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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

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EDITORIAL COMMENT

This edition of the MLA Report contains newsletters of the Association's Committees that were issued in connection with the Spring 2011 meeting in New York. The editors of the newsletters are to be commended for their diligence and hard work in preparing these newsletters, which show the complexity of legal issues currently being considered by members of the Admiralty and Maritime Bar. The Editors' Notes appearing within the newsletters are authored by the newsletter editors and reflect their considerable insight into developments in case law in their particular areas of expertise.

Continuing our practice of publishing short remembrances of members of the Association who have materially advanced its work, in this issue we honor David R. Owen of Baltimore, the first Editor of the MLA Report, who passed away on November 4, 2011, and Gerard T. Gelpi of New Orleans, who passed away on September 16, 2011.

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 are not necessarily the views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

David R. Owen

David R. Owen, who was President of the MLA from 1976 to 1978 and was the first Editor of the MLA Report, passed away on November 4, 2011. David practiced maritime law in Baltimore, Maryland with Semmes, Bowen & Semmes for his entire career – a career that spanned over 50 years – serving as Chairman of Semmes from 1974 to 1979.

David, the son of a career Army surgeon, was born in Honolulu, Hawaii in 1914. He received a bachelor's degree in 1935, a master's degree in economics in 1937, and a law degree in 1939 – all from the University of Virginia. He began the practice of law with Semmes, Bowen & Semmes in 1939. He served in the United States Navy during World War II, including service as Navigator and as Executive Officer on the USS ORDRONAUX, a destroyer active in the Atlantic and Pacific theaters. After the war, David remained active in the United States Naval Reserve, serving 33 years and retiring with the rank of captain. A high point of his Navy experience was the rescue of survivors from a German U-boat that was sunk by the ORDRONAUX; David re-established contact with the German captain after the war ended and developed a friendship that lasted many years.

Returning to Semmes after the war, David resumed the general practice of law, representing, among others, H. L. Mencken, but he soon gravitated to admiralty law, explaining once to a newspaper reporter, "I had a love of anything ocean and anything pertaining to the ocean." He joined the MLA in 1952. In addition to serving as its President, David served as the Chairman of the Committee on Practice and Procedure and as Vice-President of the MLA.

David established the maritime law practice at Semmes and served as a mentor and colleague to several Semmes maritime lawyers who have been officers and active members of the MLA. He was an excellent and very exacting teacher who knew his craft and liked to teach and tell tales about it. He was a thorough and skilled trial attorney. As an appellate advocate he drew praise from the Honorable John R. Brown, having been permitted the rare opportunity to argue on behalf of the MLA as *amicus curiae* in *Merchants National Bank of Mobile v. Dredge GENERAL G. L. GILLESPIE,* 663 F.2d 1338, 1982 AMC 1 (5th Cir. 1981). He participated in amicus curiae briefs for the MLA on at least nine occasions.

David was the author of numerous law review articles. He served as an Associate Editor of American Maritime Cases and on the Editorial Board of the Journal of Maritime Law and Commerce. He was the co-author, along with Michael C. Tolley, of *Courts of Admiralty in America – The Maryland Experience, 1634-1776*, a book published in 1995 that examines the admiralty law system as it was transmitted from England to America, with emphasis on the Maryland experience.

By: James W. Bartlett, III
M. Hamilton Whitman, Jr.

IN MEMORIAM

Gerard T. Gelpi

Gerard T. Gelpi passed away at home on September 16, 2011. He graduated from Tulane University in 1955 and Tulane School of Law in 1958. He joined the United States Marine Corps in 1958 as an officer in the Judge Advocate General Division and proudly served in active duty and later in the reserves. In 1962 he began his private practice of law in New Orleans. He established the law firm of Gelpi, Sullivan, Carroll and Laborde in 1979, where he practiced until his retirement in 2003.

His proudest professional experience was successfully arguing *Miles v. Apex Marine Corp*. before the U. S. Supreme Court in 1990. The *Miles* opinion (an 8-0 decision), limiting the damages recoverable for the death of or injury to a seaman to the items of damages specifically allowed under the Jones Act, is one of the most often cited and significant recent maritime decisions. If memory serves, there were over 300 cases prior to *Miles* against the propositions which Jerry urged and none holding in his favor. Having tried the case to the district court and argued the appeal to the Fifth Circuit, the Court noted Jerry's knowledge not only of the facts of the case, but also recognized his knowledge of the maritime law when Mr. Justice Stevens asked for Jerry's personal opinion, "May I just ask – ask you your own view?" To show the level at which the Court at the time of argument already had accepted Jerry's position that, among other arguments presented, the times had changed with worldwide communications and powerful labor unions, such that some of the traditional protections of seaman were no longer warranted, Mr. Justice Marshall humorously inquired of plaintiff's counsel concerning the vessel, "Does the union run it or does the captain run it?" When plaintiff's counsel replied that it was the captain who ran the ship, Mr. Justice Marshall rejoined, "You want to bet?"

Jerry very much enjoyed and was very active in The Maritime Law Association. He strongly believed the MLA was an essential part of the admiralty practice, and assured that the young attorneys in the firms in which he worked were members of and participated actively in the Association. Jerry served on the Association's Executive Committee, now known as the Board of Directors, from 1986 to 1989, as Chairman of the Committee on Planning and Arrangements, for the 1982 fall meeting, as Chairman of the Committee on Maritime Personnel from May 1983

through May 1987 and as Chairman of the Committee on River and Ocean Towage of the Maritime Law Association from 1990 to 1992. He was also a long time member of the Association's Nominating Committee. In 1991, Jerry chaired the Trial Practice and Procedure Seminar for the Louisiana Association of Defense Counsel. Jerry authored a chapter on collision law in Matthew Bender's *Recreational Boating Law* and has lectured at seminars presented by Louisiana State University, the Louisiana Association of Defense Counsel, the Houston Mariners Club, the American Waterways Operators, the Southeastern Admiralty Law Institute and the Maritime Law Association. Jerry also served on the Planning Committee and Advisory Board for the Tulane University School of Law Admiralty Law Institute. He was named Distinguished Maritime Lawyer of the Year in 1999 by the New Orleans Bar Association.

Jerry loved to have a good time, was fun to be with and enjoyed being with friends. Many in the world-wide maritime community fondly remember the crawfish boils and crawfish races which Jerry and his wife Yvonne commenced so long ago. The parties, which typically coincided with the Tulane Admiralty Law Institute, grew in size and reputation, and included Cajun music and dancing, as well as good food and plenty of drink.

Jerry lived with gusto and served as an example of how to practice law with integrity and enthusiasm. He was a mentor to many, not only in New Orleans, but across the country. He will continue to be greatly missed by his family, friends and colleagues.

By: C. Gordon Starling, Jr.

COMMITTEE ON ARBITRATION AND ADR

Editor: Keith W. Heard

Newsletter – May 5, 2011

Court Denies Motion to Compel Arbitration Based on Clauses in Prior Contracts Between the Parties but Stays Lawsuit on Basis of Ongoing London Arbitration.

In *Maritima de Ecologia, S.A. de C.V. v. Sealion Shipping Ltd*., 10 Civ. 8134 (DLC), 2011 AMC 1778, 2011 WL 1465744, 2011 U.S. Dist. LEXIS 41148 (S.D.N.Y. April 15, 2011) *reconsideration denied by* 2011 WL 2671541, 2011 U.S. Dist. LEXIS 72568 (S.D.N.Y. July 6, 2011), plaintiff Marecsa brought suit to recover compensation for services it provided last year in connection with the response to the DEEPWATER HORIZON oil spill disaster. Defendant Sealion was involved with the operation of a vessel, the TOISA PISCES, that had been time chartered to Marecsa for service under another, unrelated contract. After that contract expired, the vessel and its personnel remained on standby, pending the negotiation of another contract pursuant to which Marecsa would use the ship. Before that occurred, however, BP hired the vessel to assist with the cleanup of the DEEPWATER HORIZON oil spill. Sealion's New York agent arranged for Marecsa to provide the personnel needed for Sealion to perform the BP contract, although no written contract was concluded between Sealion and Marecsa for that work. Marecsa personnel were then active on the vessel for nearly five months. Although Marecsa billed Sealion for the work done by Marecsa's employees on the vessel, the invoices were not paid, prompting Marecsa to file the instant lawsuit to recover $1,152,946.57 in fees. After demanding arbitration of Marecsa in London pursuant to the arbitration clauses in other contracts between the parties, Sealion moved to compel arbitration of the instant dispute and to stay the litigation.

In support of its motion to compel, Sealion contended that although there was no written agreement to arbitrate Marecsa's claims arising from the DEEPWATER HORIZON transaction, a

binding agreement to arbitrate could be implied from the parties' prior course of dealing. Specifically, Sealion showed that on two prior occasions it had contracted with Marecsa to provide the TOISA PISCES for Marecsa to use in performing contracts to service oil rigs operated by Pemex Exploration and Production Co. ("PEP") in the Gulf of Mexico. Apparently a total of seven contracts were previously agreed between Sealion and Marecsa and all of them contained London arbitration clauses.

The court pointed out that Sealion's argument contained an inherent weakness because the case was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted at 9 U.S.C. § 201, which requires a "written agreement" to arbitrate and there was no such agreement in the arrangements covering use of the TOISA PISCES in the Gulf cleanup work. In support of its position, Sealion argued that the phrase "written agreement" in the Convention should not be given an "overly literal" interpretation and that, "under English law, an agreement to arbitrate can be implied from the parties' prior course of conduct." *Sealion Shipping*, 2011 AMC at 1783, 2011 WL 1465744, at *4, 2011 U.S. Dist. LEXIS 41148, at *10.

The court rejected Sealion's argument for several reasons. First, Sealion argued that English law should apply but the court determined that, under a proper choice of law analysis, U.S. law governed. Second, "under United States law, there is no basis for implying an agreement to arbitrate solely from a past course of conduct." *Id*. Third, and finally, the court concluded that "even if English law applied to the dispute, the expert affidavit upon which Sealion relies establishes no more than speculation that an implied agreement to arbitrate might be recognized in the United Kingdom." *Id*.

As an alternative argument, Sealion contended that even if Marecsa's claims were not subject to compulsory arbitration, the action should be stayed pending the resolution of disputes related to the first contract between Marecsa and PEP, which were currently being arbitrated in London. The court agreed that it had the authority

to "enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Sealion Shipping*, 2011 AMC at 1786, 2011 WL 1465744, at *5, 2011 U.S. Dist. LEXIS 41148, at *15. The court noted that, in the complaint, Marecsa recognized that the fees it earned in providing services under its contracts with PEP were "relevant to determining a reasonable rate for the Deepwater Horizon transaction." *Sealion Shipping*, 2011 AMC at 1786, 2011 WL 1465744, at *5, 2011 U.S. Dist. LEXIS 41148, at *16. Moreover, the court pointed out, "[t]he final rate of pay to which Marecsa refers, however, is contingent upon the outcome of the pending London Arbitration" between Sealion and Marecsa. *Id*. Since, according to the court, Marecsa could not demonstrate any prejudice if its New York litigation claims were stayed pending the London arbitration, the court granted that portion of Sealion's motion seeking a stay, while denying the motion to compel arbitration.

Agreement to Arbitrate in Bermuda Held Unenforceable With Respect to Cruise Line Employee's Jones Act and Other Statutory Claims.

In *Dumitru v. Princess Cruise Lines, Ltd*., 732 F. Supp. 2d 328 (S.D.N.Y. 2010), a Romanian citizen who was injured while working as a buffet steward on defendant's cruise ship filed state court actions alleging negligence under the Jones Act and unseaworthiness under the general maritime law, and seeking unpaid and penalty wages under the Merchant Seaman's Protection and Relief Act, 46 U.S.C. § 10313, and maintenance and cure. Defendant removed the actions to federal district court and then moved to compel arbitration of plaintiff's claims in Bermuda, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), 9 U.S.C. § 201 *et seq*.

Plaintiff contended defendant could not satisfy the Convention's requirements since the parties allegedly did not enter into a written agreement to arbitrate. However, the court found that when plaintiff was recruited by defendant in Romania, he signed a written contract entitled "Acceptance of Employment Terms and Conditions," which provided that "any and all disputes" would be resolved

by arbitration as provided by the "Principal Terms and Conditions of Employment," which were incorporated by reference. In addition, plaintiff's name appeared on a "List of Crew and Signatures of Seamen Who Are Parties to the Crew Agreement." Although plaintiff contended that he was not presented with a Crew Agreement and did not sign the list, the court noted "his position is at odds with the premise for his lawsuit, i.e., that he was employed by [defendant] PCL and was a crew member on the date of his injury. . . . Dumitru cannot bring suit based on his status as a PCL employee while simultaneously claiming that the agreed-upon conditions of his employment were never met." *Dumitru*, 732 F. Supp. 2d at 336.

Plaintiff next contended that he could not be compelled to arbitrate because the arbitration agreement at issue was contained in a seaman's employment contract and such contracts are excepted from the scope of both the Federal Arbitration Act ("FAA") and the Convention by language in 9 U.S.C. § 1. Noting that this argument had already been rejected by the Fifth, Ninth, and Eleventh Circuits, the district court nevertheless addressed the issue because the Second Circuit had not yet considered it. The court rejected plaintiff's argument because the Convention applied to legal relationships that are considered "commercial" without any exceptions and, in the event of a conflict between the FAA and the Convention, the latter had primacy. According to the court, plaintiff's argument that there is a federal policy of protecting seaman was "easily countered . . . by the competing policy in favor of [the enforcement of] arbitration agreements." *Id*. at 339.

The district court agreed with plaintiff that "the Bermuda choice-of-law provision in Article 14 of the Terms and Conditions [of Employment] should not be enforced because it operates as a prospective waiver of his U.S. statutory rights in violation of public policy." *Id*. at 340. In particular, the court noted that plaintiff would not be able to enforce his Seaman's Wage Act claim in Bermuda and that his rights under the Jones Act "far exceed that provided by a common law negligence action in Bermuda." *Id*. at 342. The court was also concerned that the case presented the court "with no meaningful 'opportunity for review' of the arbitration under Bermu-

da law," although the court's reasoning in support of this conclusion was not entirely clear. *Id*.

The court further concluded that the requirement that the arbitration be held in Bermuda was unenforceable on the basis of the Second Circuit's decision in *Harrington v. Atlantic Sounding Co*., Inc., which interpreted the Federal Employers' Liability Act (on which the Jones Act is based) as requiring "the existence of a practical and convenient forum to adjudicate the employee's rights." 602 F.3d 113, 122 (2d Cir. 2010). The court observed that, in this case, on the other hand, plaintiff was "contractually bound to arbitrate in a particular forum [i.e., Bermuda] that has no connection to the place of his injury" or to the governing U.S. law. *Dumitru*, 732 F. Supp. 2d at 345. The court noted, however, that the problem was resolved by defendant's offer to "stipulate its consent to arbitration" in New York City, Miami or Los Angeles. The court considered this satisfactory "because it gives [plaintiff] Dumitru a choice of several locations that would be available under FELA § 6." *Id*.

Noting the presence of a severability clause in the contractual "Terms and Conditions," the court ruled that both the Bermuda choice of law and the Bermuda choice of venue clauses should be "stricken" from the "Terms and Conditions," while the "core agreement to arbitrate" should be enforced. *Id*. at 346. Thus, the court concluded that "all of plaintiff's claims will be submitted to binding arbitration pursuant to Article 14 of the Terms and Conditions…." *Id*. at 347.

Construing the Same Arbitration Clause, the Southern District of Florida Holds that Arbitration of Jones Act Claims in Bermuda is Permissible.

The same arbitration and choice of law clauses that were considered in Dumitru were at issue in *Krstic v. Princess Cruise Lines, Ltd*., 706 F. Supp. 2d 1271 (S.D. Fla. 2010).

In *Krstic*, a Serbian seaman employed on one of defendant's Bermuda-flag vessels brought suit for personal injury, alleging Jones Act negligence and failure to provide prompt and adequate treatment. As in *Dumitru*, the defendant moved to compel arbitration pursuant to the arbitration clause in the agreement entitled "Acceptance of Employment Terms and Conditions," which plaintiff had signed. In connection with its motion, defendant "stipulated" to the application of U.S. law to plaintiff's statutory claims in the Bermuda arbitration.

Plaintiff opposed the motion, arguing that its Jones Act claims were categorically not arbitrable and that the defendant exercised disproportionate bargaining power over the plaintiff. The court rejected both arguments. With respect to the first argument, the court noted that it was bound by the Eleventh Circuit's ruling in *Bautista v. Star Cruises,* 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005), which held that a seafarer's claims under the Jones Act and for maintenance and cure could be arbitrated under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), 9 U.S.C. § 201 *et seq*. With respect to the second argument, the Eleventh Circuit also ruled in Bautista that the existence of unequal bargaining power did not constitute a defense to the enforcement of an agreement to arbitrate governed by the Convention.

The district court further rejected plaintiff's arguments that "(1) the arbitration provision is unenforceable because of the nature of discovery favors the defendant; (2) Bermuda arbitration is likely to be prohibitively expensive; and (3) the arbitration provision is unclear and ambiguous and should therefore be considered permissive, not mandatory." *Krstic*, 706 F. Supp. 2d at 1278. The court pointed out that plaintiff had failed to cite a single case holding that either unfavorable discovery procedures or the prospect of prohibitive costs constituted valid defenses pursuant to the Convention. With respect to plaintiff's third argument, the court concluded that the arbitration clause was quite clear and was not "susceptible to two or more reasonable interpretations." *Id*.

Paving the way for the Southern District of New York's decision in *Dumitru*, the court in *Krstic* agreed with plaintiff that the

Bermuda choice of law clause on which defendant relied was void and unenforceable since it acted as a prospective waiver of the statutory remedies applicable to plaintiff's Jones Act claim, despite defendant's purported "stipulation" to the applicability of U.S. statutory law in the arbitration.

Unlike the court in *Dumitru*, however, the court in *Krstic* refused to void the Bermuda arbitration clause, in part because defendant had offered to pay all fees of the Bermuda arbitrator and "the arbitral forum (Bermuda) is closer to plaintiff's residence than the Southern District of Florida." *Id*. at 1278 n.8. Relying on the severability clause in the contract at issue, the court severed the Bermuda choice of law provision and held that the arbitration clause itself remained enforceable, requiring plaintiff to proceed with the arbitration of its claims in Bermuda.

Injury Claimant Proceeding under Louisiana's Direct Action Statute Must Pursue Claims Against Shipowner's P&I Club in Arbitration, Pursuant to the Club Rules.

Todd v. Steamship Mut. Underwriting Ass'n, Ltd., No. 08-1195 Section "C" (3), 2011 AMC 1126, 2011 WL 1226464, 2011 U.S. Dist. LEXIS 38638 (E.D. La. March 28, 2011), is the latest decision in a case in which the district court first denied the defendant protection and indemnity association's motion to compel arbitration and was then reversed by the Fifth Circuit Court of Appeals, 601 F.3d 329, 2010 AMC 1143, which remanded the case for consideration of several issues.

Plaintiff Todd was injured in 2000 while serving as a seaman aboard the M/V AMERICAN QUEEN, which was owned by Delta Queen Steamboat Company ("Delta Queen"). In 2002 Todd sued Delta Queen in Louisiana state court, eventually winning a final judgment, which Delta Queen did not satisfy. Todd then filed suit against Steamship Mutual, the vessel's P&I Club, as allowed by Louisiana's Direct Action Statute, La. Rev. Stat. Ann. §§ 22:1269 & 655 (2009). After the direct action was removed from Louisiana state court, the federal district court denied Steamship Mutual's motion to compel arbitration which was based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq*. On appeal, the Fifth Circuit reversed on the basis of the decision in *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 129 S. Ct. 1896, 1903 (2009), where the Supreme Court ruled that non-signatories to arbitration agreements can sometimes compel parties to arbitrate under the Federal Arbitration Act ("FAA"), "if the relevant state contract law allows him to enforce the agreement." The Fifth Circuit remanded plaintiff Todd's case to the district court for further proceedings to determine whether he could be compelled to arbitrate.

As an initial step, the district court found that, although the Club's Rules contained an arbitration clause, the Rules did not clearly address whether a non-signatory may be bound to arbitrate thereunder. Although the Club argued for the applicability of federal law, the court determined that Louisiana state law controlled the questions of (a) whether Todd, as a non-signatory, could be bound to the arbitration agreement between Delta Queen and Steamship, and (b) whether Todd's claims fell within the scope of that arbitration agreement. The court noted that, under Louisiana law, choice-of-law clauses in contracts are given effect unless there is law or strong public policy justifying a refusal to enforce the contract as written. Because the Club's Rules designated English law to control their interpretation, the court concluded that English law would govern whether plaintiff Todd was bound by the arbitration clause in the Rules and whether his claims fell within the scope of the clause. However, English choice of law rules required that the issue of whether a non-signatory could be bound to arbitrate was determined by the law of the forum, which in this case was Louisiana state law. However, the relevant choice of law analysis caused the court to determine that English law determined whether Todd's claims fell within the scope of the arbitration clause.

Applying Louisiana law, the court concluded that, as a direct-action plaintiff, Todd stood in the shoes of his employer, Delta Queen, and was bound by the terms of its policy with Steamship. Going further, the court concluded that "[b]ecause Todd is seeking

to enforce the terms of the contract between Steamship and Delta Queen, he has embraced that contract such that, under both Louisiana and federal case law, he is estopped from repudiating the arbitration clause in that contract." *Todd*, 2011 AMC at 1138, 2011 WL 1226464, at *7, 2011 U.S. Dist. LEXIS 38638, at *22.

The court determined that the arbitration clause in the Club Rules was a broad one and that, as a result, the court was required to stay the action and allow the arbitrators to determine whether plaintiff's claims fell within the clause. Moreover, the court concluded that even if the arbitration clause was narrow, Todd's claims would fall within it because all of them arose from "the insurance afforded by the Club," as required by the language of the clause in the Club Rules. Todd, 2011 AMC at 1141, 2011 WL 1226464, at *9, 2011 U.S. Dist. LEXIS 38638, at *27. Therefore, the court granted Steamship's motion to compel arbitration and it stayed all proceedings in the lawsuit, pending the outcome of arbitration under the Club Rules.

District Court Rejects Public Policy Challenge to Recognition and Enforcement of German Arbitration Award and Judgment.

In *Ameropa AG v. Havi Ocean Co. LLC*, 10 Civ. 3240 (TPG), 2011 WL 570130, 2011 U.S. Dist. LEXIS 15803 (S.D.N.Y. Feb. 16, 2011), the parties entered into a contract by which defendant Havi Ocean agreed to supply sulphuric acid from Iran for plaintiff Ameropa to re-sell to a customer in Venezuela. When defendant failed to perform all of its obligations under the contract, making only one of two shipments, plaintiff demanded arbitration in Hamburg pursuant to the arbitration clause in the sales contract. Plaintiff prevailed in arbitration and then obtained a German judgment rejecting defendant's challenge to the award and declaring it enforceable.

Plaintiff filed suit in New York to have the arbitration award confirmed and enforced pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted at 9 U.S.C. § 201 ("the Convention"), and to have the German judgment recognized and enforced pursuant to New York's Uniform Foreign Money Judgments Recognition Act, N.Y. C.P.L.R. § 5303 ("the Judgments Recognition Act"). Defendant sought discovery pursuant to the Federal Rules of Civil Procedure to determine to what extent officers and employees of plaintiff's U.S. subsidiary were involved in the transaction. Plaintiff moved for confirmation and enforcement of the arbitration award and recognition and enforcement of the German judgment. Defendant cross-moved for an order compelling plaintiff to respond to defendant's discovery requests.

In opposition to plaintiff's motion, defendant argued the award was unenforceable under the public policy exceptions in both the Convention and the Judgments Recognition Act because performance of the contract on which the award was based violated the Iranian Transactions Regulations, 31 C.F.R. Part 560. The district court disagreed, stating that "review of arbitral awards under the Convention is very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Ameropa AG*, 2011 WL 570130, at *2, 2011 U.S. Dist. LEXIS 15803, at *5. With respect to the Convention's public policy exception, the court concluded that it should be granted "only where enforcement would violate the forum state's most basic notions of morality and justice." *Id. quoting Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974). The court stated that an arbitration in which the defendant's due process rights had been violated might fall within the public policy exception but that the U.S. government's "[f]oreign policy disputes with another country are not enough to overcome the 'supranational' policy of providing predictable enforcement of international arbitral awards," even in a case where "enforcement would conflict with U.S. sanctions." *Ameropa AG*, 2011 WL 570130, at *2, 2011 U.S. Dist. LEXIS 15803, at *6.

The court also rejected defendant's argument that the German judgment ran afoul of the public policy exception in New York's foreign judgment recognition statute. The court stated that the judgment "arises from enforcement proceedings and has nothing

to do with the terms of the underlying contract" and that "even if it could be said that the proper underlying cause of action involved the Iranian sulfuric acid transaction, a potential violation of U.S. sanctions would not rise to the high level needed to constitute a violation of New York public policy." Ameropa AG, 2011 WL 570130, at *3, 2011 U.S. Dist. LEXIS 15803, at *8-*9.

Defendant's discovery cross-motion was denied because, according to the court, there was no proof plaintiff's U.S. subsidiary had been involved in the transaction and, even if it had been, "this would not defeat the enforcement of the arbitral award under the FAA." *Ameropa AG*, 2011 WL 570130, at *3, 2011 U.S. Dist. LEXIS 15803, at *7.

Southern District of Texas Denies Application for TRO to Enjoin Foreign Arbitration under 9 U.S.C. § 202 Because Both Parties Were Not Citizens of the U.S.

In *S&T Oil Equip. & Mach., Ltd. v. Juridica Inv. Ltd.*, No. H-11-0542, 2011 WL 864837, 2011 U.S. Dist. LEXIS 24621 (S.D. Tex. March 10, 2011), plaintiffs sought a temporary restraining order ("TRO") to enjoin a pending foreign arbitration. Plaintiffs had entered into an investment agreement with defendant under which the latter agreed to provide financing for the costs of an arbitration which plaintiffs had commenced against the Government of Romania. The investment agreement contained a provision mandating arbitration through the London Court of International Arbitration and requiring that the situs of any arbitration be in Guernsey, Channel Islands, where the defendant was incorporated.

In support of its application for a TRO, plaintiffs alleged the arbitration clause was unenforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), was procured by fraud and was substantively and procedurally unconscionable. Plaintiffs claimed the clause was unenforceable under the Convention because, although defendant was incorporated in Guernsey, its "principal place of business" was in the United States and thus both parties were "citizens of the United

States" for purposes of 9 U.S.C. § 202. (This section of the Convention provides that an arbitration agreement "which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.") Plaintiffs contended the Supreme Court's decision in *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2009), which concluded that for purposes of determining diversity jurisdiction, a corporation's "'principal place of business'… refer[s] to the place where a corporation's officers direct, control, and coordinate the corporation's activities," applies also to determining "citizenship" under § 202.

The court determined it was unnecessary to decide whether the *Hertz* test applied to § 202 because plaintiffs had not established, in any event, that defendant's activities were controlled by corporate directors resident in the United States. The court found the allegedly "resident" directors were actually directors of an entirely separate legal entity and that defendant had established that it was, in fact, a foreign entity whose activities were coordinated from Guernsey. Moreover, the court found that the arbitration agreement was enforceable under § 202 of the Convention in any event where the parties' commercial relationship had a "reasonable relation with one or more foreign states" (i.e., because the underlying investment agreement was for payment of attorneys' fees for an international arbitration against the Romanian Government). The court also found that plaintiffs' allegations of fraud were unsupported by the evidence. Finally, the court determined that plaintiffs had not demonstrated that the arbitration clause was either substantively or procedurally unconscionable. The court found plaintiffs' contention that it would be significantly more expensive to arbitrate in Guernsey than to litigate in Texas was unsupported by any persuasive evidence nor did it find any other indication "that arbitration in Guernsey would cause 'grave inconvenience or unfairness.'" *S&T Oil Equip.*, 2011 WL 864837, at * 4, 2011 U.S. Dist. LEXIS 24621, at *17. As a result, plaintiffs could not establish a likelihood of success on the merits sufficient to justify issuance of a TRO. The court further found that plaintiffs had also failed to meet the remaining prongs of the test

for issuance of a TRO because they did not demonstrate a threat of "irreparable harm," or that the "balance of hardships" between the parties favored them or that the "public interest" warranted injunctive relief.

[**Editor's note:** In a subsequent decision, 20011 WL 1565996, 2011 U.S. Dist. LEXIS 44176 (S.D. Tex. Apr. 25, 2011), the court granted defendant's motion to compel arbitration.]

Louisiana District Court Vacates Arbitration Awards for (a) Arbitrator's Failure to Hold a Hearing and (b) Partiality Against the Losing Party in the Second Award.

In *United Steel Workers AFL-CIO Local 8363 v. Murphy Oil USA, Inc*., No. 09-7191, 2010 WL 3074322, 2010 U.S. Dist. LEXIS 78185 (E.D. La. August 2, 2010), the district court vacated not one but two labor arbitration awards.

The parties were signatories to a collective bargaining agreement which, with some exceptions, was superseded contractually by the Facility Restoration Act, which the parties executed after Hurricane Katrina to accommodate certain personnel needs related to "massive repairs" needed to defendant Murphy's oil refinery after the storm. In early November 2005, plaintiffs filed a grievance on behalf of five members of the union relative to Murphy's placement of those employees on an unpaid leave of absence. The parties selected an arbitrator and scheduled a hearing date. The hearing was adjourned due to witness health problems but, since the arbitrator was already en route to New Orleans anyway, he held a conference with the parties at which it was agreed that if the arbitrator found that the post-Katrina agreement gave Murphy the right to place the five employees on leave of absence without pay, he would issue an award in Murphy's favor without a hearing. However, if the arbitrator found that Murphy did not have the right to do so, he would convene an evidentiary hearing.

Despite this agreement, the arbitrator proceeded to issue an award in favor of the union without holding a hearing for Murphy to present witness testimony.

In July 2008, Murphy filed an action in the United States District Court for the Eastern District of Louisiana to vacate the arbitration award. The court granted that application and remanded the matter to the arbitrator for the purpose of conducting a hearing in compliance with the parties' post-Katrina agreement. *Murphy Oil USA, Inc. v. United Steel Workers AFL-CIO Local 8363*, No. 08-3899, 2009 WL 537222, 2009 U.S. Dist. LEXIS 19098 (E.D. La. March 4, 2009).

Ruling a second time in October 2009, the arbitrator found in defendant Murphy's favor, whereupon the union plaintiffs filed an action to vacate the second award. Plaintiffs claimed that the arbitrator "engaged in actual bias and misconduct and failed to adequately disclose potential conflicts of interest." *United Steel Workers*, 2010 WL 3074322, at *2, 2010 U.S. Dist. LEXIS 78185, at *4-*5. The district court agreed, concluding that the arbitrator's actions prior to his (second) ruling in defendant's favor established partiality on his part. Specifically, the arbitrator apparently asked plaintiffs' counsel to "pass along a message to the Texas Union Steel Worker's Local Union . . . that he was 'going after' that branch of the Union for charges in the amount of a $675 cancellation fee, and wanted assistance in recovering the charge." *United Steel Workers*, 2010 WL 3074322, at *3, 2010 U.S. Dist. LEXIS 78185, at *8. The court also credited plaintiffs' evidence that the arbitrator "followed this request with a statement indicating he was unsure how he was going to determine the pending case before him." *Id*. After these events, plaintiffs asked the arbitrator to recuse himself from the case but he refused. The court also noted that when plaintiffs filed a complaint with the Federal Mediation & Conciliation Service Arbitration Review Board to have the second award vacated due to partiality and misconduct, the Board investigated and determined that the arbitrator's actions were "unethical," although it did not invalidate the process or vacate the award. *United Steel Workers*, 2010 WL 3074322, at *4, 2010 U.S. Dist. LEXIS 78185, at *11. In vacating

the award, the district court concluded that "[b]ecause arbitration is a means of alternative dispute resolution, it is crucial that arbitrators remain, and appear, completely unbiased" and the arbitrator in this case failed to do so. *Id*.

[**Editor's note:** In reading the district court's second opinion, in which the award in favor of defendant Murphy was vacated, one has the sense the court was relying more on the "appearance of bias", than on evident partiality, although the court's actual conclusion was that the arbitrator's actions established "partiality" on his part. *Id*. Defendant has filed a notice of appeal to the Fifth Circuit.]

Ninth Circuit Reverses Vacatur of Arbitration Award Which District Court Concluded Had Manifestly Disregarded the Law and Contravened Public Policy.

In *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 832 (2010), the Ninth Circuit reversed the district court's vacatur of an arbitration award in favor of Dr. Lagstein which awarded him full benefits under a disability insurance policy, damages for emotional distress and punitive damages, in the total amount of more than $6,000,000.

The arbitration panel issued a split decision on Dr. Lagstein's claim for compensatory damages in August 2006 and then held hearings on his claim for punitive damages several months later, over defendant Lloyd's objection that the panel's jurisdiction had ended once it issued the initial award. The same majority of the panel awarded Dr. Lagstein $4,000,000 in punitive damages.

In the district court, Lloyd's filed a motion to vacate on several grounds. Following a hearing, the district court vacated the awards, concluding that their size was excessive and in manifest disregard of the law and that the punitive damages award contravened public policy and exceeded the panel's jurisdiction.

On appeal, the Ninth Circuit reversed. The court of appeals pointed out that a district court may not vacate an arbitration award

simply because the court disagrees with its size because "the heart of such disagreement concerns the panel's weighing of the evidence," which is beyond the scope of judicial review of an award. *Id*. at 640.

The court of appeals also rejected Lloyd's argument that vacatur was proper because the arbitration awards manifestly disregarded the law and were completely irrational. (Interestingly, the Ninth Circuit did not conclude that the doctrine of "manifest disregard" was no longer available after the Supreme Court's ruling in *Hall Street Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 2008 AMC 1058 (2008) -- as some other circuits have concluded -- relying on its decision in *Comedy Club, Inc. v. Improv W. Assocs*., 553 F.3d 1277 (9th Cir. 2009).) In support of its ruling on this issue, the court of appeals noted that "the district court found 'manifest disregard of the law' without citing any applicable law that the panel recognized and ignored" and that, on appeal, Lloyd's did not cite a single statute or judicial decision pertinent to the size of the award that the panel had manifestly disregarded. *Lagstein*, 607 F.3d at 641.

The district court also vacated the punitive damages award on the alternative ground that the panel no longer had jurisdiction over the dispute after issuing the initial award on compensatory damages. The Ninth Circuit concluded that the panel did not exceed its authority because the timing of the arbitration award was a procedural matter committed to the panel's interpretation, and the panel's conclusion that it retained jurisdiction was a plausible construction of the parties' agreement and the procedural rules the agreement incorporated.

Second Circuit Declines to Extend "*Marine Products Rule*" to Arbitrator's Resignation for Health Reasons.

