 1:1 bright line rule for all maritime cases, but rather imposed a cap in cases that did not involve "exceptional blameworthiness" or "behavior driven primarily by desire for gain" which was "profitless for the tortfeasor" and "reckless" rather than "intentional." The jury verdict awarded $465,525 in compensatory damages and punitives of $1.3 million, making the ratio 1:2.79.

Clausen is worth reading. The court was of the view that everything the defendant did (or did not do) warranted a significant punitive award as the defendant's conduct was at the "zenith of reprehensibility", having preyed on a man incapable of work, living in a broken recreational vehicle, and had done so intentionally, repeatedly and for the purpose of corporate profits. The court upheld the jury award of the 1:2.79 ratio, citing cases which upheld damages awards with even higher ratios.

Government Agent's Willful Failure to Pay Maintenance and Cure Is Subject to the Suits in Admiralty Act, Foreclosing the Possibility of Punitive Damages (Ninth Circuit)

Reece v. Keystone Shipping Co., 2010 A.M.C. 1017, 2010 WL 2331068, 2010 U.S. Dist. LEXIS 60830 (W.D. Wash. Mar. 25, 2010), involved a plaintiff's attempt to assert a punitive damages claim against an agent of the government and circumvent the exclusivity of the Suits in Admiralty Act ("SAA").[6] Under the SAA's limited waiver of sovereign immunity, Congress dictated that the government would answer for the actions of its agent. The plaintiff argued that *Townsend* permitted recovery for punitive damages against a governmental agent. The court denied this argument noting that, if anything, *Townsend* demonstrated why a claim for punitives should not be allowed since Congress specifically chose to make the SAA an exclusive statutory remedy.

Seamen May Recover Punitive Damages for Unseaworthiness but not under the Jones Act (Ninth Circuit)

Two decisions were issued in *Wagner v. Kona Blue Water Farms, LLC,* 2010 A.M.C. 2469, 2010 WL 3566731, 2010 U.S. Dist. LEXIS 95949, and 2010 A.M.C. 2455, 2010 WL 3566730, 2010 U.S. Dist. LEXIS 96105 (D. Haw. Sept. 13, 2010), pertaining to the issue of punitive damages under the Jones Act and unseaworthiness. The court held that it was bound by the Ninth Circuit's decision in *Kopczynski, supra,* which held that punitive damages were not available under Jones Act negligence claims. The court said *Townsend* (referring to the footnote) deliberately stated no opinion on whether the Jones Act prohibits the recovery of punitives. However, the court noted that the *Townsend* dissent argued that the Jones Act prohibited the recovery of punitive damages and used an analysis which mirrored the approach of the Ninth Circuit in *Kopczynski*. Since the majority in *Townsend* was silent on the issue and the dissent approved the Ninth Circuit's approach, the court found that *Townsend* was not irreconcilable with *Kopczynski*.

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[6] 46 U.S.C. §§ 30901 *et seq*.

On the issue of punitive damages for unseaworthiness causes of action, the court found it was bound by the 1987 decision of the Ninth Circuit, *Evich v. Morris*, 819 F.2d 256, 1988 A.M.C. 74 (9th Cir. 1987) ("*Evich*"), which allowed punitive damages under general maritime law claims for unseaworthiness. The court noted that *Townsend* Court's footnote 12 did not address whether *Miles* precludes the recovery of punitive damages in Jones Act claims and found *Evich* was not irreconcilable with *Miles* because unseaworthiness, unlike wrongful death, is a general maritime law creation and not a product of statute. *Id*. at *8. Since *Evich* was binding, punitive damages were available under general maritime law claims for unseaworthiness.

Imposition of Punitive Damages Is So Important, It May Warrant Reconsideration (First Circuit)

In *Mulligan v. Maritrans Operating Co*., No. 06-10492-LTS, 2010 WL3038091, 2010 U.S. Dist. LEXIS 77252 (D. Mass. July 30, 2010), the court found that the defendant acted in a willful and wanton manner in refusing to provide authorization for a procedure to alleviate the seaman's pain and injury during a six month time period, even though its prior actions had not been unreasonable. Apparently, the court's finding was primarily based on defense counsel's lack of explanation as to the delay. On reconsideration, the court believed that the defendant should have made clear previously the basis for the delay. However, the court noted that its focus was unknown to the parties until the court's order and believing the issue was so important that it should not be considered on a technicality, set aside the punitive damages award.

