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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 2012 meeting in New York. We are very pleased that the list of contributing Committees is longer than usual, with submissions from the Committees on International Organizations, Maritime Bankruptcy and Salvage being added to the more regular contributions from Arbitration, Carriage of Goods, Cruise Lines, Fisheries, Marine Ecology, Marine Insurance, Marine Torts and Recreational Boating. These newsletters present a very broad view of the present admiralty and maritime practice.

In accordance with our practice, we honor our past president George W. ("Bunky") Healy, III of New Orleans, who passed away on November 20, 2012 for his significant contributions to the work of our Association and to the spirit of our maritime bar. We have re-instituted the practice initiated by Gordon Paulsen of inviting past presidents to write short remembrances of a past president.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this edition: Corey R. Greenwald of Nourse & Bowles, LLP in New York; Patrick J.R. Ward of Hand Arendall LLC in Mobile; and Arthur Alan Severance of Sands Lerner LLC in Los Angeles. We appreciate their help. However, we remain responsible for any errors or ambiguities that may have escaped their view.

As in the past, we remind readers that articles, case notes and comments published in 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

George W. Healy, III

George W. ("Bunky") Healy, III, 38th president of The Maritime Law Association of the United States and omnipresence at its gatherings for over 50 years, died at home in New Orleans on November 20, 2012, after a lengthy illness.

Bunky, the son of George W. Healy, Jr. and the former Margaret Alford (both of Natchez, Mississippi), was born March, 8, 1930, in New Orleans, just as then U.S. Senator Huey P. Long of Louisiana was beginning his intensive campaign to become president of the United States. Bunky's childhood and teenage years were enhanced by many adventures with his Alford and Gilchrist cousins at Hopedale Plantation near Rolling Fork in the Mississippi Delta (said to stretch from the lobby of the Peabody Hotel in Memphis in the north to Catfish Row in Vicksburg in the south). In her many descriptions and references to these adventures by Bunky's cousin, the southern writer Ellen Gilchrist, Bunky is the only family member referenced by his true name (well, sort of), "Bunky." Otherwise, he lived his entire life in New Orleans except when his father was called to Washington, D.C. to be Director of the Office of War Information during World War II, and during the Korean Conflict when Bunky served as a naval officer on the West Coast and in Korea. After an extended period of R&R in his parents' home after his discharge from the Navy in 1953, and upon his father's strong suggestion that it was high time he entered the world of the gainfully employed, he instead enrolled in Tulane Law School.

After graduation from law school, Bunky entered the employ of Phelps, Dunbar, Marks, Claverie & Sims (now Phelps Dunbar LLP), where he practiced admiralty law on a global basis with distinction as associate, partner and of counsel until his death. He was active in many professional societies, including the American Bar Association, in which he served in its House of Delegates; New Orleans Bar Association, of which he was president in 1992; and The Maritime Law Association of the United States, over which he

presided in 1992 and 1993.; He was elected a Fellow of the American College of Trial Lawyers, and a Life Fellow of the American Bar Foundation and the Louisiana Bar Foundation. He was a Titulary member of the Comité Maritime International. He was a member of the Planning Committee of the Tulane Admiralty Law Institute and a frequent lecturer at maritime law conferences and seminars both domestically and abroad. He was a Master of the American Inns of Court. In 1995, he was selected as New Orleans Bar Association's Distinguished Maritime Lawyer of the Year.

Of all the many professional organizations in which he was active, he held dearest his membership in and service to The Maritime Law Association, among whose members he numbered many of his closest friends and colleagues.

In 1996, he received the President's Commendation from the Louisiana Association of Criminal Defense Lawyers for his years of court appointed, *pro bono* representation of Curtis Kyles, who had been convicted of first degree murder in 1984 and was then confined on death row at the Louisiana State Penitentiary at Angola, awaiting execution. The United States Supreme Court, in 1995, granted a writ of *certiorari* for which Bunky petitioned and ultimately reversed Kyles' conviction and ordered a new trial. Bunky was awarded the Stephen Victory award from the Louisiana State Bar Association in 1997 for an article he wrote about the Kyles' representation for the *Louisiana Bar Journal*.

A gifted raconteur, he easily and often entertained friends (and any others within earshot) with many anecdotes, some true and others not nearly so, including the misadventures of the infamous Dr. Smedley and Buford the Bird Dog.

Bunky is survived by his wife of 38 years, Sharon, 4 sons and a daughter, 11 grandchildren and many cousins, friends and pets.

He will be very much missed by family and friends - There will never be another like him!

By: Winston Rice

Remembrance

I was privileged to follow Bunky as president of The Maritime Law Association and to be prepared by Bunky for that position. Bunky was a kind, thorough and efficient leader of our Association. Bunky went the extra mile for a person who needed his help and for our organization. I was present in Brussels when Bunky nominated Howard McCormack as a Titulary member of the Comité Maritime International in French. Bunky could have of course made the nomination in English, but he went the extra mile and prepared extensively to make the speech in French.

Bunky's greatest legal accomplishment must have been his *pro bono* representation of Curtis Kyles. In typical thorough Bunky fashion, he took that death row case all the way to the Supreme Court, where he won. Not many admiralty lawyers have saved someone's life, but Bunky did.

We are probably all better people for having known Bunky.

By: Chester D. Hooper

Remembrance

The attributes that Bunky brought with him to the presidency of The Maritime Law Association were many fold. He had countless friends who admired him personally and professionally. The number of his friends was exceeded only by the number of jokes that he was able to tell in an incredibly funny manner. Bunky's two years as president from 1992 to 1994 were productive and meaningful. The attribute that he carried forward and instilled in all of us was the fact that his kindness and his sense of responsibility to each member was sterling. Such attribute must be instilled in every action the president takes to make a volunteer organization successful. He reviewed all of his efforts, making sure that nothing would ever approach a strident word or deed. This was certainly his greatest success as he continued to move the organization forward harmoniously. All of

us learned a great deal from Bunky; although we may not have his talent to lead, we will always have his example to guide us.

By: James F. Moseley

Remembrance

I had known Bunky since the early 70's and was proud to call him a friend. My first early experience was in Acapulco in 1974 at the MLA meeting. He was then, and remained until he died, charming and entertaining. My first professional activity involving Bunky was as an opponent in the famous OCEAN EXPRESS litigation in New Orleans in the late 70's. The drilling rig was recently built by Bethlehem Steel Company in Beaumont and sank while being towed to a new drilling location. At that time I was the Maritime Counsel for Bethlehem and together with Rufus Harris and the Terriberry team we represented Bethlehem. Bunky and Winston Rice and the Phelps team represented one of the tug companies towing the rig. There were numerous other New Orleans lawyers involved in the litigation.

This Yankee was the beneficiary of a truly professional exhibition of talent by Bunky, Winston and the rest of the associated lawyers from the South during the 2 weeks of depositions in the federal court in New Orleans. Bunky's professionalism was on exhibition during the days of testimony as well as afterward when some of the lawyers took refreshment breaks. At these sessions and during breaks in the testimony, his quick wit and refreshing candor were on exhibit with his recitations of his famous Boudreau stories. His talent and professionalism were evident yet he was able to retain his humorous and sparkling personality. It was one of the most interesting times in my professional life to be involved with Bunky and his fellow Southern lawyers. It was truly an education for this New Yorker in how the professionalism of the New Orleans maritime bar, particularly Bunky, was manifested. It was indeed an impressive performance.

My future activities after this case were primarily involved with Bunky and the MLA as we were both officers and president at different times. As an officer for many years, I had close contact with Bunky during his tenure as vice president and president. His professionalism in those activities was also impressive. He handled everything with his usual ebullient character, even when dealing with some *minutiae* that I as Secretary had to discuss with him.I was very pleased to have Bunky tell me that he nominated me as a Titulary member of the CMI at a CMI meeting. I was advised by others who were there that he did it in French!

Our dealings in the MLA were always memorable. I got to see Bunky in his executive capacity in which he retained his usual candor, Southern charm and natural friendliness. He easily captured an audience with his New Orleans humor and, of course, his famous Bayou stories about his outrageous character Boudreau. I always hoped I could emulate some of his professionalism when I became president.

I and my late wife Patricia were privileged to be able to know him as an outstanding opponent and as a friend for many years. The maritime bar has lost a great man both as a lawyer and as a fabulous raconteur. We were privileged to call him and his wife Sharon as friends. We always enjoyed their company and the company of his New Orleans friends.

By: Howard M McCormack

Remembrance

Bunky had just been elected MLA president when I attended my first Executive Committee meeting. While I was nervous about my performance as a Committee member, I discovered that Bunky was more worried about his favorite yellow Lab because she was having her first litter. Our conversation in a Houston bar about our shared love of dogs not only put me at ease but also, more importantly, showed me that being part of the MLA did not mean

leaving one's personality and personal interests at the door. I will be forever grateful to Bunky for that introduction and for the fact that he deliberately took time to get to know a neophyte and to find common ground. And it was not just a bow to convention: I know he remembered that conversation as well as I did because about ten years later, he introduced me to that Lab when he invited the members the Board to his home in Perdido Beach. Ah, Dixie beer!

That kind of hospitality was typical of Bunky. When I fell ill in New Orleans, Bunky sent a doctor to my hotel and later sent a member of his staff and a wheelchair to transport me to the airport, wheeling me all the way to my seat on the plane. After all, I was in his city so he considered himself my host and gave new meaning to the term "Southern hospitality." He was one of a kind.

By: Lizabeth L. Burrell

COMMITTEE ON ARBITRATION AND ADR

Editor: Keith W. Heard

Newsletter – May 2012

I. ISSUES ARISING BEFORE ARBITRATION PROCEEDINGS COMMENCE.

Named Charterer, but not its Corporate Parent, Bound by Charter Party Arbitration Clause.

In *Sunskar Ltd. v. CDII Trading, Inc.*, 828 F. Supp. 2d 604 (S.D.N.Y. 2011), the court granted the plaintiff shipowner's motion to compel arbitration against the charterer named in a fixture but denied plaintiff's motion to compel the charterer's corporate parent to arbitrate.

The court found that defendant CDII Trading, Inc. ("CDII") had agreed to charter the GEORGIA S from its owner, Sunskar Ltd., to carry iron ore from Mexico to China but then failed to load cargo on the vessel. It seems quite clear from the factual scenario in the court's decision that a fixture was agreed. Nevertheless, CDII contended that a fixture had not been agreed and that it was not required to arbitrate owner's claim for CDII's failure to perform the contractual voyage.

The court found it quite clear that a fixture, not just on "main terms" but essentially on all terms of the charter, had been agreed. As the court wrote, "[w]ritten communications via Skype provide unambiguous evidence of the parties' meeting of the minds over the Charter Party and, more specifically, the agreement to arbitrate." *Id.* at 618. CDII tried to argue that the quantity and availability of the cargo were "main terms" that were never agreed. The court rejected this argument, noting that a "25,000 mt cargo quantity term was clearly stated as early as January 19 [2011 as], agreed to along with the other main terms [CDII] concede[d] were negotiated by its [vice

president] Friedberg…." *Id*. at 617. Moreover, the court wrote at page 617 as follows:

> [Respondents] also do not explain why the availability of the ore should be considered a main term, or even a term at all, of a Charter Party. No law is cited for the proposition that a ship owner cannot consider a contract binding unless and until a shipper of goods had already collected the goods at port; such a rule of law, if it existed, would significantly hamper commerce.

CDII also tried to argue that Friedberg, the vice president who negotiated the fixture with a vice president of the shipowner's agent Skaarup Shipping, lacked actual or apparent authority to agree to the charter on CDII's behalf. The court rejected this argument, noting that "when one lacks actual authority, 'he may nonetheless bind his principal to a contract if the principal has created the appearance of authority, leading the other contracting party to reasonably believe that actual authority exists.'" *Id*. at 618 *quoting Highland Capital Management LP v. Schneider,* 607 F.3d 322, 328 (2d Cir. 2010).

Not content with having the named charterer as a counterparty in the arbitration, owner also argued that CDII's corporate parent, China Direct Industries Inc. ("China Direct"), was a party to the contract. Owner did not argue that China Direct was liable under an alter ego theory. Rather, owner argued simply that China Direct was "doing business" as CDII. *Sunskar*, 828 F. Supp. 2d at 619. Although this argument is a bit vague, it seems that owner was arguing that "China Direct negotiated with Sunskar under the name of CDII, became the charterer under the Charter Party, and failed to perform, and so should be liable despite its use of an alternate name." *Id*.

However, the court concluded "[t]here is no evidence in the record to support a contention that China Direct, under the name

CDII, is the actual charterer under the Charter Party." *Id*. at 619-20. The court noted that Mr. Friedberg, the primary contact in negotiating the charter, was an employee of CDII and "there is no evidence that he ever suggested otherwise." *Id*. at 620. Going further, the court noted that "[t]he fact that China Direct and CDII share offices, and some executives, is also not evidence that China Direct was doing business as CDII in its business with Sunskar." *Id*.

Buyer Bound by Arbitration Clause in Seller's General Terms and Conditions.

Glencore Ltd. v. Degussa Engineered Carbons L.P., 848 F. Supp. 2d 410 (S.D.N.Y. 2012), involved a motion to compel arbitration of a dispute over allegedly off-spec No. 6 feedstock oil sold by plaintiff Glencore to Degussa Engineered Carbons L.P., a/k/a Evonik Carbon Black L.L.C. ("Evonik"), the owner and operator of several chemical plants in Texas and Louisiana where carbon black is made. Evonik contended it was not bound by the New York arbitration clause contained in Glencore's General Terms and Conditions ("GTCs") but the court disagreed and granted the motion to compel.

On various occasions during the first three quarters of 2010, Glencore sold and delivered No. 6 feedstock oil to Evonik's plants. The deliveries and Evonik's payments for same were made pursuant to quarterly contracts between the parties. In March of 2011, Evonik sued Glencore in Texas state court, claiming that three shipments during the first quarter of 2010 and one during the third quarter were off-spec, causing more than $3 million worth of damage to its equipment. Glencore subsequently demanded arbitration pursuant to the arbitration clause in its GTCs. When Evonik denied there was a binding arbitration agreement between the parties, Glencore filed a petition to compel arbitration in the Southern District of New York. Evonik filed a motion to dismiss the petition, arguing essentially that its agreement with Glencore had been complete before Glencore furnished it with the GTCs, and that it had not explicitly or implicitly adopted them.