In *Ins. Co. of No. Am. v. Public Service Mut. Ins. Co*., 609 F.3d 122 (2d Cir. 2010), the Second Circuit declined to extend the "*Marine Products Rule*" to a situation in which a party-appointed arbitrator had resigned due to health reasons before the panel had rendered a partial final award. In *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 1993 AMC 190 (2d Cir. 1992),

the Second Circuit held that, despite the power granted to the district court under 9 U.S.C. § 5 to appoint a replacement arbitrator, in the event of the death of an arbitrator before an award is rendered and absent "special circumstances," an entirely new panel must be convened. However, the instant case did not involve the death of an arbitrator. Rather, shortly after the panel had rendered a favorable decision on appellee PSMIC's motion for summary judgment, but before it had ruled on appellant INA's motion for reconsideration, INA's party-appointed arbitrator, John Sullivan, announced in early May 2008 that he was resigning to undergo a six-week regimen of treatment for cancer. When PSMIC's counsel copied Sullivan on some correspondence shortly after his resignation, INA's counsel excoriated his opponent for bothering Sullivan saying that, in light of the health-induced resignation, the communication was both "improper" and "morally repugnant." Thereafter, when the parties were unable to agree on whether to appoint a replacement arbitrator or to convene a new panel, INA filed a petition in the district court for an order compelling the constitution of a new panel. Applying the *Marine Products* rule, the district court held in early December 2008 that, where there was no suggestion that the resignation was procured by the manipulation of INA, a new panel should be formed. PSMIC appealed.

While its appeal was pending, in early 2009, PSMIC learned that Sullivan's health had improved; that he was actively seeking appointments as an arbitrator; and that he had actually been well enough during the prior November to attend a two-day arbitration conference at which INA's counsel was also in attendance. PSMIC then made a motion in the district court under Rule 60(b) seeking relief from the December 2008 order. PSMIC argued that it had newly discovered evidence that Sullivan's condition had improved to the point that he had been seeking new work as an arbitrator *before* the court had rendered its December order. In July 2009, the district court granted PSMIC's Rule 60(b) motion. The court noted that, had it understood in early December 2008 that Sullivan was actively seeking engagements as an arbitrator, it could have reappointed him pursuant to 9 U.S.C. § 5. The court reasoned that such a reappointment not only would have eliminated any potential unfairness to

INA of having a newly-appointed replacement arbitrator consider its motion for reconsideration, but also would have avoided the waste of resources that necessarily accompanies formation of an entirely new panel. A reappointment of Sullivan also would have eliminated the potential policy concern that an arbitrator's resignation had been obtained by the manipulation of a party. Accordingly, the district court reappointed Sullivan and directed that, if he refused to serve, INA appoint a replacement arbitrator. INA then cross-appealed, arguing that, under Second Circuit precedents, whenever an arbitrator dies *or resigns*, the panel must automatically be reconstituted absent special circumstances which were inapplicable here. Alternatively, INA claimed PSMIC did not meet the standard under Rule 60(b) because it was not "justifiably ignorant" of the newly-discovered evidence about Sullivan's health.

The Second Circuit held that the *Marine Products* rule does not apply to vacancies resulting from resignations. Noting that in prior cases, the court had been reluctant to extend the reach of the *Marine Products* rule, it found application of that rule in the context of resignations would present the potential for abuse. For example, one party, who feared an adverse ruling from the panel, or hoped for a second bite at the apple in a proceeding that was not going well, could induce or pressure its arbitrator to resign so that it could start the process all over again. Although the Second Circuit acknowledged "the potential unfairness to a party where a substitute arbitrator is appointed and tasked with deciding issues on which the original panel members have had previous argument and discussion," it found this potential unfairness was not sufficiently strong to outweigh the potential "for manipulation and the waste inevitably occasioned by convening a new arbitral panel." *Ins. Co. of No. Am.*, 609 F.3d at 130.

The court also found that "PSMIC was justifiably ignorant of Sullivan's condition, because it was not required to monitor Sullivan's progress in his battle against cancer, especially following INA's insistence that PSMIC no longer contact him." *Id.* at 127. Moreover, it found that the district court had appropriately taken into account INA's counsel's failure to disclose to the court, be-

fore the December ruling, the material change in Sullivan's health. Thus, the Second Circuit affirmed the district court's decision to reappoint Mr. Sullivan or require INA to appoint a replacement so the arbitration could continue.

Second Circuit Rules that Arbitration May Proceed Despite Claimant's Prior Stipulation to Abide by Judgment to be Rendered in Ecuadorian Proceedings.

In 1993, residents of the Oriente region in the Ecuadorian rainforest sued Texaco in the U.S. District Court for the Southern District of New York to recover "for vast devastation to [the] region caused by ... decades of oil exploration and extraction activities." *Republic of Ecuador v. Chevron Corporation*, 638 F.3d 384, 388 (2d Cir. 2011). At the time, both Texaco and the Ecuadorian government vigorously opposed having the residents' claims litigated in the United States, and the district court granted Texaco's motion for dismissal on forum non conveniens and international comity grounds. On appeal, the Second Circuit held that the district court erred by dismissing the Complaint without first securing "a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts" and remanded for further proceedings. On remand, Texaco provided that commitment by agreeing to be sued in Ecuador, to accept service of process there and to waive certain statute of limitations-based defenses. In addition, Texaco agreed to satisfy any judgments in plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act, N.Y. C.P.L.R. § 5301 *et seq*.

Plaintiffs responded by refiling their claims in Lago Agrio, Ecuador and, according to the Second Circuit, "the resulting Ecuadorian litigation continues to this day." *Chevron*, 638 F.3d at 390. In September 2009, Chevron Corporation, which merged with Texaco in 2001, and Texaco Petroleum Corporation ("TexPet") invoked the arbitration clause in Ecuador's Bilateral Investment Treaty ("BIT") with the United States, and initiated arbitration against Ecuador. Chevron's notice of arbitration asserted that Ecuador had

improperly interfered in the Lago Agrio litigation and requested, among other things, a declaration that Chevron has no liability for environmental damage arising out of TexPet's drilling operations in Ecuador. The second argument was based on Chevron's contention that any judgment issued against it in Ecuador would violate the terms of TexPet's previous settlement agreement with Ecuador under which TexPet funded certain environmental remediation projects in exchange for what Chevron characterized as a release from liability for environmental impact falling outside the scope of that settlement.

In December 2009, Ecuador petitioned the district court to stay the BIT arbitration, arguing that Chevron's initiation of arbitration and pursuit of such broad relief violated the promises that Texaco previously made to secure a forum non conveniens dismissal of plaintiffs' action in the Southern District of New York. "Shortly thereafter, Plaintiffs [(i.e., the residents themselves)] moved to stay the arbitration 'to the extent it would seek dismissal, nullification or avoidance of any judgment' in the Lago Agrio litigation." *Id*. The district court refused to stay the arbitration and granted Chevron's motion to dismiss both actions.

The court of appeals began its analysis by considering Chevron's argument that the court lacked the power to stay the BIT arbitration. The court acknowledged that was "an open question in our circuit" but concluded that it need not resolve the question because "a stay is unnecessary in this case." *Id*. at 391.

Ecuador argued that Chevron, having previously agreed to litigate against the plaintiff residents in Lago Agrio, was now "'estopped from accepting, ha[s] waived [its] right to accept, or ha[s] otherwise rejected [its] right' to arbitration under the BIT." *Id*. at 391-92. The Second Circuit concluded, however, that "[b]ecause the parties have agreed to arbitrate threshold issues like estoppel and waiver, our precedent prevents us from addressing the merits of Ecuador's claims; instead, we leave them to the arbitral panel in the first instance." *Id*. at 392.

Plaintiffs also moved to stay the BIT arbitration on grounds of judicial estoppel, equitable estoppel, and collateral estoppel. Plaintiffs argued that Chevron was using BIT arbitration to undermine the Lago Agrio litigation and deprive them of a forum capable of resolving the claims previously dismissed by the district court on forum non conveniens grounds. Plaintiffs alleged that, in doing so, Chevron had breached the promises Texaco made to secure the prior dismissal, and a stay of the arbitral proceedings was needed to hold Chevron accountable to those promises.

The Second Circuit disagreed, noting that "there is no inherent conflict between BIT arbitration and the Lago Agrio litigation" since they involved different parties and different claims. *Id*. at 396. Addressing plaintiffs' judicial estoppel argument, the court noted that Chevron's claim that Ecuador had engaged in "improper and fundamentally unfair conduct" with respect to the Lago Agrio litigation that had undermined the impartiality of the Ecuadorian courts was essentially an argument that its due process rights had been violated in Ecuador. The court noted that this was an argument Chevron had preserved under the Recognition of Foreign Country Money Judgments Act. Likewise, the court concluded that Chevron could raise in the arbitration its claim that a prior agreement between TexPet and Ecuador releases it "from any further liability for environmental impact." *Id*. at 398.

The court acknowledged that a conflict could arise if the Ecuadorian court issued a final judgment and the arbitrators subsequently entered an award that was inconsistent with the judgment. However, the court observed that "[a]ny such conflict, should it arise, could be resolved in any resulting proceedings to enforce the judgment." *Id*. at 399. In any event, the court concluded "there is no reason for us to forestall or resolve any entirely hypothetical conflicts between as-yet-nonexistent rulings by enjoining Chevron from commencing arbitration." *Id*.

The court of appeals also rejected plaintiffs' arguments based on equitable estoppel and collateral estoppel, and affirmed the district court's refusal to stay the arbitration.

Second Circuit Reads Ambiguous Arbitration Clause to Commit Questions of Timeliness to Arbitrators Rather Than to New York Courts Under NY CPLR §7502(b).

In *Bechtel Do Brasil Construções Ltda. v. UEG AraucÁria Ltda*., 638 F.3d 150 (2d Cir. 2011), the Second Circuit addressed the question of who decides whether a claim in arbitration is time-barred: the arbitrators or the court. The case arose out of a dispute concerning the construction of a multi-million dollar power plant. The owners of the plant commenced an arbitration under ICC Rules against the contractors, relying upon the arbitration clause in the relevant agreements. The contractors, in turn, moved to stay the arbitration, arguing that the plant owners' claims were time-barred under the New York statute of limitations.

In support of their application for a stay, the contractors relied upon the governing law clause in the applicable agreements, which provided that "[a]ny arbitration proceeding or award rendered hereunder and the validity, effect and interpretation of this agreement to arbitrate shall be governed by the laws of the state of New York." *Id*. at 152. The contractors also relied upon a separate "Procedural Law" clause in the agreement which provided: "the law governing the procedure and administration of any arbitration instituted pursuant to Clause 37 is the law of the State of New York." *Id*. On the basis of these two clauses, the contractors contended they were entitled to take advantage of §7502(b) of New York's Civil Practice Law and Rules ("N.Y. C.P.L.R."), which expressly permits application *to the court* for a stay of arbitration upon the ground that the claim would be time-barred in a New York litigation. The S.D.N.Y. granted the contractors' application for a stay and the owners appealed to the Second Circuit.

The Second Circuit noted the basic tension in the agreement between the arbitration clause and the governing law and procedural law clauses which created some ambiguity regarding whether the parties intended to submit *all* questions – including the question of timeliness – to the arbitrators, notwithstanding N.Y. C.P.L.R. §7502(b). This tension and ambiguity resulted in what the court

frankly acknowledged was a "close" question. However, after carefully parsing the particular language of the arbitration clause and the two clauses referring to New York law, and relying upon prior precedents requiring the court to construe the parties' intentions "generously" in favor of arbitrability and to resolve ambiguities in favor of arbitration, the court reversed the district court's ruling that the parties had committed the question of timelines to the court. The court reasoned that the Supreme Court's opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52 (1995), had held that general choice of law clauses, such as those contained in the agreement, may be read to address only "substantive rights and obligations, and not the State's allocation of power between alternative tribunals." *AraucÁria Ltda*., 638 F.3d at 157-58. Accordingly, the Second Circuit found that, although the contract incorporated New York law to govern the procedure and administration of an arbitration *once it is commenced*, that did not necessarily compel a conclusion that the parties intended issues of timeliness to be judicially determined.

Finally, the Second Circuit rejected a more narrow interpretation of the *Mastrobuono* case rendered by New York's Court of Appeals, which had construed contract language choosing New York law to govern "the agreement and its enforcement" as language reflecting an agreement to have the *court* rule on a threshold time-bar issue under C.P.L.R. §7502(b). The governing law clause before the Second Circuit, by contrast, referred only to the "interpretation" and "effect" of the agreement and not its "enforcement" and thus created an ambiguity which had to be resolved, under binding federal precedents, in favor of arbitrability.

Third Circuit Holds Parties May Not Opt Out of FAA in Entirety and That FAA's Vacatur Standards Apply in Absence of Clear Expression of Contrary Intent.

On cross motions to confirm and vacate an arbitration award, the Third Circuit in *Ario v. The Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277 (3d Cir. 2010), held the parties could not opt out of the Federal Arbitration Act ("FAA") in its entirety and that the FAA's standards for vacatur of an award would apply in the absence of a clear intent to apply state standards. Two Pennsylvania primary insurers had demanded arbitration for nonpayment of claims pursuant to the arbitration clauses in four reinsurance treaties it had entered into with a Lloyds Syndicate. The Syndicate, in turn, sought rescission of the treaties for misrepresentation and failure to make material disclosures among other grounds. The treaties provided for arbitration in accordance with the rules and procedures established by the Pennsylvania Uniform Arbitration Act.

In an "unreasoned award," the arbitrators rescinded three of the treaties, and the primary insurers moved in Pennsylvania state court to vacate most of the award. The reinsurer removed the action to federal court, where it moved to confirm the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The primary insurers moved to remand arguing that the parties' selection of the PUAA meant they had opted out of the FAA in its entirety, including the removal provision set forth in 9 U.S.C. §205. Accordingly, the primary insurers contended the federal district court was without jurisdiction. When the district court denied the motion to remand, the primary insurers then argued the award should nevertheless be vacated and that the grounds for vacatur should be the broader ones set forth in the PUAA rather than the more restrictive ones in the FAA. The district court concluded, however, that the standards of the FAA applied, and confirmed the award. It also imposed sanctions against counsel for filing what it considered a frivolous motion for remand.

The Third Circuit affirmed that the district court had jurisdiction, that the FAA's standards for vacatur governed and that confirmation of the award was proper. The court of appeals reasoned that, although it is possible for parties to contract to arbitrate pursuant to rules or procedures borrowed from state law (and thereby opt out of the FAA's default rules in Chapter 1), "they cannot 'opt out' of FAA coverage in its entirety because it is the FAA itself that autho-

rizes parties to choose different rules in the first place." *Id*. at 288. It held further that, while parties cannot opt out of FAA coverage in its entirety, they *may* contract out of the FAA's removal provision, provided there is a "clear and unambiguous waiver," which it found to be lacking in the circumstances of the case. Finally, the court affirmed that the FAA standards for vacatur should govern rather than the PUAA standards asserted by the primary insurers. In the absence of the expression of clear contrary intent, FAA standards apply to an arbitral award rendered in favor of a foreign party and enforced in the United States. Although the arbitration was to be conducted in accordance with rules and procedures of the PUAA, the service of suit provision in the treaties referred to enforcement of any award in federal court. Therefore, there was no clear intent to apply the PUAA's vacatur standards and the standards of the FAA governed. Applying those limited standards, the Third Circuit affirmed the district court's confirmation of the arbitration award but vacated the imposition of Rule 11 sanctions.

Supreme Court Holds California's *Discover Bank* Rule, Which Classifies Most Class Waivers in Consumer Contracts as Unconscionable, is Pre-empted by FAA.

In *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), the Supreme Court ruled that a class action waiver in the arbitration clause of a consumer agreement should have been enforced by the lower courts as written. The Court held that the California "*Discover Bank Rule*," upon which lower federal courts had relied to hold the class waiver unenforceable, is pre-empted by the Federal Arbitration Act ("FAA"). By way of background, California's Supreme Court had held in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005), that class waiver provisions in consumer contracts of adhesion, involving only small amounts of damages, and an allegation that the party with superior bargaining power engaged in a deliberate scheme to cheat a large number of consumers out of individually small sums of money, are exculpatory and unenforceable under California law and are not pre-empted by the FAA.

AT&T Mobility involved a cellular telephone contract which contained a mandatory arbitration clause with a class action waiver. The consumer, who alleged he was fraudulently charged sales tax on a phone which had been advertised as "free," commenced an action in federal court which was later consolidated with a class action. AT&T moved to compel arbitration, but lost in both the district court and the Ninth Circuit. In the Supreme Court, the consumer maintained as he had below that, because the *Discover Bank* Rule applies just as equally to class waivers in agreements subject to litigation as to class waivers in arbitration agreements, it was a ground that "exist[s] at law or in equity for the revocation of any contract" and was thus "saved" from pre-emption under §2 of the FAA.

Writing for a five-to-four majority of the Court, Justice Scalia's opinion reasoned that, although §2's savings clause preserves generally applicable contract defenses such as "unconscionability," the inquiry becomes considerably more complex when a generally applicable doctrine is alleged to have been applied in a way that disfavors arbitration. The majority found that §2 did not suggest an "intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC*, 131 S. Ct. at 9. In a major victory for the business community, the Court held that where "[t]he overarching purpose of the FAA …is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," demanding that class-wide arbitration remain available to consumers despite the waiver would "[interfere] with fundamental attributes of arbitration" and "[create] a scheme inconsistent with the FAA." *Id*. The Court reasoned that switching from bilateral to class arbitration makes the dispute resolution process slower and more expensive. It also found that, in order to bind absent class members while still protecting their due process rights, class arbitration requires a procedural formality that is inimical to the informality arbitration was designed to achieve and beyond the competence of most arbitrators to administer. Finally, it concluded that class arbitration would substantially increase the risks to defendants because the limited judicial review to which arbitration awards are subject would make it more likely

that errors would go uncorrected. This risk of error could be compounded unacceptably by the aggregation of the damages of many individual claimants into high-stakes class disputes which the Court argued arbitration is poorly suited to decide.

By contrast, the dissenting opinion argued that, where the substantive *Discover Bank* Rule treated arbitrations on a par with judicial proceedings, the majority's opinion ignored the express terms of §2 of the FAA and represented an unwarranted interference with the rights of California, under our federal system, to define and apply its law of unconscionability.

New York's First Department Upholds Attachment of the New York Assets of Foreign Debtor By Foreign Creditor in Aid of Anticipated Foreign Arbitration.

In *In re Sojitz Corp. v. Prithvi Information Solutions Ltd.*, 82 A.D.3d 89, 921 N.Y.S.2d 14 (1st Dept. 2011), the court considered an issue of first impression in New York: "whether a creditor can attach assets in New York, for security purposes, in anticipation of an award that will be rendered in an arbitration proceeding in a foreign country, where there is no connection to New York by way of subject matter or personal jurisdiction." *Id.* at 90, 921 N.Y.S.2d at 15. Affirming the lower court, the Appellate Division, First Department held that, under New York's Civil Practice Laws & Rules ("N.Y. C.P.L.R."), §7502(c), the pre-award attachment of property located in New York in aid of the prospective international arbitration was proper.

The applicant for the attachment was a Japanese creditor seeking security for an anticipated arbitral award in Singapore against an Indian debtor. The underlying contract was governed by English law and had no connection with New York. The Indian debtor argued that the attachment was improper because the court did not have personal jurisdiction over it. The lower court rejected the debtor's argument, relying upon N.Y. C.P.L.R. §7502(c), which grants the courts of New York authority to issue preliminary injunctions and attachments in aid of all arbitrations, including those involving foreign parties or in which the arbitration is to be conducted outside New York.

On appeal, the debtor claimed the New York attachment statute ran afoul of the United States Supreme Court's landmark opinion in *Shaffer v. Heitner,* 433 U.S. 186 (1977). *Shaffer* held that *in rem* and *quasi in rem* jurisdiction require the same "minimum contacts" with the forum as *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), had determined were necessary for the constitutional exercise of personal jurisdiction. The First Department noted, however, that *Shaffer* had involved the assertion of *quasi in rem* jurisdiction to obtain jurisdiction over the defendant to adjudicate the merits of the case, and not simply to obtain security to satisfy a future judgment. Moreover, the Shaffer court had expressed, in dictum, the possibility of a "security exception" to the requirement for minimum contacts for the exercise of *quasi in rem* jurisdiction. Under this exception, the *Shaffer* court observed that a plaintiff might be entitled to attach property located in one state as security for a judgment being sought in another state. Accordingly, the *Sojitz* court found the New York statute did not contravene *Shaffer* where it was used solely to obtain security and not to obtain personal jurisdiction over the defendant. *In re Sojitz*, 82 A.D.3d at 96, 921 N.Y.S.2d at 19. As support for its holding, the *Sojitz* court noted the several substantive and procedural safeguards that are included in the New York attachment statute, including the requirement that the petitioner seeking a provisional aid in aid of arbitration must show that any award rendered by the arbitrator would otherwise be rendered ineffectual if the relief was not granted and the provision requiring the order of attachment to expire within thirty days if no foreign arbitration is commenced.

New York's First Department Reverses Stay, Holding Question as to Arbitrability Is for Arbitrators to Determine.

In *Icdas Celik Enerji Tersane Ve Ulasim Sanayi A.S. v. Traveler's Ins. Co.*, 81 A.D.3d 481, 916 N.Y.S.2d 88 (1st Dep't 2011),

the appellate court reversed and vacated a decision of the Supreme Court, New York County, that had granted a permanent stay of arbitration. The dispute arose out of the sale of a cargo of scrap metal by the non-party seller, Tube City, to the purchaser, Icdas Celik Enerji Tersane Ve Ulasim ("Icdas"), which had petitioned for the stay. The cargo was shipped to Turkey but rejected on arrival by Icdas. The scrap purchase agreement between Tube City and Icdas required that all disputes arising in connection with the contract be arbitrated pursuant to AAA rules.

At the same time it entered into its contract with Icdas, Tube City had agreed on a *separate* contract with respondent, Fairless Iron & Metals, by which the latter would supply the scrap cargo to be shipped to Icdas. Although Tube City nominated the carrying vessel, Fairless executed the charter party with the non-party vessel owner. After arrival and rejection of the cargo, the vessel was detained by the authorities and also suffered stevedore damage and other expenses incurred during the port call. The vessel owner demanded arbitration against Fairless -- pursuant to an arbitration clause in the charter -- for the losses caused by the vessel's detention and the damage caused by the stevedores. Fairless, in turn, demanded that Icdas, which had hired the stevedores, defend it in the arbitration proceeding commenced by the vessel owner and notified the owner it was vouching in Icdas. Thereafter, Tube City assigned to Fairless all the rights the former had against Icdas under the scrap purchase agreement, including but not limited to the right to AAA arbitration.

The First Department unanimously reversed the lower court's granting of the stay of the arbitration under the scrap sales contract holding that, "given the arbitration clause's specific incorporation by reference of AAA rules, the question of arbitrability, which includes the existence, scope and validity of the arbitration agreement, is for the arbitrator to determine." *Id*. at 483, 916 N.Y.S.2d at 89-90. Moreover, where the arbitration clause did not expressly preclude an assignee of a signatory to the agreement from seeking arbitration, Tube City's assignment to Fairless of its rights against Icdas,

under the scrap purchase agreement, gave Fairless the right to demand that Icdas submit to AAA arbitration. The court also rejected a claim that the assignment to Fairless violated New York Judiciary Law §479 because "Fairless was not assigned an existing collectible claim 'with the intent and for the purpose of bringing an action or proceeding thereon.'" *Id*. at 483, 916 N.Y.S.2d at 90. Rather, Tube City's assignment to Fairless of the former's rights under the scrap purchase agreement was made to enable Fairless to seek indemnification from Icdas in the event Fairless became obligated to the vessel owner for the stevedore damages. While collateral to the scrap purchase agreement between Tube City and Icdas, the court found Fairless's claim for indemnification against Icdas -- in connection with the alleged negligence of the stevedores -- was encompassed in the scrap purchase agreement's broad arbitration clause.

Contractual Provision to have Arbitration Governed by the AAA's Commercial Arbitration Rules is not a Consent to AAA Administration of the Proceeding.

In *Nachmani v. By Design, LLC*, 74 A.D.3d 478, 901 N.Y.S.2d 838 (1st Dept. 2010), a New York state appellate court affirmed a lower court ruling that granted a petition to compel a non-American Arbitration Association ("AAA") arbitration and to stay the AAA arbitration demanded by the respondent. In the course of its ruling, the appellate court held that a contract clause calling for arbitration "in accordance with the commercial rules of the American Arbitration Association" is not sufficient to provide that the arbitration will be administered by the AAA. Specifically, the court stated that "Petitioner correctly interpreted the provision requiring that the decision be in accordance with the AAA Commercial Rules as a choice of law rather than a forum selection clause…." *Id*. at 479, 901 N.Y.S.2d at 839.

[**Editor's note:** Even though it is unanimous, the court's ruling seems incorrect since the AAA's Commercial Arbitration Rules specifically state that "[w]hen parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the

AAA to administer the arbitration." Accordingly, it would not be surprising to see this decision appealed, although the Editor has not yet been able to find any record of that.]

Fifth Circuit Holds Question of Arbitrability is For Arbitrator To Determine Under Particular Arbitration Clause.

In *Allen v. Regions Bank*, 389 Fed. App'x 441 (5th Cir. 2010), the Fifth Circuit overruled the district court and determined that the question of arbitrability, under the particular arbitration clause before it, was for the arbitrator and not the district court to decide. Plaintiffs had entered into a home equity loan agreement in 1999 with a predecessor of Regions Bank. As part of the loan agreement, which contained no arbitration clause, loan proceeds were withheld to purchase credit life and disability insurance on behalf of plaintiffs. Thereafter, in 2001, plaintiffs opened a demand deposit account with another predecessor of Regions Bank, which contained an arbitration clause obligating plaintiffs to arbitrate any dispute arising out of that agreement. Then, in 2006, Regions Bank became the legal successor to the predecessor-in-interest banks and it mailed a lengthy "Consumer Disclosure Booklet" to all customers, including plaintiffs, stating that it constituted the new agreement (hereafter referred to as the "Regions Agreement") covering deposit accounts. The Regions Agreement contained a broad mandatory arbitration clause which provided that a "dispute regarding whether a particular controversy is subject to arbitration, including any claim of unconscionability and any dispute over the scope or validity of this agreement to arbitrate disputes or of this entire Agreement, *shall be decided by the arbitrators(s)*." (Emphasis added). *Id*. at 443. In addition, the Regions Agreement stated the arbitration provision shall "also apply to any account, contract, loan, transaction, business, contact, interaction or relationship you may have" with the bank.

In 2008, plaintiffs made a claim under the disability insurance policy. When the claim was denied, plaintiffs commenced suit against Regions Bank and the insurer alleging breach of contract and other causes of action. Regions Bank moved to compel arbitration in accordance with the broad arbitration clause in the Regions Agreement, which it contended applied to the underlying loan agreement pursuant to the "any account, contract, loan, transaction, business …" language in the arbitration clause. The district court denied the motion to compel, determining that the question of arbitrability was for the district court to decide. The Fifth Circuit reversed, however, noting that, pursuant to the Supreme Court's opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), "the issue of arbitrability is for an arbitrator *when the evidence clearly demonstrates that was the parties' agreement*." (emphasis added). *Regions Bank*, 389 Fed. App'x at 444. The Fifth Circuit noted that plaintiffs had not challenged the validity of *the arbitration agreement* in the Regions Agreement on unconscionability or other grounds. In fact, they had accepted that agreement by signing new signature cards and by continuing to use the account after Regions succeeded the predecessor-in-interest bank. Rather, plaintiff's challenge was that "the manner in which the different agreements were written did not lead clearly to the application of the arbitration provision [in the Regions Agreement] to the consumer loan [insurance] dispute." *Id*. at 445. Given the language in the Regions' arbitration clause that "[a]ny dispute regarding whether a particular controversy is subject to arbitration…shall be decided by the arbitrators," the Fifth Circuit concluded the district court had erred when it decided that the court, rather than the arbitrators, should decide the question of whether the dispute with respect to the loan agreement was covered by the arbitration clause.

Fifth Circuit Holds Defendant Waived Its Right to Arbitrate by Substantially Invoking the Judicial Process Through Filing Repeated Motions to Dismiss.

In *Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584 (5th Cir. 2010), the plaintiff seller under an asset purchase and sales agreement sued the defendant buyer alleging breach of the agreement and fraud. Plaintiff's claims were set forth in an initial complaint, an amended complaint, a second amended complaint and a third amended complaint. In response to the initial complaint, defendant had filed an answer containing an affirmative defense asserting the

right to arbitration. In response to the three amended complaints, defendant filed three separate motions to dismiss on grounds of failure to state a claim under Rule 12(b)(6) (among other grounds). In each motion, defendant reserved its right to compel arbitration in a footnote; however, defendant never actually applied in these motions to compel arbitration. Moreover, defendant's second and third motions sought dismissal on the basis of defendant's affirmative defenses of "waiver and release." Finally, defendant's third motion to dismiss also sought dismissal "with prejudice" of all of plaintiff's claims.

The district court partially granted defendant's third motion to dismiss "with prejudice," but only with respect to one count of plaintiff's third amended complaint. Defendant then made a fourth motion in which it finally sought to compel arbitration. This fourth motion was not filed until eighteen months after defendant filed its original answer asserting the affirmative defense of arbitration. The district court denied the motion to compel, concluding that defendant had waived its right to arbitrate by "substantially invoking the judicial process" through its filing of multiple motions to dismiss. Defendant appealed, arguing that filing motions to dismiss, by itself, can never support a finding that a party substantially invoked the judicial process and thereby waived its right to arbitrate.

The Fifth Circuit affirmed the district court's opinion noting that "[w]aiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." *Id*. at 588. The court of appeals noted that to invoke the judicial process, a party must "engage in some overt act in court that evinces the desire to resolve the arbitrable dispute through litigation rather than arbitration." *Id*. at 589. Citing Fifth Circuit precedent, the court noted that "'[a] party waives arbitration by seeking a decision on the merits before attempting to arbitrate.'" *Id*. To the extent defendant's second and third motions to dismiss were partially based on defendant's affirmative defenses of waiver and release, the court found that these motions, in effect, admitted the initial sufficiency and completeness of plaintiff's claim and asserted other grounds for avoiding the normal consequences of such

an admission. They thus were not mere "perfunctory" motions to dismiss. The court cautioned that filing a motion to dismiss based on an affirmative defense will not constitute a waiver of the right to arbitrate in *all* instances. However, in the circumstances of this case, where defendant had sought a dismissal of plaintiff's third amended complaint "with prejudice" -- and had partially obtained such a dismissal with respect to one count of the complaint -- there had been a "substantial invocation of the judicial process." Finally, the Fifth Circuit found that defendant had waited eighteen months to move to compel arbitration and only acted after the district court had rendered a (mostly adverse) decision with respect to its third motion to dismiss. The Fifth Circuit determined defendant's delay was an impermissible attempt to see how things went first in the district court while attempting to reserve indefinitely the right to arbitrate.

Having found defendant had "substantially invoked the judicial process," the court found further that plaintiff had met its burden of establishing "prejudice." By waiting eighteen months to move to compel arbitration, defendant's motion was untimely and the delay caused plaintiff to lose the opportunity to depose an important witness. Moreover, plaintiff incurred substantial litigation expenses responding to defendant's three motions to dismiss (and to a discovery motion defendant had also filed). Finally, defendant's multiple motions to dismiss caused plaintiff additional prejudice by giving defendant a full preview of plaintiff's evidence and litigation strategies with respect to defendant's affirmative defenses.

Eleventh Circuit Holds There Was Insufficient Evidence of Prejudice to Support Waiver of Right to Arbitrate.

In *Citibank N.A. v. Stok & Assoc., P.A.*, 387 Fed. App'x 921 (11th Cir. 2010) (*per curiam*), the court found there was insufficient evidence to support the district court's holding that a bank had waived its right to arbitrate because the bank's customer had been prejudiced by the former's one-month delay in seeking arbitration. The customer had originally filed suit against the bank in Florida state court on December 12, 2008, alleging breach of contract and various other causes of action. The underlying contract governing

the bank account provided that either party could elect to require that disputes be resolved by arbitration. Notwithstanding this provision in the contract, the bank filed an answer in the state court action on January 30, 2009, without making any reference to the arbitration provision. Thereafter, plaintiff made four filings in the state court action, including an offer of judgment on February 2, 2009, a first request for production of documents on February 3, 2009, and a reply to the bank's answer and a notice of readiness for trial -- both on February 5, 2009. In response, the state court set trial for June 1, 2009. On February 23, 2009, for the first time, the bank sent plaintiff a letter electing arbitration. One day later, it filed a motion in the state court to compel arbitration. On March 25, 2009, the bank withdrew its state court petition and filed a motion to compel arbitration in federal district court. The federal district court denied the motion, finding the bank had participated in the state court action to such an extent that it had prejudiced the customer and that the bank had thereby waived its contractual right to arbitrate.

The Eleventh Circuit reversed. It noted that whether a party has waived the right to arbitration is subject to a two-part test: first, whether under the totality of the circumstances, the party claimed to have waived had acted inconsistently with the right to arbitrate; and second, whether the other party was thereby prejudiced. The court assumed for purposes of its ruling -- without deciding the issue -- that the bank had participated in the state court action to such an extent that the first prong of the waiver test was satisfied. The court noted that, when the inconsistent conduct prong is satisfied by significant participation in litigation, the prejudice prong must be evaluated by considering the length of the delay in demanding the arbitration and the expense incurred by the party alleging prejudice from participating in the litigation process. The court compared the relatively brief twenty-four day delay between when the bank answered the state court action and when it demanded arbitration to far more egregious delays in other cases in which prejudice had been found. It also noted that the customer had not quantified in the record the litigation/discovery expenses it had incurred as a result of the proceedings in the state court. Accordingly, the appeals court found that the customer had not carried "its burden by demonstrating prejudice sufficient to warrant the district court's waiver determination." *Id*. at 925.

[**Editor's note:** The Supreme Court has granted plaintiff Stok's petition for writ of certiorari with respect to the Eleventh Circuit's ruling summarized above. 131 S. Ct. 1556 (2011).]

Southern District of New York Finds Fraudulent Inducement Claim Not Covered by Arbitration Clause and that Defendant, in any Event, Waived Arbitration.

In *Axa Versicherung AG v. New Hampshire Insurance Co*., 708 F. Supp. 2d 423 (S.D.N.Y. 2010), the district court undertook further proceedings on remand from the Second Circuit. The district court had rendered a prior opinion (*see* 2008 WL 1849312, 2008 U.S. Dist. LEXIS 33950 (S.D.N.Y. April 22, 2009)) denying defendants' post-trial motions after a jury found them liable for more than $34 million, including more than $5 million in punitive damages, for fraudulently inducing the plaintiff to enter into two reinsurance facilities. Defendants, which were subsidiaries of the American International Group, appealed the district court's denial of the post-trial motions which had been made on several grounds, including a contention that plaintiff's fraud claim was time-barred under the relevant New York statute of limitations. Before considering the appeal in its entirety, the Second Circuit remanded to the district court with instructions to develop the record further as to whether, in the first instance, plaintiff's fraudulent inducement claim sounded in contract as opposed to fraud (in which event the claim might be arbitrable under the arbitration clause in the underlying contracts); and to create a record and resolve the question of whether defendants had waived their right to arbitrate.

In their submissions on remand, the AIG defendants tried to cast plaintiff's allegations as breach of contract claims so they could argue the dispute was arbitrable. The district court held, however, that the gist of the allegations made against the defendants sounded in fraud and not in contract. The court noted that, under New York law, an insincere promise of future performance creates merely a

cause of action sounding in contract. By contrast, fraudulent inducement requires a plaintiff to demonstrate either breach of a legal duty separate from the mere duty to perform under the contract or proof of a fraudulent misrepresentation that is collateral to or extraneous to the contract.