A Court May Consider the 1:1 Ratio in Determining Jurisdiction and a Defendant's Right to a Jury Trial (Sixth Circuit)

Adams v. James Transp., No. 5:09-cv-00036-R, 2010 WL 4789290, 2010 U.S. Dist. LEXIS 121951 (W.D. Ky. Nov. 17, 2010), presents an interesting use by a defendant of a claim for punitive damages. In that case, the plaintiff filed suit under the Jones Act,

for general maritime law negligence, and for maintenance and cure, requesting a jury trial. The defendant counterclaimed for reimbursement for medical payments it made based on plaintiff's alleged fraudulent concealment of past medical problems. The defendant sought $31,000, attorney fees, costs, and punitive damages. The plaintiff then filed an amended complaint seeking to waive his right to a jury demand; the defendant objected, claiming that it would interfere with its right to a jury trial. The court found independent subject matter jurisdiction did not exist over the counterclaim because diversity jurisdiction required that the claim be $75,000 or greater and the plaintiff's behavior did not justify a 1:1 punitive damages ratio.

Seaman Entitled to Fees for Withholding of Maintenance Until Plaintiff Submitted to an IME (Ninth Circuit)

Following a jury trial, the court in *Mai v. Am. Seafoods, LLC.*, 249 P.3d 1030 (Wash. Ct. App. 2011), held that an independent medical examination could not be required if a seaman established a *prima facie* burden of injury while in the service of a ship and the vessel owner agreed to pay maintenance and cure without questioning the need for some course of medical treatment which was curative in nature. Attorney fees were appropriate but punitives were not at issue because *Townsend* post-dated the jury verdict.

Choosing One Physician's Opinion over Another Does Not Warrant a Punitive Damages Award (Fifth Circuit)

The court in *Smith v. Florida Marine Transporters, Inc.*, Nos. 10-889, 11-1224, 2011 WL 2580625, 2011 U.S. Dist. LEXIS 70117 (E.D. La. June 29, 2011), dismissed with prejudice a seaman's claims for punitive damages for failure to pay maintenance and cure based on the argument that that the employer chose to believe one physician over another in cessation of maintenance and cure payments.

Passengers May Recover Punitive Damages under General Maritime Law (Eleventh Circuit)

Lobegeiger v. Celebrity Cruises, Inc., 2012 A.M.C. 202, 2011 WL 3703329, 2011 U.S. Dist. LEXIS 93933 (S.D. Fl. Aug. 23, 2011), held that, in light of *Townsend,* the Eleventh Circuit's preclusion of punitive damages in personal injury claims in *In Re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1429, 1997 A.M.C. 2962 (11th Cir. 1997), was no longer correct. *Id*. at *7. The plaintiff was a passenger onboard a cruise ship who sustained serious injuries to her finger, which may have been exacerbated by the actions and inactions of the onboard physician.

Claimants with General Maritime Law Claims Pre-OPA May Recover Punitive Damages (Fifth Circuit)

One of the issues in a recent decision by Judge Barbier in *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 2011 A.M.C. 2220 (E.D. La. 2011), involved the question of whether the Oil Pollution Act of 1990 ("OPA")[7] was the exclusive remedy for private, non-governmental entities asserting economic loss and property damage claims, requiring claims for economic damages to be solely against the "Responsible Party". The question was framed: "whether, or to what extent, OPA has displaced any claims previously existing under general maritime law, including claims for punitive damages." Citing *Baker* and *Townsend*, the court questioned whether long-standing federal law could be displaced by statutes that were silent on the issue. With respect to the claims of any non-commercial fishermen who alleged solely economic loss without any property damage, the court held that since pre-OPA the claimants had not had a viable claim, their claims must be dismissed. However, the claims of commercial fishermen and those who sustained physical damage to their property were not displaced by OPA since OPA "saved" admiralty and maritime law. 33 U.S.C. § 2751(e). On the

[7] 33 U.S.C. §§ 2701, *et seq*.

issue of punitive damages, since OPA was silent on their availability, the court held Plaintiffs who could have asserted general maritime claims for punitive damages before OPA's enactment could maintain those claims.

III. Availability of Loss of Consortium/Society Damages in Maritime Cases

No Loss of Society for Relatives of Non-Seaman Who Died in Territorial Waters (Fifth Circuit)

The case of *In Re Maryland Marine*, 641 F. Supp. 2d 579, 2010 A.M.C. 351 (E.D. La. July 9, 2009) involved the relatives of a non-seaman who died in Alabama waters. The claimants acknowledged that no statute permitted this recovery but argued that *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 1973 A.M.C. 2572 (1974), which awarded loss of consortium damages to the widow of a longshoreman under the general maritime law who could not recover those damages under any state or federal statutes, if properly applied, provided them relief. Although the claimants argued that Congress did not intend to occupy the entire field of maritime law remedies, the court declined this argument, finding *Gaudet* only applied to longshoremen in territorial waters. The court also noted the traditional protection of maritime workers and cited the Eleventh Circuit decision of *Tucker v. Fern*, 333 F.3d 1216, 2003 A.M.C. 1705 (11th Cir. 2003), which held a non-dependent father of a non-seafarer minor killed in territorial waters was not entitled to loss of society damages under general maritime law since it would permit non-seamen's survivors more liberal recovery than seamen's survivors.