As a preliminary matter, the court concluded the case was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") since Glencore was a Swiss corporation, with a principal place of business in Switzerland. As a result, the court concluded, to establish the existence of an agreement to arbitrate, Glencore had to show "a binding agreement under 'ordinary state-law principles that govern the formation of contracts'." *Id.* at 423 *citing First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). In addition, it had to show "an agreement or an arbitral clause that is either 'signed by the parties' or 'contained in an exchange of letters or telegrams.'" *Id.* (*citing Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999)).

The court determined that Glencore had satisfied both requirements. With respect to the 2010 first quarter shipments, the court found that "Evonik took three distinct steps which together objectively manifested its assent to the written sales contract it had solicited from Glencore as embodying the parties' agreement with respect to the first quarter shipments." *Id.* at 426. The sales contract clearly provided that, absent objection by Evonik, it incorporated Glencore's GTCs, which included an arbitration clause. Under the Uniform Commercial Code ("U.C.C."), since these were dealings between merchants, it was not necessary that the incorporated document be furnished to the counterparty for the incorporation to be effective. As it were, after contract formation, Evonik requested and received Glencore's GTCs and it did not object to them. Rather, Evonik performed its obligations "and solicited new contracts from Glencore in the ensuing quarters." *Id.* at 429. Thus, the court concluded, "the assembled communications between the parties, viewed objectively, overwhelmingly evinced Evonik's agreement and intention to be bound by Glencore's GTCs as to the first quarter shipments." *Id.*

Going further, the court concluded that, alternatively, under U.C.C. § 2-207(2), the arbitration provision became part of the parties' agreement. Under this provision, proposed additional terms become

part of the contract except where the additional terms "materially alter" the contract. Under *Aceros Prefabricados, S.A. v. Tradearbed, Inc.,* 282 F.3d 92, 100 (2d Cir. 2002), a material alteration is "one that would 'result in surprise or hardship if incorporated without express awareness by the other party'." *Glencore*, 848 F. Supp. 2d at 429. And, "[u]nder New York law, an arbitration agreement does not result in surprise or hardship where arbitration is the custom and practice within the relevant industry." *Id.* at 430 *quoting Aceros,* 282 F.3d at 101. The court noted that arbitration clauses are often used in the petroleum industry, preventing the addition of such a clause from materially altering the contract and requiring specific assent.

With respect to the 2010 third quarter fuel oil shipments, the court concluded that Evonik manifested its assent to Glencore's contract and to the incorporated arbitration clause even more strongly than with respect to the first quarter shipments. This flowed from the fact that, when Evonik awarded the third quarter business to Glencore, it asked Glencore to provide the contracts as soon as possible and, given the parties' course of dealing to that point, that could only mean "the very same type of Glencore sales contract that Saucier had solicited, received and commented on for the first, and second, quarters." *Id.* at 431. Also, once Evonik received Glencore's proposed contract for the third quarter, it objected to other features of the contract but said nothing about the arbitration clause.

As a final point, the court concluded that "the parties' written back-and-forth in each quarter – including serial revisions of Glencore's sales contract and adoption of it by Evonik – satisfie[d] the requirement of an arbitral clause 'contained in an exchange of letters and telegrams' within the meaning of the Convention." *Id.* at 437.

[Editor's note: The next case, decided less than one month later, is very similar to the one you just read.]

SDNY Grants Motion to Compel, Finding Arbitration Clause in General Terms and Conditions Was Incorporated by Reference and Agreed to During Contract Negotiations.

Copape Produtos de Pétroleo Ltda. v. Glencore Ltd., No. 11 Civ. 5744 LAK, 2012 WL 398596 (S.D.N.Y. Feb. 8, 2012), examined the extended negotiation of a contract through a chain of emails and pdf forms and demonstrates again how a party may become bound by an arbitration clause incorporated by reference to an external set of General Terms and Conditions. Copape was a Brazilian buyer of a substance used in blending gasoline. It contracted with defendant, Glencore, a Swiss seller. When the parties had a falling-out, Copape commenced litigation in Brazil while Glencore demanded arbitration in New York. Copape thereafter brought an action in the Southern District of New York seeking to stay the arbitration while Glencore cross-moved to compel.

The case turned on whether Copape had effectively agreed to an arbitration clause contained in Glencore's "General Terms and Conditions" which were referred to, but were not expressly set forth in the multiple emails and pdf documents exchanged between the parties as they negotiated their deal. Glencore made the initial offer which contained the principal commercial terms. That offer, which contained no arbitration clause, included the statement "other terms and conditions as per Glencore standard DES contract." The standard DES contract referred to Glencore's General Terms and Conditions which, in turn, contained a New York AAA arbitration clause. Copape replied to the offer by altering several key commercial terms and stating that "other terms and conditions as per Glencore standard DES contract" had to be "approved by buyer." Glencore replied to the counter-offer and accepted it, including the language requiring buyer's approval of the terms and conditions in Glencore's DES contract. The court found that, had matters ended there, Copape would not have been bound by the arbitration clause.

Thereafter, however, Glencore sent the standard DES contract to Copape with an additional clause saying that these terms would

govern the contract unless Copape objected by close of business the following business day. Copape *did* send an objecting email within the time permitted but it objected to *other* provisions of the DES contract and not to its incorporation by reference of the arbitration clause contained in Glencore's General Terms and Conditions. Thereafter, there was further revision to the commercial terms and Glencore ultimately sent a confirming email, including these last changes, and confirming that "all other terms and conditions remained unchanged" and requesting that Copape reconfirm by return email. Copape sent an email reply simply saying "OK."

The court found that, although Copape had reserved the right in its initial counter-offer to approve the terms and conditions of Glencore's standard DES contract, when it received the standard DES contract with the clause requiring Copape to object by the following business day and Copape did not object to the incorporation of the arbitration clause but *did* object to other terms, which were eventually resolved, it bound itself to the arbitration clause.

Court Enforces Arbitration of Discrimination Claims Pursuant to Arbitration Clause in Collective Bargaining Agreement.

In *Keener v. Rifkin*, No. 10 Civ. 8222 (PGG) (S.D.N.Y. Jan. 17, 2012) (*reprinted in New York Law Journal*, January 23, 2012), plaintiff had been a maintenance employee at an apartment complex and a member of the Service Employees International Union (the "Union"). He alleged the defendants, his former employers, had wrongfully terminated his employment in violation of the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 and the New York State and New York City Human Rights laws. Defendants moved to compel arbitration and to dismiss the action.

Plaintiff's Union had entered into a collective bargaining agreement ("CBA") with the Realty Advisory Board on Labor Relations ("RAB"), a multi-employer bargaining association for the New York City real estate industry which served as the collective

bargaining unit for the defendant employer. The CBA contained a clause requiring that all discrimination claims be subject to the grievance and arbitration procedures of the CBA. In addition, the Union and the RAB had thereafter adopted a supplemental protocol to the CBA requiring that, where the Union declined to prosecute an employee's discrimination claim, and the employee nevertheless wished to litigate that claim, the claim would be subject to arbitration.

Plaintiff opposed defendants' motion to compel, arguing that he had never agreed to arbitrate his discrimination claims; that the Union would not adequately investigate his claims; that any arbitration would not be impartial; that he would not be able to recover emotional distress damages in an arbitration; and that only a federal court should be permitted to hear discrimination claims.

The court rejected plaintiff's arguments in their entirety, finding that a CBA that requires union members to arbitrate is enforceable and that the Union, as the employee's exclusive bargaining representative, had the broad authority to enter the arbitration agreement binding the employee. The court also rejected plaintiff's contention that the federal, state and city discrimination claims were not arbitrable, citing prior U.S. Supreme Court, federal district court and New York State authorities. The court further held that, although Section 3 of the FAA requires a federal court to stay an action to resolve a dispute subject to an arbitration agreement, courts have the discretion to dismiss—rather than stay—an action when all of the issues must be arbitrated. Because the court concluded there was no question that plaintiff's discrimination claims were subject to the CBA's arbitration clause, it granted both defendants' motion to compel and their motion to dismiss.

NDNY Enforces Arbitration Agreement in Oil & Gas Leases, Holding Issue of Whether Leases Had Expired Was for Arbitrators to Decide.

In *Alexander v. Chesapeake, Appalachia LLC,* 839 F. Supp. 2d 544 (N.D.N.Y. 2012), 259 plaintiffs, who owned over 10,000

acres of land sitting atop the Marcellus shale, sought a declaratory judgment declaring that oil and gas leases they had entered into years before with defendants' assignors had expired by their terms. The defendant lessee oil & gas companies had never actually drilled on the land or made any royalty payments under the leases because of the New York moratorium on hydraulic fracking, which lessees argued constituted a force majeure event. All the leases, except two, contained an identical and broadly-worded arbitration clause, which provided for arbitration "in the event of a disagreement … concerning this lease." As to the leases containing the arbitration clause, defendants sought to compel plaintiffs to arbitrate. As to the two leases without the arbitration clause, defendants sought a stay pending the results of the arbitration they sought to compel.

Plaintiffs argued that New York state law should govern the question of whether they were compelled to arbitrate because the leases concerned real property in New York and no gas had ever been drilled, much less transported in interstate commerce. However, the court found that federal law applied because the leases satisfied the FAA's "involving commerce" test. The primary purpose of the leases was the development of gas resources which eventually would be placed in an interstate pipeline subject to federal regulation.

Plaintiffs next argued that the leases had expired by their own terms and there was, therefore, no existing agreement to arbitrate. Alternatively, they claimed that any arbitration agreement was procedurally and substantively unconscionable and unenforceable. The court rejected these arguments, holding that the central question in the case was whether the leases had been extended beyond the primary lease terms of five and ten years and not whether valid leases were ever entered into, or whether arbitration agreements were ever made. Where the plaintiffs' challenge was not to the arbitration clause itself but instead to the duration of the lease term and whether or not a force majeure event had extended the term, "the issue of the contract's validity is [to be] considered by the arbitrator in the first instance." *Id*. at 551.

The court then turned to the claims of the leaseholders who did not have arbitration clauses in their two leases. These leaseholders argued that the results of any arbitration would not be binding on them and that a stay pending arbitration would impose undue hardship because the leases clouded their title and prevented them from refinancing, selling or entering new leases on more favorable terms. After balancing the relative hardships to the parties, and recognizing that these particular plaintiffs had *voluntarily chosen* to join their action with the 256 other plaintiffs, the court exercised its discretion to impose a conditional stay. The court granted these particular plaintiffs leave, however, to move to vacate the stay if the arbitration was not promptly initiated within six months and completed within six months of initiation.

SDNY Bankruptcy Court Rules that Violation of Automatic Stay Claim is for Arbitration and Stays Debtor's Claim Under a Separate Agreement between Defendant and Debtor's Secured Lender, Pending the Arbitration.

In the case of *In re TexStyle, LLC*, Adversary No. 11–11686 SMB, 2012 WL 1345646 (Bankr.S.D.N.Y. April 17, 2012), plaintiff, a manufacturer and marketer of home textiles and accessories and the debtor in a bankruptcy proceeding ("Debtor"), brought suit against Harry Group, Inc., d/b/a JMKC Express ("JMKC"), a warehouse management and logistics service. The Debtor contended that, when it decided to shift the work being done by JMKC to another company, Global One Logistics, JMKC refused to ship goods to the Debtor's customers and refused to deliver goods to Global One on a timely basis. The contract between the Debtor and JMKC contained an arbitration clause.

In addition to the warehouse and logistics contract with the Debtor, JMKC had also executed an Acknowledgment of Security Interest and Waiver of Liens in favor of Wells Fargo Bank, the Debtor's secured lender. In the Acknowledgment, JMKC essentially "subordinated any possible claim or lien against the [goods] to those of Wells Fargo, and generally waived its ability to assert a lien,

claim, or right of setoff against the Debtor's goods." *Id*. at *2. The Debtor was not a party to the Acknowledgment but had expressly consented to its terms. The Acknowledgment gave the Debtor the right to require JMKC to return the goods or deliver them, as directed by the Debtor. However, the Acknowledgment also said the Acknowledgment was "'intended only for the benefit of Wells Fargo and its affiliates, participants, successors and assigns,'" who had the right to enforce it. *Id*.

The Debtor moved for a preliminary injunction and temporary restraining order, seeking to compel JMKC to deliver the goods it held to Global One's warehouse. Through counsel, JMKC opposed the motion and participated in the hearing. The issues raised at the hearing were resolved "through a direction by the Court, to which the parties consented." *Id*. at *3. Shortly thereafter, JMKC's prior counsel essentially withdrew from the case and took no further action on JMKC's behalf. Although JMKC's Operations Manager continued to deal directly with the Debtor's attorney, JMKC failed to answer the complaint in the adversary proceeding and a default was taken against it. Upon motion, however, the default was vacated and JMKC's answer was accepted by the court.

In addition to moving to vacate the default, JMKC also sought to compel arbitration of the Debtor's claims against it. The Debtor argued that JMKC waived its right to arbitrate by virtue of its delay and participation in the adversary proceeding and, even in the absence of a waiver, the claims asserted under the Acknowledgment, which did not contain an arbitration clause, were not arbitrable.

The bankruptcy court rejected the Debtor's waiver argument, noting that JMKC's delay in filing an answer and moving to compel arbitration was due to the withdrawal of its first attorney. The court also concluded that the Debtor had not suffered any prejudice because no discovery had taken place and the other activity in the case "has been minimal." *Id*. at *7.

The bankruptcy court said its conclusion also applied to a claim the Debtor had asserted for a violation of the automatic stay, based on the Second Circuit's ruling in *MBNA America Bank, N.A. v. Hill,* 436 F.3d 104 (2d Cir. 2006). In that case, the court of appeals determined that the bank customer's claim under Bankruptcy Code § 362(h) was a core proceeding but concluded that arbitration of the claim would "not seriously jeopardize" the objectives of the Bankruptcy Code. *MBNA America*, 436 F.3d at 108. The bankruptcy court reached the same conclusion in this case: the claim for relief was core "because [it] derive[s] directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy case" but the Debtor had failed "to sustain its burden that arbitration of the claim will seriously jeopardize the objectives of the Bankruptcy Code." *In re* TexStye, 2012 WL 1345646 at *9. Finally, the court noted that "the stay violation claim is inextricably intertwined with the breach of contract claim under the *Agreement* [between the Debtor and JMKC], which is undeniably arbitrable." *Id*.. In other words, the allegations that underlay the stay violation claim were "the same charges that underlie the claim that the Defendant [JMKC] breached the *Agreement* [with the Debtor] by failing to ship the Products to the customers or deliver the Products to Global One in a timely manner." *Id*. Thus, if JMKC shipped or did not ship or deliver the goods in accordance with the contract between the parties, "it is hard to see how it could be liable for a violation of the automatic stay." *Id*.