The court found that the alleged misrepresentations by the AIG defendants were made knowingly and were outside the terms of the contract themselves but bore nevertheless on the risk and value of the commercial relationship and constituted collateral assurances without which the plaintiff would never have entered into the insurance facilities. Moreover, the court noted that even if New York law would treat plaintiff's allegations as duplicative of a mere breach of contract claim, the court would nevertheless still determine the claim was not subject to arbitration because the arbitration clause at issue was limited to disputes arising out of the "interpretation" of the contracts. The court reasoned that such clauses are widely understood to encompass only disputes that can be resolved by reference to the explicit terms of the contract. By contrast, plaintiff's claims alleged misrepresentations *independent* of the provisions of the contract and the AIG defendants would thus be unable, in any event, to point to any *interpretive* dispute with respect to any contractual term.

The court then turned to the question of whether the defendants had waived their right to arbitrate by participating in the trial. The court noted the test for waiver typically focuses on "'(1) the time elapsed from commencement of the litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice.'" *Id*. at 432. Although the court noted that waiver is not to be inferred lightly, it nevertheless found that defendants did not make any argument for arbitration on the grounds the disputes were covered by the arbitration clause until after discovery had closed and, even then, never explicitly moved at any time prior to trial to have the matter referred to arbitration. The court found that defendants' conduct evinced an "intention to keep its potential rights to arbitration in its back pocket." *Id*. at 437. Moreover, the court found that requiring plaintiff to now arbitrate the dispute after it had incurred the substantial expenses of extensive pretrial procedures and a trial would cause enormous prejudice to plaintiff.

After issuance of the district court's opinion on remand, the Second Circuit considered the appeal in its entirety. See 391 Fed. App'x 25 (2d Cir. 2010). The court of appeals affirmed the district court's holding that plaintiff's fraudulent inducement claims sounded in fraud and were thus properly before the court and not arbitrable. In light of its affirmance on the first point, the Second Circuit found the question of waiver was moot and did not reach that issue. However, the Second Circuit concluded the district court had erred with respect to the statue of limitations question and found plaintiff's claim was time-barred, as a matter of law, because plaintiff was charged with inquiry notice concerning the alleged fraud and had not acted on that notice within New York's limitation period for commencing fraud actions.

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[**Editor's note:** The editor wishes to acknowledge the contributions of Michael J. Walsh, who wrote a number of the summaries appearing herein, and of the following who contributed cases: Christopher Dillon, Edward Radzik and non-Committee member George Gluck.]

COMMITTEE ON CARRIAGE OF GOODS

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CARGO NEWSLETTER NO. 57

Spring 2011

OUTBOUND IS IN….

American Home Assurance Co. v. Panalpina, Inc., et al., No. 07 CV 10947 (BSJ), 2011 AMC 733, 2011 WL 666388; 2011 U.S. Dist. LEXIS 16677 (S.D.N.Y. Feb. 16, 2011) decision of Judge Barbara S. Jones.

Three containers of forklift parts were shipped from Elwood, Illinois to Australia. During the initial rail transportation from the Midwest, the train derailed and the three containers were allegedly damaged as a result. Plaintiff, subrogee of the cargo interest, filed suit against the ocean carrier to recover for damage to the cargo. The ocean carrier impleaded the railway company who contracted with the carrier to transport the containers by rail from Illinois to California, where they would be loaded on board ocean going vessels to Australia. The ocean carrier moved for partial summary judgment and declaratory judgment with respect to its claim for indemnity against the railroad. The railroad also moved for partial summary judgment seeking a determination that its liability was limited to $500 per package under COGSA, as incorporated in the agreement between it and the carrier, its intermodal rules and policies guide and the ocean carrier's multimodal bill of lading.

The court first looked at the railroad's motion for summary judgment. The railroad argued that the Carmack Amendment was not applicable and the COGSA limitation should apply as the through bill of lading contained a proper Himalaya Clause extending the benefits of COGSA to railroad.

The court first noted that COGSA per se applied only from the time of loading to the time of discharge; however, acknowledged that the parties to the bill of lading could contractually expand COGSA's coverage. The court referred to the recent decision of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2010 AMC 1521 (2010) where the rail carrier performed under a general contract with the ocean carrier. The court noted *Regal-Beloit* covered the issue of whether the terms of a through bill of lading issued abroad by an ocean carrier could apply to the domestic part of the journey via rail, despite prohibitions or limitations contained in Carmack. The Supreme Court held Carmack did not apply to a shipment originating overseas under a single through bill of lading, finding the railroad was not a receiving carrier.

The court stated that the plain language of the statue made clear that it applied when the first rail carrier in the chain of transportation accepted the cargo at the shipment's point of origin. In this case, the railroad "received" the cargo in Illinois for domestic transportation to California.

Having found Carmack applicable, the court went on to consider whether the cargo was subject to exempt transportation provided by a railroad carrier as part of a continuous intermodal movement. While recognizing a contractual extension of COGSA to an inland leg is allowable, the court found such a contractual extension could not supersede the requirement imposed by the Carmack Amendment unless the parties agreed to opt out of Carmack. The Staggers Rail Act of 1980 provided that rail carriers could offer alternative terms and thus limit their liability, however, for this to occur, the bill of lading must the give the shipper independent notice of the applicability of Carmack and the option of selecting full Carmack liability or alternative liability terms and lower shipping rates. The burden to offer full Carmack liability was on the rail carrier. Thus, a shipper and a carrier could bargain for alternative terms, but only if the shipper was first presented with the option to receive Carmack coverage.

The railroad argued that the carrier's bill of lading provided an opportunity to receive full Carmack liability coverage, referring to a provision in the bill of lading allowing a declaration of actual value. The court rejected this argument, noting that while it may have provided an option of coverage under COGSA, it did not give independent notice of Carmack applicability and did not give the shipper the choice to retain or opt out off Carmack. As the shipper was never offered full liability by either the ocean carrier or the railroad carrier, the railroad, as the receiving rail carrier, did not contract out off Carmack and could not limit its liability to COGSA's $500 limitation provision.

As to the ocean carrier's motion with respect to indemnity, the court found the motion to be premature as there had been no determination as to liability as yet. The court noted that the ocean carrier in its reply papers asked the court to render summary judgment on liability against the railroad, however, the court referred to established law that where a claim is first raised in a reply brief, the court need not consider it. The court held that any determination regarding the indemnification issue must await the outcome of the trial.

HIGHER MATHEMATICS….

Edso Exporting, LP v. M.V. Atlantic Compass, et al.,
No. 10-cv-05867 (CM) (S.D.N.Y. January 28, 2011); decision of Judge Colleen McMahon (Not officially reported).

An unpackaged crane was shipped from Baltimore, Maryland to Tripoli, Libya and was damaged in transit. The carrier asserted a defense based upon COGSA that its liability was limited to $500. The crane was not shipped in a package and the bill of lading did not include any declaration of the crane's value. The court considered the issue of limitation as per "customary freight unit".

The bill of lading described the crane as "1 UNIT(S)" and gave the weight and volume of the crane. It described the freight charges as 7,320.00 USD and contained a notation as "AA" (as

agreed). The carrier's tariff filed with the FMC stated the base freight to be $7,320 and the basis as "Each (EA)".

The court also mentioned a "quote confirmation" which was referred to in the bill of lading. The quote confirmation, under the heading "Rates and Charges", listed the figure as $7,320 and the rate basis as "as agreed". The quote confirmation also contained a reference "(rated at $60 w/m)" next to the description of the crane.

The court referred to the Second Circuit decision of *FMC Corporation v. S.S. Marjorie Lykes*, 851 F.2d 78, 1988 AMC 2113 (2d Cir. 1988) which held a customary freight unit is taken as the actual freight unit used by the parties to calculate the freight for the shipment at issue; "the court must first examine the bill of lading which expresses the contractual relationship in which the intent of the parties is the overarching standard." The court may also consider the tariff filed with the FMC. If the entries on the bill of lading evidence the intent of the parties and there is no ambiguity, there is no need for a district court to consider any of the parties' earlier negotiations.

While the court noted the bill of lading did not set out any particular method of calculation which led to the charge stated, it also noted the bill of lading referred to the volume of the crane in cubic meters. Rounding off the fractional part of such volume and multiplying by $60 per cubic meter, the result came to $7,320. The court stated "mathematics don't lie, that is how the freight was calculated" and found that there could be no dispute that the freight was charged on the cubic meter volume of the crane. Thus it held plaintiff was entitled to judgment in the amount of $500 times the cubic meters of the crane.

WARNING STILL REQUIRED; BUT YOU GOTTA BE IN IT TO WIN IT....

In Re: M/V DG Harmony; Nos. 09-4552-cv; 09-4622-cv (2d Cir. January 31, 2011); Judges Jacobs, Katzmann and Livingston; Summary Order; not officially reported.

A cargo of calcium hypochlorite (hydrated) ("cal-hypo") exploded on board the vessel. A fire followed resulting in the constructive total loss of both the vessel and its cargo. Various actions were filed for cargo damage against the vessel owners, carrier interests, as well as the shipper of the cal-hypo which exploded.

A number of the claims against the carrier interests were settled between the carrier interests and cargo interests. The action by vessel and cargo interests against the shipper of cal-hypo proceeded to trial with the district court finding the manufacturer and shipper of the cargo solely liable for the explosion and resulting total losses. It held the shipper strictly liable, liable on a general negligence theory and also found the shipper had a duty to warn with respect to the cargo and breached that duty. It further found the dangerous cargo caused the explosion.

On appeal, the Second Circuit reversed the district court's determination on strict liability and liability based on negligence. It affirmed that the shipper had a duty to warn and had breached that duty and also affirmed the factual finding that the dangerous cargo caused the explosion; however, it vacated the judgment and remanded to the district court for consideration of whether a warning, if given, would have prevented the incident. On remand, the district court found the failure to give proper instruction concerning stowage caused the explosion.

The district court had also denied summary judgment to the carrier interests (including the charterer who issued the bill of lading covering the shipment of cal-hypo) who had settled with cargo interests and did not participate in the trial which resulted in a finding of sole liability on the part of the shipper.

The shipper appealed the district court's finding of liability and the bill of lading carrier interest also appealed from the denial of its claim against the shipper.

The circuit court, considered the district court's determination that, while the IMDG did not prohibit below deck stowage of

cal-hypo, the evidence showed the shipper packaged the shipment in such a way that it caused a lower critical ambient temperature and that a specific warning by the shipper was necessary to alert the carrier that a standard protocol should not have been followed. The circuit court found that it could not overturn a factual determination of the district court even if it would have weighed the evidence differently, finding the factual determination of the district court not to be clearly erroneous. It affirmed judgment against the shipper.

As to the second issue before the court i.e. the carrier's right to indemnity, the court noted that the carrier interest had settled with plaintiffs and did not pursue its indemnity claim at trial. It agreed that carrier interest forfeited its indemnity claim by not participating in the trial below. Thus, the indemnity claim was not preserved and the district court judgment was affirmed.

COVENANT CONQUERS….

Mattel, Inc. v. BNSF Railroad Company, Nos. CV 10-0681-R; CV 10-3127-R, 2011 WL 90164, 2011 U.S. Dist. LEXIS 495 (C.D. Cal. Jan. 3, 2011), Decision of Judge Manuel L. Real.

Containerized shipments moved from China to Fort Worth, Texas under through bills of ladings and were damaged during inland railed transportation. The ocean carrier had subcontracted with BNSF to move the shipments from Long Beach to Fort Worth. The BNSF train carrying the shipments derailed in Texas in November, 2008 and the plaintiff brought suit against the railroad in its own name seeking $1,266.182.63 in damages.

The through bill of lading defined the term "Merchant" to include the shipper, cargo owner and consignee binding each to its terms. Plaintiff was the designated consignee on the shipments and also averred that it was the beneficial owner of the cargo.

The through bill of lading also provided, with respect to subcontracting and indemnity, that the Merchant undertakes no claim or allegations shall be made against any Person whomsoever by whom

the Carriage is performed or undertaken (including all Sub-Contractors of the Carrier) other than the carrier; and further provided that the Subcontractors would have the benefit of every right, defense, limitation or liberty available to the carrier.

The court found the matter ripe for summary judgment, there being sufficient time to conduct discovery and the plaintiff also having failed to identify specific facts that further discovery would reveal, and explain why such facts would preclude summary judgment.

Finding the plaintiff bound by the terms of the through bill of lading, the court noted "Rail carriers are entitled to enforce ocean carriage through bill of lading terms in their favor including a covenant not to sue, when the rail carrier falls within the definition of the parties covered by a Himalaya clause therein." Mattel Inc., 2011 WL 90164, at *4, 2011 U.S. Dist. LEXIS 495, at *8-*9 *citing Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 30 (2004).

The plaintiff asserted it was a shipper under the through bill of lading, whereas the railroad stated that the Mattel was bound by the through bill of lading because it was the consignee and it asserted it was the beneficial owner of the cargo. The court found that this disagreement was immaterial to the issue of whether the plaintiff was bound by the through the bill of lading terms as the plaintiff was the named consignee and, thus, bound by the bill of lading terms. The court specifically found that Covenants Not to Sue were not impermissible under Section 1303(8) of COGSA and held that the bill of lading's Covenant Not to Sue forbade the plaintiff to sue any of the ocean carrier's subcontracting carriers for any claims whatsoever on the shipments for cargo loss or damage irrespective of fault.

In dealing with a service contract between the ocean carrier and the plaintiff, the court found it did not affect the railroad's ability to enforce the Covenant Not to Sue. The service contract merely displaced inconsistent terms in the through bill of lading and the Covenant Not to Sue subcontractors was consistent with the Service Contract in that both affix liability on the ocean carrier. It further

found the Subcontracting and Assignment clause was consistent with the Covenant Not to Sue in the through bill of lading and that any breach of the clause would not affect the railroad's ability to fully enforce the Covenant Not to Sue.

The court dismissed the complaint against the railroad with prejudice.

[Editors have also been made aware of a decision of the same court by Judge Otis D. Wright II dated December 16, 2008: *Federal Ins. Co. v. Union Pacific Railroad Co.*, 590 F. Supp. 2d 1292 (C.D. Cal. 2008) *aff'd*, 651 F.3d 1175 (9th Cir. 2011). In that case, the court considered a similar Covenant Not to Sue contained in the ocean bill of lading. It granted the defendant railroad's motion for summary judgment finding the Covenant Not to Sue precluded the plaintiff's action against the railroad.]

PLAINT OF THE PLANTAINS…

Cholita Corp. v. M/V MSC MANDRAKI, et al., No. 10 Civ. 4717 (JSR), 2011 AMC 1417, 2011 WL 1405038, 2011 U.S. Dist. LEXIS 39138, (S.D.N.Y. April 4, 2011) decision of Judge Jed S. Rakoff.

An action was brought for alleged damage to fresh green plantains moving from Guayaquil, Ecuador to New York. The shipments were transported inside refrigerated containers and subsequently rejected by plaintiff's clients as being "damaged"; however, the nature of the damage was unclear.

Defendants moved for summary judgment on the basis that the plaintiff did not present a prima facie case.

The court noted that while a clean bill of lading normally constitutes prima facie evidence that cargo was in good condition at the time of the shipment, courts have longed recognized that it does not have this probative force where the shipper seeks to recover for damage to goods shipped in packages which prevent the carrier from observing damaged condition had it existed when the

goods were loaded. As the three containers were sealed, defendants contended that they had no opportunity to inspect the plantains and that the plaintiff failed to produce additional evidence demonstrating the good condition of the cargo at the time loading. Indeed, a witness for the plaintiff admitted in his deposition that no documents existed regarding the plantains' condition and that he had no personal knowledge of when the plantains were harvested or how they were cared for prior to being sealed in the containers.

The court acknowledged that the plaintiff did not directly challenge this contention but argued, instead, evidence of good order upon delivery to the carrier need not be produced if there is an alternative way to establish a prima facie case; showing that, from the condition of the cargo as delivered, or otherwise, that the damage was caused by the carrier's negligence and not by any inherent vice in the cargo itself.

Plaintiff argued that the actual condition of the fruit, as delivered in New York was that it was water damaged. Deposition testimony was that the containers were so flooded with water that it was "basically raining inside the container." The refrigeration log for two of the three containers also showed that the relative humidity in the containers rose to nearly 100% during the shipment. Given the nature of the damage, the plaintiff argued that the case was analogous to *Transatlantic Marine Claims Agency, Inc. v. M/V "OOCL Inspiration"*, 137 F.3d 94, 1998 AMC 1327 (2d Cir. 1998) where cargo wetting resulted from sea water, and *Arkwright Mut. Ins. Co. v. The M.V. Oriental Fortune*, 745 F. Supp. 920, 1991 AMC 2237 (S.D.N.Y. 1990) involving wetting damage to a shipment of electrical ceiling fans, where there was nothing inherent in the merchandise itself or in its packaging that would itself produce moisture, rust or corrosion and circumstantial evidence suggested the water damage was caused by the introduction of water from an outside source.

Although the court recognized plaintiff's evidence was not as compelling as that in *Transatlantic* and in *Arkwright*, it found there were genuine issues of material fact that precluded the granting of summary judgment; while the nature of the damage to the

plantains was unclear, the plaintiff had produced some evidence that the plantains sustained water damage. Assuming the truth of this assertion for the purposes of the motion, the court concluded that the water damage was not an "inherent vice" of the plantains. The court further found that it was not unreasonable to infer that the damage was caused by carrier's employees negligently altering the ventilation settings and thereby caused the relative humidity in the containers to rise to 100%. "Plaintiff's evidence is just sufficient, therefore, to satisfy its initial burden and to defeat defendants' motion for summary judgment."

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Volume 5, Number 1, May 5, 2011

SHIPBOARD RELEASES - THE NEXT BATTLE GROUND

Robert D. Peltz and Carol L. Finklehoffe
Leesfield & Partners, P.A.

Although there are several reported decisions involving the validity of releases executed by passengers for excursions and other activities occurring off a cruise ship, there is surprisingly little authority regarding the enforceability of attempts to disclaim liability for shipboard activities. With the escalation of new and potentially dangerous shipboard activities, such as rock climbing walls, FlowRiders and even ballooning, the battle over the validity of releases for such activities will only become more prominent in the future.

One of the obvious impediments to the enforceability of such releases is the existence of 46 U.S.C. §30509 (previously codified at 46 U.S.C. app. §183c) which provides:

> (A) Prohibition.--
>
> (1) In general.-- The owner, master, or agent of a vessel transporting passengers between ports in the United States or between a port in the United States and a port in a foreign country, may not include in regulation or contract a provision limiting:
>
> > (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or

> > (B) the right of a claimant for personal injury or death to trial by court of competent jurisdiction.
>
> (2) Voidness.-- A provision described in paragraph (1) is void.

Therefore, under the clear and unambiguous wording of 46 U.S.C. §30509, a shipowner is prohibited from disclaiming liability for its negligence on cruises which stop at a U.S. port.

A handful of cases have dealt with the issue of whether releases for shoreside excursions and activities occurring off the cruise ship, such as snorkeling, scuba diving and the use of jet skis are valid. The courts in these cases have upheld the releases, generally in reliance upon state law principles. See, e.g., *Borden v. Phillips*, 752 So. 2d 69 (Fla. Dist. Ct. App. 2000) (concluding there was no admiralty jurisdiction for recreational boating and scuba diving injuries).

None of these earlier cases, however, have involved claims occurring on the cruise ship itself or even discussed the application of 46 U.S.C. §30509. See, e.g., *In re Royal Caribbean Cruises, Ltd.*, 459 F. Supp. 2d 1275 (S.D. Fla. 2006) (personal watercraft operated at out island during excursion), *In re Royal Caribbean Cruises Ltd.*, 403 F. Supp. 2d 1168 (S.D. Fla. 2005) (personal watercraft operated at out island during excursion).

In one of the first decisions to directly consider the application of 46 U.S.C. §30509 to releases involving shipboard activities, one federal district judge from the Southern District of Florida has recently concluded that the statute was inapplicable to prevent the enforcement of a release executed by a passenger to bar her claim arising from injuries during the course of a FlowRider shipboard activity. *Johnson v. Royal Caribbean Cruises, Ltd.*, 2011 AMC 1171, 2011 WL 1004583 (S.D. Fla. 2011), *rev'd*, No. 11-11729, 2011 WL 6354064 (11th Cir. Dec. 20, 2011) (slip op.). [**Editors' note:** This case was reversed shortly before this issue of *MLA Report* went to

press.] In this case, the court upheld a disclaimer signed by the passenger in which she agreed "to 'fully release and forever discharge' [the carrier] from 'any and all actions' arising from 'any accident or injury' in any way connected to [her] use of the FlowRider."

In its initial analysis, the court held that admiralty jurisdiction did not apply to the plaintiff's claim, thereby rendering 46 U.S.C. §30509 inapplicable. Although noting that the accident occurred on navigable waters, the court concluded that the activity had an insufficient connection to maritime commerce and traditional maritime activity as required under *Gerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995).

The court next determined even if admiralty jurisdiction existed that 46 U.S.C. §30509 would not bar the operation of the release, since it is only applicable to a carrier's activities "in providing transportation and other essential functions of common carriers." The judge reasoned that:

> While courts have expanded the essential functions of a ship as common carrier to include the provision of "comfortable accommodations" to passengers [citation omitted] recreational and inherently dangerous activities such as the FlowRider can hardly be considered essential functions of a common carrier, nor are they at all related to a carrier's duty to provide safe transportation to its passengers.

The court's threshold presumption that the prohibition contained in 46 U.S.C. §30509 only applies to situations coming within admiralty jurisdiction belies the clear wording of the statute, which contains no such limitation on its face. Therefore, as a preliminary matter there appears to be no legal basis to add a judicial limitation to the operation of the statute, which is not contained within the statute itself.

Even if the operation of the statute could be considered limited to situations falling within admiralty jurisdiction, the court's reasoning also clearly conflicts with over 50 years of nearly unanimous decisions from the United States Supreme Court, numerous circuit courts and countless district courts, which have concluded that passenger accidents occurring aboard a cruise ship are subject to admiralty jurisdiction. In fact in the landmark case of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 1959 AMC 597 (1959), the U.S. Supreme Court expressly held that a trip and fall by a guest of a crewmember on a stairway carpet fell within admiralty jurisdiction. *See, e.g., Everett v. Carnival Cruise Lines,* 912 F.2d 1355, 1991 AMC 700 (11th Cir. 1990) (trip over fire door threshold); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 1988 AMC 1146 (2d Cir. 1988) (trip and fall on stairway in cruise ship); *McCormick Shipping Corp. v. Stratt*, 322 F.2d 648, 1964 AMC 119 (5th Cir. 1963) (passenger injured by defective closet door). To accept the court's rationale in *Johnson* would be to exclude virtually every passenger claim occurring aboard a cruise ship from the application of admiralty jurisdiction and maritime law.

The second basis for the court's conclusion, that 46 U.S.C. §30509 only applies to the shipowner's activities in "providing transportation and other essential functions of common carriers," also ignores the overwhelming body of maritime law applicable to cruise ships, which has uniformly concluded that passenger injuries occurring during the course of recreational activities fall within admiralty jurisdiction. *See, e.g., Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 1991 AMC 444 (6th Cir. 1990) (passenger injured while playing basketball on ship); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1990 AMC 46 (11th Cir. 1989) (slip and fall on wet spot on deck in cruise ship's outdoor disco); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 1983 AMC 2100 (2d Cir. 1983) (fall over stool in cruise ship's disco dance floor); *Moore v. Am. Scantic Line*, 121 F.2d 767, 1941 AMC 1207 (2d Cir. 1941) (passenger injured while skipping rope on the bridge deck).

Even if such a limitation were applicable on the operation of the statute, it is obvious that recreational activities such as the FlowRider are an essential part of the purpose and function of modern cruise ships. Whether one is reading a newspaper or magazine,

watching television or using the Internet, it is hard to miss ads for cruise ships focusing on shipboard activities and amenities.

Maritime law has also long recognized that the function of a cruise ship is not limited to transportation but also includes the recreational activities of its passengers. Accordingly, maritime cases have provided seaman's status to hairdressers, musicians, waiters, busboys, bartenders and entertainers, to name just a few. *See, e.g., Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973) (hairdresser) (and cases cited therein). In fact, cases taking such an expansive view of the function of the vessel date back several hundred years. In the 1910 decision in *The J.S. Warden*, 175 F. 314 (S.D.N.Y. 1910), the great Learned Hand relied upon a similar decision in 1806 to conclude that a bartender served an essential ships function on a steam paddle wheeler.

As a result, previous cases have applied the provisions of 46 U.S.C. §30509 and its predecessor, 46 U.S.C. app. §183c to render releases and disclaimers appearing in tickets invalid for injuries occurring to passengers during the course of a cruise. *See, e.g., Moore,* 121 F.2d 767 (2d Cir. 1941) (disclaimer inapplicable to bar claim by passenger injured while skipping rope on the bridge deck); *Hawthorne v. Holland Am. Line*, 160 F. Supp. 836, 1958 AMC 2446 (D. Mass. 1958) (barring enforcement of ticket provision disclaiming liability where the passenger was guilty of contributory negligence). Significantly, even prior to the adoption of 46 U.S.C. app. §183c in 1936, such disclaimers have been rejected under maritime law on public policy grounds. See, e.g., *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1985 AMC 826 (11th Cir. 1984) (citing *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889).

RECENT TRENDS IN CRUISE SHIP DESIGN CLAIMS

David J. Horr
Horr, Novak & Skipp, P.A.

Recent cases have addressed the parameters' of cruise ships' potential liability for claims of faulty or deficient design. The cases addressed the distinctions that exist between manufacturers of a product and users of a subsequently delivered product where liability to a passenger is concerned.

OVERVIEW

The general maritime law holds that a vessel purchaser that does not participate in the design or construction of the vessel cannot be held strictly liable for its passengers' safety on a products liability theory. *See, e.g., Davis v. Spirit of New Jersey,* No. Civ. 96-4992(JCC), 2000 WL 33302241 (D.N.J. May 5, 2000). The vessel operator in this context is considered a provider of services, not a manufacturer or seller. *Id.*; *see also, Dudley v. Bus. Express*, 882 F. Supp. 199 (D.N.H. 1994) (operator of an airplane is merely providing service of air transportation and is not held strictly liable for injuries sustained by its passengers). The maritime law is clear: a ship operator is not strictly liable for passengers' safety. *Everett v. Carnival Cruise Lines, Inc.*, 912 F.2d 1355, 1358, n.3, 1991 AMC 700 (11th Cir. 1990).

Similarly, maritime law does not impose an implied warranty on the ship-owner for the fitness of the vessel or for the safety of its passengers. *Rockey v. Royal Caribbean Cruises, Ltd.*, No. 99-708-CIV-GOLD, 2001 WL 420993 (S.D. Fla. Feb. 20, 2001). A ship-owner may be liable to a crewmember on a claim for unseaworthiness if the vessel is not reasonably fit for its intended purpose. *See, e.g., Levine v. Zapata Proteen (USA), Inc.*, 961 F. Supp. 942, 945 (E.D. La. 1996) (involving a claim for defective design of stairs that injured plaintiff). However, it is black letter maritime law that a passenger may not sustain a claim for a vessel's unseaworthiness. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1335, 1985 AMC 826 (11th Cir. 1984).

Efforts to apply strict liability notions in this context also generally fail. It is well established that the ship-owner is not the insurer of its passenger's safety and it does not become liable to a passenger simply because an accident occurs. *Everett*, 912 F.2d

at 1358 n.3; *Luby v. Carnival Cruise Lines, Inc*., 633 F. Supp. 40, 41 n.1, 1986 AMC 2330 (S.D. Fla. 1986), *aff'd*, 808 F.2d 60 (11th Cir. 1986) (unpublished decision). The mere fact that an accident occurred does not give rise to a presumption that a dangerous condition existed before the incident. *Isbell v. Carnival Corp*., 462 F. Supp. 2d 1232, 1237, 2007 AMC 677 (S.D. Fla. 2006); *Barbary v. Costa Crociere, S.p.A*., No. 08-60123-CV-GOLD (S.D. Fla. Apr. 17, 2009) (PACER Doc. No. 45).

Cruise ship operators owe their passengers the duty to exercise reasonable care under the circumstances. *Kemarec v. Compagnie General Transatlantique*, 358 U.S. 625, 630, 1959 AMC 597 (1959). There must be some failure to exercise due care before liability may be imposed. *Monteleone v. Bahama Cruise Line, Inc*., 838 F.2d 63, 64, 1988 AMC 1146 (11th Cir. 1988). The standard of reasonable care generally requires that the carrier have actual or constructive notice of the risk-creating condition. *Keefe v. Baham Cruise Line, Inc*., 867 F.2d 1318, 1322, 1990 AMC 46 (11th Cir. 1989). An essential element of a claim for negligent design is that the defendant actually designed the subject premises or product. *See, e.g., Dillaha v. Yamaha Motor Corp*., 23 F.3d 1376 (8th Cir. 1994) (affirming summary judgment on negligent design claim in favor of defense where evidence showed defendant did not design or manufacture the subject go-kart); *Cornish v. Renaissance Hotel Operating Co*., No. 8:06-CV-722T27EAJ, 2008 WL 1743861 (M.D. Fla. Apr. 15, 2008) (directing verdict for defendant on negligent design claim where plaintiff failed to introduce evidence that defendants actually designed the allegedly defective dock facility). A plaintiff's failure to prove the defendant actually designed the subject area is fatal to the negligent design claim as a matter of law. *Id*.

Two cases of relatively recent vintage demonstrate the significance of factual and legal distinctions for the ship's potential liability on a negligent design claim.

I. Rodgers v. Costa Crociere S.p.A.

A. *Rodgers v. Costa Crociere S.p.A*., No. 08–60233–CV–WPD (S.D. Fla. July 7, 2009) (PACER Doc. No. 76); *aff'd*, 410 Fed. App'x 210 (11th Cir. 2010)

Rodgers was a passenger aboard the COSTA MAGICA. He alleged he was injured when his shoe caught in a gap between the metal bullnose edge of a step and the carpet of the step on a stairway in the theatre balcony causing him to trip and fall down a flight of stairs. Rodgers brought suit alleging, *inter alia* that the stairway was negligently designed.

The ship moved for summary judgment. As it pertained to the claim for negligent design the district court granted the motion for summary judgment.

Plaintiff argued the stairway was dangerous and defective as designed and as a result no proof of notice to the ship was required to satisfy the plaintiff's burden of proof. The court was not persuaded by this argument observing that the plaintiff failed to present evidence to dispute that the ship was not designed or manufactured by defendant. The court found that Costa was merely the ultimate purchaser of the vessel similar to the court's finding in *Davis v. Spirit of New Jersey*, No. Civ. 96-4992(JCC), 2000 WL 33302241 (D.N.J. May 5, 2000). The court observed that Costa could not be held strictly liable as "'the mere consumer of a product which has been alleged to have been defectively manufactured.'" Order at 12, *quoting Davis* at *6. The district court rejected plaintiff's argument for imposing a products liability theory. The court observed that simply by holding out the COSTA MAGICA as its own by virtue of operating it this did not equate with Costa holding out the vessel as manufactured and designed by it. The court quoted the discussion in *Bird v. Celebrity Cruise Line, Inc*., 428 F. Supp. 2d 1275, 2005 AMC 2794 (S.D. Fla. 2005), as illustrating that the Eleventh Circuit has limited "'strict liability to cases involving intentional acts by a ship's crew members [and has noted] that the Circuit's "slip-and-fall" cases apply the *Kermarec* standard of reasonable care under

the circumstances.'" Order at 13, *quoting Bird*, 428 F. Supp. 2d at 1281 (itself quoting *Doe v. Celebrity Cruises, Inc*., 394 F. 3d 891, 910, 2005 AMC 214 (11th Cir. 1004)). "'Strict products liability has never been noted as another exception to the negligence basis for liability. Moreover, one cannot reconcile the imposition of strict liability, imposed although "the seller has exercised all possible care in the preparation and sale of his product," with the much-cited proposition in this Circuit that a ship-owner is not the insurer of its passengers' safety.'" Order at 13, *quoting Bird*, 428 F. Supp. 2d at 1282 (itself quoting Rest. 2d Torts §402A(2)(a) (1965) and citing *Kornberg*, 741 F.2d at 1334).

B. *Rodgers v. Costa Crociere S.p.A*., 410 Fed. App'x 210 (11th Cir. 2010)

On appeal, the Eleventh Circuit affirmed summary judgment on the negligent design claim. The court specifically observed there was no evidence whatsoever that Costa actually designed the stairs or the handrails. Because neither the facts nor the law supported Rodgers' negligent design theory, the court affirmed the summary judgment rendered by the district court.

II. Groves v. Royal Caribbean Cruises, Ltd.

Groves v. Royal Carribean Cruises, Ltd., No. 09-20800-CIV (S.D. Fla. Dec. 8, 2010) (PACER Doc. No. 95), mot. for recons. denied, 2011 WL 109639 (S.D. Fla. Jan. 11, 2011), appeal docketed, No. 11-10815-AA (11th Cir.)

Groves was a passenger on the FREEDOM OF THE SEAS. While exiting the dining area of the vessel on the last day of her cruise, Groves slipped and fell when she stepped backwards from the carpeted area onto the granite hard floor near the waiters station. Groves filed suit alleging, *inter alia*, that the cruise line was liable for negligent design of the area in the dining room where the accident occurred. The ship moved for summary judgment which the court granted. Discussing the applicable law the court acknowledged the general principles recited above in the overview. The

court also stated "where [a] defendant created the unsafe or foreseeably hazardous condition, a plaintiff need not prove notice in order to show negligence." Order at 3, *citing Rockey v. Royal Caribbean Cruises, Ltd*., No. 99-708-CIV-GOLD, 2001 WL 420993 *4-5 (S.D. Fla. Feb. 20, 2001).

However, the court concluded that the facts did not demonstrate defendant designed the allegedly offending areas in the Dining Room. The court declined to apply the *Rockey* reasoning. Instead, the court recognized that the ship can be liable for negligent design of the dining area only if it had actual or constructive notice of the alleged hazardous condition. The court noted the absence of evidence to establish notice (either actual or constructive).

After a trial that resulted in a verdict for the ship, Groves recently initiated an appeal. The appeal ostensibly includes the order granting motion for summary judgment on the negligent design claim.

Conclusion

Reluctance by courts to extend the cruise ship's potential liability on negligent design claims reflects a recognition that a ship's duty to its passengers is based on negligence concepts. The courts have declined to adopt warranty/strict liability notions in this context.

CASE LAW UPDATE

Admiralty Jurisdiction

Grosset v. McMurtry, 764 F. Supp. 2d 782, 2010 AMC 2122 (D.S.C. 2010)

A defamation claim by one sports fisherman against another for taking embarrassing photographs and then showing them to others ashore after the conclusion of a fishing trip did not meet either

element necessary to establish admiralty jurisdiction. Initially, the court concluded that the tort of defamation was not completed until the defendant showed the photographs to others. Since this occurred ashore, the location requirement for asserting admiralty jurisdiction was not met. The court further held that the claim also failed to meet the requirement that the actions have an impact on maritime commerce.

Maintenance and Cure

Stanton v. Buchanan Marine, L.P., 2010 AMC 2170, 2009 WL 2447823 (S.D.N.Y. 2009)

In upholding a collective bargaining agreement ("CBA") provision that limited maintenance payments to 90 consecutive days, even if the injured seaman had not reached maximum medical cure, the court relied upon a long line of cases upholding limitations on maintenance in legitimately negotiated CBAs. *See, e.g., Ammar v. United States*, 342 F.3d 133, 2003 AMC 2451 (2d Cir. 2003); *Frederick v. Kirby Tanks Ships, Inc*., 205 F.3d 1277, 2000 AMC 1839 (11th Cir. 2000); *Baldassaro v. United States*, 64 F.3d 206, 1995 AMC 2947 (5th Cir. 1995); *Barnes v. Andover Co*., 900 F.2d 630, 1990 AMC 1265 (3d Cir. 1990); *Al-Zawkari v. Am. S.S. Co*., 871 F.2d 585, 1990 AMC 1312 (6th Cir. 1989); *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 1990 AMC 1368 (1st Cir. 1989); *Gardiner v. Sea-Land Serv., Inc*., 786 F.2d 943, 1986 AMC 1521 (9th Cir. 1986).