Spouse of Injured Non-Seafarer Not Entitled to Loss of Consortium Where Accident Was Outside Territorial Waters (Eighth Circuit)

Following similar logic as in *Maryland Marine*, in *Doyle v. Graske*, 579 F.3d 898, 2009 A.M.C. 2493 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 2062 (2010), the Eighth Circuit declined to permit

loss of consortium damages to the spouse of a non-seafarer who was injured in a recreational boat in the Grand Caymans. Since there was no well-established rule authorizing loss of consortium damages as there was with respect to punitive damages under maritime law, the court felt it was not being asked to change maritime law as the *Townsend* Court had been asked to do. Since the issue was one of first impression in the Eighth Circuit, the court decided it would continue the development of general maritime law "in the manner of a common law court." *Id*. at 906. With no recognized claim under general maritime law as there had been in *Townsend*, the court looked to legislative enactments governing closely related claims for guidance and concluded that permitting recovery would result in serious disparities between general maritime law and legislative policies. First, spouses of those injured beyond territorial waters (as was the case in *Doyle*) would be treated differently than those who claims were subject to the Death on the High Seas Act (which would not permit recovery). Moreover, the rights of spouses of injured non-seafarers would be greater than the rights of the spouses of injured seamen under the Jones Act, which would be "odd" since the principles of maritime law "always included a special solitude for the welfare of seamen and their families." *Id*. at 907. *Certiorari* was denied by the Supreme Court on March 29, 2010, 130 S. Ct. 2062 (2010).

No Loss of Society Damages for Siblings of Seaman Who Died in Territorial Waters (Fifth Circuit)

In *Crescent Towing & Salvage Co. v. M/V BELO HORIZONTE*, No. 08-1544, 2009 WL 5171792, 2009 U.S. Dist. LEXIS 118649 (E.D. La. Dec. 21, 2009), the court dismissed the claims of the siblings of a seaman who died while in Louisiana territorial waters. The siblings claimed that their claim for loss of society damages was different from the issue faced by the *Miles* Court because, unlike the situation in *Miles*, they were dependent on the deceased seaman. The court declined to accept this argument, finding that *Miles* did not limit its decision to nondependent survivors.

Fisherman's Wife Not Entitled to Loss of Consortium for Accident in Territorial Waters (Second Circuit)

In *Stepski v. M/V NORASIA ALYA*, No. 7:06-cv-01694, 2010 WL 6501649, 2010 U.S. Dist. LEXIS 16602 (S.D.N.Y. Jan. 14, 2010), the court applied *Miles* to hold that loss of consortium damages were unavailable to the wife of an injured fisherman following a collision in territorial waters. The court assumed that *Townsend* stood for the proposition that punitive damages are generally available under general maritime law but found the facts did not warrant it.

Loss of Consortium Unavailable to Longshoreman's Widow Injured Outside Territorial Waters (Fifth Circuit)

Sinegal v. Merit Energy Co., No. 07-CV-1740, 2010 WL 1335151, 2010 U.S. Dist. LEXIS 31070 (W.D. La. Mar. 29, 2010), addressed a widow's claim for loss of consortium following the injuries and subsequent death of her husband while outside territorial waters. Finding Fifth Circuit jurisprudence clear regarding a general maritime law loss of consortium claim for injuries on the outer continental shelf and citing *In Re Maryland Marine*, the court held loss of consortium damages were unavailable. *Townsend* did not compel a different conclusion because *Miles* addressed a different issue.

Loss of Consortium Damages Available to Wife of Seaman for Unseaworthiness (Ninth Circuit)

In denying a motion to dismiss in *Barrette v. Jubilee Fisheries, Inc*., 2012 A.M.C. 1062, 2011 WL 3516061, 2011 U.S. Dist. LEXIS 89514 (W.D. Wash. Aug. 11, 2011), the court held loss of consortium damages were available to the wife of an injured seaman. The seaman was a deckhand onboard a fishing vessel who was allegedly exposed to unsafe levels of Freon and suffered permanent lung damage. The Ninth Circuit case of *Smith v. Trinidad Corp*., 992 F.2d 996, 1993 A.M.C. 2083 (9th Cir. 1993), precluded loss of society claims for every maritime tort that occurred on the

high seas. However, the court held it was not bound by *Smith* in light of the *Townsend* Court's statement that the reading of *Miles* as limiting recovery in maritime cases to the remedies under the Jones Act was far "too broad". *Id*. at *6. The court applied the analytical framework of *Townsend* and held that loss of consortium damages were available under general maritime law before the enactment of the Jones Act, denying the motion to dismiss with respect to the unseaworthiness claim.

IV. Conclusion

While the true reach of *Baker* and *Townsend* is still developing, the maritime law's goal of uniformity has once again become anything but uniform in view of the inconsistency of the decisions rendered in past few years. Until federal circuits with heavy maritime dockets decide the issues against the backdrop of *Baker* and *Townsend*, the uncertainty faced by litigants will most certainly continue.

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