The final issue before the bankruptcy court concerned what to do about the Debtor's claims under the Acknowledgment. The court noted that the *Acknowledgment* did not contain an arbitration clause, and the Debtor was not even a party to the *Acknowledgment*. And, "although the Acknowledgment grants the Debtor certain rights, the negating language implies that the Debtor is not a third party beneficiary with the right to assert claims under the Acknowledgment." *Id*. The court concluded that, "in light of the state of the record, [it would] stay any claims under the *Acknowledgement* pending the results of the arbitration," noting that "Courts have the inherent power to grant a discretionary stay

of a proceeding pending arbitration, *Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S,* 943 F.2d 220, 225 (2d Cir. 1991), where there are issues common to the arbitration and the court proceeding, and those issues may be determined by the arbitration." *Id.* In this case, the court expressed the view that resolution of the claims under the parties' primary contract might resolve the analogous claims under the Acknowledgment, "to the extent the Debtor can assert them." *Id.* at *10.

In conclusion, the bankruptcy court granted the motion to compel arbitration with respect to all claims under the primary contract between the parties and stayed the claims under the Acknowledgment, without prejudice to the defendant's right to move to dismiss those claims.

Owner's Claim Against Salvor for Gross Negligence is Not Covered by "Arising Under" Language of Arbitration Clause.

In *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 2011 AMC 2327 (9th Cir. 2011), the owner of a vessel that grounded on a submerged coral reef off the island of Oahu in February 2005, entered into a salvage agreement with Titan Maritime. Titan succeeded in removing the vessel but, at some point in the ship's grounding or removal, the reef suffered serious damage. Pursuant to 33 U.S.C. § 2701(b)(2), the U.S. Government informed owner it would likely be liable for damages in excess of $15 million. Several months later, owner sued Titan in federal district court in Hawaii, seeking indemnity and/or contribution based on the damage Titan allegedly caused through gross negligence in removing the vessel from the reef. Titan then moved to compel arbitration under a clause in the contract providing that "[a]ny dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English Arbitration Act 1996 and any amendments thereto, English law and practice to apply." *Id.* at 916, 2011 AMC at 2328. The district court denied the motion and Titan appealed to the Ninth Circuit.

The court of appeals upheld the district court's ruling in all respects. Titan argued that English law governed the arbitrability of the dispute, based on the wording of the arbitration clause. The court of appeals observed that "[n]either the Supreme Court nor this court has decided whether federal arbitrability law allows contracting parties to agree to apply a non-federal law of arbitrability to interpret a given arbitration agreement." *Id*. at 918. Reviewing the Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989), on which Titan relied, the Ninth Circuit concluded that "contracting parties have the power to agree to apply non-federal arbitrability law." *Id.* at 919, 2011 AMC at 2333. On the basis of *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995), however, the Ninth Circuit concluded "that courts should apply federal arbitrability law absent 'clear and unmistakable evidence' that the parties agreed to apply non-federal arbitrability law." *Cape Flattery*, 647 F.3d at 921, 2011 AMC at 2336. In this case, the court concluded, there was "no clear and unmistakable evidence that the parties agreed to apply English arbitrability law." *Id*.

Applying federal arbitrability law, the court ruled that owner's claims were not arbitrable. The court noted that prior Ninth Circuit decisions had held "that the phrase 'arising under' in an arbitration agreement should be interpreted narrowly." *Id*. Specifically, the court observed that a clause providing for arbitration of disputes "'arising out of or relating to'" the agreement was broader than one that applied just to disputes "arising under," which "'is intended to cover a much narrower scope of disputes, *i.e.,* only those relating to the interpretation and performance of the contract itself.'" *Id*. at 922, 2011 AMC at 2337 *quoting Mediterranean Enterprises, Inc. v. Ssangyong Construction Co.,* 708 F.2d 1458, 1464 (9th Cir. 1983). Although other circuits had disagreed with this approach, the court in *Cape Flattery* wrote that "out-of-circuit cases provide no basis for us to ignore our own precedent." *Id*.at 923, 2011 AMC at 2339. Applying the rule found in its precedents, the court said it had "no difficulty concluding that the present dispute is not arbitrable." *Id*., 2011 AMC at 2340. The court observed that owner's claims

against Titan did "not turn on an interpretation of any clause in the contract . . . or on Titan's performance under the contract." *Id* at 924, 2011 AMC at 2341. The court concluded "[i]nstead [that] the dispute involves a tort claim based on Hawaii and maritime tort law, incorporated as part of the Oil Pollution Act of 1990, and limited by that federal statute to grossly negligent acts." *Id*. Thus, the court concluded the dispute was not one "arising under" the contract and was not arbitrable. Titan's petition for writ of *certiorari* was denied by the Supreme Court on April 2, 2012. *Titan Maritime, LLC v. Cape Flattery Ltd*., 132 S. Ct. 1862 (2012).

[Editor's note: Your Editor has difficulty understanding how the disputes in the case did not "turn on Titan's performance under the contract."]

SDNY Order Requiring Arbitration Reversed in Favor of Judicial Proceedings, per Subsequent Contract.

In *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522 (2d Cir. 2011), the Second Circuit reversed the district court and held that the adjudication clause in a Private Placement Agreement, providing for dispute resolution in the courts of New York, superseded the arbitration clause in a prior Engagement Agreement, which had provided for arbitration before the Financial Industry Regulatory Authority ("FINRA").

NewOak was an independent broker dealer that had entered the Engagement Agreement with Applied Energetics, an issuer of private securities. By terms of the Agreement, NewOak was to act as the exclusive placement agent in a private offering of Applied's securities. The Agreement had a mandatory and exclusive arbitration clause providing for arbitration of all disputes before FINRA. The Engagement Agreement also provided that the parties would thereafter enter into a subsequent, more formal Private Placement Agreement, which they ultimately did. The Private Placement Agreement contained a mandatory and exclusive adjudication clause providing for all disputes to be heard in either the federal or

state courts of New York. The Private Placement Agreement also contained a merger clause stating that it (and certain other specified documents related to the transaction, *but not the Engagement Agreement*), constituted the entire agreement between the parties.

NewOak initiated FINRA arbitration, claiming that Applied had knowingly issued materially false and misleading information. Applied petitioned a New York state court for a stay of arbitration, citing the mandatory New York adjudication clause in the Private Placement Agreement. The action was removed to the Southern District of New York, where NewOak moved to compel arbitration before FINRA. The district court, relying on the Second Circuit's opinion in *Bank Julius Baer & Co., Ltd. v. Waxfield Ltd.*, 424 F.3d 278 (2d Cir. 2005), granted the motion to compel and Applied appealed.

The Second Circuit held the facts before it were distinguishable from those at issue in *Bank Julius Baer*. First, unlike in *Bank Julius Baer, both* the adjudication clause and arbitration clause were exclusive and mandatory and there was no way to treat them as complementary. Second, the court noted that there was no merger clause at issue in *Bank Julius Baer*. Finally, the court found that, in deciding whether an obligation to arbitrate exists, courts should generally apply state-law principles governing contract formation. Under New York law, it was well settled that a subsequent contract regarding the same matter will supersede the prior contract. Accordingly, the Private Placement Agreement superseded the Engagement Agreement and the case was reversed and remanded to the district court for a trial on the merits.

EDNY Holds Forum Selection Clause in Subsequent Agreement Overrides Prior Arbitration Agreement.

In *Biremis, Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV-11-4934 (LDW), 2012 WL 760564 (E.D.N.Y. Mar. 8, 2012), two members of FINRA were bound under FINRA's Code to arbitrate any disputes that arose out of their business dealings with

one another. However, both parties had entered a subsequent trading agreement under which plaintiff agreed to pay for using defendant's online trading system (the "Agreement"). The Agreement contained a forum selection clause which provided that the Agreement "shall be governed by and construed in accordance with the laws of the State of New York, whose state and federal courts shall have exclusive jurisdiction over any dispute arising out of or in connection with this Agreement." When plaintiff allegedly failed to pay execution charges pursuant to the Agreement, defendant commenced a FINRA arbitration. Plaintiff then moved in federal district court to enjoin the arbitration on the basis of the exclusive forum selection clause contained in the Agreement. Defendant cross-moved to dismiss the action for injunctive relief or, alternatively, to stay the action pending the FINRA arbitration.

Plaintiff argued first that the FINRA Code and its arbitration clause did not apply to it because, subsequent to the execution of the Agreement, it ceased to be a member of FINRA. However, the court found the FINRA Code explicitly bound former members whose FINRA membership had been terminated or cancelled.

The court then considered whether the forum selection clause in the subsequent Agreement supplanted the earlier arbitration agreement contained in the FINRA Code. The court examined two decisions, *Bank Julius Baer & Co. v. Waxfield, Ltd.*, 424 F.3d 278 (2d Cir. 2005), and *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522 (2d Cir. 2011), which had considered whether a broad agreement to arbitrate was vitiated by a subsequent agreement's forum selection clause but had reached different results, based on the specific wording of the clauses at issue. The *Biremis* court found the mandatory and exclusive forum selection clause before it was similar to the one adjudicated in *Applied Energetics*. There simply was no way to read the arbitration clause in the FINRA Code and the mandatory and exclusive forum selection clause in the Agreement in a complementary way (as had been done in *Bank Julius Baer*). Where both clauses directly conflicted, and it was possible to give effect only to one, the court found the later-

entered New York forum selection clause vitiated the parties' prior agreement to arbitrate.

Eleventh Circuit Affirms Dismissal of Jones Act Claim Holding "Public Policy" Defense Inapplicable to Initial Stage of Enforcement of Agreement to Arbitrate.

The Eleventh Circuit affirmed dismissal of a Jones Act negligence claim brought in federal district court by a Nicaraguan crew member of a cruise line incorporated in Bermuda, but with its principal base of business in Miami, for injuries allegedly suffered on a Bahamian-flag vessel. In *Lindo v. NCL (Bahamas), Ltd*., 652 F.3d 1257, 2012 AMC 409 (11th Cir. 2011), the court held that the arbitration clause in the crewmember's employment contract was enforceable—at least at the initial arbitration-enforcement stage of the proceeding.

The arbitration clause was contained in a collective bargaining agreement negotiated between NCL and the Norwegian Seafarer's Union and was incorporated by reference in the crewmember's employment contract. The clause provided for resolution of all claims related to the seaman's employment, including Jones Act claims, in Nicaragua under Bahamian law by binding arbitration pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The seaman opposed enforcement of the arbitration clause (both in the district court and on appeal) on the grounds that it was void as against public policy because it operated as a prospective waiver of his statutory Jones Act claim.

In affirming, the Eleventh Circuit described the two stages of enforcement of an arbitration agreement (i.e., enforcement of the agreement to arbitrate and enforcement of an award), and noted that the New York Convention contains defenses corresponding to these separate stages of enforcement. It ruled that Article II(3) of the New York Convention applies to the initial stage of deciding whether there is an enforceable agreement to arbitrate, whereas Article V

applies at the subsequent stage of deciding whether to confirm an award. In particular, the court found that the "public policy" defense is contained only in Article V, whereas Article II(3) refers only to the "null and void" defense. Citing its prior opinion in *Bautista v. Star Cruises*, 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005), the court found that the "null and void" defense did not encompass public policy objections but was restricted to standard breach of contract defenses "such as *fraud, mistake, duress, and waiver*—that can be applied *neutrally on an international scale*." *Lindo*, 652 F.3d at 1272, 2012 AMC at 430.

The court's lengthy opinion surveyed all major U. S. Supreme Court and Eleventh Circuit opinions on the enforceability of arbitration agreements, including the Eleventh Circuit's prior opinion in *Thomas v. Carnival Corp.*, 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009), in which the court had refused, on public policy grounds, to enforce a seaman's arbitration agreement as to his Seaman's Wage Act claim. The *Lindo* court criticized the decision in *Thomas* as departing from binding Supreme Court and Eleventh Circuit precedents which had found that contracts providing for arbitration of U.S. statutory claims are enforceable, absent a clear and specifically expressed intention to the contrary by Congress.

Filipino Seaman's Lawsuit Was Governed by Arbitration Clause in Employment Contract but District Court Erred in Denying As Moot Seaman's Request for a Preliminary Injunction on Certain Aspects of His Case.

Aggarao v. MOL Ship Management Co., Ltd., 675 F.3d 355, 2012 AMC 781 (4th Cir. 2012), involved a motion to dismiss for improper venue filed by vessel interests in a lawsuit filed by a Filipino seaman to recover damages for severe injuries he sustained aboard the ASIAN SPIRIT, a car carrier, in the Chesapeake Bay near Baltimore. Before joining the vessel, plaintiff Aggarao entered into a Philippine Overseas Employment Administration contract of employment ("POEA Contract") with a Mitsui O.S.K. crewing company that incorporated certain "Standard Terms and Conditions,"

including a mandatory arbitration clause and a Philippines choice of law clause. One day after signing the POEA Contract, plaintiff entered into a "Seafarers Employment Contract" with the crewing company that incorporated the terms of a collective bargaining agreement, by the terms of which the vessel's owner and charterer were bound.