Punitive Damages

Nes v. Sea Warrior, Inc., 2010 AMC 2297, 2010 WL 5140687 (Wash. Super. Ct. 2010)

A Washington trial court concluded that the U.S. Supreme Court's decision in *Atlantic Sounding v. Townsend*, 129 S.Ct. 2561, 2009 AMC 1521 (2009), which upheld the imposition of punitive damages in maintenance and cure cases also allowed the recovery of such damages under the Jones Act. In rejecting the long line of cases

to the contrary, the court concluded that the dissent in *Townsend* "makes it clear that it understands the majority decision to allow punitive damages under the Jones Act . . . ."

Royal Caribbean Cruises Ltd. v. Doe, 44 So. 3d 230 (Fla. Dist. Ct. App. 2010)

Under Florida Statutes § 768.72 (2009), which precludes the assertion of a claim for punitive damages in the absence of "a reasonable showing by evidence in the record or proffered by the claimant which provides a reasonable basis for recovery of such damages," it was error for the court to permit an amendment in a seaman's claim filed in state court without undertaking the requisite evidentiary analysis.

Arbitration

In *Thomas v. Carnival Corp*., 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009), the Eleventh Circuit concluded that an arbitration clause in a seaman's collective bargaining agreement was unenforceable where it operated in conjunction with a Panamanian choice of law provision to deprive a seaman of his right to bring an action under the Seaman's Wage Act, 46 U.S.C. § 10313. In over a dozen recent cases, different judges in the Southern District of Florida have construed *Thomas* in often conflicting manners. These cases include:

Lindo v. NCL (Bahamas) Ltd., No. 09-22926-CIV, 2009 WL 7264038 (S.D. Fla. Dec. 23, 2009) (Graham, J.)

In *Lindo*, the plaintiff's CBA required that he submit his claims to arbitration proceedings in his home country (Nicaragua), which would apply the law of the vessel's flag (Bahamas). Although the plaintiff argued that the provision would therefore deprive him of his claims under the Jones Act, the court refused to extend the holding in *Thomas* to bar enforcement of claims arising outside of the Seaman's Wage Act. Instead, it held that it must rely upon the Eleventh Circuit's explicit holding that a Jones Act claim is subject

to arbitration in *Bautista v. Norwegian Cruise Line, Ltd*., 396 F.3d 1289, 1302 (11th Cir. 2005). *But see Williams v. NCL (Bahamas) Ltd*., 774 F. Supp. 2d 1232 (S.D. Fla. 2011) (Lenard, J.).

Bulgakova v. Carnival Corp., No. 09-20023-CIV, 2010 WL 5296962 (S.D. Fla. Feb. 26, 2010) (Seitz, J.)

In *Bulgakova*, another federal district judge utilized a different analysis but reached the same result in refusing to void an arbitration provision for a seaman's claims under the Jones Act, unseaworthiness and for maintenance and cure. The court concluded that while Panamanian substantive law might bar the seaman's Jones Act claim, it would likely recognize his non-statutory claims as a basis for recovery. Therefore, while the choice of law provision might "threaten to extinguish" the plaintiffs claims, there was no indication in the case that the court would subsequently be deprived of an "opportunity for review" at the award enforcement stage. Thus, it held that if the plaintiff was in fact denied his U.S. maritime remedies during the course of the arbitration, his remedy would be to come back after the arbitration and raise the claim in the post-proceeding enforcement stage. Accordingly, the court ruled that the plaintiff s request for relief was "premature" until after the arbitration was actually conducted.

Sorica v. Princess Cruise Lines, Ltd., No. 09-20917-CIV, 2010 Fla. L. Wkly. Fed. D 437 (S.D. Fla. Aug. 14, 2009) (Huck, J.) (PACER Doc. No. 33)

Another judge rejected the seaman's request to have an arbitration provision declared null and void after the cruise line had stipulated to having the case governed by U.S. substantive law, even though it was to be arbitrated in Bermuda. Although this stipulation removed the crux of the *Thomas* objection to arbitration, the court nevertheless went on to note in *dicta*:

> The fact that the arbitration agreement may not be enforceable because it is purportedly null and void, does not mean that the arbitration agreement does not exist or that the dispute is not one that "relates to an arbitration agreement . . . covered by the convention." [citation omitted] . . . In other words, jurisdiction is not contingent upon the validity or enforceability of the arbitration agreement, but simply whether the four jurisdictional prerequisites have been met and the claims relate to the arbitration agreement.

See also Orozco v. Princess Cruise Line, Ltd., No. 10-23276-CIV, 2010 WL 3942854 (S.D. Fla. Oct. 7, 2010) (King, J.) (compelling arbitration based upon cruise line's agreement to waive choice of law provision); *Matthews v. Princess Cruise Lines, Ltd*., 728 F. Supp. 2d 1326 (S.D. Fla. 2010) (Gold, J.) (same); *Krstic v. Princess Cruise Lines, Ltd*., 706 F. Supp. 2d 1271 (S.D. Fla. 2010) (Gold, J.) (same); *Gawin v. Princess Cruise Lines, Ltd*., 706 F. Supp. 2d 1261 (S.D. Fla. 2009) (Ungargo, J.) (same).

Harrison v. NCL (Bahamas) Ltd., No. 1:11-Civ-20414, 2011 WL 1595170 (S.D. Fla. Apr. 27, 2011) (Cooke, J.)

Yet another district court judge reached the opposite result in *Harrison*, concluding that since it takes two parties "to stipulate" that the cruise lines agreement to waive a choice of law provision was ineffective, thereby causing the contract to run afoul of *Thomas*. The court further determined that since the contract did not have a severability clause, that it would have been inappropriate in any event to severe the offensive choice of law provision.

Kovacs v. Carnival Corp., No. 1:09-cv-22630-PCH, 2010 Fla. L. Wkly. Fed. D 438 (S.D. Fla. Dec. 21, 2009) (Huck, J.) (PACER Doc. No. 19), *mot. for reconsideration denied* (PACER Doc. No. 29)

In yet another variation on the theme, the cruise line stipulated to arbitrate the plaintiff's Seaman's Wage Act claim under U.S. law, but refused to similarly stipulate as to the accompanying Jones Act claim. The court concluded that Panamanian law does not provide a seaman with a reasonable equivalent to the rights provided by the Jones Act. Accordingly, it held that it would be against pub-

lic policy to compel arbitration of the plaintiff's Jones Act claim "because to do so would deprive her of important statutory rights provided by Congress to effectuate public policy." Order at 2. The court went on to further hold that it would be inefficient to bifurcate the plaintiff's separate claims and accordingly, granted the seaman's request to remand the case back to state court.

Morocho v. Carnival Corp., No. 10-21715-CIV, 2011 U.S. Dist. LEXIS 4316, 2011 WL 147750 (S.D. Fla. Jan. 18, 2011) (Martinez, J.)

Still another judge concluded that a seaman's complaint seeking recovery for violation of the Jones Act, unseaworthiness, failure to provide maintenance and cure, failure to treat and for penalty wages was not subject to arbitration where the employment contract contained a choice of law provision requiring the application of Panamanian law in reliance upon *Thomas*. In reaching this conclusion, the court noted that while the validity of the seafarer's agreement is typically a question for the arbitrator to determine, the issue of the validity of the arbitration clause contained within the contract is appropriate for resolution by the court.

Doe v. Princess Cruise Lines, Ltd., 696 F. Supp. 2d 1282 (S.D. Fla. 2010), aff'd in part, rev'd in part, 657 F.3d 1204 (11th Cir. 2011)

In another crewmember case arising in a different context it was held that an arbitration provision in a crew contract did not apply to sexual assault claim by one crewmember against another, since the dispute "did not arise out of" the crewmember's employment.

Forum Non Conveniens

Wilson v. Island Fees Investments, Ltd., 590 F.3d 1264, 2010 AMC 2248 (11th Cir. 2009)

In an opinion arising from a case against a resort in the Bahamas, the Eleventh Circuit Court of Appeals reversed a dismissal

based upon *forum non conveniens*, which will likely have an impact on cruise line cases involving similar issues. In its opinion, the court concluded that while the financial inability of a plaintiff to bring a lawsuit in a foreign forum will not affect the analysis of whether the forum provides a reasonable alternative; nevertheless, a party's claim of financial hardship "is a factor to be considered in the balancing of interests that bears upon convenience, a balancing process that is to be performed *after* identifying an alternative forum." *See also Gross v. British Broad. Corp.*, 386 F.3d 224 (2d Cir. 2004); *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708 (1st Cir. 1996).

Discovery

Schulte v. NCL (Bahamas) Ltd., No. 10-23265-CIV, 2011 WL 256542, 22 Fla. L. Wkly. Fed. D 574 (S.D. Fla. Jan. 25, 2011)

A security video is not privileged from disclosure on the grounds of work product and a carrier is not entitled to postpone the production of the video until after it deposes a passenger, whose fall was captured on the video. The fact that the carrier preserved the video from destruction in anticipation of litigation did not transform the video into work product protected material.

Shore Excursions

Koens v. Royal Caribbean Cruises, Ltd., 774 F. Supp. 2d 1215 (S.D. Fla. 2011)

A suit arising out of a shoreside excursion during which the passengers were robbed at gunpoint was dismissed by a federal judge in reliance upon an old intermediate Florida appellate court decision, *Carlisle v. Ulysses Line Ltd.*, 475 So. 2d 248, 1986 AMC 694 (Fla. Dist. Ct. App. 1985). The plaintiff had purchased a ticket aboard the ship for a Segway tour conducted on a remote 162-acre private nature preserve in the Bahamas known as "Earth Village." During the course of the tour, a number of the excursion participants were attacked by armed robbers, who stole the participants' possessions after terrorizing them at gunpoint. The court dismissed the plaintiff's complaint on the grounds that the "'duty to warn [of

foreseeable criminal activity] is limited to dangers known to exist in the *particular* place where the passenger is invited to, or reasonably may be expected to visit.'" *Koens*, 774 F. Supp. 2d at 1219-20, *quoting Carlisle*, 475 So. 2d at 251. Accordingly, the court concluded that allegations of the rising crime rate in Nassau in general were insufficient to give rise to a duty to warn of the potential for crimes occurring at the Earth Village Nature Preserve. The court went on to further hold that the failure to allege any specific deficiencies in regard to the safety record of the excursion operator would preclude a claim against the cruise line for negligent misrepresentation based upon the claimed failure to "fully vet and vouch for the safety record of the tour operator." *Id*. at 1221 (internal quotation and alterations omitted).

Bridgewater v. Carnival Corp., No. 10-22241-CIV, 2011 WL 817936 (S.D. Fla. Mar. 2, 2011)

In order to state a claim against a cruise line for the purported negligence of a shore excursion operator under the theory of apparent agency, the plaintiff must allege a sufficient basis to establish the required elements that: (1) the carrier made representations which caused the passenger to believe that the excursion operator had authority to act for it; (2) such belief was reasonable and (3) the passenger reasonably relied upon this belief to its detriment. The court similarly held that in order to state a claim under the theory of joint venture, the plaintiff would have to sufficiently plead facts to support the following five elements: (1) the intention of the parties to create a joint venture, (2) joint control or right of control, (3) joint proprietary interest in the subject matter of the venture, (4) the right of both venturers to share on the profits and (5) the duty of both to share in the losses.

Samuels v. Holland Am. Line-USA, Inc., No. C0901645 RSL, 2010 WL 3937470 (W.D. Wash. Oct. 4, 2010)

A passenger who was rendered a quadriplegic during a beach excursion as a result of being flipped by a wave so that he landed on his neck was barred from recovery against the carrier on the grounds that the sea conditions were considered to be open and obvious.

Criminal Law

United States v. Williams, 419 Fed. App'x 902 (11th Cir. 2011)

U.S. Customs did not need "reasonable suspicion" to search a passenger's cabin and accordingly, the discovery of cocaine while the vessel was docked in Port Everglades following its return from Costa Rica did not constitute a violation of the passenger's Fourth Amendment rights. *See also United States v. Alfaro-Moncada*, 607 F.3d 720 (11th Cir. 2010) (reasonable suspicion not necessary for Customs officers search of a crewmember's cabin while vessel was docked in U.S. territorial waters).

Shipboard Medical Care

Wajnstat v. Oceania Cruises, Inc., No. 09-21850-Civ, 2011 WL 465340 (S.D. Fla. Feb. 4, 2011)

In an effort to circumvent the Barbetta line of cases, which hold that a cruise line may not be held vicariously liable for the negligence of a ship's doctor, *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1988 AMC 2650 (5th Cir. 1988), the plaintiff alleged that the carrier was negligent in equipping the vessel's medical center, training the shipboard medical staff, failing to provide communication equipment to reach shoreside medical providers and for failing to timely evacuate the plaintiff. The court rejected the first three arguments on the grounds that they were barred by that portion of the *Barbetta* rule which provides that a cruise ship "is not a floating hospital." The court rejected the plaintiff's evacuation claim on the basis that there were no allegations that the Captain had overruled any order by the ship's doctor to evacuate the passenger.

Rinker v. Carnival Corp., 753 F. Supp. 2d 1237, 2011 AMC 1386 (S.D. Fla. 2010)

The court rejected additional attempts to circumvent the *Barbetta* rule by arguing that the carrier was negligent for failing to hire a ship's doctor licensed by either the state of the vessel's home

port (California) or its flag (Bahamas) on the grounds that no such duty exists. The court rejected the plaintiff's further argument that vicarious liability could be imposed on the grounds that the carrier violated the international safety management code on the grounds that the ISM does not create any legally enforceable duties to cruise ship passengers. *See also Calderon v. Reederei Claus-Peter Offen*, No. 07-61022-CIV, 2009 WL 3429771 (S.D. Fla. Oct. 20, 2009).

Time Bar

Crist v. Carnival Corp., 410 Fed. App'x 197, 2011 AMC 904 (11th Cir. 2010) (unpublished)

In an unpublished decision, the Eleventh Circuit Court of Appeal concluded that a passenger's prior unsuccessful filing of a lawsuit in state court did not equitably toll the one year time bar provision contained in the carrier's ticket where the cruise line had expressly informed the passenger prior to the filing of suit that all lawsuits were required to be filed in federal court and that it would not waive any of the ticket provisions. The court distinguished the prior opinion in *Booth v. Carnival Corp.*, 510 F. Supp. 2d 985, 2008 AMC 58 (S.D. Fla. 2007), which had applied the doctrine of equitable estoppel on the grounds that the carrier in that case had not advised the passenger prior to the filing of suit of its intent to insist upon the forum selection clause or other ticket provisions. The Eleventh Circuit concluded that in the absence of such an express declaration, the passenger in *Booth* was justified in believing that the carrier might waive its contractual venue provision. Where the carrier advised the passenger in advance that it would insist upon enforcing its forum selection clause, any resulting belief by the passenger to the contrary would be unwarranted and insufficient to give rise an equitable estoppel.

Palmer v. Norwegian Cruise Line, 741 F. Supp. 2d 405, 2011 AMC 887 (E.D.N.Y. 2010)

The one-year time bar provision set forth in a ticket was binding upon the passenger, even though her ticket was purchased

by her traveling companion. The court concluded that the passenger "knew or should have known that she needed a ticket to board the cruise ship," regardless of who purchased it.

Ship's Design

Rodgers v. Costa Crociere, 410 Fed. App'x 210 (11th Cir. 2010) (unpublished)

In a passenger suit based upon a slip and fall down a flight of stairs that were alleged to have been defectively designed, the Eleventh Circuit affirmed a summary judgment in favor of the shipowner on the grounds that the plaintiff had failed to present any evidence establishing that the owner had actually designed the stairs. A similar result was reached in *Groves v. Royal Caribbean Cruises Ltd.*, No. 09-20800-CIV, 2011 WL 109639 (S.D. Fla. Jan. 11, 2011) (Torres, J.), *appeal docketed*, No. 11-10815-AA (11th Cir.)

COMMITTEE ON FISHERIES

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

FISHERIES CASE BRIEFS

Updated Cases

General Category Scallop Fishermen v. Secretary, U.S. Dept. of Commerce, 635 F.3d 106 (3d Cir. 2011)

Former scallop permit holders challenged the final rule establishing criteria and authority for determining percentage of scallop catch allocated to general category fleet and establishing individual fishing quota (IFQ) permit system. The U.S. District Court of New Jersey granted summary judgment in favor of the National Oceanic and Atmosphere Administration ("NOAA") and the National Marine Fisheries Service ("NMFS"). *Gen. Category Scallop Fishermen v. Sec'y, U.S. Dept. of Commerce*, 720 F. Supp. 2d 564 (D.N.J. 2010). An appeal on four issues followed.

Issue No. 1

(1) Whether the NMFS complied with the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–706, and the Magnuson–Stevens Fishery Conservation and Management Act of 1976 (Magnuson–Stevens Act), 16 U.S.C. §§ 1801–1883, when it promulgated regulations implementing Amendment 11 to the Atlantic Sea Scallop Fishery Management Plan, including a "control date" that effectively terminated the access rights of general scallop fishermen who were not established in the fishery prior to November 1, 2004.

Holding

On issue No. 1, the Third Circuit held that the publication by NMFS of the New England Fishery Management Council's ("NEFMC") proposed November 1, 2004, control date did not promulgate a rule. The control date did not become a rule until NMFS adopted Amendment 11 on February 27, 2008. The Advance Notice of Proposed Rulemaking ("ANPR") dated November 1, 2004, made it clear that the control date was a proposed rule and nothing more. NEFMC gave timely public notice of the September 14–16, 2004, meeting by publishing the date 14 days in advance as the Magnuson–Stevens Act required. The court determined that this was sufficient to have put the fishermen on notice that a control date might well be one of the mechanisms put forward at the September 2004 meeting for reducing access to the scallop fishery.

Issue No. 2

(2) Whether the process by which Amendment 11 was adopted complied with the Magnuson–Stevens Act requirement that public hearings be held in "appropriate locations in the geographical area" that will be affected by changes to a Fishery Management Plan ("FMP").

Holding

On issue No. 2, the court rejected the fishermen's assertion that NMFS was required to hold at least one public meeting in every State comprising the New England and the Mid–Atlantic regions, including Delaware, Pennsylvania, Maryland and North Carolina. The court determined that the 35 meetings held satisfied the Magnuson–Stevens Act's requirements that public meetings "shall" occur "at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans . . . ." 16 U.S.C. § 1852(h)(3).

Issue No. 3

(3) Whether NMFS reasonably concluded that Amendment 11's reliance on NMFS internal dataset to determine permit eligibility complied with the Magnuson–Stevens Act's National Standard 2, which requires the use of the "best scientific information available."

Holding

On issue No. 3, the court upheld the district court's ruling that the decision "to utilize NMFS landings data from dealer reports to determine whether a vessel met the 1,000–pound landings criterion did not contravene National Standard 2." The court of appeals noted that during the development of Amendment 11, NMFS and the NEFMC concluded that despite reporting flaws in the available data groups there were no practical or cost-effective means for correcting the many errors in both Vessel Trip Reports ("VTR") and scallop dealer datasets. To address errors or omissions in the NMFS data, Amendment 11 provides that fishermen who are denied "limited access general category" ("LAGC") permits may challenge the denial "on the grounds that the information used by the Regional Administrator was incorrect." See Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 11, 73 FR 20,090, 20,092 (Apr. 14, 2008) (codified at 50 C.F.R. Part 648). The appeals process allows a rejected applicant to continue fishing pending the outcome of the appeal to prevent any prejudicial delay.

Issue No. 4

(4) Whether NMFS reasonably concluded that Amendment 11's limitations on the general category scallop fishery were consistent with the Magnuson–Stevens Act's National Standard 5, which prohibits the implementation of any fishery management measure that has "economic allocation as its sole purpose."
Holding

On issue No. 4, the court upheld the district court's determination that National Standard 5 was met. The court of appeals adopted NMFS's explanation that "the motivating force in the development of Amendment 11 was the control of mortality in the general category fishery and that economic considerations were secondary."

Stacy v. Rederiet Otto Danielsen, A.S., 609 F.3d 1033, 2010 AMC 782 (9th Cir. 2010)

The Ninth Circuit overturned the United States District Court for the Northern District of California's dismissal of the complaint for failure to state cause of action noting that the plaintiff, a commercial fishing vessel owner, plead sufficient facts against the owner of a freighter, which passed plaintiff's fishing vessel at close quarters in dense fog and then collided with a different fishing vessel, resulting in the death of the captain of that fishing vessel. The Ninth Circuit determined the plaintiff alleged that his vessel was within the zone of danger and that he suffered emotional distress from the fright caused by the negligent action of the freighter. The matter was remanded to the district court.

Following the Ninth Circuit's decision, the owner of the freighter filed a petition for *writ of certiorari*, which was denied by the Supreme Court in February 2011. *Rederiet Otto Danielsen, A.S. v. Stacy, 131 S.Ct. 1493 (2011).*

Gonzalez v. U.S. Dept. of Commerce, 695 F. Supp. 2d 474 (S.D. Tex. 2010)

Shrimp trawler owners brought an action challenging four separate but related administrative actions concerning civil penalty assessments, shrimp seizure and permit sanctions issued by the defendant. The sanctions in question amounted to relatively small dollar fines, but the bigger issue was that permit sanctions were also issued. These sanctions were issued to two companies that were owned by plaintiff Gonzalez. The two companies had nothing to do with the underlying offense, yet the permits issued to the two companies were sanctioned without an opportunity for a hearing to con-

test the permit sanctions. The plaintiffs challenged the agency's assessments against them under Magnuson-Stevens Act and the APA. In the end, the court concluded that the Notice of Permit Sanctions and/or Notice of Intent to Deny Permit ("NOPS/NIDP") should not have been issued to the two non-violating sister corporations of the corporate violator without an opportunity to contest the permit sanctions imposed on them first. As such the NOPS/NIDP that were issued against the two non-violating sisters corporations were vacated and remanded for further hearing at the agency level.

The trawler owners appealed all four sanction decisions and argued before the Fifth Circuit that seizure of shrimp by NOAA violated the separation of powers doctrine because it was done in the absence of judicial review. The trawler owners also contended that the Magnuson–Stevens Act is unconstitutional because it allows the executive branch to seize property without judicial review. In a relatively brief decision, the Fifth Circuit affirmed the district court's upholding of the four sanctions because the Magnuson–Stevens Act provides for jurisdiction in the federal courts for any civil forfeiture actions. *See Gonzalez v. U.S. Dept. of Commerce Nat. Oceanic*, 420 Fed. App'x 364 (5th Cir. 2011) (unpublished).

New Cases

United Boatmen v. Locke[1], No. 09-5628, 2011 WL 765950 (D.N.J. Feb. 25, 2011)

On January 2, 2009, NMFS issued a final rule to establish that the recreational harvest limit ("RHL") for Black Sea Bass in 2009 was 1.14 million pounds. NMFS estimates annual landings in the Black Sea Bass recreational fishery based largely on the results of the Marine Recreational Fishery Statistics Survey ("MRFSS"), which used random telephone and intercept surveys to estimate fishing effort, catch and participation.

1. In his capacity as Secretary of the U.S. Department of Commerce.

On September 29, 2009, NMFS concluded along with the Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission that the "best available information" from the MRFSS indicated that the 2009 RHL for Black Sea Bass had been "greatly exceeded." NMFS established a temporary, emergency rule to close the Black Sea Bass recreational fishery in the exclusive economic zone from Cape Hatteras to Maine for a period of 180 days (the "Emergency Rule"). The Emergency Rule was implemented swiftly and without public comment to mitigate the magnitude of overage and avoid potential closure of the recreational fishery in the exclusive economic zone for all of 2010. On November 4, 2009, plaintiffs filed this action challenging the Emergency Rule.[2]

On January 1, 2010, NMFS introduced a new registry program designed to improve its ability to collect data on fisheries such as the Black Sea Bass recreational fishery. Marine Recreational Fisheries of the United States; National Saltwater Angler Registry Program, 73 Fed. Reg. 79,705 (Dec. 30, 2008) (codified at 50 C.F.R. Part 600). The new program, called the National Saltwater Angler Registry Program ("NSARP"), requires recreational anglers and for-hire fishing vessels that engage in angling and spearfishing for marine and anadromous fish to register annually with NMFS. *Id.* at 79,706.

On May 22, 2010, participants in the Black Sea Bass recreational fishery were allowed to resume fishing pursuant to the Summer Flounder, Scup and Black Sea Bass Fishery Management Plans. (The court's decision fails to provide details on the decision to reopen the fishery.)

Defendants moved for judgment on the pleadings and the court dismissed the matter based upon the mootness doctrine by determining that the plaintiff failed to show any "reasonable expecta-

2. According to its website, United Boatmen "is an organization that has been fighting for the interests of New Jersey Party Boat, Charter Boat and Tackle businesses, their patrons, and the fisheries that we enjoy and prosper from for over 30 years." United Boatmen, http://www.unitedboatmen.com (last visited December 27, 2011).

tion" that NMFS will close the Black Sea Bass recreational fishery in the future. The court noted that defendants are in the process of replacing the MRFSS data scheme with NSARP, such that future data collection in the Black Sea Bass recreational fishery will take place under an entirely different regulatory scheme.

Firestone v. Gibson, 2011 AMC 143, 2010 WL 4683991
(S.D. Ala. 2010)

Plaintiff worked on fishing vessels for most of his life. In 1991, he severely injured his right ankle in a motorcycle accident. In June 2006, an administrative law judge determined that the plaintiff was 100% disabled as of October 2002 whereby he could not perform even sedentary work. Despite this knowledge, plaintiff contacted the defendant in August 2008 and requested a site on the F/V BILLY B. Defendant did not require a pre-sign on physical and did not interview the Plaintiff about his physical fitness.

In September 2008, during his second trip on the F/V BILLY B, the vessel was anchored and fishing at night, and as the plaintiff was walking the boat rolled and the plaintiff's right foot caught in a bird that was positioned in the walkway. The next morning, the plaintiff attended at the local emergency room and complained of right foot pain where it was noted that he had discoloration of his toes and later up to his ankle area. He was admitted for observation and scheduled for an angiogram the next day. Plaintiff was discharged from the hospital a week later after a diagnosis of severe ischemia of the right foot. He underwent a right femoral embolectomy, right iliac and popliteal thrombectomy and an on-table angiogram. Approximately one week later, now some two weeks after leaving the vessel, the plaintiff underwent an amputation of his right leg below the knee because of peripheral vascular disease and gangrene of the right foot. At this time, the plaintiff was forty-four years old.

In November 2009, the plaintiff filed typical seaman's claims against the defendant, including claims for punitive damages and general maritime negligence. In December 2010, the defendant moved for summary judgment on all counts, which the court granted

after oral argument. The court held that the plaintiff could not establish proximate causation for his injuries stemming from the incident onboard the F/V BILLY B and therefore dismissed the plaintiff's claims under the Jones Act, unseaworthiness, punitive damages and general maritime law negligence.

In evaluating the merits of the plaintiff's maintenance and cure claim, the court identified two issues (1) whether the defendants established that the plaintiff could reasonably be expected to have considered his medical history a matter of importance to the defendants; and 2) whether there existed reasonable grounds for the plaintiff to have had a good-faith belief that he was fit for duty. The court concluded that the plaintiff's prior fishing experiences precluded a finding that it would be reasonable for the plaintiff to not consider a finding of 100% disability "a matter of importance" to the defendants. Further, the court held that there were no reasonable grounds for the plaintiff to believe that he was fit for duty when he was hired. Accordingly, summary judgment also entered on the plaintiff's maintenance and cure claim.

Trustees of Freeholders of Commonalty and Town
of Southampton v. Grannis[3],
29 Misc.3d 1237(A), 920 N.Y.S. 2d 245 (N.Y. Sup. Ct. 2010)

The plaintiff towns contended that, pursuant to various 17th Century Crown Patents, they have exclusive rights over the fisheries in their respective jurisdictions and, consequently, that the State of New York lacked the authority to require a recreational saltwater fishing license within those fisheries. "The State's rationale for the saltwater fishing license was simply to collect statistical data for the Federal government" under the National Saltwater Angler Registry Program ("NSARP"), which the State believes will charge taxpayers a higher fee than it will charge. The court held that the State's statute violated "the rights of the people of the respective Towns and may not be enforced upon those who seek to fish in the waters regulated by the respective Towns."

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3. In his official capacity as Commissioner, New York State Dept. of Environmental Conservation

Whaley v. Pacific Seafood Group, No. 01-3057-PA, 2011 WL 773492 (D. Or. Feb. 28, 2011)

The plaintiffs, who were commercial fishermen, sought a preliminary injunction against the defendant seafood processors, contending that the defendants' activities "suppressed competition in the Pacific coast markets for whiting, shrimp, Dungeness crab and groundfish" and that the plaintiffs were forced "to sell fish to the defendants at less than competitive prices." The injunction the plaintiffs proposed would have "prohibited defendants from communicating with each other, except as necessary for accounting, about the prices for fish defendants were paying fishermen" and " from communications intended to direct fishing vessels to particular seafood processing plants." The district court denied the motion on the grounds that the evidence demonstrated that defendants' combined operations had expanded the market for whiting since 2006 and that the defendants had paid higher prices for whiting. Furthermore, the court held that the proposed injunction would interfere with the defendants' business operations and that the plaintiffs failed to show that they were being harmed by defendants' alleged illegal price-fixing

COMMITTEE ON MARINE ECOLOGY AND MARITIME CRIMINAL LAW

Editors: Dennis Minichello
Alexander M. Giles
Katharine F. Newman
Assistant Editor: Mary Ellen Kearns

BILGE & BARRATRY

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From the Helm

This issue of Bilge & Barratry continues our practice of providing our membership with useful and timely information on the most current issues in marine ecology and maritime criminal law. In this issue, you will find an update on the Asian Carp litigation written by Stephanie Espinoza, following up on her article on the same subject in the previous issue. Next, you will find some new developments regarding Vessel General Permits and ballast water issues. Joel M. Androphy and Pat Cooney provide a 12-step guide for successfully handling criminal maritime cases in the United States; and, to complement that guide, we have included a publication of the U.S. Coast Guard on reporting requirements in the event of a casualty or oil spill. Last, but not least, we include our regular feature of case summaries for both civil and criminal cases reported since the last issue. These summaries include a case from the U.K. Court of Appeals on the subject of insurance and piracy brought to our attention by Allen Black. Hopefully, you will find something of interest in this issue.

As a reminder, all members are invited to submit articles or other materials for consideration in future issues of Bilge & Barratry. Finally, if you have any questions or comments with regard to the contents of this issue, or past issues, please feel free to contact the undersigned.

Dennis Minichello,
Chair Editor

ARTICLES

Update - Asian Carp Litigation

Stephanie A. Espinoza*

The legal battle waged by a number of Great Lakes States regarding the potential influx of Asian Carp into the Great Lakes suffered a blow in December of 2010, when Judge Robert M. Dow, Jr., of the United States District Court for the Northern District of Illinois denied those States' request for a preliminary injunction, which sought a number of extreme measures such as closing locks and sluice gates along the canal system leading to Lake Michigan in the Greater Chicago Metropolitan area. While this decision does not dispose of the issues in that action, the detailed opinion certainly increases the challenge to those States that seek extreme judicial intervention to stop what they view as an imminent threat to the environmental health of the Great Lakes.

On July 19, 2010, the States of Michigan, Minnesota, Wisconsin, Ohio and Pennsylvania ("Plaintiff States") filed suit in the U.S. District Court for the Northern District of Illinois against the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District, seeking injunctive and declaratory relief. *Michigan v. U.S. Army Corps of Engineers*, No. 10-CV-4457, 2010 WL 5018559 (N.D. Ill. Dec. 2, 2010), *aff'd on other grounds*, No. 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011). Subsequently, a number of entities intervened as defendants in the suit, including the Coalition to Save our Waterways, Wendella Sightseeing Tours and the City of Chicago. The Grand Traverse Band of Ottawa and Chippewa Indians were permitted to intervene as intervenor-plaintiffs.

The Plaintiff States sought a preliminary injunction against the defendants, requiring them to temporarily close and cease operation at several locks and sluice gates along the canal system, to install block nets and gates at the sluice gates and to continue the use of strategic poisoning of areas in which Asian carp may be present. Most severely, the Plaintiff States requested that the court enter

an order "requiring the District and the Corps to take all appropriate and necessary measures to expeditiously develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin and the Chicago Area Waterway System ("CAWS") from Lake Michigan so as to prevent the migration of bighead carp, silver carp, or other harmful aquatic invasive species into Lake Michigan."

On December 2, 2010, after three days of testimony and one day of closing arguments, Judge Dow issued a Memorandum Opinion and Order, denying the Plaintiff States' motion for preliminary injunction.

In its opinion, the court first set out the high legal threshold to be met in granting a preliminary injunction, setting forth the three factors to be met, which included (1) some likelihood of success on the merits; (2) no adequate remedy at law exists; (3) irreparable harm. *Id*. at *13, *citing Abbot Labs. v. Mead Johnson & Co*., 971 F.2d 6, 11 (7th Cir. 1992). The court also considered the public interest served by granting or denying the relief. *Id*.

The court then addressed the defendants' argument that the Plaintiff States' public nuisance claim was untenable, given the grant of sovereign immunity found in Section 702 of the Administrative Procedure Act ("APA"). The court found both legal bases under which the Plaintiff States brought their action (public nuisance and review under the APA) to be potentially applicable, such that an analysis on the merits was required. The court further disposed of the defendants' claim that federal statutes displaced Plaintiff States' remedies, finding that the relevant statutes did not directly address the subject matter of Plaintiff States' claims, nor did they provide an adequate remedy.

Proceeding to the merits of the Plaintiff States' public nuisance claim, the court found that there was insufficient evidence to establish that the Asian carp represented a threat of imminent harm to the Great Lakes. The court relied on the Restatement (Second) of Torts in setting forth the requirements for a public nuisance action:

"Generally, interference with a public right is unreasonable if the conduct: (1) involves interference with public health, safety, peace, comfort, or convenience; (2) is proscribed by statute, ordinance, or administrative regulation; or (3) is of a continuing nature or has produced a permanent or long-lasting effect upon the public right." *Michigan*, 2010 WL 5018559 at *20, citing Restatement (2d) of Torts § 821B(1) (1979).

First, the court held that the evidence did not establish the actual existence of a nuisance at this time, as opposed to a potential nuisance at some point in the future. The court relied on undisputed evidence provided by the Asian Carp Regional Coordinating Committee, that "(1) only a small number of individual Asian carp exist above the electric barrier; (2) there is no evidence that the electric barrier has failed; and (3) the potential for the establishment of a self-sustaining population in the CAWS above the electric barrier or in Lake Michigan is not imminent in a legal sense and remains an unknown based on the characteristics of these fish." *Id*. at *21.

The court expressed some skepticism about the Plaintiff States' reliance on positive environmental DNA ("eDNA") results above the electric barrier. After determining that the testimony of the Plaintiff States' only witness, Dr. David Lodge, was admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), it minimized that testimony by noting "…the bottom line is that even giving every benefit of the doubt to Plaintiffs on the basis of Dr. Lodge's testimony–that is, squeezing that testimony for every ounce of weight that the testimony will bear–Plaintiffs cannot establish a showing of irreparable harm that would justify the entry of a mandatory injunction at this time." *Michigan*, 2010 WL 5018559 at *26. Specifically, the court found that the balance of a few positive eDNA results, along with one live fish above the barrier and one dead fish below the barrier, when contrasted with the hundreds of thousands of pounds of fish collected, simply did not establish imminent harm.