On August 13, 2008, plaintiff was assisting with pre-loading preparations, prior to the vessel's arrival at Baltimore, when he was "crushed between a deck lifting machine and a pillar," resulting in "severe injuries to his spinal column and cord, his chest cavity and his abdomen." *Id*. at 362, 2012 AMC at 785. Emergency surgery was performed, followed by "a barrage of additional surgeries and medical procedures, twelve in all." *Id*. The injury left plaintiff a paraplegic "with complete paralysis." *Id*. Defendants, the vessel's owner, manager and charterer, furnished evidence to the district court that plaintiff had reached "as full a recovery" as the treating hospital in Baltimore could provide him on December 4, 2008. *Id*. Several days later, defendants informed plaintiff that, given the extent of his rehabilitation, the vessel's owner and P&I Club had authorized travel arrangements for his return to the Philippines and would not be funding further medical care for him in the U.S. Plaintiff "declined to be repatriated to the Philippines for fear that he could not receive adequate medical treatment there. He also believed that his aging parents, who live[d] in a remote rural area, would be unable to care for a paraplegic and he would die." *Id*.

Plaintiff sued defendants for unseaworthiness, maintenance and cure, breach of contract, violation of the Seaman's Wage Act, and negligence under general maritime law and the Jones Act. Defendants responded to the lawsuit by moving to dismiss the complaint for improper venue under Rule 12(b)(3), pursuant to the arbitration clause in the employment contract. Plaintiff opposed the motion to dismiss, arguing the arbitration clause was unenforceable. Several months later, plaintiff sought a preliminary injunction, compelling the vessel's owner and manager, inter alia, to provide maintenance and cure for him in the U.S. until he could

attain maximum medical cure. The district court ruled that the arbitration clause was enforceable and that plaintiff was equitably estopped from pursuing in court his separate claims against owner and charterer, which were nonsignatories to the POEA Contract (that required arbitration).

On appeal to the Fourth Circuit, plaintiff argued there was never an agreement to arbitrate because the Seafarers Employment Contract and the collective bargaining agreement had superseded or modified the POEA Contract and thereby annulled the arbitration clause. He also argued that an agreement to arbitrate could not have arisen from a commercial legal relationship, as required by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, because a seaman's employment contract is exempt from the FAA definition of "commerce." The court of appeals rejected plaintiff's first argument on the basis that plaintiff could not show that the parties intended the Seafarers Employment Contract to constitute a novation of the POEA Contract. Plaintiff's contractual modification argument was also rejected because "the presumptions favoring arbitrability must be negated expressly or by clear implication," *id*. at 368, 2012 AMC at 795, and there was no such evidence in the case. The court rejected the argument based on an alleged exception for seamen's employment contracts because, although § 1 of the FAA contains such an exception, it does not apply to the Convention.

Plaintiff argued further that, even if the jurisdictional prerequisites of the arbitration enforcement Convention were satisfied, the arbitration clause could not divest the district court of jurisdiction because the Seaman's Wage Act entitled him to access a federal court to resolve his claim thereunder. However, the court of appeals agreed with "[t]he Ninth and Eleventh Circuits [which] have determined that '[t]he Convention Act expressly compels the federal courts to enforce arbitration agreements,' notwithstanding the jurisdiction conferred on such courts to adjudicate Seaman's Wage Act claims." *Id*. at 370-71, 2012 AMC at 799.

Plaintiff next argued that arbitration of his Jones Act and Seaman's Wage Act claims in the Philippines would contravene U.S. public policy. In particular, he was concerned that "the arbitrator would apply the law of the Philippines to the exclusion of otherwise applicable American law, thereby denying his right to pursue his federal statutory claims." *Id*. at 371, 2012 AMC at 800. The court pointed out, however, that plaintiff was "not entitled to interpose his public policy defense, on the basis of the prospective waiver doctrine[,] until the second stage of the arbitration-related court proceedings—the award-enforcement stage." *Id*. at 373, 2012 AMC at 803.

Plaintiff's final argument was that even if he were obliged to arbitrate his claims against the vessel's manager, the district court erred in concluding he was equitably estopped from pursuing his claims against owner and charterer because they were not signatories to the POEA Contract. The court of appeals began its analysis by pointing out that a nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory. Observing that (a) plaintiff alleged the same claims against all the defendants, employing the same allegations as the bases for liability, (b) the claims against all defendants allegedly arose from the same "occurrence" or "incident," and (c) plaintiff emphasized in all his claims that his injuries occurred while he was acting in the scope of his employment, the court of appeals concluded that the doctrine of equitable estoppel applied and that plaintiff was required to arbitrate his claims against the signatory ship manager, as well as his claims against the nonsignatory shipowner and charterer.

Despite the many points of agreement between the court of appeals and the district court, the former found fault with the latter over "its procedural disposition of the case—i.e., dismissal of the Complaint with prejudice and denial of the injunction request as moot." *Id*. at 375, 2012 AMC at 807. The Fourth Circuit concluded that the district court "was not divested of jurisdiction once it concluded that Aggarao's claims were subject to arbitration in the

Philippines." *Id*. Specifically, the court of appeals observed that plaintiff's "public policy defense invoking the prospective waiver doctrine is not subject to arbitration, and he is unable to pursue that defense until after an arbitration award has been made. Hence, the district court was not constrained to dismiss this case." *Id*. at 376, 2012 AMC at 808.

Going further, the court of appeals noted that, in light of the "hollow-formality" test, "the district court was not obliged to deny the injunction request as moot when it deemed [plaintiff] Aggarao's claims to be arbitrable." *Id*. Thus, the court of appeals determined that "the district court erred in failing to exercise its discretion when it denied the injunction request as moot." *Id*. at 377, 2012 AMC at 809-10. The court of appeals pointed out "there were genuine issues of material fact regarding whether the defendants had provided adequate maintenance and cure to him and, relatedly, whether he was fit to be repatriated to the Philippines." *Id*., 2012 AMC at 810 Also, the appellate court noted that the district court was empowered "to assess the second aspect of the injunction request, that Aggarao remain in the United States pending arbitration because he is not fit to be repatriated to the Philippines, or because he will not receive adequate medical care in that country." *Id*. at 378, 2012 AMC at 812. As a procedural matter, the court of appeals noted that "[i]rrespective of the outcome of the injunction request, the court should stay this case pending the arbitration proceedings to ensure that Aggarao will have an opportunity at the award-enforcement stage for judicial review of his public policy defense based on the prospective waiver doctrine." *Id*. at 379, 2012 AMC at 813-14.

Subrogated Insurers of Consignees Held Bound by New York Arbitration Clause; Anti-Suit Injunction Issued to Protect Arbitration vis-à-vis Foreign Litigation.

An arbitration clause was held binding on the subrogated insurers of the consignees of an allegedly damaged shipment of caustic soda in *Stolt Tankers BV v. Allianz Seguros, S.A.*, 2011 AMC 1711 (S.D.N.Y. 2011). The court also issued an anti-suit injunction

enjoining the insurers from pursuing litigation in Brazil. Stolt had entered a charter party with non-party, Tricon Shipping, pursuant to a Fixture Recap that incorporated the ASBATANKVOY form, as supplemented by Tricon's Shipping Clauses. The Fixture Recap also included the phrase: "General Average/Arbitration New York." Clause 24 of the ASBATANKVOY form provided for arbitration in either New York or London, as specified in Part I of the form. Part I of the form, in turn, provided the parties with the option to strike one or the other location, but neither city was stricken. In addition, Clause 37 of the Tricon terms stipulated that "[i]f no selection is made, New York shall be deemed to have been selected under Part I, Clause K."

The insurers had commenced suit in Brazil to recover for damage to the cargo. Stolt then petitioned to compel the insurers to arbitrate in New York and to enjoin them from pursuing their pending subrogation action in Brazil.

In these circumstances, the court rejected the insurers' contention that the phrase "General Average/Arbitration New York" in the Fixture Recap referred only to arbitration of disputes concerning General Average and found it was an unambiguous expression of the parties' intent to arbitrate all disputes in New York. And, in any event, the Tricon Shipping Clauses also designated New York. So, whether the parties made a deliberate choice (as done via the Fixture Recap), or whether they made no choice at all (a situation covered by Tricon's Clause 37), New York was the designated forum for arbitration.

The court determined that the consignees were bound by the New York arbitration clause because they were identified on the Stolt bills of lading and the bills specifically incorporated the arbitration clause by reference. Thus, the consignees had not only consented to arbitration but to the *in personam* jurisdiction of the New York courts. Their subrogated underwriters stood in their shoes and were subject to personal jurisdiction and were bound to arbitrate as well.

After considering the five factors articulated in *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 1988 AMC 880 (2d Cir. 1987), the court also issued the requested anti-suit injunction against the insurers. It found that the parties in Brazil were the same as in the New York action and that resolution of the case in the enjoining court was dispositive of the litigation being enjoined. Although under principles of comity anti-suit injunctions are to be used sparingly, the court nevertheless found that allowing the action to continue in Brazil would undermine both the federal policy favoring arbitration and the reason for including the arbitration clause, which was to avoid the expense of litigation.

SDNY Holds Interpretation of Reinsurance Treaty's "Act-as-One" Clause is a Procedural Issue for the Arbitrators to Decide.

In *Munich Reinsurance Am., Inc. v. Nat'l Cas. Co.*, No. 10 Civ. 5782 SHS, 2011 WL 1561067 (S.D.N.Y. Apr. 26, 2011), the court determined that the interpretation of a reinsurance treaty's "act-as-one" provision involved a procedural issue which was for the arbitrators rather than the court to decide. Munich Reinsurance America was reinsured under a treaty in which National Casualty and Employers Insurance Company of Wausau were participating reinsurers. An arbitration clause in the treaty provided that: "[i]f more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party for purposes of this clause and communications shall be made by [Munich Re] to each of the reinsurers constituting the one party, provided, however, that nothing therein shall impair the rights of such reinsurers to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the reinsurers under the terms of this Contract from several to joint." *Id.* at *1. The clause also called for Munich Re to appoint one arbitrator, the reinsurers to select one arbitrator, and the two party-appointed arbitrators to name a neutral umpire.

When Munich Re resubmitted claims under the treaty, National and Wausau denied them. Munich Re commenced arbitration against both reinsurers, who then jointly appointed their

arbitrator. Thereafter, Wausau moved to disqualify Munich Re's attorney, arguing that he had obtained prior confidential information about Wausau's arbitration strategies. Wausau refused to participate any further in the arbitration until the disqualification issue was resolved and it filed a separate disqualification action in the district court, which remained pending before a different judge. Relying on the "act-as-one" provision in the treaty, National then also refused to arbitrate unless Wausau participated.

Munich Re moved to compel National to arbitrate and to have the court appoint an umpire. National cross-moved for an injunction to prevent Munich Re from pursuing either the litigation or the arbitration until the separate disqualification litigation was resolved. The court granted Munich Re's motion to compel, holding that whether the act-as-one provision barred a separate arbitration against National without Wausau's participation was a threshold procedural issue for the arbitrators to decide. The court relied on federal precedents, both within and outside the Second Circuit, holding that the question of whether an arbitration should proceed on an individual or consolidated basis is for the arbitrators to decide.

The court rejected, however, Munich Re's petition to have the court appoint an arbitrator. The court reasoned that the FAA required the parties to proceed with selection of an umpire in accordance with their arbitration clause, and there was no present reason to believe that, in the face of the court's order compelling National to arbitrate, the two arbitrators would not proceed to appoint the umpire.

Second Circuit Refuses (Again) to Enforce Class Action Waiver in an Arbitration Clause.

The issue of class action arbitrations has much occupied the attention of the federal courts over the past several years. In the case of *In re American Express Merchants' Lit*., 667 F.3d 204 (2d Cir. 2012)("*Amex III*"), the Second Circuit dealt with the issue *for the third time in the same case*.

This litigation, which began in 2003, involves an allegation by various merchants and a supermarket trade association that American Express ("Amex") violated the antitrust laws with an illegal tying arrangement. Essentially, plaintiffs contend that Amex committed the violation by means of a requirement that merchants who honor the traditional Amex charge card must also honor Amex credit cards (e.g., Amex Blue) at fees above those charged by other major credit card issuers. Amex moved to compel arbitration pursuant to a mandatory arbitration clause in its Card Acceptance Agreement, a standard form contract. The merchants opposed arbitration because the clause contains a class action waiver that "precludes the signatory from having any claim arbitrated on anything other than an individual basis." *Id*. at 210.

In 2006, the district court granted Amex's motion, holding that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve." *In re Am. Express Merchs. Lit.,* No. 03 CV 9592 (GBD), 2006 WL 662341 at *6 (S.D.N.Y. Mar. 16, 2006). On appeal, in a decision referred to as "*Amex I*," the Second Circuit held that the issue of the class action waiver's enforceability was a matter for the court, not the arbitrator, to decide. Going further, the court of appeals ruled that the class action waiver in this case was unenforceable because plaintiffs had established through expert testimony that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver." *In re American Express Merchants' Litigation,* 554 F.3d 300, 315-16 (2d Cir. 2009)("*Amex I*"). Thus, the waiver could not be enforced since doing so "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." *Id*. at 320.

However, the Supreme Court granted *certiorari*, vacated the Second Circuit's decision in *Amex I* and remanded for further consideration in light of the high court's holding in *Stolt–Nielsen S.A. v. Animal-Feeds Int'l Corp.,* 130 S. Ct. 1758, 2010 AMC 913 (2010). In "*Amex II*", *In re American Express Merchants' Lit.,* 634 F.3d 187 (2d Cir. 2011), the Second Circuit concluded that "*Stolt–*

Nielsen did not require us to depart from our original analysis." *Amex III*, 667 F.3d at 212. The court adhered to its conclusion that enforcement of the class action waiver would bar plaintiffs from pursuing their statutory claims because the evidence established, as a matter of law, that "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Amex II,* 634 F.3d at 197–98.

Shortly after the Second Circuit issued its ruling in *Amex II*, the Supreme Court handed down its opinion in *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011), holding that the Federal Arbitration Act preempted a California law barring the enforcement of class action waivers in consumer contracts. Amex argued that *Concepcion* required reversal of the Second Circuit's holding in *Amex II* but the court of appeals held that the Supreme Court's ruling did not address the enforceability issue presented by the instant case. The court of appeals observed that "*Concepcion* and *Stolt–Nielsen,* taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration" but they do not "require that all class-action waivers be deemed per se enforceable." *Amex III*, 667 F.3d at 213-14.