To the contrary, the court found most credible the testimony of the defendants' expert, Mr. Chapman, a fish biologist with the

U.S. Geological Survey, and found that the electrical barrier system was providing an effective deterrent to Asian carp; that it was unlikely that a sizable population of Asian carp could survive and reproduce in the Great Lakes; and, if an invasion did occur, it would probably take many years for the population to become problematic. *Id*. at *29-30.

The court went on to assess the public interests at stake and the potential balancing of harms. Namely, the Plaintiff States' demand that locks along the CAWS be permanently closed was found to create an unreasonable flood risk, as it would render those locks unusable to control flooding in extreme weather conditions. *Id*. at *30-31. The court also noted that the Plaintiff States' proposals would divert necessary funds from other Corps projects, and could affect the timeliness of Coast Guard search and rescue operations by eliminating navigation through the locks. *Id*. at *31-32. Further, the court found that the economic impact of the Plaintiff States' proposals could exceed $4 billion. *Id*. at *33. Finally, the court gave great deference to the multiple federal and state agencies that have already been working toward a solution to the Asian carp problem, and declined to displace this work with its own judgment. *Id*.

Just days after the district court's decision, the Plaintiff States filed an appeal to the Seventh Circuit, seeking a ruling that the district court had abused its discretion in failing to enter the preliminary injunction. On March 31, 2011, the district court entered a partial stay of the litigation, precluding any further motion practice while the appeal is pending, but allowing discovery to continue.

The parties have fully briefed the issues on appeal. The Plaintiff States argue that the district court abused its discretion by holding them to a standard of establishing "imminent" harm, rather than merely "threatened" harm. Further, they allege that the district court made several clearly erroneous findings of fact relating to the presence of Asian carp above the electrical barrier system and the possibility of Asian carp survival and reproduction in Lake Michigan. The Plaintiff States further argue that the district court erred by failing to address their demand that the Army Corps of Engineers

accelerate the feasibility study of options for a permanent solution to the Asian carp problem through the dismantling of the canal system. The defendants predictably respond to these arguments by relying on the district court's thorough and reasoned opinion.

Appellate oral argument is scheduled for May 5, 2011. [**Editors' note:** The case has since been affirmed on other grounds. *Michigan v. U.S. Army Corps of Engineers*, No. 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011).]

*Ms. Espinoza is an attorney with the law firm of Marwedel, Minichello & Reeb, P.C., in Chicago.

Agreement between the U.S. Coast Guard and the Environmental Protection Agency Regarding the Vessel General Permit

Dennis Minichello*

The U.S. Coast Guard and the Environmental Protection Agency ("EPA") entered into a Memorandum of Understanding ("MOU") on February 11, 2011, outlining the steps that the two agencies will take to better coordinate efforts for ensuring compliance with the Vessel General Permit provisions of the National Pollutant Discharge Elimination System. The MOU provides a framework for improving Coast Guard and EPA cooperation on data tracking, training, monitoring and verifying compliance industry outreach. At the same time as the issuance of the MOU, the Coast Guard issued CG-543 Policy Letter 11-01, providing guidelines to the Coast Guard personnel to evaluate compliance with the Vessel General Permit requirements. (The MOU can be accessed at http: //epa.gov/ compliance/monitoring /programs/ cwa/npdes.html. The Policy Letter can be accessed at https://homeport.uscg.mil/cgi-bin/st/portal/uscg_docs/-MyCG/Editorial/20110211/543%20Policy%20ltr%2011-01%20VGP%20with%20enclosure.pdf-?id=f430b06515231a86d6185356dfc50b2e1d92bcb6.)

According to the MOU, the Coast Guard will incorporate aspects of the EPA's Vessel General Permit program into its existing inspection protocols and procedures and will identify and report deficiencies to the EPA. The EPA will retain full responsibility in enforcement authority to address Vessel General Permit Violations and unauthorized discharges. According to its Policy Letter, the Coast Guard will incorporate compliance monitoring utilizing a "Job Aid" consisting of guidelines representing the minimum items that marine inspectors and port state control officers should examine during a Vessel General Permit compliance examination. When deficiencies are discovered, inspectors will (1) encourage vessel owners and operators to correct the deficiency; (2) inform the master or the person in charge of all of the deficiencies that can be immediately corrected; and, (3) provide information regarding deficiencies to the EPA for enforcement action.

*Mr. Minichello is a shareholder with the law firm of Marwedel, Minichello & Reeb, P.C., in Chicago.

Update on the Ballast Water Issue for the St. Lawrence Seaway and the Great Lakes

Dennis Minichello*

The ballast water issue has been of paramount importance to vessel owners and shipping interests, especially those who operate within the St. Lawrence Seaway and the Great Lakes. The exchange of ballast water by vessels has been viewed as the main reason for the introduction of invasive species into our waterways. Within the past couple of years, all of the states bordering the Great Lakes have enacted legislation addressing the handling of ballast water by vessels applying different standards for determining acceptability and, thus, making compliance extremely difficult, expensive and sometimes impossible for vessel owners. The U.S. federal government has yet to preempt these states with a single set of regulations. The lack of uniformity, as well as the unrealistic standards set by the states, has created the possibility of a major interruption of water born commerce.

Fortunately, there have been some positive developments on this issue, which allow for cautious optimism. Perhaps the most significant development has been the issuance of the report of the Great Lakes Seaway Ballast Water Working Group ("BWWG") in February 2011 ("BWWG Report"). The BWWG is composed of members from the U.S. Coast Guard, Transport Canada – Marine Safety, the St. Lawrence Seaway Development Corporation and the St. Lawrence Seaway Management Corporation. Their mandate is to develop, enhance and coordinate bi-national compliance and enforcement efforts to reduce the introduction of aquatic invasive species via ships' ballast water. (The BWWG Report can be accessed at http://www.d9.uscgnews.com/external/content/document/443/1013479/1/2010_Great_Lakes_Seaway_BWWG_Report.pdf.)

In the report, it is noted that since 2006, ballast water management requirements in the Great Lakes and the St. Lawrence Seaway system have been the most stringent in the world, with regulations that include salt water flushing, detailed documentation requirements, increased inspections and civil penalties, encompassed within a comprehensive regulatory enforcement regime. The report notes that:

> In 2010, 100% of vessels bound for the Great Lakes Seaway from outside the exclusive economic zone (EEZ) receive ballast tank exams on each seaway transit. All 7754 ballast tanks, during 415 vessel transits, were assessed. Vessels that did not exchange their ballast water or flush their ballast tanks were required to either retain the ballast water and residuals onboard, treat the ballast water in any environmentally sound and approved manner, or return to sea to conduct a ballast water exchange. Vessels that were unable to exchange their ballast water/residuals and that were required to retain them onboard, received a verification boarding during their outbound transit prior to exiting the Seaway. In addition, 100% of ballast water reporting forms were screened to assess ballast water history, compliance, voyage information and proposed discharge location. The BWWG anticipates continued high vessel compliance rates for the 2011 navigation season.

BWWG Report at 2.

The report found that the regulatory regime has resulted in a high rate of compliance and opines that "The current high effectiveness of ballast water exchange coupled with the BWWG's aggressive enforcement of current regulations and the high industry compliance rate should be seen as minimizing the urgency for state involvement in ballast water regulation." *Id*. at 9.

At the state level, on December 21, 2010, the Wisconsin Department of Natural Resources released its Ballast Water Treatment Feasibility Determination, proposing that its permitting system be modified to harmonize it with the IMO regulations. The WDNR determined that it was currently not possible with available ballast water treatment systems to meet the standards set by state law and that "open ocean salt water flushing has been proven to be effective in helping reduce the threat of aquatic non-indigenous species to U.S. waters." U.S. Great Lakes Shipping Ass'n, *Wisconsin Department of Natural Resources Proposes Modification of Ballast Rule, available at* http://www.usglsa.org/ItemsOfInt.htm (last accessed Dec. 27, 2011). (The WDNR report can be accessed at http://www.greatlakes-seaway.com/en/pdf/WI_DNR_2010_-BW_Feasibility_Report_12-21-10.pdf

In California, the California State Lands Commission ("CSLC") issued a report in January 2011 stating that it was reconsidering its previously held position that there are ballast water treatment technologies available to meet the statutorily set performance standards and whether its performance standard of "0 detectable living organisms" is actually achievable. (The CSLC report can be accessed at http://www.slc.ca.gov/spec_pub/mfd/ballast_water/-Documents/2011_BiennialRpt_Final.pdf.)

The ballast water issue will continue to be a closely watched issue until such time as uniform standards can be adopted throughout the United States.

*Mr. Minichello is a shareholder with the law firm of Marwedel, Minichello & Reeb, P.C., in Chicago

TWELVE STEP GUIDE FOR SUCCESSFULLY HANDLING CRIMINAL MARITIME CASES IN THE UNITED STATES

Joel M. Androphy and Patrick Cooney
(first published in the *Maritime Advocate*)

Introduction

The government gains an unfair advantage in preparing a maritime case for criminal prosecution. A vessel is boarded, and interviews are conducted before criminal counsel is contacted. Even if civil counsel is contacted, there appears to be a complacent view that the U.S. Coast Guard is merely conducting a civil or administrative review, and that any efforts to block the investigation could lead to some heightened concern and unnecessary delays. By the time criminal counsel is called to the scene, efforts to discover the basis for any prosecution have been hampered. Often, more crimes have potentially occurred in the form of false statements and obstruction of justice by the crew's mere denial of any knowledge. This article is intended to provide a basic, but comprehensive, framework for counsel to follow when dealing with criminal maritime cases.

[i] Initial Contact with Coast Guard/Criminal Investigators

Long before criminal counsel is contacted, civil counsel has boarded the vessel or been in communication with the Coast Guard. Depending on the alleged reason for the vessel's detention, an immediate decision needs to be made about the potential scope of the investigation. This decision will have the greatest impact on the defense of the case. If there is the slightest suspicion that an

environmental violation has occurred, civil counsel should advise the crew that criminal counsel is being retained to advise them and then should alert the government to forestall any interviews. It is important that the crew understand the reason for counsel since the government will frequently approach them until criminal counsel arrives on the scene, often days later. Civil counsel can only advise the crew of their rights, not whether to reject any attempted interviews by government investigators.

[ii] Restricting Length of Investigation/Crew Detention

If there is a reason to detain the crew, a warning sign of a criminal investigation, civil counsel should be careful to negotiate a restricted agenda. The government will generally allow the vessel to leave port, provided a security agreement is executed. The security agreement provides for a monetary bond for potential violations, and travel restrictions on some of the crew. The crew under investigation will generally be detained in the port city. Civil counsel should put a time limit on the government's investigation, perhaps three to four months, to avoid a protracted investigation that can take years. Companies frequently complain that it is financially ruinous to allow the government an unlimited time to investigate while they have to pay for accommodations and a replacement crew. Often, the longer the investigation, the more agitated the crew, creating the potential to "just say anything" to be released. Unless the company is willing and able to provide "absolute assurances" of a crewmember's return, do not expect any relief from the government. Even at the end of the investigation period, expect a request for more time. Your options are yes, and more expenses, or no, and a probable indictment or the issuance of material witness warrants, which will transfer the crew from a motel to the jail.

[iii] Inspection of Vessel/Initial Interviews of the Crew

After the preliminaries, and before the arrival of criminal counsel, an inspection of the vessel should occur to investigate for any potential liability. Although a brief interview of some of the crew may occur, be careful to advise them that as company counsel

you do not represent them. Company counsel will often attempt to conduct extensive interviews with the crew prior to the retention of criminal counsel. By taking advantage of their position of authority, they often confuse the crew, and elicit admissions that crew counsel may not want to share with the company. Be careful and brief with your communications. They should only be utilized as an effort to focus on nature of any potential problems. If criminal counsel is able to arrive soon, it may be advisable to delay any discussion with the crew. Communications with the government may give you enough information while avoiding any infringement of the crews' rights.

[iv] Assembling Criminal Counsel for the Company and Crew

The decision on retention of counsel is dependent on the extent of the company's willingness to pay fees. It is generally advisable to hire criminal counsel for the company, the master and the chief engineer. Depending on the scope of the investigation, one attorney for the remainder of the engineering department may suffice. If the initial interviews suggest a conflict in the engineering room, additional counsel should be contacted. One attorney for the remainder of the crew should suffice. Whistleblowers can create dissension and complicate the retention of counsel. Abandoning a potential whistleblower, however, may be unadvisable and close off lines of communication.

Civil counsel should contact counsel that meet several criteria. These cases require the ability to communicate with foreign nationals, the willingness to work with others, and an understanding how to engage the government. Although experience is a requirement for company counsel and the officers, criminal lawyers are not always the best choices for the crew. Many lawyers would rather work with an experienced civil attorney who is willing to communicate with the joint defense, than criminal counsel who are more attuned to cooperating with the government.

[v] Joint Defense Agreements

If you have to sign a lengthy written agreement to have assurances that counsel will not violate communications held in trust, you probably have the wrong team of lawyers. Joint defense agreements permit open communications with counsel for the company and crew. They are vehicles for the parties to be informed while assessing their positions and deciding on resolutions. Although somewhat disfavored by the courts, oral agreements and a follow up email and acknowledgment should suffice. Company counsel should keep in constant communication with all counsel, keeping them informed as to the status of any internal investigation as well as government communications. From the company's perspective, an uninformed joint defense has the potential to be a dangerous defense group.

[vi] Preparing for the Whistleblower

Whistleblowers generally alert the government about potential environmental violations expecting a monetary reward from any fines. Sometimes whistleblowers will remain on the vessel, other times they may have departed at a prior port. Although the government will want to keep their identities confidential, there are serious implications if efforts are not made to segregate the whistleblower from the rest of the crew. Company counsel has to provide for the safety of all the crew while defending his client. Once that issue has been resolved, it is important to understand the informant's depth of information and motives.

[vii] Interviews with Current and Past Crew

The current crew should be interviewed, and information shared with the joint defense. Although the current crew should provide sufficient details, former crewmen may provide greater insight. Crews on vessels are constantly changing, and many potential violations have their origins with prior crewmen. This task is generally complicated by the transient nature of employment. Communication with employment agencies and other vessel owners may be required.

[viii] Prior Inspections

Prior inspections of the vessel are critical in understanding the history of the company's operations. If your client is accused of altering the piping on the vessel, or having inoperable equipment, prior inspections should allow you to determine your client's awareness and responsiveness to prior events. The government is looking for repeat offenders and companies that ignore problems. If you can establish that your client was attentive to environmental concerns, it may allow you to bypass criminal consequences. For the same reason, it is also advisable to review the inspections of other vessels in the company's fleet to determine if the situation is isolated or a common practice.

[ix] Dealing with the Evidence/Hiring of Experts

Depending on the issues and financial resources, it is important to retain qualified experts to evaluate the evidence. Experts to review oil samples, paint, metal, piping configurations, oily water separators and incinerators are mandatory. Make sure that they have the expertise and can withstand any attacks on their competency. Although your initial investigation should be focused preventing any indictments, you need to be prepared to go to trial with your expert team.

[x] Convey to Client Results of Internal Investigation/Potential Charges/Punishment

This will generally be the company's first encounter with a criminal investigation. Anticipate that ownership of the vessel is foreign and unfamiliar with U.S. laws. Constant communication is required. Meet with your client and provide a thorough explanation of the government's position and the results of your internal investigation. Invite your client to an inspection of the vessel to convey your understanding and appreciation for the seriousness of the case.

After your initial investigation, prepare visual diagrams showing the government's theory of the case and your defenses.

The diagrams will prepare you to better communicate with the client the potential for exposure, perhaps dissuade the government from pursuing the case, and be ready for trial if the government refuses to acknowledge your client's innocence. In addition, prepare a memorandum explaining the grand jury system, what crimes could be charged and the potential consequences. Discuss how the courts and petit jury will evaluate the evidence, and prepare the critical instructions the jury will review in deciding responsibility. Many corporate clients, especially foreign entities, do not understand that a company can be criminally responsible even when a low level crewmember commits a crime despite repeated warnings to follow the laws. Most federal circuit courts of appeal provide that a company is criminally responsible if any crewmember commits a crime that benefitted the company. Some circuits provide the potential for exoneration if a crewmember's actions violated company policy.

[xi] Settlement Options

The company will have many options to resolve the case. If the government decides that there is merit in prosecution, try to avoid a guilty plea. You may be able to convince them that a non-prosecution or deferred prosecution agreement is a proper disposition. The company's history and willingness to pay restitution, donate to environment causes and execute stringent compliance programs are key factors. If a guilty plea is the only option, prepare to minimize the scope of the charges, the fines and the length of probation.

[xii] Going to Trial

If the company elects to resolve the case in court, prepare for multiple charges, and charges against some of the crew. Since the crew are being detained in hotels, their bond is going to be a serious issue of contention. It should be easy to argue that they are not flight risks based on their history of temporary residency. Request that they be allowed to remain in their hotels without passports or other means of travel. For the crew classified as witnesses, join in their request for release provided there are adequate assurances they

will return for trial. Video depositions of the witness crew will be ordered if the court is inclined to release them. The depositions will provide a wonderful opportunity to learn more about the government's case, expose any weaknesses and commit the deponents to a position and not random thought.

Conclusion

The focus on any defense should be client vindication. An internal investigation is a means to compile evidence and make an informed decision. It is not an exercise in maximizing billable hours with an agenda to plea guilty. Prepare your case as if your only option were trial. Even if you ultimately settle the matter, your chances of a better deal will be enhanced.

Contact the authors at: JAndrophy@bafinn.com and Patrick.Cooney@roystonlaw.com

CASE SUMMARIES – CIVIL

U.K. Court of Appeals Decision Gives Approval to Ransom Payments

Masefield AG v. Amlin Corp. Member Ltd., [2011] EWCA (Civ) 24 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2011/24.html (last accessed Dec. 28, 2011)

This case arose out of the hijacking of the M/V BUNGA MELATI DUA in the Gulf of Aden by Somali pirates on August 19, 2008. The vessel, which was carrying the Masefield's cargo of biodiesel, was hijacked during a voyage between Malaysia and Rotterdam. The vessel owners negotiated to pay a ransom to secure the release of the vessel and its crew, as well as the cargo. In the interim, Masefield served a notice of abandonment on its insurer Amlin, which rejected the notice. Eleven days later, Amlin paid a $2,000,000 ransom, and the pirates released the vessel, its crew and the cargo. Nevertheless, Masefield sought recovery for a total loss from Amlin.

The lower court ruled in favor of Amlin, agreeing that the cargo was not irretrievably lost because of the good chance that ransom negotiations would succeed. On appeal, the U.K. Court of Appeals noted that the payment of ransoms to pirates is not proscribed and may be a reasonable action by a cargo owner. It held that the temporary deprivation of a ship and cargo by pirates who intend to release them upon payment of a ransom is not theft. The court held that where that the pirates did not intend to permanently deprive the owner of the cargo, there was no theft. The court further held that where the cargo could be released upon payment of a relatively small amount of money in comparison to the value of the ship and cargo, there was no permanent loss, and U.K. law does not make the payment of ransom illegal.

Editor's note: Thanks to Allen Black of Winston & Strawn, Washington, D.C., for his bringing this case to the attention of Bilge & Barratry.

PWSA Violation Ruled a "Continuing Offense" Requiring Immediate Notice to Coast Guard

United States v. Canal Barge Co., Inc., 631 F.3d 347, 2011 AMC 445 (6th Cir. 2011)

This case involved a barge that sprang a leak near St. Louis, Missouri, as it was carrying benzene down the Mississippi River. The leak was temporarily stopped, but the Coast Guard was not notified until several days later when the fix failed while the barge was on the Ohio River in the tow of another boat. The repair had lasted about four days, and the barge had been transferred to the control of a different captain and tow boat between the original leak and the subsequent leak. Canal Barge and three of its employees were tried in the Western District of Kentucky for violation of the Ports and Waterway Safety Act ("PWSA") and the Clean Water Act, and conspiracy to violate the PWSA. The jury found the defendants guilty of violating the PWSA. Following the trial, the defendants moved for acquittal both before and after the verdict on the theories that venue was improper because the government had failed

to prove that the U.S. Coast Guard office in St. Louis had not been notified of the original leak and that there was insufficient evidence that the violation of the PWSA was knowing and willful. The court granted the defendants' post-verdict motion regarding venue, "concluding that the PWSA violation was a point in time offense that was complete at the time the defendants failed to immediately notify the Coast Guard of the hazardous condition, which occurred on the Mississippi River prior to entry into the Western District of Kentucky," but denied their remaining motions.

The principal issues on appeal were whether "the district court erred in granting the post-verdict motion for judgment of acquittal for lack of proper venue because the defendants' PWSA violation is a continuing offense under 18 U.S.C. § 3237(a)" and "whether the PWSA violation is an offense 'involving . . . transportation in intra-state . . . commerce' under 18 U.S.C. § 3237(a)." Ruling on the first issue, the Sixth Circuit held that the failure to notify the Coast Guard immediately of a leak of benzene from a tank barge constituted a continuing violation of the PWSA. Determining that a hazardous condition existed, the court stated that the obligation to report immediately commenced "when the relevant actor has relevant knowledge and continues, at least, until a report is made or the Coast Guard otherwise becomes aware of the condition." It did not matter that there was no discharge into the navigable waters. Therefore, venue lay in the Western District of Kentucky in the case, and the Sixth Circuit reversed the district court on this point.

The court also determined that the evidence was sufficient to establish the elements of a PWSA offense beyond a reasonable doubt. The fact that there was no evidence of an actual leak in the water was not determinative of the liability of Canal Barge. The court reasoned that "Because benzene is highly explosive, the risk in the case was not just that the liquid would spill overboard and contaminate the River, but that the leaking fuel would ignite and blow up the barge."

State Law Claims for Pollution Found to Lack Necessary Elements

Louisiana v. Rowan Companies, Inc., 728 F. Supp. 2d 896 (S.D. Tex. 2010)

This case arose out of a *Qui Tam* action in the U.S. District Court for the Eastern District of Louisiana, alleging violations of federal environmental regulations on the Rowan Midland Drilling Rig. Robert D. Marcy alleged that the crew on the Midland concealed violations of federal environmental regulations. After the federal authorities investigated the allegations, it was determined that, during blasting activities, the Midland crew failed to take containment measures to minimize the discharge of spent blast media into the navigable waters of the United States in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(a)(2). The investigation also revealed that on multiple occasions over a two-year period of time, the crew discharged a mixture of hydraulic oil and water into U.S. waters without reporting the discharge to the appropriate federal agency. The discharges were occurring at night to avoid detection. The Midland's crew also discharged garbage in violation of the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a). Rowan was criminally prosecuted and admitted to violations of the Clean Water Act and the Act to Prevent Pollution from Ships and pleaded guilty to failing to notify waste discharged into U.S. waters, discharging garbage into U.S. waters and knowingly discharging a pollutant into U.S. waters. Rowan ended up paying $7,000,000 in criminal fines, $1,000,000 to five state-governed organizations for environmental training concerning CWA violations and $1,000,000 to the National Marine Sanctuaries Foundation for Preservation Projects, off the coasts of Louisiana and Texas.

This case followed when the State of Louisiana, acting in its sovereign capacity, initiated a civil suit based on Rowan's admitted violations of federal environmental laws, bringing claims for negligence, trespass, public nuisance and unjust enrichment arising from Rowan's commission of maritime torts and violations of federal environmental regulations. Rowan subsequently moved for summary judgment.

The first issue had to do with the application of the doctrine of laches regarding Louisiana's maritime negligence claim. The court noted that the Fifth Circuit applies an analogy rule to determine which party bears the burden of proof with regard to unreasonable delay and prejudice for purposes of determining the timeliness of the action. The court determined that the most analogous statute was the state tort statute of limitations of one year. However, the court determined that whether the federal statute of limitations for contract claims (three years) or the state tort statute of limitations (one year) was applied, Louisiana's maritime tort claim was untimely, and Louisiana bore the burden of showing that its delay was either excusable or non-prejudicial. On that point, the court determined that Louisiana did not have actual notice of the alleged tortuous activity until some time after the criminal action was filed, and then filed suit within three months of receiving actual notice. The court further noted that Louisiana has a one-year prescriptive period and that was not violated. Therefore, a civil action was timely.

As for the merits of the negligence claim, the court noted the five elements of a negligence claim, including the requirement for "actual damages." The court determined that Louisiana did not show any evidence of actual damages and, therefore, could not satisfy that element of a negligence claim.

Regarding the unjust enrichment claim, the court noted that "maritime unjust enrichment claims are cognizable when based on a maritime contract." Again referencing the prerequisites for establishing an unjust enrichment claim, under the law of Louisiana, the court determined that the maritime unjust enrichment claim was not viable. There was no evidence that established that Louisiana was impoverished or that Rowan was enriched, noting that Rowan paid millions of dollars in fines as part of its sentence in the criminal actions.

The public nuisance claim "involves an unreasonable interference with the right common to the general public." In that regard, the court noted that it must be determined whether the conduct involved a significant interference with public health, safety, peace,

comfort or convenience. If a public nuisance can be proven, the plaintiff must have suffered significant harm different in kind from that suffered by the general public in order to recover damages. Recovery is available to a plaintiff who has sustained particular damages to find a common law substantially greater than the presumed at law damages suffered by the general public. Again, the court determined that Louisiana failed to establish that it suffered significant harm different in kind from the general public, even though it recognized that "pollution is a significant interference with public health and safety."

Finally, the court reviewed the trespass claim where "a plaintiff must show damages flowing from the act of trespass with either direct or circumstantial evidence." Again, Louisiana failed to provide any specific evidence of the actual environmental impact of Rowan's pollution, thus failing to show actual harm or any inconvenience or damages flowing from the trespass. As a result of Louisiana's failure to show any actual harm or impoverishment to Louisiana, granted Rowan's Motion for Summary Judgment.

CASE SUMMARIES – CRIMINAL

Shipping Company and Senior Crewmembers Convicted of Covering up Oil Pollution

United States v. Atlas Ship Mgmt. Ltd., No. 8:10-cr-00363-SDM-EAJ-1 (M.D. Fla.)

Press Release, U.S. Dept. of Justice, (Apr. 22, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-enrd-1373.html (last accessed Jan. 17, 2012)

> Atlas Ship Management Ltd., a Turkish Corporation, pleaded guilty in U.S. District Court in Tampa, Fla. to federal charges of making false statements and knowingly failing to accurately maintain an Oil Record Book as required by international treaty and U.S. law . . . .

The company was sentenced to pay an $800,000 criminal fine, pay $100,000 in community service to the Pinellas County, Fla., Environmental Fund, and to implement a comprehensive Environmental Compliance Program that requires detailed inspection and auditing of the defendant's ships that sail into the United States.

. . .

Atlas Ship Management Ltd. operated a 10,965 ton, 471.5 foot commercial ocean going ship named the M/V Avenue Star that carried bulk cargo throughout the world including into and out of Tampa. On Oct. 21, 2009, the U.S. Coast Guard boarded the ship to conduct an inspection of the vessel to ascertain if it was in compliance with international and United States law. During the inspection, two crewmembers provided information to the Coast Guard that indicated that senior engineers on the vessel were illegally dumping oily waste from the engine room directly into the sea. The crewmembers also informed the Coast Guard that some oil waste was being stored in the clean sea water ballast tanks on the vessel. The Coast Guard inspection confirmed what the crewmembers had alleged. Engineers on the vessel had installed and used a bypass hose, also referred to as a "magic pipe" or "magic hose," specially crafted to fit between the sludge pump discharge line and the "gooseneck" on the Oil Water Separator discharge line, to bypass pollution prevention equipment on board the M/V Avenue Star. The ship's engineers discharged oily bilge wastes that had accumulated in the engineering spaces on the M/V Avenue Star through this "magic pipe" on two or more occasions.

From October 10 until October 21, 2009, engineering officers and other crew members aboard the M/V Avenue Star transferred oily bilge wastes that had accumulated in the engineering machinery spaces into the aft port peak ballast tank. The ballast tanks are used to adjust the stability and trim of the vessel, and are filled with clean sea water and are

not intended to be used to store oil waste. Prior to October 21, 2009, while the M/V Avenue Star was transiting from Honduras to Tampa, some volume of the oily waste was discharged from the ballast tank directly into international waters. All discharges of oil from a vessel into the sea, even if illegal, are required to be recorded in the vessel's Oil Record Book. None of these discharges were recorded in the Oil Record Book for the M/V Avenue Star.

The chief engineer of the vessel, Gunduz Avaz, previously pleaded guilty to and was sentenced for his role in covering up the illegal overboard oil discharges. The second assistant engineer, Yavuz Molgultay, also previously pleaded guilty and was sentenced for his involvement in covering up the illegal discharges of oil from the ship.

For their role in providing valuable information to the U.S. Coast Guard that led to convictions in this case, the two crewmembers who "blew the whistle" in this case were each awarded $125,000 by the district court. The award money is derived directly from the fine paid by Atlas Ship Management Ltd.

The Pinellas County Environmental Fund will receive $100,000 from this case as a community service payment. The Pinellas County Environmental Fund is a partnership among Pinellas County, the National Oceanographic and Atmospheric Administration and the National Fish and Wildlife Foundation. The purpose of this partnership is to provide grants for projects that conserve and restore fish and wildlife habitat in Tampa Bay.

This case was investigated by the U.S. Coast Guard Investigative Service and the U.S. Environmental Protection Agency. The case was prosecuted by the U.S. Attorney's Office in the Middle District of Florida and by the Environmental Crimes Section of the Department of Justice.

Ship Crew Member Pleads Guilty for Obstruction of U.S. Coast Guard Pollution Investigation

United States v. Zacharias, No. 6:10-cr-00039-1 (S.D. Tex.)

Press Release, U.S. Dept. of Justice, (Apr. 22, 2010), *available at* http://www.justice.gov/opa/pr/2010/April/10-enrd-467.html (last accessed Jan. 17, 2012)

> The chief engineer of a cargo vessel registered in the Republic of Panama pleaded guilty in federal court in Corpus Christi, Texas, for obstructing a U.S. Coast Guard investigation into the illegal overboard discharge of polluted wastewater as well as failing to keep accurate pollution control records . . . .
>
> John Porunnolil Zacharias, the chief engineer of the M/V Lowlands Sumida, a 37,689 gross ton bulk carrier cargo ship, pleaded guilty . . . to a violation of the Act to Prevent Pollution (APPS) for failing to maintain an oil record book and to an obstruction violation for providing inspectors with a false engine room sounding log, and for altering a center fuel oil tank by installing a "dummy" sounding tube to conceal the contents of the tank.
>
> Zacharias, as the chief engineer, was responsible for the supervision of the engineering officers, the fitter and the motormen working in the engine spaces of the Lowlands Sumida. He was also responsible for assuring that the oil record book accurately recorded the handling of oily waste on the ship including the processing of oily waste water through the ship's oil-water separator and the operation and maintenance of the oil-water separator.
>
> On Oct. 6, 2009, the U.S. Coast Guard conducted a port inspection of the Lowlands Sumida. During the inspection, they received information from one of the crewmen alleging that a chief engineer was using the center fuel tank to store oily waste water and that the waste water was then discharged overboard by tricking the oil content meter on the ship's oil water separator.
> Zacharias admitted to the altering of a center fuel oil tank through the installation of a "dummy" sounding tube. The "dummy" sounding tube would show the tank as empty when measured, even though there was liquid in the tank.
>
> Large commercial ships, such as the Lowlands Sumida, are required by APPS to maintain a record known as the oil record book to document the movement, tank to tank, and the disposal of, all oil that has originated in the engineering spaces on the ship. Oily bilge waste waters, which accumulate in the lower-most part of the ship, can only be discharged overboard if the wastes are processed through a machine known as an "oil water separator" which ensures that the water discharged overboard contains no more than 15 parts per million (ppm) of oil. Zacharias admitted to discharging oily waste water that exceeded the 15 ppm limit from the ship and not recording the discharges in the oil record book.

Zacharias was sentenced to probation for a term of 5 years.

Companies to Pay More Than $6 Million for Natural Resource Damages from Buzzards Bay Oil Spill

3 Cases filed in the District of Massachusetts: *United States v. Bouchard Transportation Co*., No. 1:10-cv-11958 (consolidated case no.); *Massachusetts v. Bouchard Transportation Co*., No. 1:10-cv-11960; and *Rhode Island v. Bouchard Transportation Co*., No. 1:10-cv-12031

Press Release, U.S. Dept. of Justice, (Nov. 15, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-enrd-1297.html (last accessed Jan. 17, 2012)

The Department of Justice, the Commonwealth of Massachusetts and the state of Rhode Island announced . . . that Bouchard Transportation Co. Inc. and its affiliates will pay more than $6 million to settle a portion of the federal and state natural resource damages claims for the April 2003 spill of up to 98,000 gallons of oil into Buzzards Bay. The settlement announced . . . is in addition to damage assessment costs for federal and state governments of almost $1.6 million.

. . .

The U.S. Coast Guard first reported an oil spill on April 27, 2003. At that time, the tug Evening Tide was towing the unmanned tank barge Bouchard B. 120, which was carrying No. 6 fuel oil. The barge was in route from Philadelphia to the Mirant Power Generating Facility in Sandwich, Massachusetts.

The barge grounded on a shoal soon after entering the western approach to Buzzards Bay, rupturing its hull and allowing the release of the cargo. In the days and weeks following the grounding, winds and currents drove the spilled oil ashore, affecting approximately 100 miles of shoreline in Massachusetts and Rhode Island. Cleanup of the oiled shoreline took months, including at Barney's Joy and Hoppy's Landing, where a heavy oil coated boulders and cobble.
Hundreds of loons, seaducks and other birds were killed as a result of the spill. The beaches, which function as breeding and forage habitats for shorebirds, such as piping plovers, were impacted by the spill. In addition, the oil spill adversely affected the public's use of Buzzards Bay waters and the adjoining coastline, by causing the oiling and temporary closure of shellfishing beds throughout the bay and restricting boat and beach access.

Bouchard Transportation earlier reached a criminal plea agreement as a result of the spill, agreeing to a fine of $10 million. In the criminal matter, the company was charged

with negligently piloting the Evening Tide resulting in the death of migratory birds in violation of the Federal Migratory Bird Act.

The natural resource trustees in this case include the National Oceanic and Atmospheric Administration, the Department of the Interior's Fish and Wildlife Service, the Commonwealth of Massachusetts and the state of Rhode Island.

. . .

The settlement will . . . compensate the public for injuries to shoreline and aquatic resources, piping plovers and coastal recreational uses, such as beach access, shellfishing and boating that depend on the natural resources affected by the spill. The current settlement does not address injuries to terns, loons and other birds. The trustees continue to discuss these injuries with the responsible parties and also to pursue the recovery of additional damage assessment costs.

The federal and state trustees may use portions of the settlement funds, after public input, to restore salt marsh and river herring runs. In addition, the trustees may use some of the settlement funds to fund a potential project to stabilize a portion of shoreline of Ram Island, which is a state-owned wildlife sanctuary in Massachusetts and serves as critical nesting and fledgling habitat for roseate terns, a federally listed endangered species. The 2003 oil spill caused significant injury to the salt marsh on Ram Island.

Liberian Shipping Company Sentenced to Pay $2.4 Million for Falsifying Oil Record Book and Lying to Cover up Illegal Discharges of Waste

United States v. Cardiff Marine, Inc., No. 1:11-cr-00058-MJG (D. Md.)