The Second Circuit said it found guidance in other Supreme Court rulings. It noted that, in *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 637 n.19 (1985), the High Court had indicated in *dicta* that "should clauses in a contract operate 'as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy'." *Amex III,* 667 F.3d at 214. And, in *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000), the Court had "acknowledged in dicta 'that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum'." *Id.* at 216. Turning, once again, to the case at hand, the Second Circuit noted that the affidavit submitted by plaintiffs' expert economist, which predicted that an expert economic study concerning

liability and damages would cost "at least several hundred thousand dollars, and might exceed $1 million," "[d]emonstrates that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id*. at 218. Therefore, "as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable." *Id*. The court of appeals remanded the case to the district court with instructions to deny the motion to compel arbitration.

[Editor's note: In an order published on May 29, 2012, the Second Circuit denied Amex's motion for a rehearing *en banc* in the *American Express Merchants' Litigation* case. *In re Am. Exp. Merchants' Litig*., 681 F.3d 139 (2d Cir. 2012). Presumably, Amex will now petition for writ of *certiorari*. If so, it will be very interesting to see what the Supreme Court does with the case.]

SDNY Invalidates Class Action Waiver in Fair Labor Standards Act Case After *AT&T Mobility LLC v. Concepcion*.

In *Sutherland v. Ernst & Young*, 847 F. Supp. 2d 528 (S.D.N.Y. 2012), Judge Kimba Wood reconsidered and reaffirmed her earlier decision invalidating a class action waiver in an employment agreement. Plaintiff Sutherland had filed a putative class action against her employer, Ernst & Young, alleging she was wrongfully classified as exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA") and New York state law. She claimed that she, and others similarly situated, were therefore not fully compensated. Her individual claim for compensatory damages amounted to only $1,867.00. The court had denied Ernst & Young's motion to compel arbitration, which was based on the arbitration clause in the applicable employment agreement and which permitted arbitration only on an individual basis. The court based its prior decision on the Second Circuit's opinion in *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. ("Amex II")*, 634 F.3d 187 (2d Cir. 2011), and a finding that Sutherland could not vindicate her statutory rights under the FLSA, absent collective action.

Ernst & Young moved for reconsideration on three grounds: clear error; new evidence; and intervening changes in controlling law. The court disposed of the clear error and new evidence arguments in summary fashion. But it conceded that whether the United States Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), had overruled the case-by-case analysis set forth in *Amex II*, and justified a reversal of her earlier decision, was a "close question."

After reconsideration, Judge Wood rejected Ernst & Young's claim that *AT&T Mobility* had effectively overruled *Amex II*. The court found the facts in *AT&T Mobility* were significantly different than those facing Sutherland because the Concepcions were able to vindicate their statutory rights through arbitration. In fact, the Supreme Court had stressed that, because of the terms of their particular arbitration agreement, the Concepcions would have been *better off* from a financial perspective arbitrating their claims against AT&T than they would have been as participants in a class action. Those generous terms ensured that the Concepcions could bring their claim in arbitration on an individual basis. By contrast, the terms of the arbitration agreement and the costs of discovery in Sutherland's case would preclude her from redressing the alleged FLSA violations because of the small amount of her claim. Judge Wood found that Sutherland's case was similar, instead, to the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), in which the Court stated that contractual agreements that would operate "as a prospective waiver of a party's rights to pursue statutory remedies" are unenforceable.

In addition, Judge Wood relied on the fact that the *Discover Bank* rule (i.e., invalidating class-action waivers in arbitration agreements), which had been interpreted in *AT&T Mobility,* was a rule of *state common law* and accordingly was preempted by the FAA, whereas the case-by-case analysis under *Amex II* is based on a federal court's interpretation of the FAA itself.

Supreme Court Holds Arbitration May Not Be Denied Entirely, Even Though Only Some of the Claims Are Found to Be Non-Arbitrable.

In *KPMG LLP v. Cocchi*, 132 S.Ct. 23 (2011), investors in limited partnerships who lost money as a result of Bernard Madoff's Ponzi scheme brought an action in a Florida state court against KPMG, the auditor of the partnerships' financial statements. Their lawsuit alleged four causes of action: negligent misrepresentation; violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); professional malpractice; and aiding and abetting a breach of fiduciary duty. Their theory was that KPMG had failed to use proper auditing standards which resulted in misrepresentations as to the financial health of the partnerships, thereby causing the investors substantial losses.

KPMG had performed its audit work in accordance with an audit services agreement containing an arbitration clause. The clause provided that "any dispute or claim arising out of or relating to … the services provided [by KPMG] … (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved" either by mediation or arbitration. Relying on this clause, KPMG moved to compel arbitration. The Florida trial court denied the motion to compel and the Florida Fourth District Court of Appeal affirmed.

The Florida Court of Appeals noted that, where none of the investors had expressly assented to either the audit services agreement or its arbitration provision, the clause could only be enforced if the investors claims were derivative in that they arose from the services KPMG performed for the partnerships pursuant to the audit services agreement. Because it found that two of the four causes of action -- the negligent misrepresentation and FDUTPA claims -- were *direct* causes of action, the Florida Court of Appeals affirmed. The Florida Court of Appeals did not address, however, whether the remaining two claims (i.e., for professional malpractice and aiding and abetting a breach of fiduciary duty), were direct claims or simply derivative of the partnerships' claims against KPMG.

In a *per curiam* opinion rendered on the basis of the petition for *certiorari*, the United States Supreme Court vacated and remanded. It noted a court cannot refuse to compel arbitration merely because *some* of the claims are not arbitrable. Citing its prior opinion in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985), the Court held that the FAA requires that if a dispute presents multiple claims—some arbitrable and some not—the former must be sent to arbitration even where this will lead to inefficient piecemeal litigation in two different fora. Since the Florida Court of Appeal had not addressed whether two of the four causes of action were arbitrable, the Supreme Court vacated the decision and remanded for consideration of the arbitrability of these other two claims.

II. ISSUES ARISING DURING ARBITRATION PROCEEDINGS.

SDNY Refuses to Appoint Replacement for a Party-Appointed Arbitrator.

The question of whether one party to a reinsurance arbitration had the authority to appoint a replacement party-appointed arbitrator, after its first party-appointed arbitrator had resigned, was before the court in *Northwestern National Ins. Co.* v. *Insco, Ltd.,* No. 11 Civ. 1124 SAS, 2011 WL 1833303 (S.D.N.Y. May 12, 2011). NNIC and Insco had entered into a reinsurance agreement with an arbitration clause that provided for each party to appoint one arbitrator and for the two so chosen to appoint the third arbitrator. NNIC initiated arbitration and each side appointed its arbitrator. A third arbitrator was chosen and, after an organizational meeting in which initial disclosures were made, both sides agreed the panel was properly constituted.

Thereafter, both party-appointed arbitrators made additional disclosures. These led Insco to object, just three days before the panel was to hear argument on NNIC's summary judgment motion, that the panel could not render an impartial decision. Insco's objection letter demanded that the entire Panel resign, failing which

Insco would "go to court." Insco's letter of objection further noted that Insco would shortly be appointing a replacement arbitrator. Insco's party-appointed arbitrator then resigned, but the NNIC and neutral arbitrators did not. NNIC filed a petition under Section 5 of the FAA to have the court appoint a replacement arbitrator. After the petition was filed, but before it could be heard, Insco appointed a qualified replacement arbitrator. NNIC objected on the grounds that Insco was proceeding in bad faith because it was losing the arbitration and did not have the authority under the arbitration agreement to appoint a replacement arbitrator. NNIC argued that, since the arbitration agreement was silent as to the power to appoint a replacement arbitrator, the court should appoint the replacement.

The court rejected NNIC's position. Although Section 5 of the FAA grants authority to the court to appoint a replacement arbitrator where an arbitration agreement does not specifically provide a method for so doing, the *Northwestern* court noted that NNIC had not cited a single case in which a court appointed a replacement party arbitrator that differed from the one selected by the party. While courts have appointed replacements for a neutral or sole arbitrator, they have deferred to the party's choice with respect to a party-appointed arbitrator. The *Northwestern* court found this deference to be consistent with the underlying goal of arbitration, which is to have a resolution of disputes which the parties are willing to accept as binding. Thus, while courts have the power to replace arbitrators where the arbitration agreement provides no method for replacement, "it is prudent to preserve the balance of arbitrators intended by the parties if possible." *Id*. at *2. Accordingly, NNIC's petition to have a replacement arbitrator appointed was denied.

III. AWARD ENFORCEMENT ISSUES.

Second Circuit Reverses SDNY's Vacatur of Reinsurance Arbitration Award, Finding no Evidence of "Evident Partiality."

In *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 2012 AMC 928 (2d Cir. 2012), the

Second Circuit reversed a decision by the Southern District of New York which had vacated the final award in a reinsurance arbitration on the basis of "evident partiality."

Scandinavian Reinsurance Co. Ltd. ("Scandinavian Re") and St. Paul Fire & Marine Insurance Company, St. Paul Reinsurance Company, Ltd. and St. Paul Re (Bermuda) Ltd. (collectively "St. Paul") entered into a Retrocessional Casualty Stop Loss Agreement under which St. Paul ceded a portion of its casualty reinsurance portfolio to Scandinavian Re. When disputes arose under the agreement, St. Paul demanded arbitration. Each party appointed an arbitrator, who then selected a neutral umpire.

As it turned out, the arbitrator St. Paul appointed (Peter Gentile) and the umpire (Paul Dassenko) were subsequently appointed as arbitrators in another arbitration involving Platinum Underwriters Bermuda, Ltd. ("Platinum Bda"), a company related to St. Paul, in which Bart Hedges, a witness in the St. Paul/Scandinavian Re dispute, was also identified as a likely witness. However, neither Gentile nor Dassenko disclosed any of this information, even though they supplemented their initial disclosure in the St. Paul/Scandinavian Re arbitration several times during the pendency of the case. In fact, Scandinavian Re did not learn that Dassenko and Gentile served together on the Platinum Bda arbitration until over two months after an award adverse to Scandinavian Re was issued in its arbitration with St. Paul. The award exposed Scandinavian Re "to an aggregate limit of approximately $290 million in liability." *Id*. at 68, 2012 AMC at 935.

An additional factor of relevance to the case was that Mr. Hedges testified that the reinsurance agreement in the Platinum case should be interpreted "as written" but testified in the St. Paul arbitration that the agreement there should be interpreted "in light of Scandinavian[ ]'s *intent* at the time it entered into the agreement." *Id*. at 69, 2012 AMC at 938 [emphasis in original].

The award in the Platinum case was vacated by the U.S. District Court for the Eastern District of Pennsylvania on the grounds it could not be rationally derived from the parties' submissions and was "completely irrational." *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F. Supp. 2d 631 (E.D. Pa. 2009). The Third Circuit Court of Appeals subsequently affirmed the *vacatur* of the award in the Platinum arbitration, although this occurred after the Southern District of New York issued its *vacatur* ruling in the instant case. *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*,400 F.App'x 654 (3d Cir. 2010).

The Southern District of New York vacated the award in the Scandinavian Re/St. Paul arbitration, concluding that Dassenko's and Gentile's simultaneous service as arbitrators in the two reinsurance cases constituted a material conflict of interest and that their failure to disclose their participation in the Platinum arbitration met the Second Circuit's standard for evident partiality because the undisclosed relationships involved in that arbitration "collectively were material." *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.,* 732 F. Supp. 2d 293, 309 (S.D.N.Y. 2010).

On appeal, the Second Circuit reversed, concluding that "under the circumstances of this case, the fact of Dassenko's and Gentile's overlapping service as arbitrators in both the Platinum Arbitration and the St. Paul Arbitration does not, in itself, suggest that they were predisposed to rule in any particular way in the St. Paul Arbitration." *Scandinavian Reinsurance*, 668 F.3d at 64. The court of appeals did not consider "the fact that two arbitrators served together in one arbitration at the same time that they served together in another is, without more, evidence that they were predisposed to favor one party over another in either arbitration." *Id.* at 74. Nor did the court regard the "identified similarities" between the two arbitrations as suggesting bias. *Id.* at 75. The court further noted "there is no indication in the record that Gentile was appointed by Platinum at the recommendation of St. Paul, or that Gentile or Dassenko had any special financial or professional interest in ruling in St. Paul's favor as a result of their participation in the Platinum

Arbitration." *Id*. at 76. The court concluded that "[a]lthough it would have been far better for them to have disclosed that fact, we do not think disclosure was required to avoid a vacatur of the Award in light of the fact that the relationship did not significantly tend to establish partiality." *Id*. at 78. The Second Circuit remanded the case to the district court with instructions to deny the petition to vacate the award and grant St. Paul's cross-petition to confirm it.

Second Circuit Finds No Manifest Disregard of Lilly Ledbetter Fair Pay Act.

In *Schwartz v. Merrill Lynch & Co., Inc*., 665 F.3d 444 (2d Cir. 2011), a Merrill Lynch financial advisor had participated in class action gender discrimination litigation against the brokerage firm. She ultimately entered into an individual settlement agreement and release, releasing Merrill Lynch from all claims to and including April 2, 2002. In 2003, she once again claimed gender discrimination by Merrill Lynch and these *new* claims were subject to arbitration. Merrill Lynch moved to confine the arbitration to events subsequent to April 2, 2002. The single arbitrator, before whom the matter was then pending, ruled that discrimination claims arising from events occurring before April 2, 2002 were barred by the release, but that Schwartz could offer evidence of events that occurred shortly before that date if they were relevant to her claims of discrimination after that date. Arbitration hearings were ultimately held before a three-member panel in May and August 2008. During their course, the arbitrators determined they would restrict Schwartz from presenting evidence with respect to events occurring more than six months before April 2, 2002. In November 2008, the Panel issued its award and found that Schwartz had not proven her claims.

Schwartz moved to vacate the award on the basis of the Lilly Ledbetter Fair Pay Act (the "Act"), which Congress passed in late January 2009 and made *retroactive to May 28, 2007*. Schwartz argued that, since her claim was pending on May, 28, 2007, the Panel's decision to exclude evidence of Merrill Lynch's conduct before the six-month period prior to April 2, 2002 was clearly

contrary to the Act. The district court denied the motion, finding no manifest disregard of the law by the arbitrators because they had rendered their decision months before the Act was passed and "[a] change in the decisional law after the entry of a final award is not grounds for vacatur." *Schwartz v. Merrill Lynch & Co., Inc.*, No. 09 Civ. 900 (WHP), 2010 WL 517585 at *4 (S.D.N.Y. Feb. 8, 2010).

On appeal, Schwartz argued she was denied the opportunity to present and recover for claims during the actionable liability period based on or related to discriminatory decisions and acts that predated her 2001 settlement and release. The Second Circuit found her contentions without merit. The court noted that, post-*Hall Street*, manifest disregard remains a valid ground for vacating arbitration awards as a judicial gloss on the specific grounds for *vacatur* specified in Section 10(a) of the FAA. The court also noted that under the FAA, an arbitrator's award may also be vacated where the award is in manifest disregard of the terms of the parties' arbitration agreement. However, the court found the record did not provide any basis for vacating the award.

Citing Section 10(a)(3) of the FAA, the court held that the temporal limitation on the introduction of evidence imposed by the arbitrators was not so unreasonable as to constitute "'misconduct … in refusing to hear evidence pertinent and material to the controversy'." *Schwartz,* 665 F.3d at 453. Moreover there was no manifest disregard of the Act because that statute had not been passed when the award was rendered and the decision to exclude evidence was not based on the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), but rather on the panel's contractual interpretation of the release.

Second Circuit Rejects Challenge to Arbitrator's Disclosure and Finds No Evident Partiality or Manifest Disregard of Law.

The questions of whether an arbitrator had failed to make sufficient pre-hearing disclosure and whether the panel manifestly disregarded the law were at issue in *STMicroelectronics, N.V. v.*

Credit Suisse Securities (USA) LLC, 648 F.3d 68 (2d Cir. 2011). Pursuant to FINRA rules, a customer had commenced arbitration against its broker claiming securities fraud, breach of contract and intentional misrepresentation. Midway through the arbitration hearings, the broker learned that one of the three arbitrators had testified on multiple occasions as an expert witness on behalf of claimants against financial institutions. The broker then challenged the partiality of the arbitrator who refused to disqualify himself. After the panel issued a unanimous award against the broker, the customer moved to confirm it. The district court granted the motion to confirm over the broker's objection that the award should be vacated under FAA Section 10(a)(2) for evident partiality.

On appeal, the broker changed the focus of its argument and claimed the award should also be vacated under Section 10(a)(3)'s "catch-all" for "other misbehavior by which the rights of any party have been prejudiced." The Second Circuit affirmed the confirmation of the award, noting the high standard which motions to vacate must satisfy and the lack of evidence supporting *vacatur*.

The arbitrator's initial pre-hearing disclosure stated that he had worked as a litigation consultant and as an expert witness for "both sides." By way of example, he disclosed one case in which he had worked for a financial institution and another in which he had been retained by a claimant. Mid-way through the hearings, the broker learned of a statement the arbitrator had made, several years before the arbitration at issue, in which the arbitrator noted that he had *testified* as an expert more than twenty-five times and only one or two of those instances were on behalf of financial institutions. On appeal, the broker claimed that this made the pre-hearing disclosure (i.e., that the arbitrator worked for "both sides") misleadingly unbalanced and that it demonstrated an alleged predisposition by the arbitrator in favor of claimants. The broker also alleged the arbitrator had failed to disclose a prior engagement as an expert witness for a claimant on an issue directly relevant to the arbitration.

As to the first point, the court noted that—when challenged mid-way through the hearings—the broker had provided further

evidence of having worked for *both* claimants and financial institutions. Moreover, the arbitrator's prior statement related just to matters in which he had *testified* as an expert and did not encompass *all* his engagements on behalf of both sides. In addition, the prior statement did not take account of work the arbitrator had performed for financial institutions between the time of the statement, and the time of the initial disclosure, a period which spanned several years.

As to the second point, the court noted that, just like judges, arbitrators have predispositions with respect to the law and that the arbitrators with the most commercial experience (and, therefore, the ones most in demand), were likely to have predispositions and experience with relevant issues. After noting that the broker had never asked the arbitrator for a complete accounting of his experience either before or during the arbitration, or during the proceedings before the district court, the Second Circuit ruled the broker failed to carry its heavy burden of demonstrating evident partiality or misbehavior.

The court also found that, to the extent the manifest disregard doctrine still exists post-*Hall Street*, whether as an independent ground for review or as a judicial gloss on the grounds for *vacatur* enumerated in Section 10, the proof fell far short of demonstrating manifest disregard of the law.

Seventh Circuit Reinstates Award, Finding Arbitrators' Silence Did Not Constitute Manifest Disregard of Law.

The Seventh Circuit joined several other circuit courts of appeal in holding that "manifest disregard of the law" as a ground for *vacatur* independent of the grounds set forth in Section 10(a) of the FAA did not survive the Supreme Court's ruling in *Hall Street Associates, L.L.C. v. Matell, Inc.*, 552 U.S. 576 (2008).

In *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281 (7th Cir. 2011), the underlying contractual dispute between the parties involved allocation of ownership rights in certain foreign and domestic patents. The district court found

that the arbitrators' failure to discuss the foreign patents separately from the domestic patents in making their award was a "manifest disregard of the law" and vacated the portion of the award dealing with the foreign patents. The Seventh Circuit reversed, holding that, after *Hall Street*, manifest disregard is not an independent basis for *vacatur* distinct from the four grounds available under Section 10(a) of the FAA and that it cannot be used except to the extent it can also be shown that the arbitrators "exceeded their powers" under the applicable arbitration agreement.

The Seventh Circuit noted the arbitrators' failure to separately discuss their reasoning as to the ownership of the foreign patents was not in excess of the arbitrators' powers. It explained that the district court appeared to have inferred from the arbitrators' silence with respect to the foreign patents that the arbitrators must have had an extra-contractual ground for reaching their decision as to their ownership. The court of appeals identified this as a "logical error," noting that "[s]ilence is just silence." *Id*. at 285.

The Seventh Circuit's decision deepened the split among the Circuits as to how to interpret the Supreme Court's ruling in *Hall Street* with respect to the doctrine of manifest disregard of the law.

Eleventh Circuit Holds Award Was Sufficiently Reasoned and Was Improperly Vacated by the District Court on Grounds that the Arbitrators Had Exceeded Their Powers.

The question of whether arbitrators exceeded their powers—by failing to provide a "reasoned award" as called for by the parties' agreement—was before the court in *Cat Charter, LLC v. Schurtenberger,* 646 F.3d 836 (11th Cir. 2011). Claimants had contracted with respondents to build a yacht on a cost-plus basis. When the deal soured, claimants demanded AAA arbitration and sought recovery on several theories including, among others, deceptive and unfair trade practices; breach of contract; and civil remedy (theft) for criminal practices under Florida law.

Before arbitration commenced, the parties requested the panel to provide a "reasoned award." The panel delivered an award in favor of claimants which took the form of a numbered list of roughly seven sentences. On the deceptive and unfair practices claim, the relevant portion of the award's first sentence read: "we find that Claimants have proven their claim against Respondents … by the greater weight of the evidence." The award's second sentence, granting claimants' breach of contract claim, was essentially identical. The award's remaining sentences addressed the issue of attorneys' fees and denied the other claim theories in summary fashion, with the exception of the claim for civil theft, which provided slightly more detail as to the panel's reasoning for denial. Claimants moved to confirm the award in federal district court. Respondents cross-moved to vacate under Section 10(a)(4) of the FAA on the ground that the arbitrators had exceeded their powers because the award's brevity did not qualify as a "reasoned award." The district court held for respondents and vacated the award. Claimants appealed.

On appeal, respondents argued that the panel's statements that the claimants had proved their contract and deceptive practices claims "by the greater weight of the evidence" added no explanatory value and could not transform it from a "standard" or "bare" award. The Eleventh Circuit disagreed. After noting that the underlying commercial dispute essentially involved a "swearing contest" between the parties, it reversed the district court. The court of appeals held that a "reasoned award" falls on a spectrum and is "something short of findings [of fact] and conclusions [of law]" and something more than a "standard" award. *Cat Charter,* 646 F.3d at 844.

Where the panel's decision turned primarily upon credibility determinations, the panel's statement as to "the greater weight of the evidence" provided sufficient justification to constitute a "reasoned" award. This result was supported by the fact that the award also provided more detailed reasoning with respect to the civil theft claim. In reinstating the award, the Eleventh Circuit explained that,

had the parties wanted a more detailed justification, they could have requested the panel to provide findings of fact and conclusions of law.

Divided Second Circuit Panel Dismisses Award Enforcement Action on the Basis of Forum Non Conveniens.

In *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru,* 665 F.3d 384 (2d Cir. 2011), a divided panel of the Second Circuit Court of Appeals reversed the district court and dismissed an action brought to enforce a Peruvian arbitration award on the basis of *forum non conveniens* ("FNC").

Plaintiff, a Brazilian corporation, entered into a consulting agreement with one of the defendants, an agency or instrumentality of the Peruvian government, to prepare engineering studies on water and sewage services in Peru. After a fee dispute arose, plaintiff commenced arbitration in Peru against the agency, pursuant to a clause in the contract that allowed resort to the courts or arbitration in that country, and obtained an award directing the agency to pay more than $21 million. The ministry of which the agency was a part appealed to the Court of Appeals in Lima, challenging the award and seeking its nullification, but that application was unsuccessful. The agency began making payments on the award but a Peruvian statute imposes "a limit of three percent of the budget of a governmental entity on the amount of money the entity may pay annually to satisfy a judgment." *Id*. at 387.

As a result of this payment cap, plaintiff filed suit in the Southern District of New York to confirm the award and obtain a judgment for $21,607,003. Plaintiff advised the district court that Peru had substantial assets in New York, resulting from the sale of bonds. Plaintiff based its action in part on the Inter–American Convention on International Commercial Arbitration (the "Panama Convention"), which is enforceable pursuant to the FAA.

The defendants – the Republic of Peru, its Ministry of Housing, Construction and Sanitation, and an agency or program

within the ministry – moved to dismiss on several grounds, including lack of subject matter jurisdiction, FNC and international comity. The motion was denied in all respects. On the appeal to the Second Circuit, the U.S. Government submitted a brief *amicus curiae* in which it urged a remand so the district court could give "further consideration to the issue of subject matter jurisdiction over the Republic and the Ministry." *Id*. at 389. Interestingly, however, the Government did not contend the district court erred in refusing to dismiss on grounds of either FNC or international comity.

In a 2-1 decision, the Second Circuit (per Judge Newman) reversed and instructed the district court to dismiss the petition to confirm the award. The district court had recognized that, despite the applicability of the Panama Convention, it could reject jurisdiction "for reasons of convenience, judicial economy and justice," pursuant to the Second Court's ruling in the case of *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine,* 311 F.3d 488, 497, 2002 AMC 2782, 2791 (2d Cir.2002). Applying FNC analysis, the district court concluded that a Peruvian forum would be inadequate because, although Peruvian law permitted execution of arbitral awards, only a U.S. court could attach the commercial property of a foreign nation located in the U.S. The Second Circuit viewed this as error, writing that "[w]here adequacy of an alternative forum is assessed in the context of a suit to obtain a judgement and ultimately execution on a defendant's assets, the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there." *Figueiredo*, 665 F.3d at 391.

Turning to an analysis of public interest factors, the Second Circuit concluded Peru's three percent cap statute was "a highly significant public factor warranting FNC dismissal." *Id*. at 392. Specifically, the court observed that "[w]ith the underlying claim arising (1) from a contract executed in Peru (2) by a corporation then claiming to be a Peruvian domiciliary (3) against an entity that appears to be an instrumentality of the Peruvian government, (4) with respect to work to be done in Peru, the public factor of

permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award tips the FNC balance decisively against the exercise of jurisdiction in the United States." *Id*. While acknowledging that enforcement of arbitration awards is "normally a favored policy of the United States and is specifically contemplated by the Panama Convention," the court ruled that this "general policy must give way to the significant public factor of Peru's cap statute." *Id*. In requiring that the petition be dismissed, the court imposed various conditions, including the condition that "if, for any reason, the courts of Peru decline to entertain a suit to enforce the Award, this lawsuit may be promptly reinstated in the District Court." *Id*. at 394.

Judge Lynch issued a long and thoughtful dissent. He pointed out that since FNC is not listed as a defense to enforcement of an arbitration award in either the New York or Panama Conventions, "a strong case can be made that, by acceding to the treaties, the United States has made the doctrine inapplicable to enforcement proceedings that they govern." *Id*. at 397. Recognizing that the Second Circuit had previously held FNC applicable to award enforcement cases in *Monegasque,* he was clearly troubled by that ruling, thought the case was distinguishable and, in any event, thought the majority had misapplied FNC in this case. He stated that "the majority's position—that a substantive law that is favorable to one of the parties is a public interest factor that may count in the forum non conveniens balance if that party is also a sovereign—finds no support in *Monegasque* or any other case of which I am aware. To the contrary, the Supreme Court has specifically held that whether the alternative forum's substantive law is more or less favorable to the party seeking dismissal is *not* a factor that the district court may consider in deciding a forum non conveniens motion." *Id*. at 401.

Judge Lynch also thought the majority's ruling did violence to the strong federal policy in favor of arbitration, especially with respect to international disputes. He wrote that "[t]he value of international arbitration, especially in contracts involving sovereign states, is that it provides a mechanism by which commercial actors may avoid the 'home court advantage' of proceeding in the courts

of an adversary state. But this advantage is negated if a party may obtain an independent adjudication on the merits, but is prevented from enforcing any award it obtains anywhere but in the courts of the very country that is to pay the award." *Id*. at 402.

Judge Lynch described the majority's logic as "unprecedented" and, in his view, "foreclosed by Supreme Court law." Specifically, he thought the majority's act of giving conclusive weight to differences in substantive law was prohibited by the Supreme Court's decision in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), and said the majority achieved its result "by a sleight of hand: asserting that although, in the normal course, forum non conveniens is self-consciously blind to how dismissal will affect the substantive law that governs the case, when one of the parties is a sovereign, substantive legal issues may be transformed into public interest factors and considered in the analysis." *Figueiredo*, 665 F.3d at 403.

In closing, Judge Lynch said his concern was "less with the implications of the majority's holding for this particular plaintiff than with how this decision will distort the law of forum non conveniens in this Circuit and undercut the transnational effort (in which the United States is an active participant) to promote commercial arbitration. Because I believe that the majority's decision adopts an incorrect, expansive, and unprecedented approach to forum non conveniens precisely in a context in which we should be particularly cautious and restrained in its application, I respectfully dissent." *Id*. at 408.