Press Release, U.S. Dept. of Justice, (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-enrd-226.html (last accessed Jan. 17, 2012)

> Cardiff Marine, Inc., a Liberian-registered shipping company, was sentenced . . . in federal court in Baltimore after pleading guilty to a felony violation of the Act to Prevent Pollution from Ships. The company admitted falsifying records of illegal discharges of oily waste from the *M/V Capitola*, making false statements to the Coast Guard and other acts of concealment. U.S. District Judge Marvin J. Garbis[ ]sentenced Cardiff to pay a $2.4 million fine and serve three years probation, subject to an environmental compliance plan that includes audits by an independent third party auditor.
>
> The guilty plea and sentencing were announced by U.S. Attorney for the District of Maryland, Rod J. Rosenstein; Ignacia S. Moreno, Assistant Attorney General, Environment & Natural Resources, U.S. Department of Justice; Rear Adm. Dean Lee, Commander of the U.S. Coast Guard's 5th District; Special Agent in Charge Otis E. Harris, Jr. of the Coast Guard Investigative Service-Chesapeake Region; and Special Agent in Charge David M. Dillon of Environmental Protection Agency's Criminal Investigation Division.
>
> According to court documents, the investigation into the *M/V Capitola* was launched on May 3, 2010, at the Port of Baltimore, after a crew member informed a clergyman, who was on board the *Capitola* on a pastoral visit, that there had been "monkey business in the engine room," which involved a "magic pipe." The magic pipe proved to be a bypass hose that allowed the dumping of waste oil overboard, circumventing pollution prevention equipment required by law. The crew member asked the minister to alert the Coast Guard and to pass on a flash drive bearing video taken in the ship's engine room. That triggered an inspection of the *Capitola*, and ultimately, [the] guilty plea.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

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News and Information

FRUSTRATION, MARITIME LAW AND GENERAL AVERAGE

Keith W. Heard
Burke & Parsons
New York, NY

A claim for breach of contract is sometimes met by the defense of frustration – that the contract could lawfully not be performed due to a change in facts or circumstances that frustrated the original intent of one or both parties. The doctrine is described in Lowndes & Rudolf as follows:

> Frustration is the main exception to the basic rule that contracts are absolute – that is, they must be fulfilled however difficult, inconvenient or expensive performance may become. It occurs when, as a result of some extraneous event outside the control of either party, further performance of the contract becomes physically impossible, or illegal, or "something radically different from that which was undertaken by the contract".

J. Cooke & R. Cornah, *Lowndes & Rudolf: The Law of General Average and the York Antwerp Rules* at 26 (13th ed. 2008). Arguments based on frustration of contract are made from time to time in maritime cases but, in truth, the concept may not be as broad as many of us have believed over the years. In particular, the doctrine has certain limitations that complicate its use in defending against claims for General Average contributions.

Many of us learned about the doctrine of frustration in law school by studying the so-called "coronation cases." For example, in *Krell v. Henry*, [1903], 2 K.B. 740 (C.A.), an English case that Professor E. Allan Farnsworth has called the "fountainhead" of the doctrine, the parties entered into a contract for the use of a space to see King Edward VII's coronation procession. When the procession was postponed indefinitely due to the King's illness, the party who had booked the space refused to pay for its use. The owner of the premises sued to recover the rental payment but the Court ruled the contract had been frustrated when the procession was indefinitely postponed.

A current expression of the doctrine of frustration may be found in section 265 of the *Restatement (Second) of the Law of Contracts*, which reads as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate to the contrary.

According to Professor Farnsworth, who is the reporter for the *Restatement (Second)*, the party claiming that a supervening event frustrated its purpose in entering into a contract must meet four requirements:

1. The event must have "substantially frustrated" that party's "principal purpose";

2. The non-occurrence of the event must have been "a basic assumption on which the contract was made";

3. The frustration must have resulted without the fault of the party seeking to be excused; and

4. That party must not have assumed a greater obligation than the law imposes.

2 *Farnsworth on Contracts* at 652-53 (3rd ed. 2004). Professor Farnsworth has explained that section 265 of the *Restatement (Second)* expresses the fourth requirement in the phrase "unless the language or the circumstances indicate the contrary." *Farnsworth* at 653, n. 12.

According to Professor Farnsworth, the first and fourth requirements present the greatest obstacles to a party seeking excuse on the grounds of frustration. The first requirement is troublesome in part because the Courts "have viewed the affected party's principal purpose in broad terms." *Id*. at 653. The mere fact that an exceptional event has prevented a party from taking advantage of a transaction in the expected way "may not suffice to satisfy the requirement of substantial frustration if the party can turn the bargain to its advantage in some other way." *Id*. The first requirement is also troublesome because courts have required that the frustration be "nearly total." As Professor Farnsworth writes, "the mere fact that what was expected to be a profitable transaction has turned out to be a losing one is not enough." *Id*. at 653-54.

The fourth requirement is a challenge to satisfy because "[e]ven if a party can show that its principal purpose has been frustrated, a court may refuse to excuse the party on the ground that the party assumed the risk of the occurrence of the frustrating event," either on the basis of contractual language or because the event was foreseeable. *Id*. at 654-55.

In general, Professor Farnsworth notes, there is a "judicial reluctance to excuse [performance] on the ground of frustration." *Id*. at 657. Nevertheless, maritime law in England and in the United States is replete with instances in which contractual parties have sought to be relieved of performance on the basis of frustration.

The Classic American Case

The best-known American case is *Transatlantic Fin. Corp. v United States,* 363 F.2d 312, 1966 AMC 1717 (D.C. Cir. 1966), arising out of the closure of the Suez Canal in 1956. The Government voyage chartered the M/V CHRISTOS on October 2, 1956, to carry bagged wheat from Galveston to Bandar Shapur, Iran. While the charter did not prescribe the route of the voyage, the District Court found that "the normal, most direct route would have been via the Straits of Gibraltar, and the Suez Canal." *Transatlantic Fin., Corp. v. United States*, 259 F. Supp. 725, 726 (D.D.C. 1965).

On July 26, 1956, the Egyptian government nationalized the Suez Canal Company and assumed its operation, "causing an international crisis" that remained unresolved when the ship sailed from Galveston on October 27th. Two days later Israel invaded Egypt and two days after that, England and France invaded the Suez Canal zone. Several days later, the Egyptian government sank vessels to obstruct the entrance to the Canal and close it to traffic. The shipowner, Transatlantic, instructed the CHRISTOS to proceed to Bandar Shapur via the Cape of Good Hope and it did so. According to the District Court, the voyage via the Cape added about 18 days and approximately 3100 miles over what would have been required for a voyage via Suez. The vessel discharged its cargo at Bandar Shapur and the Government paid the freight due under the voyage charter.

Two years later, Transatlantic presented a $41,175.83 claim to the Department of Agriculture as compensation for the additional costs incurred in the voyage around the Cape. The Government rejected the claim, asserting that its only liability was to pay freight as set forth in the charter. Transatlantic argued that it was "assumed and understood" by the parties when the contract was negotiated that the ship would follow "the normal and shortest" sea route to Iran via the Suez Canal, that when the purpose was frustrated by events beyond Transatlantic's control and the government nevertheless insisted on delivery, an obligation arose on the part of the government to compensate Transatlantic, *quantum meruit*, for its expenses in diverting the ship from the usual route. *Transatlantic*, 259 F. Supp. at 727.

The district court observed that the law of impossibility of performance and especially the area of impossibility dealing with frustration was "one of the most troublesome fields of contract law." *Id*. at 727. However, the court concluded that since performance of the contract was simply "more oppressive or more expensive," rather than impossible, Transatlantic had a duty "to go forward without extra compensation." *Id*. at 728.

The Court of Appeals for the D.C. Circuit affirmed. The Court of Appeals noted that, to succeed on its argument of impossibility of performance, Transatlantic needed to establish the following:

> 1. that an unexpected contingency had occurred,
>
> 2. that the risk of the unexpected occurrence had not been allocated by agreement or by custom, and
>
> 3. occurrence of the contingency had rendered performance commercially impracticable.

Transatlantic, 363 F.2d at 315. Reviewing the facts, the Court of Appeals accepted that "the parties expected performance by the usual and customary route at the time of contract" and the closure of the Canal was an "unexpected development." *Id*. at 316.

With respect to the second requirement, the Court of Appeals concluded that the risk of the Canal closure had not been allocated by custom or agreement. While the Court was not necessarily convinced that "the continued availability of Suez was [an implied] condition of performance," it concluded that "the implied expectation that the route would be via Suez is hardly adequate proof of an allocation to the promisee [i.e., the Government] of the risk of closure." *Id*. at 316-17. The Court went further and said that "[i]n some cases, even an express expectation may not amount to a condition of performance," e.g., an express expectation of the route to be followed. *Id*. at 317. In other words, parties' expectations as to the

route to be followed do not represent an allocation of the risk that the route may become unavailable before performance is completed. However, the fact that trouble was already brewing with respect to the Canal when the charter was agreed was probably reflected in the freight rate paid by the Government and reflected "a willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the [third factor of] impracticability of performance by an alternative route in stricter terms than we would were the contingency unforeseen." *Id*. at 319. In other words, although Transatlantic won on the first and second factors, since those were "close calls," that colored the court's analysis of the third factor.

Turning then to the third factor, the Court was willing to consider various circumstances - including the extent of the risk to vessel, crew and cargo, and the availability of insurance - but, in the end, the only circumstance in Transatlantic's favor was the added expense. Unfortunately for Transatlantic, the Court concluded that the additional expense of sailing via the Cape was not so great as to render performance commercially impracticable. Actual freight paid for the voyage was $309,457.50 (minus $3,779.58 in dispatch), versus additional costs of $41,175.83 for proceeding via the Cape. The Court of Appeals observed that "to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone." *Id*. at 319.[4]

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4. The Court of Appeals noted that Transatlantic's position on damages was inconsistent with its theory of liability. If contractual performance had been impossible, the contract would have been a nullity. However, Transatlantic billed and collected freight from the Government pursuant to the contract and relied on quantum meruit only for the additional cost of the trip around the Cape. Had Transatlantic been consistent with its arguments, its "theory of relief should have been quantum meruit for the entire trip." Id. at 320.

Other Examples of Frustration Cases

In addition to canal or seaway closures, there are other maritime cases in which frustration of contract has been asserted. These cases include matters involving (a) risk of capture or seizure of vessels or cargos, (b) trapping of vessels in ports or waterways, (c) requisition, (d) destruction of vessels and (e) deficiency of officers or crew by strike or otherwise.

With respect to risk of capture or seizure, in *Wong Wing Fai Co. v. United States*, 840 F.2d 1462 (9th Cir. 1988), a time charter of a tanker let to the Military Sealift Command was held frustrated due to the vessel's seizure by South Vietnamese soldiers trying to flee the North Vietnamese in 1975. In addition to other claims, the shipowner sought to recover "lost profits" at the daily hire rate from the day the vessel was commandeered until the day the North Vietnamese government took possession of the ship. Quoting from *United States v. M/V MARILENA P.*, 433 F.2d 164, 167 n. 1 (4th Cir. 1969), another case that arose in the context of the Vietnam War, the Ninth Circuit observed that "[f]rustration of a charter party is a change of conditions so radical that accomplishment of the commercial object of the charter is made impossible." *Wong Wing*, 840 F.2d at 1471. The court had no difficulty concluding that the commandeering of the vessel clearly frustrated the charter. *See also Essex S.S. Co. v. Langbehn*, 250 F. 98 (5th Cir. 1918), a case involving a vessel chartered before the outbreak of World War I that was unable to call at the contractually-designated European discharge ports after war broke out.

When war has caused vessels to be trapped in ports, waterways or other constricted bodies of water, courts have often held that the charter parties which the vessels were performing were frustrated. In *Embiricos v. Sydney Reid & Co.*, [1914] 3 K.B. 45, for example, a Greek vessel was chartered to load grain in the Sea of Azov for a voyage to England. The ship arrived at the loading port just before war broke out between Greece and Turkey in 1912. Charterer began loading the ship but stopped on receipt of news the Turkish authorities were seizing and detaining Greek vessels at the Dardanelles. War was declared and, a few days later, charterer informed owner that the charter was being cancelled. The vessel was unable to leave the Black Sea until the war ended nearly a year later. The court held that charterer was justified in treating the charter as at an end. See also *Scottish Navigation Co. v. Souter* [1917] 1 K.B. 222, involving frustration of the charter for a vessel detained by Russian authorities at a port on the Baltic Sea when World War I began.

One of the more interesting trapping cases is *Court Line, Ltd. v. Dant & Russell, Inc.*, [1939] 64 Ll. L. Rep. 212. In that case, a vessel operating under time charter loaded cargo at Portland, Oregon for discharge at Wuhu and Shanghai, China in 1937. While the vessel was discharging at Wuhu, which is 750 miles up the Yangtze River, hostilities broke out between Chinese and Japanese forces around Shanghai, at the mouth of the river. As a result, the Chinese government placed a boom across the river about 100 miles below Wuhu, making it impossible for the vessel to return to Shanghai.[5] Pursuant to charterer's instructions, the Shanghai cargo was also discharged at Wuhu. Thereafter, the shipowner claimed that the vessel was still on hire while charterer asserted that the time charter had been frustrated, once discharge of the Shanghai cargo had been completed. The vessel was finally able to proceed down river and pass through the boom about three and a half months after the date of the claimed frustration. At arbitration in London, the umpire found that, at the time the Shanghai cargo was discharged (i.e., early September 1937), it was thought the vessel would be subjected to an indefinite delay. Reviewing the relevant English authorities, the judge in the King's Bench division wrote that "the causes of frustration may have to be in operation for long enough to raise a presumption of inordinate delay before frustration takes place." *Id.* at 219. Since the facts found by the umpire indicated it was believed at the time the vessel would be delayed for an indefinite duration, the court upheld his decision that the contract was indeed frustrated.

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5. This should resonate with anyone who has seen the movie, The Sand Pebbles, with Steve McQueen and Candice Bergen.

More recently, the English courts had occasion to consider the plight of trapped vessels in connection with the war that began with Iraq's invasion of Iran in September 1980. According to an article by R. Glenn Bauer entitled "Effects of War on Charter Parties," 13 *Tulane Maritime Law Journal* at 19 (1988), some sixty vessels were trapped in the Shatt-al-Arab, the waterway between the two countries, on the day of the invasion.

One of the trapped vessels was the EVIA, which was operating on an 18-month time charter on the BALTIME form. EVIA finished discharging a cargo of Cuban sugar at the Iraqi port of Basrah on September 22, 1980, the day hostilities began. The vessel remained trapped there while her plight was considered at arbitration and in court in London. Owner sought damages on the ground charterer breached the safe port warranty by ordering the ship to Basrah. Charterer argued the contract became frustrated on Oct. 4, 1980, since, by that time, the combatants had become heavily engaged and the Shatt-al-Arab had become an area of major military operations. The umpire concluded Basrah was a safe port because there was no anticipation of hostilities affecting the port when charterer ordered the EVIA to go there or when she arrived at the port. The judge in the Commercial Court disagreed but the Court of Appeals, in a decision by Lord Denning, agreed with the umpire that there was no breach of the safe port warranty and that the contract was frustrated. *The EVIA*, [1982] 1 Lloyd's Rep. 334. On the issue of frustration, Lord Denning relied principally on what Lord Roskill wrote in *The NEMA*, [1981] 2 Lloyd's Rep. 239, where he observed that frustration resulted when the delay actually suffered, and the prospects of future delay, were such as to make the contractual obligations "radically different" from what was undertaken in the contract. *The EVIA*, 1 Lloyd's Rep. at 340. Owner's appeal of Lord Denning's ruling to the House of Lords was unsuccessful. *The EVIA*, [1982] 2 Lloyd's Rep. 307.

A vessel's requisition by governmental authorities can but does not always result in frustration of a charter party. In *Texas Co. v. Hogarth Shipping Co.* 256 U.S. 619 (1921), an American charterer sought damages for the alleged breach of a voyage charter when the

vessel nominated and accepted for performance was requisitioned by the British government in World War I. There was no vessel substitution clause or restraint of princes exception in the charter. The Court held requisition was a supervening act that rendered performance impossible, excusing the shipowner from performance. The Supreme Court wrote at pages 629-30 as follows:

> [W]here parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability the contract must be subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it .... The principle underlying the rule ... does not apply when the risk is fully covered by a term of the contract, nor where performance is not practically cut off but only rendered more difficult or costly.

The destruction of a vessel can also result in the frustration of a charter party. In *Ellis v. Atlantic Mut. Ins. Co.*, 108 U.S. 342 (1883), a shipowner was held not entitled to recover freight on cargo not transported to destination when the carrying vessel burned and sank at the loading wharf. The Supreme Court wrote as follows:

> [B]y the disaster which occurred before the ship had broken ground or commenced to earn freight, the circumstances with reference to which the contract of affreightment were entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the [cargo] underwriters were absolved from all liability under the contract of affreightment.

Id. at 349. Although the word "frustration" does not appear in this old case, what we now recognize as the doctrine of frustration was

clearly the basis for the Court's ruling. Indeed, the language quoted above is somewhat similar to that found in section 265 of the *Restatement (Second) of Contracts*.

Despite the ruling in *Ellis*, New York maritime arbitrators have taken a different view in cases involving the loss or destruction of a vessel. See The *GRAND ZENITH*, 1979 AMC 2179 (Arb. at N.Y. 1979) (Zubrod, Berg, O'Riordan) (time charter not frustrated by vessel's total loss where contract contemplated the risk of vessel loss and allocated it by giving Owner the right to substitute a similar vessel), and *The GIOVANNA LOLLI-GHETTI*, 1974 AMC 2161 (Arb. at N.Y. 1974) (Nixon, Healy, Smith) (accord). However, these arbitration awards can be explained by the fact that "the risk of the unexpected occurrence had . . . been allocated by agreement," the second factor addressed by the court in the *Transatlantic Financing* case.

Finally, the doctrine of frustration might be applicable if a strike or other deficiency of officers or crew "plainly appeared insolvable." *United States v. M/V MARILENA P,* 433 F.2d 164, 168 (4th Cir. 1969). In that case, involving a trip time charter for a voyage from the West Coast to South Vietnam, the vessel began loading ammunition and other military cargo at Tacoma when all of the crew and some of the officers announced they would not sail the vessel to Vietnam and walked off the ship. The government took the position that the contract was terminated, loaded the cargo on another vessel and, in response to a suit by the time charterer, counterclaimed to recover its damages, presumably for the higher cost of the replacement vessel.

The district court awarded the Government damages for breach of contract, but the Fourth Circuit reversed, holding that the Government's rights and remedies were set forth in the charter, which provided that the vessel would be off-hire in the event of time lost from a deficiency of men, including but not limited to strikes. According to the Court of Appeals, "no right of repudiation was automatically conferred upon the United States." *Id*. at 167. The court observed that the warranty of seaworthiness in the charter did

not rise to the level of a condition, "nor did the crew's inaction constitute a frustration of the hiring of the ship." *Id*. The court did not analyze the case according to the *Transatlantic Financing* factors but instead wrote simply that "[f]rustration of a charter party is a change of conditions so radical that accomplishment of the commercial aspect of the charter is made impossible." *Id*. at 167, n. 1 (citing Gilmore & Black, *The Law of Admiralty* (1957)). Going further, the court of appeals remarked that "cancellation might have been imposed if the strike so plainly appeared unsolvable as to be a frustration, but that was not the appearance here." *Id*. at 168.

Frustration and General Average

These cases – English and American – illustrate that a party in a maritime case can obtain exoneration for breach of contract if it can prove frustration. This gives rise to the question whether a vessel charterer or bill of lading holder, for example, can defeat a shipowner's claim for general average contributions by arguing frustration – for example, in a situation where it will take months to repair a ship that was carrying cargo under a voyage charter. As leading commentators have put it, "in the context of general average the issue most likely to arise is whether damage to the ship or the cargo suffered as a result of an accident on the voyage, or the delay consequent thereon, is sufficiently serious to frustrate the contract and thus to terminate the adventure at a port or place of refuge." *Lowndes & Rudolf* at 26. As will be seen, however, there are reasons why the defense is unlikely to be successful in a general average situation.

Two cases, in particular, are instructive in considering the proper resolution of this issue. In *Reefer and Gen. Shipping Co., Inc. v. Great White Fleet, Ltd*., 1996 AMC 1254 (S.D.N.Y. 1995), the parties entered into a two year time charter which, by addendum, they extended for an additional two years. When a class surveyor raised questions about the vessel's seaworthiness, the charterer, Great White Fleet ("GWF"), terminated the contract and re-delivered the vessel. However, once the crew installed a portable generator on the vessel's deck, the class surveyor issued a revised survey record

confirming the ship's seaworthiness, subject to the condition that the No. 3 generator be repaired by the next docking survey and no later than a date certain. The shipowner, Reefer and General Shipping, then commenced an action for damages, alleging that GWF breached the charter by terminating it and redelivering the vessel. GWF asserted certain defenses, including one of frustration. GWF asserted, in particular, "that, as the essential purpose of the Charter was frustrated by Reefer's material breach of the agreement, it was entitled to terminate the Charter and redeliver the Vessel under the doctrine of maritime frustration." *Id*. at 1258. The shipowner moved to strike that and other defenses from the answer.

> In reviewing the law on frustration, the court observed the following:
>
> > It is well-established that in order to succeed on a defense of maritime frustration, a party must show (1) the occurrence of an unexpected contingency; (2) no allocation of risk between the parties either express or implied; and (3) commercial impracticability of performance. *American Trading & Pro. Corp. v. Shell Int'l Mar., Ltd*., 453 F.2d 939, 941-42 (2d Cir. 1972); *Asphalt Int'l v. Enterprise Shipping Corp*., 514 F. Supp. 1111, 1115 (S.D.N.Y.), aff'd, 667 F.2d 261 (2d Cir. 1981); *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315-16 (D.C. Cir. 1966).

Id. at 1258-59.

Continuing, the court wrote as follows:

> In the case at hand, the Court finds that GWF's Maritime Frustration Defense fails because, even viewing the facts favorably to GWF, it cannot establish the second element, namely, a lack of risk allocation between the parties. Specifically, provisions in the Charter expressly and unambiguously allocate the risk of the contingencies GWF claims justify termination under the doctrine of frustration, including the: (1) Breakdown Clause, which provides for termination in the event of three breakdowns within a twelve-month period; (2) Off-Hire Clause, which allows GWF to place the vehicle off-hire and withhold charter hire if a breakdown "hinder[s] or prevent[s] the working of the vessel" for more than twenty-four hours; and (3) Seaworthiness Clause, which provides for termination in the event a class surveyor finds the Vessel to be unseaworthy. As these provisions provide an express allocation of the risk of unexpected contingencies, GWF's Maritime Frustration Defense fails as a matter of law. *See Glidden Co. v. Hellenic Lines, Ltd*., 275 F.2d 253 (2d Cir. 1960) (frustration defense failed because the parties contemplated alternate routes when the Suez Canal closed); *Denali Seafoods, Inc. v. Western Pioneer, Inc*., 492 F. Supp. 580 (W.D. Wash. 1980) (frustration defense failed because charter party expressly contained clauses covering redelivery of the vessel, maintenance, repair, damage and insurance).

Id. at 1259-60. Accordingly, the court granted the plaintiff shipowner's motion to strike the frustration defense from the answer, removing it from the case.

The other case to be considered in this connection is one mentioned by the court in *Reefer and General Shipping*, the case just discussed. This additional case is *Denali Seafoods, Inc. v. Western Pioneer, Inc*., 492 F. Supp. 580, 1981 AMC 1560 (W.D. Wash. 1980). In *Denali*, the vessel was bareboat chartered to transport frozen crab from Alaska to Seattle. During the term of the charter, however, the vessel grounded at Bold Cape, Alaska. After temporary repairs were made, Western, the bareboat charterer, returned the vessel to Denali but refused to make the last three hire payments or pay for the damage caused by the grounding. Denali then filed suit and moved for summary judgment with respect to guaranteed charter hire. Western argued in part that the grounding resulted in the commercial frustration of the contract but the court disagreed. After setting forth the three requirements from the D.C. Circuit's decision in *Transatlantic Financing*, the district court in *Denali* rejected the frustration defense, writing in part as follows:

> A grounding is not an unexpected contingency on voyages between Alaska and Seattle. The charter party contains clauses covering redelivery of the vessel, maintenance, repair, damage, and insurance which both expressly and impliedly indicate the parties allocated the risk of such grounding.

Id. at 582.

Although a casualty that prompts a shipowner to declare general average may bring a voyage to an end, that does not necessarily mean the governing contract has been frustrated. As the court stated in *Denali*, the existence of contractual provisions dealing with vessel breakdowns or casualty situations (e.g., an off-hire clause in a time charter or an exceptions clause in many types of charters) can be viewed as a strong indication that the parties foresaw the possible occurrence of the general average event when agreeing to the terms of the contract. In the *Transatlantic Financing* case, the Court of Appeals explained that a successful frustration defense required "that an unexpected contingency had occurred." *Transatlantic Fin*., 363 F.2d at 315. If the parties are included in the charter party or bill of lading provisions dealing with the legal consequences of events such as that for which general average was declared, it will be difficult to argue the event was "unexpected" or "unforeseen."

Going further, the very existence (or incorporation) of contractual provisions relating to general average may itself prevent reliance on the doctrine of frustration. The purpose of general average is to apportion the economic consequences of overcoming the effects of certain voyage-related events between or among the parties in interest. *Sea-Land Serv., Inc. v. Aetna Ins. Co*., 545 F.2d 1313, 1315, 1976 AMC 2164, 2166 (2d Cir.1976). Thus, it can presumably be argued that a contract's general average provisions constitute a basis for concluding that "the risk of the unexpected occurrence had . . . been allocated by agreement," defeating reliance on the frustration doctrine.

Conclusion

Maritime cases dealing with issues of frustration of contract are usually interesting because the facts are so compelling. Indeed, these cases often arise in times of war or other international crises. Despite facts that are sometimes momentous, the law governing these cases is rather straightforward. As explained above, to prevail on a frustration defense, the proponent must establish that (a) an unexpected contingency had occurred, (b) that the risk of the unexpected occurrence had not been allocated by agreement or by custom, and (c) the occurrence of the contingency had rendered performance commercially impracticable. As this brief review of the law has shown, these elements can be established in some cases but it is much more difficult to do so when frustration is asserted as a defense to a claim for general average contribution.

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SOME FURTHER THOUGHTS ON FRUSTRATION

by Jonathan Spencer
The Spencer Company
New York, N.Y.

Whether or not a voyage is frustrated is a very difficult area of general average practice, particularly in cases where cargo is forwarded from a port of refuge in another bottom. The underlying premise is that, in order to recover detention expenses in general average, the shipowner is entitled to retain the cargo at the port of refuge and carry it to destination after the ship has completed repairs. This proposition is particularly important when voyage freight is at risk and only payable on right and true delivery of the cargo.

On occasion, the potential detention becomes so protracted that cargo seeks to argue that the original voyage has become frustrated. It is a weighty decision, because in these circumstances cargo must pay its own costs of delivery to destination, which are to

be balanced against cargo's contribution to the general average if the voyage is allowed to continue. The shipowner will in any case hold out for a continuation of the voyage in order to continue recovering his detention expenses in general average since, in principle, once the common maritime adventure is broken up by the separation of the cargo from the vessel, the general average itself is at an end. Whether or not the cargo can successfully assert that the voyage is at an end is complicated by the scarcity of apposite cases.

To ameliorate the situation, a mechanism developed for cargo to be forwarded under what came to be known as non-separation of interests agreements, under which the voyage is deemed to continue after the cargo has been sent on. The *quid pro quo* is that delay to cargo is minimized while the ship owner continues to recover detention expenses in general average. The terms of the non-separation agreement typically would be negotiated at the time that the general average security was to be proffered, prior to the cargo interests taking delivery at the port where the voyage was to be broken up. A casualty had arisen and the parties negotiated from the standpoint of being in possession of the relevant facts. For many years, the question of whether or not the voyage was in fact frustrated became the subject of agreement between the parties during these negotiations and, as research into the case law shows, no litigation ensued.

So common did the procedure become that a standard wording was agreed in the London insurance market by the late 1960s, with the New York market following suit some years later. Since 1994 it has been embodied in Rule G of the York-Antwerp Rules ("YAR") and this is where difficulty starts to arise. The wording provides, in material part, as follows:

> When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.

The difficulty is that no-one knows how lengthy a prolongation of the voyage is permissible "under the contract of affreightment and the applicable law" because the question is not addressed in the typical contract of affreightment and, as we have seen, there is not really any applicable law.

The difficulty is compounded by the subjectivity that cargo interests be notified, "if practicable", before the forwarding takes place. This wording was introduced at the time that the non-separation agreement was first incorporated into the York Antwerp Rules. The intention was to allow for a situation where it truly was impracticable for cargo to be notified – say, where the casualty involved a vessel on liner service carrying many containers and an opportunity arose to forward on relatively short notice on another vessel within a lapse of time which would not permit all the cargo interests to be notified. In practice, however, some average adjusters seem to be construing the wording much more broadly, failing to notify cargo interests of forwarding even when there is ample opportunity to do so. The effect of this is that non-separation claims are arriving through the back door – cargo might arrange to take delivery at a port of refuge in the belief that there is mutual agreement with the shipowner that the voyage has been terminated only to find when an average adjustment is eventually published months or even years later that, by virtue of the incorporation of the non-separation agreement into the applicable York-Antwerp Rules, they are being asked to pay substantial claims for general average expenditure incurred during prolonged periods of detention after the voyage has been broken up.

We have seen cases where the general average allowances have been continued for as much as seven or eight months after the forwarding of cargo, a period that would likely never have been the subject of a non-separation agreement in pre-YAR '94 days, the frustration of the intended voyage being clear by virtue of the delay,

but where, now, cargo is being forced to fight a rearguard action sometimes a period of years after the event – and is faced with an entirely unbudgeted claim for general average contribution.

The phenomenon is ameliorated to a degree under the 2004 York-Antwerp Rules, which no longer permit recovery for crew wages during a port of refuge detention, but the 2004 Rules have not been widely adopted and are virtually unseen outside the oil industry.

Hence, overall, we have problems in an area that was already grey before the adoption of the 1994 Rules and that begs for resolution by some clear legal precedents.

[Our sincere thanks to Keith W. Heard of Burke & Parsons and Jonathan Spencer of the Spencer Company for the foregoing article and additional analysis – Eds.].

RECENT CASES OF INTEREST

Outer Continental Shelf Lands Act Compensation Eligibility Standard

Pac. Operators Offshore v. Valladolid, 604 F.3d 1126 (9th Cir. 2010).

The Outer Continental Shelf Lands Act provides workers compensation benefits for "any injury occurring as the result of operations conducted on the Outer Continental Shelf." *Pac. Operators Offshore v. Valladolid* asked whether an outer continental shelf worker injured on land is: (1) always eligible for compensation, because his employer's operations on the shelf are the 'but for' cause of his injury (2) never eligible for compensation, because the Act applies only to injuries occurring on the shelf or (3) sometimes eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf. The Ninth Circuit adopted the third test, while the Fifth Circuit had previously adopted the second test in *Mills v. Director, Office of Workers' Compensation Programs*, 877 F.2d 356 (5th Cir. 1989) and the Third Circuit had previously adopted the first test in *Curtis v. Schlumberger Offshore Servs., Inc.*,

849 F.2d 805 (3d Cir. 1988). The *Valladolid* case involved a worker who spent 98% of his working time on an offshore oil drilling platform and 2% of his working time at an onshore facility operated by his employer. He was killed by a forklift while working at the onshore facility.

[Our sincere thanks to Joseph G. Grasso, Esq., of Wiggin and Dana, for the foregoing summary – Eds.].

Deepwater Horizon Compensation Fund Transparency

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866 (E.D. La. February 2, 2011).

The Mealey's Litigation Report, Insurance, issue of February 23, 2011, contained a report that the federal judge overseeing the consolidated action involving hundreds of personal injury and economic loss claims relating to the Gulf of Mexico oil spill had ordered the group managing the $20 billion fund established to compensate economic losses to become more transparent and to refrain from giving legal advice.

When the Judicial Panel on Multidistrict Litigation established the MDL 2179 docket, under Judge Carl J. Barbier, in August of 2010, it decided to include personal injury/wrongful death actions in the same proceeding as actions seeking economic damages resulting from the explosion of the rig and ensuing oil spill, noting that they overlapped factually.

In December of 2010, plaintiffs filed a motion asking the court to supervise communications between BP PLC and putative class members. The motion contended that the Gulf Coast Claims Facility (GCCF) created to process economic loss claims, "is nothing more than an alter ego of the BP defendants." The plaintiffs sought court supervision to ensure that communications between the GCCF and would-be class members were not misleading or confusing.

Judge Barbier concluded that the "hybrid role" of GCCF and the attorney that heads it led to confusion and misunderstanding by claimants, especially those not represented by counsel. The court found "that any claim of the GCCF's neutrality and independence is misleading to putative class members and is a direct threat to this ongoing litigation, as claimants must sign a full release against all potential defendants before obtaining final payments." *In re: Oil Spill*, 2011 WL 323866, at *7. In particular, the lawyer in charge of the GCCF had "been quoted on a number of occasions as publicly advising potential claimants that they do not need to hire a lawyer and will be much better off accepting what he offers rather than going to court." *Id*. Judge Barbier concluded that a full disclosure of the relationship between the attorney, GCCF and BP "will at least make transparent that it is BP's interests as the OPA [The Oil Pollution Act of 1990] responsible party that are being promoted." *Id*.

Submarket Accused of New York State Antitrust Violations

Global Reinsurance Corp. – U.S. Branch v. Equitas, Ltd., 82 A.D. 3d 26, 921 N.Y.S. 2d 1 (App. Div. 1st Dept. 2011).

While not strictly maritime, this case is of interest because it involves the issue of whether Equitas, the entity formed in London to take over Lloyds' liabilities for pre-1993 asbestos and environmental damage claims, is in violation of New York State antitrust laws.

Plaintiff Global Reinsurance appealed from orders dismissing its second amended complaint and motion for reargument. The Appellate Division reversed and reinstated the complaint.

The complaint alleged that the Equitas defendants are the hub of a conspiracy that violates New York's antitrust law, the Donnelly Act (General Business Law §340 *et seq*.) The relevant "product market" alleged was the market for non-life (property, casualty and related lines) retrocessional reinsurance - "the coverage provided by retrocessionaires to retrocedents, i.e., the reinsurers that

provide coverage to the insurers, or cedents, that provide the coverage to the underlying policyholders," including the purchase, sale and servicing of such coverage. *Global*, 82 A.D. 3d at 28.

It was alleged that the market is worldwide, but that there exists a submarket, the "Lloyd's marketplace," in London, consisting of hundreds of syndicates made up of individual Names that annually compete for the placement of new insurance, reinsurance and retrocessional business. It was claimed that prior to the formation of the conspiracy, the syndicates in that market chiefly competed for retrocessional business in the areas of premiums charged and claims handling.

The plaintiff's claim was that with respect to claim handling, for decades "the culture of the Lloyd's marketplace, a culture that helped it to win business, has been that claims should be paid on terms that are favorable to claimants (be they policyholders, cedents or retrocedents), i.e., even when the policy's terms would permit the claims to be rejected." *Id*. New business was thus obtained not just on the basis of proven ability to pay claims, but also on a reputation for not making "hardheaded" decisions when claims are submitted. The conspiracy allegedly began in 1996, when the Names faced financial ruin due to losses from pre-1993 business, in particular long-tail asbestos and environmental coverage. Since the syndicates could not retroactively increase the premiums on the pre-1993 business, they could only meet the threat by cutting claims payouts. The problem with that was that if only some of them cut payouts, they would lose future business to syndicates that adhered to the culture that had made the Lloyd's marketplace a success.

The solution, allegedly, was concerted action in 1996 that permitted all syndicates to cut claims payments on pre-1993 business, and compete as they had historically done on new business. This was carried out by the Reconstruction and renewal Plan ("R&R Plan"), whereby the Lloyd's market was restructured. As part of that restructuring, it is alleged that the Equitas entities were established to reinsure and perform claims-handling responsibilities for certain pre-1993 liabilities of the Names, including contracts with entities such as plaintiff Global Reinsurance.

Equitas was granted "'exclusive and irrevocable responsibility' for the liability of the Names that arose from the pre-1993 business." *Id*. at 29. This meant that instead of the syndicates making independent decisions on validity of claims and whether, when and how much to pay, Equitas made all those decisions. The reserves held by or on behalf of the Names to pay those claims were pooled in a single fund managed and controlled by Equitas. In this way, the liability of each of the Names was capped at the amount of the reserves contributed to the fund (assuming Equitas was able to settle all the claims).

The effect of this restructuring was to place all the syndicates simultaneously into runoff as to the pre-1993 business. Equitas used its exclusive claims-handling authority to cut claims payouts on pre-1993 business, which tended to ensure the adequacy of the reserves in the fund.

In sum, plaintiff claimed that cost savings from the elimination of claims service competition were realized at its expense and that of retrocedents generally. Equitas either denied claims, or paid less and paid later, in ways that retrocessionaires subject to competitive constraints, such as plaintiff, could not, causing plaintiff millions of dollars of damages.

The majority opinion of the Appellate Division began its analysis of the issues by rejecting an argument accepted by the dissent – that the complaint fails to allege an antitrust injury. The majority opinion explained that the Donnelly Act should generally be construed in the light of Federal precedent, unless a different interpretation is justified by State policy, differences in statutory language or legislative history. An antitrust injury is injury of the type the antitrust laws were intended to prevent, and that flows from that which makes the defendant's acts unlawful.

Antitrust laws are meant to protect competition. To demonstrate harm to competition, a plaintiff must show an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged conduct. The antitrust plaintiff must assert harm to competition as a whole. The plaintiff satisfied these requirements, according the majority, by alleging that the practices in the Lloyd's market arose because of competition among retrocessionaires, and that antitrust law bars them from agreeing to stop engaging in any of the practices in the market, not just those that are required by contract law.

The fact that the plaintiff had been in runoff and had not purchased retrocessional coverage since the alleged unlawful restraint of trade began did not disqualify its assertion of an antitrust violation with respect to the pre-1993 claims. The claim was that "the unlawful conspiracy does not – a condition of its success is that it must not – have any adverse consequences for purchasers of post-1993 non-life retrocessional coverage." *Id*. at 32.

In other words, to be a proper antitrust plaintiff, one need not be a purchaser after the alleged unlawful agreement goes into effect. In fact, the law is that an antitrust plaintiff need not be a consumer or competitor at all in order to assert a claim. "A post-purchase horizontal restraint that deprives the purchaser of economic benefits it otherwise would obtain affects the quality of the product or service purchased, thereby causing economic injury just as real as a pre-purchase horizontal restraint that increases the price the customer pays." *Id*. at 33. Here, plaintiff sustained antitrust injury because "the quality of what it purchased, retrocessional coverage with the attendant claims-handling service, was adversely affected by an agreement eliminating competition over claims-handling." *Id*.

Rejecting the lower court's basis for dismissing the second amended complaint, the Appellate Division concluded that plaintiff's assertions, taken as a whole, sufficiently alleged an appropriate market and submarket and market power. The allegations supported a reasonable inference that the Lloyd's syndicates had the ability to raise prices significantly above the competitive level without losing their business. Any doubt on the issue should be resolved in favor of reinstating the action and allowing the issue to be resolved after discovery.

The Appellate Division also found that the allegations of injury to plaintiff in New York were sufficient to support subject matter jurisdiction, which is not displaced by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 USCA §6a. While plaintiff was a citizen of Germany, it was recognized under New York law to have legal status as a "U.S. branch" of an alien insurer, and was regulated under New York insurance law. Its alleged financial losses caused by the conduct of Equitas were reflected in its U.S. branch balance sheet. Its status as a "branch" under New York law was relevant to determining whether the alleged anticompetitive effects occurred in New York. Accordingly, dismissal of the complaint was reversed and the case remanded for further proceedings.

[Our sincere thanks to Michael Marks Cohen, Esq., of Nicoletti Hornig & Sweeney, for calling the foregoing cases to our attention – Eds.].

Insurance Service Broker Accused of Breach of Fiduciary Duty

People v. Wells Fargo Ins. Servs., Inc., 16 N.Y. 3d 166 (2011).

The New York Attorney General brought an action against the insurance brokerage now known as Wells Fargo Insurance Services, Inc., alleging that it engaged in repeated fraudulent or illegal acts in violation of Executive Law §63; was unjustly enriched; committed common-law fraud; and breached its fiduciary duties to its customers.

The Attorney General alleged that brokers such as Wells Fargo represent organizations and individuals seeking to buy insurance, obtaining quotes from insurers and presenting them to customers. Brokers also make recommendations about what coverages will best meet a customer's needs. These recommendations may include complex insurance placements where the customer must choose among insurers with varying coverages, financial stability and prices.

The Attorney General's central contention was that while customers relied on it to make recommendations strictly based on the customer's best interests, Wells Fargo entered into a number of

undisclosed "incentive" arrangements, pursuant to which insurers rewarded it for steering customers to them. In particular, it was alleged, under its Millennium Partners Program participating insurers agreed to pay cash compensation to Wells Fargo based on the volume of business that the broker brought to them. Such payments were not disclosed by Wells Fargo to its customers.

The court noted that the complaint did not allege that Wells Fargo made any affirmative misrepresentations or that any customer suffered demonstrable harm from the incentive arrangements. Nor was it alleged that any customer was persuaded to buy inferior or overpriced insurance in order for Wells Fargo to earn the incentives.

The New York Supreme Court dismissed the complaint with leave to replead. The Attorney General chose not to replead, but appealed. The Appellate Division affirmed the dismissal. The Court of Appeals granted leave to appeal, and also affirmed.

The Court of Appeals reasoned that all of the complaint's legal theories can be boiled down to a claim for breach of fiduciary duty. The general applicable legal standard is that:

> [i]n the absence of an allegation that Wells Fargo misrepresented any fact to its customers, or that it did anything to cause actual injury to the customers' interests, the case rests on the rule that one acting as a fiduciary in a particular transaction may not receive, in connection with that transaction, undisclosed compensation from persons with whom the principal's interests may be in conflict (*see generally EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY 3d 11, 19-22 (2005)).

Wells Fargo, 16 N.Y. 3d at 170. While the court called the rule a sound one in general, it concluded that it did not apply to the particular facts at issue.

The court observed that Wells Fargo could not give advice in bad faith, such as by recommending coverage it knew to be inferior, in exchange for an under-the-table payment from the insurer. But the complaint did not allege such conduct, or anything else that vio-

lated its duty of loyalty – unless entering into undisclosed incentive arrangements was a breach of that duty.

The court discussed the complexity of the principal-agent relationship specific to the case of an insured, insurance broker and insurer:

> A broker is the agent of the insured, but it customarily looks for compensation to the insurer, not the insured, and it is sometimes the insurer's agent also – for example, when collecting premiums. We have thus referred to the broker's "duel agency status" (*Bohlinger v. Zanger*, 306 NY 228, 230 (1954)). Indeed, the word "broker" suggests an intermediary – not someone with undivided loyalty to one or the other side of the transaction.

Id. at 171. Several Appellate Division cases had ruled that such a broker need not disclose to its customers contractual arrangements it has made with insurance companies. The Court of Appeals agreed with that approach, holding that "an insurance broker does not have a common-law fiduciary duty to disclose to its customers 'incentive' arrangements that the broker has entered into with insurance companies." *Id*. at 169.

The court noted that the practice of non-disclosure had been outlawed by a recently adopted regulation of the Insurance Department, having prospective effect only. It opined that such "[a] regulation, prospective in effect, is a much better way of ending a questionable but common practice than what the Attorney General asks us to do here: in substance to outlaw the practice retroactively by creating a new common-law rule." *Id*. at 172.

Inherent Vice vs. Covered Peril

Global Process Sys. Inc. v. Syarikat Takaful Malaysia Berhad
[2011] UKSC 5, on Appeal from the Court of Appeal
(Civil Division) [2009] EWCA Civ. 1398

The appeal concerned the scope of the exclusion in a marine insurance policy for a loss caused by an "inherent vice" in the subject matter insured.

The oil rig CENDOR MOPU, then in Galveston, Texas, was purchased by respondents for conversion into a mobile offshore production unit for use off the coast of Malaysia. Respondents obtained insurance from appellant for carriage of the oil rig on a towed barge from Texas to Malaysia. The policy covered "all risks of loss or damage to the subject-matter insured except as provided in Clause 4." Clause 4.4 excluded "loss, damage or expense caused by inherent vice or nature of the subject matter insured."

The oil rig consisted of a platform and three cylindrical tubular steel legs, of welded construction, each 10 feet in diameter. The rig was carried on the barge with the legs extending into the air.

The tug and barge proceeded from Galveston to Saldanha Bay, north of Cape Town, where some repairs were made to the legs. The voyage resumed, but one leg broke off and fell into the sea. The following evening the other two legs broke off. The breakages were the result of metal fatigue caused by the motion of the waves. While it was claimed that a "leg breaking wave" caused the final fracture, the court found that the weather encountered on the voyage "was within the range that could reasonably have been contemplated."

After the appellant rejected the respondent's claim under the policy for the loss of the three legs, the case came to trial before the Commercial Court, which held that the proximate cause of the loss was that the legs were not capable of withstanding the normal incidents of the insured voyage, including the weather reasonably to be expected. This constituted an "inherent vice" under Clause 4.4, meaning that appellant was not liable under the policy.

The Court of Appeals reversed, holding that the cause of the loss was an insured peril, the "leg breaking wave." The Supreme Court unanimously dismissed the appeal, holding that the cause of the loss was an insured peril rather than an inherent vice.

In its Reasons for the Judgment, the Supreme Court explained:

> 1. The precise issue before the Supreme Court, in accordance with the terms of the Marine Insurance Act, is whether the "proximate cause" of the loss was an insured peril, in the form of the stresses created by the height and direction of the waves encountered, or an "inherent vice" in the rig, for which the Marine Insurance Act specifically provides that an insurer is not liable. (There was no claim that the "inherent vice" clause in the policy had any different meaning from the Act).
>
> 2. The classic definition of "inherent vice" is that of Lord Diplock in Soya G.m.b.H. Mainz Hommanditgesellschaf v. White [1983] 1 Lloyd's Rep. 122: "It means the risk of deterioration of the goods shipped as a result of their natural behavior in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty."
>
> 3. The phrase "ordinary course of the contemplated voyage" was not intended to embrace weather conditions foreseeable on such a voyage. There is also no apparent limitation on the phrase "any fortuitous external accident or casualty." Therefore, the Supreme Court reasoned, "anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss from being attributed to inherent vice."
>
> 4. Applying these principles, it was not possible to fit the facts of the case before it into any normal concept of deterioration of the goods as a result of their natural behavior in the ordinary course of the contemplated voyage. Rather, the loss had some obvious characteristics associated with a fortuitous marine accident or casualty. In particular, the breaking of the legs was neither expected nor contemplated, and only occurred due to a wave

> of a direction and strength "catching the first leg right at the right moment, leading to increased stress and the collapse of the other two legs in turn."
>
> 5. The fact that the legs were not capable of withstanding the "normal incidents of the insured voyage, in particular the weather reasonably to be expected," did not make inherent vice the proximate cause of the loss. If that were the case, the policy coverage would only extend to "perils of the sea that were exceptional, unforeseen or unforeseeable," which, the Court opined, would frustrate the purpose of all cargo insurance, which is to provide indemnity for loss or damage caused by "all perils of the sea."

The court therefore held that the proximate cause of the loss was a covered peril of the sea, and not inherent vice.

Ship and Cargo Successfully Ransomed from Pirates Did Not Constitute a Total Loss

Masefield AG v. Amlin Corporate Member Ltd.,
[2011] EWCA 24 (Court of Appeals, January 26, 2011)

The BUNGA MELATI DUA was captured in the Gulf of Aden by Somali pirates while bound from Malaysia to Rotterdam with a cargo of bio-diesel owned by Claimant.

Negotiations, to which claimant was not a party, for payment of a ransom to obtain return of the vessel, its crew and cargo, took place between the vessel owner and the pirates. Prior to the conclusion of those negotiations, which ultimately were successful, the claimant made a claim under its cargo policy on the ground that seizure by pirates amounted to an actual total loss.

Under the Marine Insurance Act, 1906, a total loss of insured subject matter may be either actual or constructive. A marine policy covers both, unless it expressly provides otherwise. An actual total

loss occurs when the subject matter is destroyed, or the assured is "irretrievably deprived thereof."

A Constructive Total Loss (CTL) exists where the subject matter is "reasonably abandoned on account of its actual total loss appearing to be unavoidable." This is said to be the case where the assured is presently "deprived" of the subject matter and either a) it is unlikely the he can recover it, or b) the cost of doing so would exceed its value once recovered.

Where a CTL exists, the assured may treat it as a partial loss, or elect to treat it as though it were an actual total loss, by giving the insurer notice of abandonment. If the insurer declines the notice of abandonment, disputing that the circumstances amount to a CTL, the parties typically agree that the proceedings are deemed to have been commenced as of the date notice was given. The existence of a CTL (or not) is determined from the facts on the notice date, not subsequent events.

In this case, notice was given to the insurers while negotiations with the pirates were still going on. The insurers refused the abandonment, but agreed that the date of notice should be deemed the date of commencement of proceedings. Some 10 days later, the shipowner paid the agreed ransom, and the ship was released and proceeded to Rotterdam, where the cargo was safely discharged. The claimant nevertheless pursued the CTL insurance claim in preference to taking delivery of the cargo.

Thus the courts were faced with the question of whether seizure of cargo by pirates amounts to a total loss under a marine insurance policy, notwithstanding subsequent recovery of that cargo.

The case was tried in the Commercial Court in February of 2010. As to any claim of actual loss, the court noted that the test of whether the assured has been "irretrievably deprived" of property is an objective one, to be assessed as of the relevant time (the time of notice of abandonment) on the basis of the true facts then present, whether all of those facts were known to the assured or not. While

the fact of recovery of the vessel and cargo within a short period was not directly material, let alone decisive, the court was entitled to consider what in fact happened after the notice date to the extent it might assist in determining what the probabilities really were. Moreover, correspondence following the seizure and information in the public domain at the time showed that all interested parties were aware that the cargo was likely to be recovered. Other ships and cargos seized by Somali pirates had been promptly released following negotiations over a relatively short period. Here the seized ship and cargo were recovered 11 days later after payment of a ransom representing only a small portion of their value. The trial judge further noted that the assured could not be said to be "irretrievably deprived" of property if it was legally and physically possible to recover it, even if recovery required disproportionate effort. The assured had to establish that recovery was not possible. Mere capture by pirates did not prove that, because depending on the facts, recovery of possession is often possible, and indeed expected after the usual period of negotiation.

The alternative CTL claim also failed in the Commercial Court's view, because: 1. the cargo had not been "abandoned," for purposes of §60 of the Marine Insurance Act, which requires abandonment of any hope of recovery (here, the shipowner and cargo owners had every intention of recovering their property and were hopeful of doing so); and 2. there was no reasonable basis for regarding an actual total loss as "unavoidable," without which there could be no CTL.

The Commercial Court also rejected a public policy argument that release of the subject property in return for payment of ransom should not be considered relevant to whether a vessel and cargo were in practice irrecoverable. The court noted that payment of ransom is not illegal, and found no "clear and urgent" reason to declare it contrary to public policy. Courts in the past have held ransom payments recoverable as sue and labor expenses incurred pursuant to the assured's duties under the Marine Insurance Act.

From the Commercial Court's judgment in favor of the insurers, the claimant appealed. The Court of Appeal also found for the insurers.

The appellant abandoned the CTL argument on appeal, and focused solely on the claim of an actual total loss, claiming that seizure by pirates constituted an actual total loss as a matter of law. In the alternative, it argued that the taking amounted to "theft" under the Theft Act 1968, so an insured loss by theft, separately compensable under the policy, occurred at the moment of seizure.

Affirming the lower court's ruling on the question of actual total loss, the Court of Appeal held that there is no rule of law that seizure by pirates equals an actual total loss, although such a seizure may mature into an actual total loss depending on the facts. In this case, however, there was always a strong likelihood that payment of a small sum (compared to the value of the ship and cargo) would secure their return, which it did. This was no "irretrievable deprivation" of property, just a case of "wait and see."

The "theft" argument was rejected because it confused the concept of "peril" with that of "loss." There was a peril to be insured against, but the policy required a loss caused by that peril, and there could be no loss without irretrievable deprivation.

As to public policy, the Court of Appeals agreed with the lower court that there was no universally recognized principle that would allow it to conclude that payment of ransom was "beyond the pale" or "without any legitimate recognition." While the Act does not require payment of a ransom, it does not follow that any potential loss that can be averted by payment of ransom thereby becomes an actual total loss.

COMMITTEE ON MARINE TORTS AND CASUALTIES

May 5, 2011

Chair: Mary Elisa Reeves

Admiralty Jurisdiction

Johnson v. Royal Caribbean Cruises, Ltd., 2011 AMC 1171, 2011 WL 1004583 (S.D. Fla. March 18, 2011), rev'd, 2011 WL 6354064 (11th Cir. Dec. 20, 2011).

A cruise ship passenger was injured while attempting to ride a "flow-rider" continuous wave attraction on a cruise ship. The plaintiff sought jurisdiction on admiralty grounds. The court held that even if the location test was met, the connection to traditional maritime activity was lacking, stating that "while the cruise line industry is itself maritime commerce, it is unlikely that the cruise line industry would be disrupted by future FlowRider-related injuries, as falling off the board and injuring oneself is an inherent and unavoidable risk of using the FlowRider, an activity which is completely voluntary and must be purchased separately from the cruise fare." *Id*. at 1174-75. As for the connection test, the court held that the "FlowRider is a purely recreational activity that bears no relationship to traditional maritime activities such as navigation, piloting, and shipping." *Id*. at 1175.

[**Editor's note:** This decision was recently reversed and will be the subject of discussion in our next newsletter.]

Forum

Cleveland v. Accumarine & Transp., LP, 2011 AMC 1081, 2011 WL 939011 (D.S.C. March 16, 2011).

The court denied in *personam* jurisdiction over the defendant where the plaintiff, who was injured in Louisiana alleged jurisdiction in that he resided in South Carolina when he received a telephone call from defendant offering him employment, that he ac-

cepted the employment offer over the telephone from South Carolina, that defendant authorized South Carolina medical care providers to provide medical treatment to him, that defendant sent maintenance checks to plaintiff in South Carolina from around June 2008 through February 2009. The court found that all of the activities that were generated within the State of South Carolina were the result of the actions of the plaintiff and not the defendant. Plaintiff resides in South Carolina and plaintiff sought the follow-up treatment of medical providers there; and plaintiff requested that his maintenance check be sent to his residence.

Colindres v. Port City S.S. Servs., Inc., No. 10-23321-Civ., 2011 WL 1458088 (S.D. Fla. April 15, 2011).

Likewise, *in personam* jurisdiction was denied where the defendant employer had three contacts with the state of Florida: a phone call to the SIU union hall in Ft. Lauderdale, Florida, an email to an employee of the union hall in Ft. Lauderdale, Florida, and a subsequent telephone call to confirm receipt of the email. The court found that the contacts were insufficient minimal contacts, and further, they did not give rise to the plaintiff's cause of action.

Shore Leave

Whatley v. Waterman S.S. Corp., Civil Action No. 09-0532-WS-B, 2010 WL 5376327 (S.D. Ala. December 23, 2010).

The court granted summary judgment to defendant as to plaintiff's unseaworthiness and Jones Act claims. The plaintiff was employed as a cook aboard a vessel operated by the defendant. The vessel lay for years off the coast of Saipan, and the defendant arranged for a third party to provide launch services to ferry the crew to the island for shore leave and back to the vessel. The crew used a gangway to disembark at the Port of Saipan. The plaintiff was injured while returning to the ship after overnight shore leave. While walking back to the launch, but at least 70 feet from the gangway, she stepped in a pothole and fell, suffering several broken bones. The defendant, however, paid maintenance and cure.

Maintenance and Cure

Haney v. Miller's Launch, Inc., 773 F. Supp. 2d. 280 (E.D.N.Y. 2010)

Defendant sought summary judgment on the issue, inter alia, of whether or not it was responsible for the palliative pain treatment of the plaintiff. The court opined that whether pain is included in medical treatment may be a question of fact for the jury, but that it is time to reconsider the old rule, now out of the main stream of medical practice. The court denied summary judgment on the issue, holding that "[p]alliative care is now encompassed in the notion of recovery and maximum improvement." *Id.* at 292.

Lovos v. Ocean Fresh Sea Clam, Ltd., No. CV 08-1167 (JS) (ARL), 2010 WL 5665035 (E.D.N.Y. December 21, 2010)

Plaintiff, a per diem clam shucker, sought partial summary judgment awarding maintenance and cure. Plaintiff reported that he was injured aboard the defendant's vessel, but waited six days before making such report. The plaintiff alleged that the clam dredge hose disconnected and hit him causing back and neck injuries. The plaintiff did not complain on the date of injury and there was no observation of his injury. The captain observed and supervised his work on the day of the alleged incident and he had no complaint as to plaintiff's work that day. There was no record of any clam hose coming loose. Plaintiff also performed per diem work in the intervening days between the alleged injury and the report of injury. The court denied the motion for award of maintenance and cure on the grounds that there was a material question of fact as to whether or not the plaintiff was injured in the service of the ship.

Firestone v. Gibson, 2011 AMC 143, 2010 WL 4683991 (S.D. Ala. November 12, 2010)

Plaintiff fisherman brought claim for maintenance and cure claiming that he injured his ankle after stepping on a piece of gear. The plaintiff had been found to be 100% disabled by an administra-

tive law judge two years prior to his employment and was likely fully disabled for the prior 6 years. The award of maintenance and cure was denied on the grounds that the fisherman was 100% disabled prior to beginning the trip, even though the defendant employer failed to perform a pre-hire physical or interview concerning the fisherman's fitness. Plaintiff's leg was eventually amputated as a result of poor circulation -- unrelated to the alleged injury.

The defendant alleged that plaintiff fraudulently concealed his medical issues and was therefore not entitled to maintenance and cure. Plaintiff argued that he had known the defendant fishing vessel owner for many years, therefore he was aware of plaintiff's medical conditions at hire. The court held that plaintiff could not reasonably believe that his medical condition was not of importance to his employer or that plaintiff had reason to believe that he was fit for duty aboard the vessel.

Messier v. Bouchard Transp., 756 F. Supp. 2d 475 (S.D.N.Y. 2010)

In a case of first impression, the U.S. District Court for the Southern District of New York addressed the meaning of "manifested" in the context of maintenance and cure. Plaintiff captain sought maintenance and cure after being diagnosed with lymphoma. The lymphoma was only discovered during treatment received subsequent to the captain's falling from a ladder while he was leaving the vessel after being relieved. The captain never sought maintenance and cure for his back pain which was short lived.

The captain did seek maintenance and cure for his lymphoma on two theories; first, that his illness "manifested" while he was in the service of the ship. The court denied plaintiff's motion on the first theory, finding no reason to extend the applicability of maintenance and cure to diseases that were not "made evident or certain by showing or displaying" symptoms during service to a ship, citing plaintiff's own testimony that he was asymptomatic while he was in the service of the ship.

Plaintiff's second theory was that because the disease manifested while he was otherwise entitled to maintenance and cure, he was entitled to maintenance and cure for the lymphoma. The court disagreed noting that although plaintiff would have been entitled to maintenance and cure if the disease manifested while he was "*receiving*" maintenance and cure for his back injury, he never sought maintenance and cure for the injury. He was therefore not "*receiving*" maintenance and cure when his lymphoma became apparent – holding that mere eligibility for maintenance and cure is not enough.

Allision

In re Gore Marine Corp., 767 F. Supp. 2d 1316, 2011 AMC 1951 (M.D. Fla. 2011)

The passenger and operator of a recreational fishing vessel were injured when the vessel they were travelling in allided with an anchored dredge pipeline at night. The operator of the fishing vessel held a 100 ton master's license. The two had transited the area of the allision earlier in the day and no dredge or pipeline was present. While they were fishing, a dredge, support tugs and pipeline anchored in the area, which area was in open water and recommended in the Coast Pilot for anchoring. A tug was at each end of the 1800' pipeline.

The court applied both the *Oregon* and *Pennsylvania* rules. In attempting to overcome the presumption of the *Oregon* rule, the fishing vessel operator argued that the dredge was improperly manned and equipped, and lacked a lookout as required by Rule 5 of the COLREGS. The court found the dredge to be properly manned, equipped and trained and that Rule 5 was inapplicable to the anchored vessels. The court also found that there was no common law duty to maintain an anchor watch for a vessel at rest and without power. [**Editor's note:** The court cited a Fifth Circuit case that appears to be distinguishable on the grounds that, unlike here, that vessel was in a harbor. The fishing vessel operator also argued that Rule 7 was violated by failing to use all available means to avoid collision, and Rule 8 for failure to take action to avoid a collision.

Again, the court found the Rules inapplicable to an anchored vessel, and even if Rule 7 did apply, the court found that the dredge crew used all available means. The court, did however, find that the presumption was rebutted as the pipeline itself lacked all-around white lights as required by Rule 24(g) (although the failure to provide white lights was later determined to be non-contributory given that the pipeline was otherwise lit with a sufficient number of flashing yellow lights).]

In applying the Pennsylvania rule, the court found that the fishing vessel operator violated both Rule 6 and Rule 7 of the COLREGS by failing to maintain a safe speed and failing to determine if risk of collision existed. The operator testified that she saw both red and green sidelights, indicating a collision course, but could not make out the vessel. Having closed the distance she still could not make out the vessel. The court found that upon closing the distance and still having doubt as to the vessel she was approaching, the operator had a duty to slow her speed and alter her course to avoid collision and she failed to do either.

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

Northern Assurance brought a claim as subrogee to its insured seeking distribution of the funds paid by a town whose harbormaster allided with the assured's sailing vessel. The insured sought detention damages for loss of use of their sailboat during the short summer season and proffered evidence of the cost of a replacement vessel. The insureds had spent $125,000.00 and numerous hours preparing the vessel for use. Nevertheless, the court found that it was bound by the ancient precedent of *The Conqueror*, 166 U.S. 110 (1897), holding that detention damages are not available for recreational vessels.

Procedural Issues

Luera v. M/V Alberta, 635 F.3d 181 (5th Cir. 2011)

Plaintiff, suing both in rem against the ship and in personam against the owners, is entitled to jury on the entire matter when he asserts both admiralty and diversity jurisdiction. Because the claims arise out of one set of facts, one trier of facts should be used at trial.

Indemnity Agreements

Dinenno ex rel. Dinenno v. Lucky Fin Water Sports, LLC, Civil Action No. 08-5903 (JEI/JS) 2011 WL 1004680 (D.N.J. February 22, 2011)

A third-party complaint was filed by a jet-ski operator against the guardian of a minor passenger on a jet ski. The guardian signed the indemnity agreement as guardian for his son's childhood friend who was vacationing with them. The child was injured in a collision with another jet ski. The guardian remained ashore throughout. The complaint sought contribution under New Jersey statutory law; common law indemnification; and "contractual indemnification" based on the rental agreement.

The guardian agreed to "*release and further discharge* Lucky Fin Water Sports, L.L.C., . . . from all claims demands, actions, or causes of action on account of my death or *on account of any injury to me [i.e., the child]* which may occur from any cause during the trip." Dinenno, 2011 WL 1003680, at *2. He only agreed to indemnify Lucky Fin "against all loss, cost or damage on account *of any injury to persons or property* occurring or rising out of this lease." The court found that the guardian only agreed to indemnify Lucky Fin for injuries that the child might cause to another person, not his own injuries. With regard to injuries to the child himself might suffer, the guardian only agreed to release and further discharge any claim the child might have against Lucky Fin. The court further held that no reasonable factfinder could find the guardian at fault for the accident, which is a prerequisite to both the contribution and indemnification claims.

Right to Trial by Jury

Adams v. James Transp. Co., No. 5:09-CV-0036-R, 2010 WL 4789290 (W.D. Ky. November 17, 2010)

Plaintiff seaman initially filed a complaint seeking a jury trial. Plaintiff sought to file a third amended complaint to proceed under Rule 9(h) and waive a jury trial. The defendant, having asserted a counter-claim under 28 U.S.C. 1332(a) (Diversity jurisdiction) argued that such would deny the right to a trial by jury. Plaintiff having failed to meet its requirement of the amount in controversy on the counter-claim, and having no other independent basis for federal jurisdiction, the court permitted plaintiff to amend his complaint.

Seaman Status

Maddux v. U.S., No. 1:08-cv-442, 2010 WL 5184787 (S.D. Oh. December 15, 2010)

Vessel Operator filed a motion for summary judgment on Jones Act claim alleging that it was not the employer of a contractor hired by a 3rd party, but who worked aboard its vessel. The court denied the motion on the grounds that under the borrowed servant doctrine the plaintiff was subject to the control of the vessel's master.

The court found that while his direct employer controlled his work as a mechanic, plaintiff had many duties owed directly to the vessel operator, and more specifically, duties that he owed directly to the captain of the vessel. The ship operator had responsibility for the vessel's safety, and pursuant to this responsibility, the ship operator controlled plaintiff's participation in safety drills, fire drills, lifeboat drills, security drills, and first-aid drills.

Casser v. McAllister Towing & Transp., Inc., No. 10 Civ. 1554 (JSR), 2010 WL 5065424 (S.D.N.Y. December 7, 2010)

Defendant employer filed a motion for summary judgment on the issue of seaman's status under the Jones Act for their port engineer who suffered injury while transferring between two under way vessels. The port engineer admitted to spending only 20% of his time on underway vessels. At oral argument, plaintiff's counsel argued that once a person steps onto a vessel, he is subject to the perils of the sea. The court disagreed, holding that performing repairs and conducting inspections on vessels that are at dockside hardly exposes the plaintiff to "the perils of the sea," and "if this argument were accepted, then there would be no distinction between a longshoreman and a seaman-a conclusion that cannot stand in light of the two separate and mutually exclusive compensation schemes Congress established for longshoremen and seamen." *Casser*, 2010 WL 5065424, at *3.

The court further noted that the plaintiff took his orders from a land-based worker and he returned to his home every night after work and did not sleep or eat on the vessels, further suggesting that the plaintiff was not a seaman.

Mendez v. Anadarko Petroleum Corp., Civil Action No. M-10-1755, 2010 WL 5343181 (S.D. Tex. December 20, 2010)

Floating gas-production platform is not a vessel for Jones Act purposes. Instead, the platform is a permanently moored work area intended to extract gas and is not capable of maritime transportation. Therefore, plaintiff does not qualify as a seaman.

Smith v. Marine Terminals of Arkansas, Inc., No. 3:09CV00027 JLH, 2010 WL 4789167 (E.D. Ark. November 17, 2010)

Plaintiff drove 50-90 ton trucks, hauling various types of loose iron or steel from a dock barge owned by Marine Terminals to a scrap yard. The dock barge was a floating dock near the riverbank tied to the shore by suspension cables and connected to land by a

ramp. Plaintiff would back the truck down the ramp onto the dock barge where a crane operator would transfer iron or steel from river barges to the truck using a hydraulic crane fitted with a clamshell bucket. Plaintiff was allegedly injured when he placed his hand in a clamshell bucket, without the knowledge of the operator, and the operator closed the bucket. Focusing on "the essence of what it means to be a seaman" and "the congressional purpose" in enacting the Jones Act, the court concluded that plaintiff was not a seaman. The court then turned to plaintiff's §905(b) claim.

On that claim the issue was whether the negligence that caused plaintiff's injury was attributed to Marine Terminals in its capacity as a vessel owner or in its capacity as employer engaged in stevedore operations. The court found that plaintiff was injured while working on a vessel, the sole purpose of which was to engage in stevedore operations. The court declined to say as a matter of law that plaintiff was not engaged in vessel operations because in this instance vessel operations and stevedore operations were one and the same. The court noted that a jury could find that the dock barge did play a direct role in plaintiff's injury on the ground that Marine Terminals as vessel owner failed to provide a vessel with equipment required to safely draw the slack from the suspension cables. Marine Terminals' motion for summary judgment was therefore granted on plaintiff's Jones Act claim, unseaworthiness claim, and maintenance and cure claims, but denied on his §905(b) claim.

Pettis v. Bosarge Diving, Inc., 751 F. Supp. 2d 1222 (S.D. Ala. 2010)

A diver whose claim was based upon suffering an episode of decompression sickness was found to be a seaman where he spent over 30% of his time in support of employer's diving vessel fleet as deckhand, captain, apprentice diver, dive tender and diver over a two year period. The court found that he contributed to the function and accomplishment of the dive vessels' mission of providing dive services to its customers and that his service was substantial in both duration and nature when viewed in the context of his entire employment.

Death on the High Seas Act

Helman v. Alcoa Global Fasteners, Inc., 637 F.3d 986 (9th Cir. 2011)

The court held that DOHSA covers non-commercial aircraft accidents beyond 3 nautical miles and that Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (December 27, 1988), extending the territorial waters of the U.S. from 3 to 11 nautical miles, does not alter DOHSA's applicability; therefore, state law is preempted.

LHWCA

Albina Engine & Mach. v. Director, OWCP, 627 F.3d 1293 (9th Cir. 2010)

Because the analysis of liability in cases of multiple employers over time is to be conducted sequentially, starting with the most recent employer, the last responsible maritime employer is liable for payment of benefits under the LHWCA.

Great So. Oil and Gas, Co., et al. v. Director, OWCP, 401 Fed. App'x 964 (5th Cir. 2010)

Meyers, plaintiff, worked as a mechanic on a work-over rig mounted on a barge, which was spudded in at a well location in Louisiana state waters. Meyers allegedly injured his left knee when he slipped and fell between two barges. Meyers was initially paid state workers' compensation benefits but then sought retroactive and future total disability benefits under the LHWCA. Following a formal hearing, the Administrative Law Judge ("ALJ") concluded that Meyers was not a covered employee under the LHWCA because the barge was a fixed platform and not a vessel and Meyers was not engaged in a traditional maritime activity. The BRB reversed and held that Meyers was injured in the course of his employment on navigable waters and, therefore, under *Perini*, Meyers was a covered employee. The BRB remanded the case to the ALJ to award appropriate benefits. The ALJ awarded temporary total disability.

The BRB affirmed and this appeal followed. The only significant issue on appeal was whether Meyers qualifies for benefits under the LHWCA. Great Southern argued that performing oilfield work does not qualify as maritime employment and therefore Meyers had not satisfied the "status" requirement of the LHWCA to qualify for benefits. The appellate court disagreed, pointing out that when a worker is injured on actual navigable waters in the course of his employment on those waters, he satisfies the status requirement and is covered by the LHWCA. The appellate court held that the case was controlled by Perini and Bienvenu and there was need for a showing that Meyers was engaged in maritime employment. Because Meyers was injured while working on a vessel in navigable waters, the BRB correctly determined that Meyers was indeed covered under the Act. The court also rejected Great Southern's argument that Meyers' presence on navigable waters at the time of his injury was transient or fortuitous, because the BRB's conclusion to the contrary was supported by substantial evidence in the record. The appellate court declined to consider Great Southern's argument that Meyers is foreclosed from coverage under the LHWCA because his work assignment on the barge rendered him a member of the crew of a vessel, as that issue was not raised before the ALJ. The appellate court affirmed the BRB's award of benefits to Meyers under the LHWCA.