Award Against Foreign Government Vacated Because Court rather than Arbitrators Should have Determined "Arbitrability" and Determination of that Issue by the D.C. Circuit Showed Claimant had Failed to Satisfy a Precondition to Arbitration.

In *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012), BG Group, a British entity, invested in gas companies in Argentina under the protection of a bilateral investment treaty between Argentina and the United Kingdom. The

treaty provided that disputes between an investor and the host nation would be resolved in the host nation's courts. However, if no final court ruling was forthcoming within eighteen months or the dispute was unresolved after a court ruling, the treaty provided that resort could then be had to arbitration.

In a severe economic crisis, Argentina passed emergency legislation eliminating the prior pegging of the Argentine peso to the US dollar, upon which BG Group's investment depended. As part of the emergency legislation, Argentina also established a formal re-negotiation process for public service contracts, which excluded any licensee who sought redress in court or through arbitration; and stayed key legal proceedings by aggrieved parties for six months.

Eight months after the lapse of the stay of proceedings, and without initiating any court action in Argentina, BG Group commenced arbitration proceedings against Argentina. In accordance with the bilateral investment treaty, the arbitration proceeded under Article 21(1) of the UNCITRAL rules, which provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction" to hear the arbitration.

The arbitral panel determined that it had jurisdiction over the dispute on the grounds that court proceedings in Argentina would have been futile. In rendering a $185 million award in favor of BG Group, the panel concluded that "'Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment'" required by the bilateral investment treaty. *Id*. at 1368. A U.S. trial court confirmed the award and denied Argentina's petition to vacate, which was reversed by the D.C. Circuit on the grounds that the controversy was not arbitrable.

The court of appeals held that "[b]ecause the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law

for the court to decide." *Id*. at 1371. Thus, the court of appeals concluded that the district court "erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability" when BG Group had disregarded the treaty's requirement that it initially seek resolution of its dispute in an Argentinian court. *Id*. Rather than remanding the case to the district court for an arbitrability determination, the court of appeals did that on its own, concluding that the award must be vacated because it was clear BG Group "was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained." *Id*. at 1373.

[Editor's note: The editor wishes to acknowledge the contributions of Michael J. Walsh, who wrote many of the summaries appearing herein, and of the following who contributed cases: Michael Marks Cohen, David Nourse and non-Committee member Thomas Grasso.]

COMMITTEE ON CARRIAGE OF GOODS

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

CARGO NEWSLETTER NO. 59

1 x $7,320 YIELDS $500….

Edso Exporting LP v. Atlantic Container Line AB, 471 F. App'x 8, 2012 AMC 1811 (2d Cir. 2012); Summary Order of Judges Dennis Jacobs, Guido Calabresi, Rosemary S. Pooler

On a motion for partial summary judgment requesting that any damages be limited to $500 per "customary freight unit", the district court concluded the customary freight unit was each cubic meter of a crane which had been damaged. (See Cargo Newsletter No. 57). The carrier argued that the customary freight unit was each item shipped and reasserted this argument on appeal.

The circuit court noted (in a ruling by summary order[1]), on the facts before it, that the bill of lading and tariff, when read together, unambiguously established the freight unit was on a per-item basis, rather than a per-cubic meter basis. The bill of lading described the basis of the freight "As Agreed" and any ambiguity as to the meaning of this phrase was resolved by the tariff which was incorporated by reference in the bill of lading. The tariff identified the base freight as "Each (EA)". "In the context of the $7,320 figure immediately above 'Each (EA)' can only refer to each crane." *Edso*, 471 F. App'x at 9, 2012 AMC at 1813. Because the bill of lading, as supplemented by the tariff, unambiguously established the customary freight unit was each crane shipped, "the district

[1] Rulings by Summary Order do not have precedential effect. Citation to a Summary Order is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and Rule 32.1.1 of the Court's Local Rules.

court erred by considering extrinsic evidence as to how the parties calculated the $7,320 figure." *Id*. at 10, 2012 AMC at 1813

The circuit court rejected an argument by the appellee that a quote confirmation mentioned in the bill of lading indicated the crane was rated at $60 per weight or measurement ton, noting the bill of lading merely referenced the confirmation without any elaboration. "By contrast, it expressly incorporates by reference the tariff. If the parties had intended to also incorporate the terms of the quote confirmation, they would have done so explicitly." *Id*.

Prior to its conclusion, the court stated "'While some courts have held that the customary freight unit is the measurement customarily used to calculate the rate to be charged,' in this circuit 'the customary freight unit is not the standard unit of measure used in the industry, but the actual freight unit used by the parties to calculate freight for the shipment at issue'." *Id*. at 9, 2012 AMC at 1812 *quoting FMC Corp.v. S.S. Marjorie Lykes*, 851 F.2d 78, 80, 1988 AMC 2113, 2115 (2d Cir. 1988) (internal quotation marks omitted). "'To determine the customary freight unit for a particular shipment, the district court should examine the bill of lading, which expresses the contractual relationship in which the intent of the parties is the overarching standard. A district court may also consider the tariff required to be filed with the Federal Maritime Commission, which also sets forth the freight rate'." *Id*. "Where the bill of lading and the filed tariff are unambiguous as to the freight unit used to calculate freight the court may not consider extrinsic evidence of the parties' intent, including negotiations." *Id*. at 9, 2012 AMC 1812-13 *quoting FMC Corp*., 851 F.2d at 80-81, 1988 AMC at 2115. In particular, if the bill of lading and tariff unambiguously establish that freight is charged on a lump sum basis, or based on the number of items shipped, it is irrelevant that the parties may, as a practical matter, have calculated freight based on the weight or volume measurements of the goods. See *Vigilant Ins. Co. v. M/T Clipper Legacy,* 656 F. Supp. 2d 352, 359, 2011 AMC 462, 470 (S.D.N.Y. 2009); *Ulrich Ammann Bldg. Equip. Ltd. v. M/V Monsun*, 609 F. Supp. 87, 91, 1985 AMC 1965, 1969 (S.D.N.Y. 1985).

Finding no ambiguity in the governing documents concerning the basis on which freight was charged, the court found the carrier entitled to partial summary judgment limiting its damages to $500, and reversed the judgment of the district court.

NO STONE LEFT UNTURNED….

MTS Logistics, Inc. v. Stone Tile Direct, LLC; 2012 AMC 1653 (S.D.N.Y. 2012); Decision of Honorable Paul A. Crotty dated March 27, 2012

The defendant purchased natural stone from a company in Turkey and retained the services of plaintiff for ocean carriage of the stone from Turkey to the United States. Plaintiff issued a bill of lading which listed the defendant as "Consignee" and "Notify Party" and the Turkish shipper as "Shipper". The plaintiff signed the bill of lading as "Carrier". Clause 1 of the Bill of Lading provided that Merchants "shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under the Bill of Lading". It defined "Merchants" as the "shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants or agents of any of these." Clause 7 contained a warranty to the carrier that the description and particulars of the goods "including, but not limited to, weight, content, measurement, quantity, quality, condition, marks, numbers and values are correct". The bill of lading further provided that "Merchant shall indemnity the Carrier against all loss, damage, fines and expenses arising or resulting from the inaccuracies in or inadequacy of, such particulars,…." The bill of lading showed a declared weight to be 21,450 kgs as furnished by the shipper. The actual weight was later determined to be approximately 27,615 kgs.

As a result of the understated weight, cable cranes were unable to safely discharge the stone cargo, leading to port demurrage and vessel detention charges. The actual carrier passed these charges on to the NVOCC plaintiff who in turn sued the defendant consignee.

The court noted that while typically the "'primary obligation to pay shipping costs rests with the shipper, rather than the consignee,'" the consignee can become liable for the shipping costs where it has a binding statutory or contractual obligation to pay the freight charges. *MTS Logistics,* 2012 AMC at 1656 (citing cases). The bill of lading called for "freight collect" and the court noted that "freight charges" are to include "[d]etention and demurrage charges to be receiver's account." *Id*. at 1657.

The court found plaintiff had demonstrated that the defendant had a contractual obligation to pay the detention and demurrage charges. The court further went on to note the bill of lading provided "Merchant" shall be jointly and severally liable for their performances, obligations which included warranting that the cargo weight was correct. There was no dispute that both defendant and the Turkish shipper qualified as "Merchants." Likewise, there was no dispute that the cargo weight, as reflected in the bill of lading, was inaccurate. "Thus, Defendant, as a Merchant, is obligated to 'indemnify the Carrier [for] all loss, damage, fines and expenses arising or resulting from [this] inaccurac[y].'"

The defendant argued that the merchant indemnification provision violated section 1304(3) of COGSA which prevents a shipper from being held liable for damages sustained by a carrier "without the act, fault, or neglect of the shipper, his agents, or servants". The court distinguished defendant's argument, noting that the bill of lading involved provided that the merchant shall indemnify the carrier for losses for which the carrier is *not* responsible. Since the plaintiff cannot be indemnified for damages that it is responsible for, the merchant provision in the bill of lading does not violate Section 1304(3).

While there was no evidence which suggested that the plaintiff itself was negligent or was in any way responsible for the misstated cargo weight, there was sufficient evidence that the Turkish shipper was negligent in misstating the cargo weight:

> Accordingly, Plaintiff has demonstrated that the Defendant is also contractually obligated, as a Merchant, to indemnify Plaintiff for damages caused by the misstated cargo weight. See *APL Co. PTE*, 582 F.3d at 955 (finding that parties listed as "notify party" on bill of lading, who were not themselves negligent, were contractually liable as "merchants" to indemnify carrier for shipper's negligence).
> *Id*. at 1658-59.

The court went on to consider the quantum of damages, noting the plaintiff's motion was seeking a lower amount than that claimed in its Rule of 56.1 Statement. The court granted judgment in the lesser amount finding the plaintiff had not demonstrated entitlement to the greater amount. The court awarded prejudgment interest at the United States Treasury Bill rate and denied plaintiff's request for attorney's fees, noting an indemnitee may recover "'… attorneys fees and expenses incurred in *defending* a claim as to which he is indemnified, he may not recover fees and expenses incurred to establish his right against the indemnitor', absent an explicit agreement otherwise". *Id*. at 1660 *quoting Peter Fabrics, Inc. v. S.S. HERMES, 765 F.2d 306, 315-16, 1986 AMC 1699, 1712 (2d Cir. 1985)*.

There was no specific contract provision allowing for attorney's fees and there was no claim or evidence that the defendant acted in bad faith. Thus, attorney's fees were denied.

IF YA WANNA DANCE, YA GOTTA PAY THE PIPER….

Orient Overseas Container Line Ltd., v. Crystal Cove Seafood Corp, 2012 AMC 1395 (S.D.N.Y. 2012)*;* Decision of Paul G. Gardephe dated February 14, 2012.

Plaintiff ("carrier") contracted with defendant ("consignee") to transport a shipment of frozen tilapia from China to Smyrna, Tennessee. The carrier sought $49,364.20 in demurrage, transportation and surveying expenses which it incurred as a result of consignee's alleged wrongful refusal to accept delivery. The carrier's alleged damage represented $77,350 for container demurrage and reefer monitoring charges less $30,610 which was received from a salvage sale of the cargo.

The consignee counterclaimed, seeking damages of $60,860 representing the market value of tilapia which it claimed was ruined because of a refrigeration unit malfunction. The carrier conceded that some portion of the cargo was damaged but nonetheless contested liability and the appropriate amount of damages. The consignee sought sanctions for spoliation of evidence and both sought attorneys' fees.

Although the carrier was found to have acted with due diligence at the beginning of the voyage, the court found that it acted negligently after discovering the malfunction of the refrigeration unit and its negligence caused damage to the cargo.

The court found the carrier was negligent in failing to immediately transfer the cargo into a working container after discovering the malfunctioning refrigeration unit. By the time the container arrived at the warehouse of the consignee's designated agent for delivery, the fish had partially thawed and was giving off a strong odor. After the carrier discovered the malfunction, it did not notify the consignee of the malfunction until two days later, and then failed to transload the cargo into a working container until three days later, despite a request by the consignee. Thus, the fish remained in a non-functioning container for more than seven days in 90 degree heat.

The carrier's claims manager made the decision not to transload the fish, despite being informed by his subordinates that "Rather than wait until morning we need to get this load into [a] working unit ASAP". The court was not convinced by any of the

explanations given and concluded that the carrier was negligent in handling the cargo, causing damage to the cargo.

The court noted that ordinarily, the measure of damage under COGSA is the difference between the market value of the shipment at destination had it arrived in good condition and its market value as damaged. However, the fair market value rule is not the sole method of computing damages and alternative means may be used in order to adequately compensate for a loss. "For example, under COGSA, where a carrier's negligence has rendered cargo 'practically valueless,' a shipper is not required to take delivery of the damaged goods and may recover their replacement cost" *Id*. at 1407-08 *citing Bosung Industrial Co. v. M.V. Aegis Sonic*, 590 F. Supp. 908, 915 (S.D.N.Y. 1984).

The court found the case presented unusual facts:

> The shipper rejected delivery of seriously compromised food cargo damaged as a result of the carrier's negligence; the carrier nonetheless pressured the shipper to take delivery of the cargo; the parties then spent the next seven months disputing what should happen to the cargo, while it remained stored in the carrier's container; after seven months, the carrier – without authorization from the shipper – sold the cargo at a much higher price than the survey reports suggested it might be worth.
>
> *Id*. at 1410.

The court further noted that the plaintiff's carrier obtained $30,610 from the salvage sale of the cargo, while the consignee had not received any compensation for its $60,860 loss. Although the carrier argued that there was a failure to mitigate damage, the court

found that by the time the container arrived at the delivery terminal, the cargo was in such a compromised condition that the consignee was within its rights to reject delivery. The carrier had not shown that such decision was unreasonable. The fact that the cargo was later sold for $30,610 for salvage did not undermine the conclusion that the cargo was "practically valueless" for its intended purpose, i.e. human consumption.

The court went on to grant pre-judgment interest, but refused the consignee's claim for punitive damage.