RECENT CASES ADDRESSING LIMITATION OF LIABILITY ISSUES

Christina K. Schovajsa, Esq.
Eastham, Watson, Dale & Forney, LLP, Houston, TX

Seventh Circuit holds that a Vessel Owner is Forbidden by FELA from Combining a Property Damage Counterclaim with a Limitation of Liability in Order to Offset a Personal Injury Claim under the Jones Act

Deering v. Nat'l Maint. & Repair, Inc., 627 F.3d 1039 (7th Cir. 2010)

Deering, who was employed by National as a riverboat pilot, sued National for injuries he sustained while operating a towboat to move barges at National's drydock facility. Deering originally filed claims in state court under the Jones Act and general admiralty law. National then filed a petition in federal district court under the Limitation of Liability Act seeking to limit its liability to Deering to the vessel's salvage value, which National represented to be $30,000. After the federal court stayed the state court action, Deering filed his claims in the limitation proceedings. National then counterclaimed, seeking damages of $800,000 (the value of the vessel before it sank). Deering then moved to dismiss National's counterclaim on the ground that counterclaims in the nature of setoffs to Jones Act claims are forbidden by section five (5) of the Federal Employers' Liability Act ("FELA"). The district court granted Deering's motion and National filed this interlocutory appeal under 28 U.S.C. § 1292(a)(3).

Setoffs in personal injury suits by employees are addressed in section 5 of FELA, which like the rest of that statute is incorporated into the Jones Act by reference. Section 5 provides that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury of death for which said action was brought." Recognizing that the Fifth Circuit had previously held in *Withhart v. Otto Candies, LLC*, 431 F.3d 840 (5th Cir. 2005) that a counterclaim against a seaman for property damages is not a "device" within the meaning of section 5 of the FELA, the Seventh Circuit expressly limited its decision in *Deering* to "merely" holding that "combining a property-damage counterclaim with a limitation of liability in order to wipe out a substantial personal injury claim under the Jones Act is a liability-exempting device forbidden by the Act" "rather than creating a conflict with the Fifth Circuit." *Deering*, 627 F.3d at 1048. "We leave for a future day (which may be long in coming, given the paucity of cases such as this) the resolution of the issue

whether a shipowner who does not seek to limit his liability should nevertheless be forbidden to set off damages for negligent damage to property against a Jones Act claim." *Id*.

Eighth Circuit Holds Rule F(1) Gives Court Discretion to Compound Interest on Security

Am. Milling Co. v. Brennan Marine, Inc., 623 F.3d 1221 (8th Cir. 2010)

This appeal (which is one of several stemming from an allision in 1998 between one or more barges being towed by a towboat belonging to American Milling and a moored casino boat owned by President Casino) involves an interpretation of Rule F(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions which outlines the procedure for posting security on a limitation fund and specifies the interest paid.

When it originally filed its limitation action in April 1998, American Milling submitted security to establish a limitation fund in the amount of $1.25 million. However, after American Milling sold the vessel for $2.2 million ten months later, the district court ruled that the fair market value of the vessel, and hence the value of the limitation fund, was $2.2 million. Thereafter, American Milling posted security in the form of a corporate surety bond in the amount of $2.2 million.

In May 2005, the Eighth Circuit affirmed the trial court's decisions regarding the parties' liability, American Milling's right to limits its liability and the value of the limitation fund and then remanded the case for further proceedings regarding damages. On remand, American Milling moved to deposit the cash value of the limitation fund, along with the simple interest accrued on its security since April 6, 1998 (which was the date it filed its limitation). Originally, the district court granted the motion on the belief that the request was unopposed. Shortly thereafter, President Casino filed a motion to set aside the court's order. President Casino argued that the interest on the fund should be compounded annually, and that the security should be maintained in the form most beneficial to the claimants throughout the proceedings, which in this case was

the bond. American Milling opposed the motion to set aside, contending that the "per annum" language of Rule F(1) permitted only simple interest. American Milling also asserted that because depositing funds with the court is a permissible means of offering security for a limitation fund under Rule F(1), the court could not require American Milling to maintain a bond at the above-market, six percent interest rate specified in the rule. The district court granted President Casino's motion and ordered that the six percent interest on the surety bond be compounded annually.

On appeal, the Eighth Circuit first found that the district court did not abuse its discretion in determining that the language "per annum" contained in Rule F(1) permitted compound interest on the security for the limitation fund. In so holding, the court recognized the "general rule" that compound interest is not allowed to be computed upon a debt but also noted that (a) there was an exception to the general rule in cases of equity; and, (b) limitation proceedings have long been recognized as "the administration of equity in the an admiralty court." In connection with the foregoing, the court observed:

> Interest on a limitation fund serves a compensatory purpose similar to that of prejudgment interest. President Casino and the other claimants affected by the allision were forced to finance their own repairs throughout the course of this protracted litigation. They were unable to invest those funds elsewhere to earn a compound rate of return. At the same time, American Milling's ability to post security for the limitation fund enabled it to invest the $2.2 million with the prospect of generating compound returns. Prejudgment interest is inadequate to compensate President Casino for the opportunity cost of the repairs, because no matter how much prejudgment interest is awarded, the recovery may not exceed the limitation fund and the damages alone in this case exceeded the value of the fund.

Am. Milling, 623 F.3d at 1226.

The court also declined to accept American Milling's argument that because depositing cash with the court is an acceptable method of posting security under Rule F, the district court must allow it to choose that option at any time during the proceedings, regardless of the effect on the claimants. In connection with the foregoing, the Eighth Circuit noted that when American Milling posted security of $2.2 million in January 2001, it had three ways to do so. American Milling "elected" to post a bond. That option required American Milling to pay interest on the security at the six percent annual rate specified in Rule F(1) but that choice also permitted the company to have continued use of its cash throughout the proceedings and to avoid interest payments altogether if the company was not found liable for damages. Once it became clear that American Milling was liable for 80% of the damages (which is a sum greater than the limitation fund) and interest rates were below the six percent required by Rule F(1), it was no longer advantageous for American Milling to maintain the security. A decision to allow American Milling to choose the option of depositing cash at this stage of the litigation would have favored the company's economic interests but would have been detrimental to President Casino. Based on the foregoing, the Eighth Circuit held that the district court did not abuse its discretion when it forbid American Milling to change its position at this stage in the litigation in a manner that would have been detrimental to the claimants.

Florida District Court Dismissed Limitation "Sua Sponte" Because Vessel Owner had not Received Written Notice of Claim and Failed to Offer any Facts in Support of His General Allegations that He was Entitled to Limitation

In re Ryan, No. 11-80306-CIV, 2011 WL 1375865
(S.D. Fla. April 12, 2011)

William Ryan's ("Owner") vessel exploded and caught fire while it was docked at a marina in Florida. The explosion and subsequent fired killed one person aboard the vessel, injured two others, and caused property damage to other vessels and docks. In his complaint for exoneration from or limitation of liability, the Owner

alleged "on information and belief" that he "anticipated" claims being filed by several individuals and entities. The Owner further averred in his complaint that while the cause of the explosion remained undetermined, the resulting damage was "done, occasioned and incurred without [his] privity or knowledge."

In holding that the Owner lacked statutory standing, the court noted that the Limitation of Liability Act permits a shipowner *who receives written notice of a claim* arising from a maritime incident to seek a limitation of his liability by filing an action in the district court within six months of receiving written notice of claim. Because the Owner's claim was not brought by one who had received a written notice of claim but rather by one who alleged that he "anticipates" that claims would be asserted against him, the Owner failed to show himself to be a person who had suffered an injury within the "zone of interests" intended to be protected by the statute or rule on which the limitation of liability claim is based. The court also found the Owner's complaint to be defective on the basis that it was factually insufficient to support a limitation of liability claim. More particularly, the court found that because the Owner offered only general legal conclusions such as "the resulting damage was done, occasioned and incurred without [his] privity or knowledge" and failed to provide even the minimal facts necessary to suggest the potential absence of fault on his part, thereby making the limitation of liability possible, his complaint failed to meet the requirement of Supplemental Rule F(2) that a vessel owner seeking limitation of liability "set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owners' liability shall be limited."

Automobile Accident Fails to Satisfy "Location Test" Necessary to Invoke Admiralty Jurisdiction

In re Catamaran Holdings, LLC, No. 10-00230, 2010 WL 4823209
(D. Hawaii Nov. 22, 2010)

An employee of Marine Charters, Inc., the owner pro hac vice of the vessel M/V PRIDE OF MAUI, assisted in tying the boat to the dock, washing the bow and window, and placing scuba equipment on the vessel. The vessel then moved from the North Pier in the harbor to the South Pier, where additional supplies and equipment were loaded, and crewmembers and passengers were boarded. Instead of driving the company van, an employee drove his own truck from the North Pier to South Pier to assist in the second stage of preparing the vessel for departure. The employee hit Mildred Winham while she was walking in the South Pier with her husband. The accident occurred as the Winhams were making their way along the South Pier to board a passenger excursion vessel operated by Pacific Whale. Mildred Winham allegedly sustained serious and permanent injuries while her husband allegedly sustained mental and other injuries as a result of the accident.

The incident gave rise to more than one legal action including this limitation of liability matter filed by the owners of the M/V PRIDE OF MAUI ("Owners") and one filed by Pacific Whale Foundation which is discussed below. In response to the Owners filing the instant action seeking exoneration or to limit their liability, the Winhams filed a motion to dismiss claiming that admiralty jurisdiction was lacking.

Because the Limitation of Liability Act does not provide an independent basis for admiralty jurisdiction, a court exercising jurisdiction over a complaint seeking exoneration from or limitation of liability must have independent admiralty jurisdiction over the underlying tort giving rise to the limitation action. A party seeking to invoke federal admiralty jurisdiction over a tort claim must satisfy conditions of both location and connection with a maritime activity. The location test requires that either the tort occur on navigable waters or the injury suffered on land was caused by a vessel on navigable waters.

In an effort to satisfy the location test, Owners first directed the court's attention to a line of cases that held the location test was satisfied where sequences of causal events start on board a vessel

and end on land, specifically ones that involved car accidents. However, the court promptly distinguished those cases (all but one of which involved intoxicated vessel crew members or passengers in "booze cruise" cases) because they all involved a tort that occurred on the vessel, (for example, the serving of too much alcohol), which inevitably led to an incident on land.

Next, the court rejected Owners' assertion that the location test was satisfied based on their contention that the employee was on a "land-based errand" because the record did not support the Owners' claim. The court reasoned that the employee could have just stayed on the vessel and gotten himself to the South Pier on the vessel. Additionally, there was no evidence that the employee's supervisor requested or required him to drive his own vehicle. As such, it was unclear how his transit was in the service of the vessel.

Owners also urged the court to view any activity within the scope of a crewmember's employment to be "in service of the vessel" and therefore as satisfying the location test. The court acknowledged that this reading applied in certain Jones Acts claims and maintenance and cure claims, but held that those phrases were inapplicable in this case because the injury was to a third party and not to a crewmember. The court went on to note that even if it was to apply the reading urged by the Owners, there was no evidence that the employee was acting in the scope of his employment or in the service of the vessel at the time of the accident.

Waiver does not Constitute a Maritime Contract and thus Confer Jurisdiction Where the Relationship Between the Incident Underlying the Cause of Action and the Terms of the Waiver were far too Attenuated to be a Causal Relationship

In re Pacific Whale Found., No. 10-00650, 2011 WL 1134312 (D. Hawaii March 24, 2011)

Under the same facts as *Catamaran Holdings*, Pacific Whale filed a complaint for the exoneration from or limitation of liability. In conjunction with the court's ruling regarding jurisdiction in *Cata-*

maran Holdings, the court issued an "Order to Show Cause Why Case Should Not be Dismissed for Lack of Admiralty Jurisdiction" herein. In response, Pacific Whale alleged the same facts. However, Pacific Whale alleged that its limitation petition did not rely on federal admiralty tort jurisdiction but, rather, was based on a waiver that constituted a "marine contract". The court disagreed noting that the fundamental problem with Pacific Whale's argument was that this dispute was not covered at all by the waiver because the waiver expressly referred to "boating and snorkeling," and released Pacific Whale from liability for "personal injuries or wrongful death that may occur during the forthcoming activities as a result of the inherent risks or as a result of negligence." In coming to this conclusion, the court reasoned that the accident was not a part of the "forthcoming activities" because the Winhams had not reached the boat and were not in any of Pacific Whale's offices and/or with any Pacific Whale agent at the time of the accident. Additionally, neither the automobile accident nor Mildred Winham's injuries could be said to have "arisen out of" boating or snorkeling.

Limitation Plaintiff Straddles the Line between Legitimate use of Limitation Proceedings and use of Proceedings as an Offensive Weapon

JNB Marine, Inc. v. Stodghill, 769 F. Supp. 2d 1028
(E.D. Va. 2011)

JNB Marine, Inc. and C & M Industries, Inc. ("Owners") initiated limitation proceedings approximately three months after Stodghill filed suit in state court asserting claims of Jones Act negligence, unseaworthiness, maintenance and cure, and punitive damages. In response, Stodghill filed a motion to dissolve the injunction. Owners then filed a motion to dismiss Stodghill's claim for lack of subject matter jurisdiction.

The court granted Stodghill's motion to dissolve the injunction as he was the sole claimant and made the proper stipulations in support of his request. The court then addressed the Owners' motion to dismiss for lack of subject matter jurisdiction wherein Owners argued that the court should dismiss Stodghill's claim because he was not a seaman as a matter of law, and therefore, the court must dismiss his claim for lack of subject matter jurisdiction. In denying the motion, the court noted that by opposing Stodghill's motion to dissolve while simultaneously pursuing a motion to dismiss for lack of jurisdiction, Owners were straddling the line between a legitimate use of the limitation procedure and "attempting to use the Petition for Limitation of Liability as an offensive weapon." *JNB*, 769 F. Supp. 2d at 1031.

Vessel Owner Exonerated where Improper Lighting did not Cause the Accident

In re Gore Marine Corp., 767 F. Supp. 2d 1316, 2011 AMC 1951
(M.D. Fla. 2011)

In order to transfer equipment, Great Lakes Dredge & Dock Company, LLC ("GLDD") chartered three tugboats. After preparing to tow the equipment, the resulting setup, which included a floating dredge pipeline, was approximately 1,800 feet long. While in transit, it became apparent that the tow would not be completed before the arrival of bad weather so the decision was made to drop anchor beyond the demarcation line and wait for better weather. The piping was tightened and the lighting along the piping was checked before the equipment was ultimately staged for the evening. Approximately an hour later and after the sun set; Donna Skaggs, who was returning from a fishing trip in the Gulf of Mexico in a 24-foot Boston Whaler, struck the pipeline causing injury to Skaggs and her passenger. Thereafter, the owner of the lead tug, Gore Marine, filed a complaint for exoneration from or limitation of liability.

In an attempt to rebut the *Oregon* Rule and establish her right to the *Pennsylvania* Rule and its presumption, Skaggs presented several different theories on which the court could hold Gore Marine negligent or in violation of a regulation. In the end, the only regulation that the court agreed Gore Marine was in violation of was COLREGS Rule 24(g) regarding the shape, size, and color of the lighting. In so determining, the court found the pipeline was well

lit, but found that the lighting setup was not within the exact requirements of Rule 24(g). The court also found Skaggs to be in violation of COLREGS Rules 5 and 6 based on her course and speed under the circumstances. As both vessels were in violation of regulations, the *Pennsylvania* Rule required a finding that the statutory fault of both vessels contributed to the accident unless the court found that one vessel could not have caused the accident. Ultimately, the court held that the cause of the accident was Skaggs' failure to see the lights and that Gore Marine's non-compliance with 24(g) regarding the shape, size, and color of the lighting was not a material factor and could not have contributed to the allision. Judgment was entered in favor of Gore Marine and it was exonerated from liability.

Dismissal of Owner's Complaint was Improper Pending Resolution of Question Whether Negligence of a Managerial or Ministerial Employee was to Blame for the Incident

In re Spirit Cruises, LLC, No. 10 C 5438, 2011 WL 529462 (N.D. Ill. Feb. 3, 2011)

Spirit Cruises, LLC was the owner of a passenger cruise vessel upon which Margie Holmes ("Decedent") sustained fatal injuries. Spirit filed a complaint for exoneration from or limitation of liability and, in response, the representatives of Decedent's estate ("Claimants") filed a motion to dismiss contending that Spirit, as both owner and operator of the vessel, could not possibly have lacked "privity and knowledge." Spirit responded by asserting that the court could not address privity and knowledge until negligence was determined. Spirit was correct that the usual procedure is to address negligence before determining the privity and knowledge of the ship owner; however, courts have recognized an exception "where it is apparent on the face of the complaint that the owner has privity and knowledge." Under the exception, a court may dismiss the complaint without a determination as to negligence.

The court found this matter was controlled by and analogous to *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993). More particularly, because Spirit was a corporation,

the issue of privity and knowledge turns on what type of employee was responsible for the negligence. "The 'privity or knowledge of purely ministerial employees is not attributable to the corporation.' However '[i]f a managerial employee is possessed of privity or knowledge, i.e., if he or she personally participates in the activity that caused the alleged loss, the corporation is precluded from the benefit of the Limitation Act.'" *In re Spirit*, 2011 WL 529462, at *2. In denying the Claimant's motion to dismiss, the court held that, similar to the case of *Great Lakes Dredge & Dock Co*., dismissal was inappropriate until the question of whether the alleged negligence was that of a managerial or ministerial employee.

Owners Charged with Both Privity and Knowledge of Employee's Negligence and Unseaworthiness of a Vessel

In re Alex C. Corp., Nos. 00-125-00-DPW, 01-12186-DPW, 2011 AMC 157, 2010 WL 4292328 (D. Mass. Nov. 1, 2010)

This litigation followed in the wake of a Boston Harbor oil spill that occurred when a tug boat allided with the tanker vessel it was meant to be undocking. Bay State Towing Company, Inc. was employed to un-dock the vessel and arranged for three tugs (the ALEX C., LITTLE JOE, and QUENAMES) to assist in the procedure. While Alex C. Corporation technically owned the vessel the ALEX C., the court later determined that Alex C. Corporation was a shell corporation for Bay State with the sole purpose of owning the ALEX C.

Captain Michael Duarte, Vice President of Operations for Bay State and the docking master, was assigned by Bay State to oversee the operation. The captain of the LITTLE JOE did not arrive on time, so Duarte instructed the first mate of the QUENAMES to assume control of the vessel while the captain of the QUENAMES, Conte Coluntino, brought the LITTLE JOE to the terminal where the M/T POSAVINA was located. Upon arrival to the terminal, the ALEX C. was positioned by the port stern quarter of the M/T POSAVINA, while the LITTLE JOE assumed a position along the sea wall further astern of the tanker. At that time, Colun-

tino, with Duarte's permission, left the LITTLE JOE to return to the QUENAMES leaving Scott Van Pembrook, an unlicensed deckhand and engineer, the sole person aboard the LITTLE JOE. Before the tanker was unmoored, it began testing its engines. The wash from the tanker's second ahead engine caused the LITTLE JOE to swing starboard against the sea wall. In an effort to assist the LITTLE JOE and the inexperienced Van Pembrook, the captain of the ALEX C., Christopher Deely, attempted to maneuver the ALEX C away from the M/T POSAVINA to a position further aft of its position along the tanker. Deely erred in maneuvering the ALEX causing the tug to impact the hull of the M/T POSAVINA. A fender of the ALEX C., which had been damaged prior to that day and never repaired, made metal-on-metal contact with the M/T POSAVINA in the flared area of the tanker's hull puncturing it, thus causing the oil contained within to spill into the water. As a result, Alex C. Corp and Bay State filed this limitation action.

The court first determined that Duarte's decision to allow the LITTLE JOE to be solely manned by the untrained Van Pembrook and Deely's operation of the ALEX C, both constituted negligence. In addition, the court found that the condition of the fender aboard the ALEX C rendered that vessel unseaworthy and the presence of only Van Pembrook aboard the LITTLE JOE made that vessel unseaworthy as well. The court then turned to whether Alex C Corp. and Bay State lacked privity and knowledge of the aforementioned negligence and unseaworthiness.

In holding that the Bay State had privity and knowledge of both the negligence of Duarte and the unseaworthiness of the LITTLE JOE, the court highlighted the fact that Duarte was a high-level employee of Bay State and was directly involved in the decision regarding the manning of the LITTLE JOE; therefore, his actions were attributable to Bay State. Additionally, the court held that both Alex C. Corp. and Bay State had privity and knowledge of the unseaworthiness and negligent operation of the ALEX C. In so doing, the court reasoned that Deely was an agent of both entities and thus his actions, as well as his knowledge of the damaged fender, could be imputed to both Alex C. Corp. and Bay State.

Executive's Direct Involvement in Indicate Privity and Knowledge

Haney v. Miller's Launch, Inc., 773 F. Supp. 2d 280 (E.D.N.Y. 2010)

Miller's Launch owned a 42-foot crew boat that provided water taxi service throughout the New York ports' waterways. Robert Haney was a deck hand aboard the crew boat as it was traveling from its base on Staten Island to a pier in Manhattan. The water was choppy making maneuvering the vessel more difficult. As the vessel was attempting to dock at 34th Street, the vessel ran into the pier and then a bulk-head causing Haney to be thrown to the deck of the crew boat. Haney sought immediate medical attention for injuries he sustained to his back and neck. The captain of the crew boat contacted Miller's port office to request the medical attention. The Vice President of Operations for Miller instructed the captain to return to the base on Staten Island before providing aid, because he believed that there was too large a height difference between the 34th street pier and the vessel's deck to safely offload Haney. After the alleged incident, Haney filed a lawsuit in federal district court. Subsequently, Miller moved for a summary judgment, or in the alterative, to limit its liability to the value of the vessel.

In deciding that limitation of liability had not been established, the court held that control by Miller's headquarters, evidenced by the Vice President of Operations' order to return to the pier on Staten Island before providing medical care, was sufficient to find that Miller possessed privity and knowledge of the negligence alleged by Haney. In connection with the foregoing, the court stated, "the nature of the vessel's voyages -- providing taxi service over the New York ports' waterways -- suggests the opportunity for more detailed control by the owner and responsibility of its executives, who were virtually on the scene, to supervise the vessel's ongoing seaworthiness more closely than if the vessel were on the high seas." *Haney*, 773 F. Supp. 2d at 289-90. The court further opined, "the underlying theory of limited liability as a policy to encourage investment in risky, long sea voyages has little relevance to the [vessel's] meanderings within New York harbor, in sight of its home port." *Id.*

Owner Entitled to Limitation of Liability where it Lacked Privity and Knowledge of Captain's Negligence

Delta Towing LLC v. Basic Energy Servs.,
No. 6:08CV0075, 2011 WL 102717 (W.D. La. Jan. 12, 2011)

Delta Towing LLC ("Delta") was hired by Basic Energy Services to tow a barge to Sabine Lake. Delta assigned two tugboats to complete this task. The captain in charge was on the lead tug pulling the tow. Delta's safety protocol required the captain of the tug complete a "Pre-Tow Safety Questionnaire" prior to setting off. The process of filling out the questionnaire required the captain to evaluate the planned route for hazards, list the dimensions of the tow, and identify all hazards (including bridges) expected during the voyage. Despite the requirement, the captain failed to fill-out the questionnaire. As the tow was proceeding under a bridge, one of the barges allided with the bridge pulling the barge's mast out of position, resulting in extensive damages to the barge. Approximately fifteen (15) minutes prior to the allision, the captain had turned the controls of the tugboat over to an apprentice mate so that the captain could go to his cabin and rest. The license held by the apprentice did not permit him to operate the vessel unless the captain was present on the bridge.

Delta filed a limitation complaint seeking to limit its damages to $866,496.00 and Basic responded with a claim for $927,424.27 for all the property damage caused during the allision. Delta admitted that the cause of the allision was the captain's failure to complete the pre-tow questionnaire and/or calculate the clearance under the bridge but denied that it had privity or knowledge of this failure. Delta also admitted that Delta management was at fault for having a mate with an apprentice license at the wheel while towing 24 hours a day but expressly denied that this causally contributed to the allision. The court found that Delta was entitled to limitation because the evidence demonstrated that Delta Towing had an adequate safety system in place, such that any failure on the part of the captain to execute the pre-tow questionnaire in this instance was not within Delta's privity and/or knowledge. Further, the court found that the

presence of the apprentice on the bridge, instead of the captain, was not a proximate cause of the accident because the accident would have happened regardless of the captain's presence due to the fact that the captain had failed to calculate the clearance under the bridge prior to departure.

Evidence of More than "Mere Navigational Errors" by Captain of Vessel Precluded Summary Judgment on Vessel Owner's Lack of Privity and Knowledge

Limon v. Berryco Barge Lines, L.L.C., 787 F. Supp. 2d 580
(S.D. Tex. 2011)

The plaintiffs and cross claimants in this case alleged that Berryco Barge Lines, L.L.C. ("Berryco") was liable for injuries the plaintiffs sustained in an allision between a Berryco vessel on which they were passengers and an unlit barge. Among other things, the plaintiffs alleged that Berryco was negligent by entrusting its vessel to Captain Turrentine, who was piloting the vessel while intoxicated, and by failing to implement proper safety procedures. Berryco moved for summary judgment on issues including its right to limitation. With regard to limitation, the issue was whether Berryco knew or should have known of "the conditions or actions likely to cause the loss." Generally, "errors in navigation" are not attributable to the owner on *respondeat superior* for limitation purposes. However, courts have found that owners may nonetheless be held liable for a captain's negligent navigation of a vessel when the owner's negligence contributed to the navigational errors.

In denying Berryco's motion for summary judgment, the court cited two Fifth Circuit cases and compared the facts in each case to the case at bar. The two cases were *In re Kristie Leigh Enterprises*, 72 F.3d 479 (5th Cir. 1996) and *Trico Marine Assets, Inc. v. Diamond B. Marine Servs., Inc.*, 332 F.3d 779 (5th Cir. 2003). In *Kristie Leigh*, the Fifth Circuit held that there was no evidence that the owner had "knowledge that [the captain] was unsafe," and the record did not indicate that the captain needed additional training or instruction in performing his duties. The opposite held true in *Trico*

Marine, where the Fifth Circuit determined that the corporation had a more "hands-off" approach to management. The corporation in *Trico Marine* "sent the captain out in fog without a lookout, without training in using the radar, and with an excessively noisy engine." The Fifth Circuit determined that these facts showed "far more than mere navigational errors." After examining the facts of the two cases, the court acknowledged that the present situation more closely resembled the facts of *Trico Marine* than *Kristie Leigh*. More particularly, the captain of the Berryco vessel was sent by Berryco out at night with a radar that could malfunction if used with the GPS system and/or that the captain did not know how to use the radar and without a navigational map that could have alerted him to numerous obstacles in the lake. The court also pointed to evidence in the record that Berryco conducted a minimal investigation into the captain's competence and that the captain piloted the vessel at full speed and without lights while consuming alcohol. Lastly, the court noted that unlike the *Kristie Leigh*, there is a question of whether Berryco made any effort to ensure that the captain was trained in the safe operation of Berryco's vessels.

Stay Lifted to Allow U.S. Government to File Complaint Against Limitation Petitioners for Removal of Sunken Rig Pursuant to the Rivers and Harbors Act, 33 U.S.C. §§ 401–476

T. Moore Servs., LLC v. Rentrop Tugs, Inc.,
No. 10-1221, 2011 WL 201633 (W.D. La. Jan. 20, 2011)

T. Moore Services, LLC was the owner of a salvage yard that purchased numerous scrap rigs located in Lake De Cade. T. Moore employed several towing companies to transport the rigs to the salvage yard. During the transportation of one of the rigs, it began to take-on water and ultimately sank. T. Moore filed suit against the towing companies and their insurers. In response, the towing companies filed individual complaints seeking exoneration from and/or limitation of liability. Later, the United States filed a claim in the limitation proceedings requesting that the court lift the stay to allow the United States to file complaints against the limitation petitioners for violations of the River and Harbors Act of 1899,

33 U.S.C. §§ 401-476. Citing *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 442 (5th Cir. 1977), the court noted that the liability of parties for wreck removal costs under the River and Harbors Act is not limited by the Limitation Act. Based on the foregoing, the stay was lifted in order to allow United States Government to file its complaint.

All Claimants, Including Contribution Claimants, must Enter Stipulations to Protect Limitation Petitioner

In re RQM, LLC, No. 10 CV 05520, 2011 WL 98472
(N.D. Ill. Jan. 12, 2011)

RQM, LLC was the owner of a motor yacht chartered by Brunswick Corporation and Brunswick Boat Group (together "Brunswick"). During an event on the yacht, Scott Vandenberg fell from the yacht's stern top deck to its stern well deck sustaining significant injuries. Subsequently, RQM filed a complaint for exoneration from or limitation of liability and deposited security of $1,624,000 with the court. Three claimants responded to the complaint: Mr. Vandenberg, his wife (together "the Vandenbergs"), and Brunswick. The Vandenbergs alleged various tort and related state law claims against RQM and Brunswick seeking damages of $50,000,000. The Vandenbergs also filed a motion to dissolve the injunction to allow them to file their actions in state court. The Vandenbergs expressly agreed to enter all the stipulations required to lift the stay; however, Brunswick, which had a claim for contribution and indemnity against RQM, would not. The Vandenbergs contended that the court should dissolve the Limitation Act injunction based on the "single claimant" exception to the Limitation Act (thereby allowing the Vandenberg to proceed in state court against both RQM and Brunswick) because their proffered stipulations included a stipulation which they claimed "obviated" the need to consider Brunswick a second claimant. Specifically, the Vandenbergs agreed not to enforce any judgment obtained in state court against Brunswick that could expose RQM to a contribution claim in excess of the value of the limitation fund. However, because Brunswick would not stipulate that it would not seek contribution or indemnifi-

cation from RQM in excess of the limitation fund, the court was not satisfied "that RQM's right to seek limitation of liability would be adequately protected in the state court proceedings." Accordingly, the court denied the Vandenberg's motion to dissolve the injunction.

District Court in Utah Adopts Position that Appropriate Stipulations must be Made by Third-Party Claimants

In re Aramark Sports and Entm't Servs., LLC,
No. 2:09-CV-637-TC, 2010 WL 4791443 (D. Utah Nov. 18, 2010)

Three couples rented a 20-foot powerboat from Aramark Sports and Entertainment Services, LLC. While the three couples were on a lake, the boat sank, killing two of the couples. One of the couples survived as they were able to swim to shore. Aramark filed a complaint with the court to limit its liability to value of the vessel after the incident which was undisputedly $0. The representatives of the estates and heirs of the two couples who drowned (the "estates") moved to stay the limitation of liability proceeding so that they could pursue their claims in state court. In connection with the foregoing, the estates made the appropriate stipulations to protect Aramark's right to have the court determine all issues related to Aramark's limitation of liability claim; however, the third party claimants, which were the Bradys (the couple that survived) and Baja Marine, the alleged manufacturer of the boat, refused to similarly stipulate.

In denying the motion to lift the stay of the estates, the court rejected the position held by the Sixth and Eighth Circuits that view third-party claims as derivative of the first-party claims so as to require stipulations from only the first-party claimants. Instead, the court followed the precedent of the Second and Third Circuits which hold "that as long as there is a potential set of circumstances in which a shipowner could be held liable in excess of the limitation fund, the reasonable prospect of claims for indemnification or contribution should constitute a multiple claimant situation necessitating a concursus." *In re Aramark*, 2010 WL 4791443, at *2. Because the Bradys and Baja Marine would not file similar stipulations, the

court held that the estates' stipulations alone could not ensure the shipowner's right to limit its liability such that the court could lift the stay.

Vessel Owner Granted Default against Parties that Filed Answers but not Claims

In re Beauvois, No. 2:10-cv-480-FtM-36SPC, 2010 WL 5055833
(M.D. Fla. Dec. 3, 2010)

Owner of a vessel filed a complaint for exoneration from or limitation of liability within six months of first receiving written notice of a possible claim against him arising from the collision between his vessel and another. Pursuant to Supplemental Rule F(4), Owner filed an approved Notice of Monition in the local daily newspaper requiring all claimants to file their respective claims and answers by October 22, 2010 or be defaulted. Before the deadline passed, several parties appeared through counsel and filed answers to the complaint but did not file claims. Within said answers, the "claimants" simply admitted or denied the allegations in Owner's complaint and/or included affirmative defensives; however, none included claims or counterclaims against Owner. After the deadline passed, Owner filed a motion for entry of default asserting that the deadline to file claims had passed and no claims had been filed. Citing Supplemental Rule F(5) and precedent requiring a claim be filed first and prior or contemporaneously with an answer, the court determined that the claimants' answers, alone, were insufficient "because a person who has not presented a claim for damages may not [ ] answer the limitation claim and contest the allegations therein." *In re Beauvois*, 2010 WL 5055833, at *2. As a result, the court ruled that default be entered against all the individuals who filed answers and all other non-filing claimants.

Notice that Claimant was Hospitalized and Seeking "Documentation Regarding any Investigation Done" Deemed Insufficient to Trigger the Limitation of Liability Act's Six Month Prescriptive Period

In re Weber Marine, Inc., No. 09-8071, 2010 WL 4884436 (E.D. La. Nov. 23, 2010)

This cause of action arose from an incident where Jerry Billiot was captaining a tugboat owned by Weber Marine, Inc. across the Mississippi River on February 4, 2009. As the vessel was traversing the river, Billiot alleged that he was exposed to chemicals that were spilled in the river and sustained injury as a result. On February 6, 2009, counsel for Billiot sent correspondence wherein he stated that "Billiot had been hospitalized because of the [ ] accident" and sought "documentation regarding any investigation done with respect to the incident." *In re Weber Marine,* 2010 WL 4884436, at *1. On September 24, 2009, Billiot filed suit in state court. Subsequently, on December 30, 2009, Weber filed its limitation of liability complaint with the court. In response, Billiot filed a motion seeking dismissal of Weber's complaint "because it was not timely filed and the parties should be allowed to continue the litigation pending in state court." *Id*. Although the correspondence on February 6, 2009, provided details of the incident, the court found that it did not satisfy the notice of claim requirement, because it failed to inform Weber that it appeared to be responsible for the damage in question. Furthermore, the letter failed to inform Weber of Billiot's intention to seek damages from Weber, and the letter did not reveal a reasonable possibility that the claim is subject to limitation. As the February 6, 2009 correspondence was deficient in these respects, the court held that Weber's limitation of liability complaint was timely filed.

Alternatively, Billiot sought a grant of summary judgment "because it [was] clear that Weber Marine had privity or knowledge of the unseaworthiness of the [vessel] and Weber Marine's negligent safety procedures and training." *Id*. As an assessment of whether Weber was negligent is the first prong in the two-prong analysis

of determining if a shipowner may limit its liability, the court emphasized that there were genuine issues of material fact regarding whether Weber was negligent, specifically, if Weber had a duty to supply on-board equipment responsive to chemical exposure. Consequently, the court held that it need not consider the second prong, whether Weber had privity and knowledge, because there was a genuine issue of material fact concerning the first prong, negligence.

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