As to the carrier's claim for demurrage, the court noted that "a shipper who lawfully refuses to accept delivery cannot not be held liable for demurrage and related expenses." *Id*. at 1416. "After rejecting the shipment and arranging for a joint survey, however,[the consignee] instructed [the carrier] not to sell or otherwise dispose of the cargo." *Id*. For some seven months, the cargo remained as it was pursuant to the consignee's demand that no sale of the cargo take place. "Having demanded that Orient continue storing the frozen tilapia for seven months, Crystal bears responsibility for reasonable storage fees." *Id*.

The carrier asserted its claim for demurrage fees under the bill of lading and tariff, amounted to $77,350. The court, however, noted that the carrier's delivery of "practically valueless" cargo defeated its claim for demurrage. Even assuming *arguendo* that the demurrage terms in the bill of lading and tariff applied, the carrier would have an obligation to mitigate its damages. The evidence demonstrated that the spoiled tilapia would not contaminate other food items stored at U.S.C.S., who would have agreed to store the cargo for the period involved at a cost of $4,390. There was no contrary evidence as to reasonable storage fees.

Given the consignee's "unreasonable" demand (for seven months) that the carrier not dispose of the spoiled cargo, the court found the carrier entitled to storage fees in the amount of $4,390.

The court denied the claim for spoliation sanctions, noting that there was no evidence that records were destroyed "with a culpable state of mind" nor was there any reason to believe the consignee suffered prejudice as a result of the failure to produce the records at issue. (Records were produced covering the critical time period).

Both sides moved for attorneys' fees. The carrier relied on its bill of lading, which provided for an award of attorneys' fees where the shipper has breached its obligations under the bill of lading; however, the court noted the consignee was entitled to reject delivery of the spoiled fish and, thus, the carrier had no right to attorneys' fees.

As to the consignee's claim for attorneys' fees under general maritime law, "generally, attorneys' fees awarded in admiralty suits are discretionary and based on a finding of bad faith." The court discussed various aspects which would support a granting of attorneys' fees (citing cases), concluding that the carrier acted in bad faith to the extent that it contested liability. While its arguments regarding damages were not entirely frivolous, it offered no colorable argument as to liability:

> There was never any dispute that the frozen tilapia was presented to Orient in good condition, that the refrigeration unit in Orient's container malfunctioned, and that, as a result, the cargo arrived at USCS on August 4, 2009 in a damaged condition. Orient offered no explanation as to why it had not moved the frozen tilapia into a working container on August 1, 2009, when it discovered the malfunction. Orient likewise did not explain why the fish was not transloaded on August 2. And Orient provided no credible explanation

> as to why it refused to transload the fish on August 3, 2009, when it first notified Crystal of the malfunction and Crystal requested that the fish be transloaded into a working container.
>
> *Id*. at 1419.

The carrier's defense as to liability was pursued in the face of contemporaneous documents from its own employees demonstrating that they understood that it was necessary that the tilapia be transloaded into a working container "ASAP". All of the critical facts concerning liability were in the carrier's possession at the outset of the suit.

Because the carrier had no colorable defense as to the counterclaim for cargo damage, the court found its defense was pursued in bad faith and for purposes of delay and vexatiousness, granting the consignee's application for attorneys' fees, premised on the carrier's challenge to the consignee's counterclaim as to liability.

Judgment was entered in favor of the carrier on its claim for demurrage in the amount of $4,390 and in favor of the consignee on its counterclaim for cargo damage in the amount of $60,860 plus pre-judgment interest.

As to attorneys' fees, the consignee's claim was to be made the subject of supplementary submissions.

THE BELL TOLLS EVEN AT THE ELEVENTH HOUR….

AIG Mexico Seguros Interamericana, S.A. de C.V., v. M/V Zapoteca, 844 F. Supp. 2d 440, 2012 AMC 490 (S.D.N.Y. 2012); Decision of Chief Judge Loretta A. Preska dated February 15, 2012;

The court considered a motion to dismiss pursuant to a forum selection clause in the "original accomplished and signed bill of

lading" which defendants regarded as the relevant contract between the parties. The plaintiff argued that the motion had previously been squarely before another judge who rejected it with prejudice. The court reviewed the history of the matter and found the motion was not precluded by any prior orders. The prior judge had denied a motion "without prejudice" and specifically stated that after discovery, defendants could make another motion. The court found no reasons to believe that the former judge rejected the contract forum selection arguments with prejudice prior to full discovery.

Speaking to the forum selection clause, the court noted:

> Absent fraud or undue influence, forum selection clauses should be readily enforced against contracting parties (citing cases). Further, a broad forum selection clause governing "all" claims arising under the bill of lading extends to non-signatories connected to the carriage even where those claims arise outside the four corners of the contract itself (i.e., tort or bailment liability) (citing cases).
>
> *AIG Mexico,* 844 F. Supp. 2d at 442, 2012 AMC at 492.

The bill of lading submitted by defendants made clear the vessel's owner was the carrier and its place of business was Cyprus. Plaintiff proffered an alternative "unsigned and non-negotiable bill of lading" which had a forum selection provision pointing to Hamburg, Germany.

While the former judge concluded that, at that time, there was insufficient evidence to make a determination one way or another as to which bill of lading, if any, controlled the forum selection clause, the court found that defendants had demonstrated that the signed

original bill of lading stated that a number of original bills of lading having been signed, where one was "accomplished", the others were "to stand void" and the original bill of lading was "accomplished" when it was endorsed.

The plaintiff's witness "most knowledgeable about the bill of lading" identified the signed original as the relevant bill of lading to the cargo involved and further testified that a signed original bill of lading would have been necessary for any shipment involving a letter of credit, as here. Plaintiff's expert appended to his investigation report the signed original bill of lading proffered by defendants and the plaintiff's head of plant operation testified it was the practice in worldwide commerce for a recipient of goods to present an original, rather than unsigned non-negotiable copy, in order to collect cargo at destination. Finally, no witness for the plaintiff testified that there were any confusion over which document was the actual bill of lading involved.

The court stated that defendants did not have to explain away the very existence of the different term in plaintiff's proffered unsigned non-negotiable bill of lading, but needed only to make a showing by a preponderance of the evidence that the signed original was the knowing agreement of the parties. Given this, the court dismissed the matter with prejudice to re-filing in the Southern District of New York.

The court went on to consider an argument by plaintiff that renewal of the motion on the eve of trial created a special hardship:

> But forum-selection clauses are presumptively valid matters of contract and unencumbered by the multi-factor analysis that would accompany a motion to dismiss for *forum non conveniens* (citing cases). As such, this Court's discretion is limited. Moreover, whatever lack of fairness Plaintiff claims results from

> this decision is at least equaled by the prospect of subjecting Defendants to trial in a forum they have specifically contracted against. See *M/S_Bremen*, 407 U.S. at 15, 1972 AMC at 1413… More to the point, even Plaintiff's own proffered bill of lading points *away* from the courts of the United States." (Arguing jurisdiction in Germany)
>
> *AIG Mexico,* 844 F. Supp. 2d at 444, 2012 AMC at 496.

A shipment from Mexico to Spain did not implicate the courts of the United States. Finally, the court rejected plaintiff's argument that a letter of undertaking given to avoid arrest of the vessel at a U.S. port rendered the defendants otherwise amenable to suit in the United States.

The letter specifically stated that it was without prejudice to any rights or defenses of the vessel or its owner, "none of which is to be regarded as waived":

> Implicit in Plaintiff's argument is the assertion that a theory of *in rem* or *quasi in rem* jurisdiction may be substituted for the explicit contractual rights of the parties before the Court. This is contrary to law. *See, e.g., Bison Pulp & Paper Ltd. v. M/V Pergamos*, No. 89-cv-1392, 1995 WL 880775 at *16 (S.D.N.Y. Nov. 29, 1995).

It found the letter of undertaking insufficient to overcome the effect of the mandatory forum selection clause at issue and granted the motion to dismiss.

MERCHANT CLAUSE DOES NOT CREATE FICTION….

Kawasaki Kisen Kaisha, Ltd., and "K" Line America, Inc., v. Plano Molding Co., 2011 AMC 2291 (N.D. Ill. 2011); Decision of Judge Harry D. Leinenweber dated July 27, 2011.

A containerized shipment of steel molds was shipped from Shanghai to Illinois. The carrier transported the container to California where it was transferred to a rail carrier. During rail transportation on the way to final destination, a derailment occurred and the steel injection molds broke through their shipping container and the floor of the rail car, falling onto the rail bed. Cargo was damaged in the derailment and damage was incurred by containers, railroad equipment as well as the rail bed.

The action was brought by the ocean carrier and the railway against the consignee purchaser of the injection molds for settlements made to other cargo interests as well as the damages incurred by the railway.

The consignee had retained an NVOCC to arrange for the shipment of steel molds from Shanghai to Illinois. The NVOCC contracted with a Chinese corporation to handle the booking of the shipment. Booking was made with the ocean carrier to transport the steel molds from Shanghai to Illinois.

The NVOCC issued a bill of lading identifying the manufacturer as the *shipper* and the defendant as *consignee*. The ocean carrier issued a waybill which identified THI (the booking contractor) as the shipper and the NVOCC as the *consignee*. The waybill incorporated the terms and conditions of the ocean carrier's bill of lading.

Both plaintiffs alleged the derailment was caused by improper loading of the steel molds in the shipping container; specifically the molds were packed in a manner that concentrated their weight in too small an area. For the purposes of the motion, the consignee did not dispute this theory; however, moved for summary judgment.

Plaintiffs' breach of contract claims rested on the obligations asserted against the consignee under the NVOCC's bill of lading and/or the ocean carrier's bill of lading. A claim for negligence was also asserted alleging that the consignee knew, or should have known, that the steel molds posed a significant risk of harm if not properly loaded.

As to the contract claims, the argument was made that the consignee fell within the definition "Merchant" as set forth in both bills of lading. The consignee asserted that it was not a party to either bill of lading and did not accept their terms.

As to the ocean carrier's bill of lading, the bill of lading contained a broad definition of "Merchant" and a warranty by the "Merchant" that stowage and securing of the contents of the containers were safe and proper. It was undisputed that the consignee was not named in the ocean carrier's bill of lading which named THI (who arranged the booking at the request of the NVOCC) and the NVOCC was named as the consignee. The court noted that a buyer cannot be deemed to fall under a "Merchant" clause unless the buyer is a party to the bill of lading or has consented to be bound by its terms (citing cases). Plaintiffs argued that the consignee had a future interest in the goods and thus could be bound by the bill of lading as a third-party beneficiary. While some courts have recognized that an intended beneficiary to a bill of lading may be bound through an agency relationship with one of the contracting parties, the court found as a matter of law that the NVOCC was not the consignee's agent, but rather an independent contractor. The court noted that the situation presented was essentially a carrier seeking to impose liability on a cargo owner for the alleged actions of an intermediary or the shipper of the goods, noting that the consignee did not pack or ship the goods at issue, nor had it supervised the entities that did:

> As opposed to an agent, an independent contractor is a person employed by another to perform work, but who follows the employer's instructions only as to the results of the work, and

> not the means by which the work is accomplished.

The court found the relationship between the consignee and the NVOCC was one of an independent contractor. There was no evidence that the cargo consignee supervised the loading of molds or had any communications with THI as to how the molds should be loaded into the container. Because the consignee was not a party to the ocean carrier's bill of lading, nor a principal of a party to that bill of lading, it could not be bound by it.

As to the NVOCC's bill of lading, it contained a similar definition of "Merchant" and warranty as to packing by the "Merchant". Although the plaintiffs were not parties to the NVOCC's bill of lading, they claimed protection under the Himalaya Clause found in the NVOCC's bill of lading.

The Himalaya Clause, by its plain language, extended the NVOCC's protection to the plaintiffs (including the railroad as the ocean carrier's contractor).

The consignee was named as "consignee" on the NVOCC's bill of lading; however, the consignee argued that this was an error and that it was not to take possession of the goods until they arrived at its door. It was also noted that the NVOCC had previously listed the consignee as "consignee" in at least thirteen prior bills of lading.

Nevertheless, the court stated that, even if it were to find a question of fact as to whether the consignee was in fact the true named consignee, such did not address the issue of whether it could be bound by the bill of lading "when it did not negotiate the terms of that bill of lading and has not sought benefits under it." There was no agency relationship that bound the consignee. The NVOCC's bill of lading was issued by THI at the direction of the NVOCC. Neither the NVOCC nor THI were the consignee's agents so the consignee could not be bound through those entities. As such, the consignee was entitled to summary judgment on the plaintiffs' claims under the NVOCC's bill of lading.

As to the negligence claim, the court noted buyers do not typically owe carriers and fellow cargo owners a duty of care. As between carrier, shipper and consignee, the consignee would be least likely to possess the necessary knowledge to have avoided any difficulty arising from improper packaging.

While some courts have held that a different rule might apply where the buyer had unique knowledge of the known risks involved or, if it was on notice of some incompetence on the part of the shipper, there was not enough evidence that the consignee was on notice that the parties who packed and shipped the container were unable to do so properly. Nor was there any evidence that the consignee was aware of the risk of concentrating the weight of the molds in too small an area. Accordingly, the court found the consignee entitled to summary judgment on the negligence claim.

[**Editor's note:** Affirmed in part, reversed in part, and remanded by *Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.,* 696 F.3d 647, 2012 AMC 2611 (7th Cir. 2012).]

MANGOES GET COLD SHOULDER….

J.R.J. Enterprises Inc. v. M/V Duncan Island, No. 10 Civ. 6496, 2012 WL 1450421 (S.D.N.Y. Apr. 23, 2012); Decision of the Honorable Robert W. Sweet.

A shipment of mangoes was transported from Ecuador to New York City in a reefer container. The container was clean, dry and free of odors on loading and sealed. On board, the container's reefer unit was set to eight degrees Celsius as per instructions. The container arrived at New York and was discharged on November 22, 2009 for Custom's inspection. Following the inspection, the container was picked up by the consignee's agent on November 24, 2009 and delivered to its buyer's warehouse. It was alleged that upon inspection on November 25, 2009 some of the mangoes were marked by brown and black discoloration spots, which is typical of chilling damages from storing mangoes at temperature below 8 degrees Celsius or failure to hot wash them prior loading. The

consignee did not survey the cargo, properly document the alleged damage or notify the defendant at that time

The bill of lading provided for notice of damages or any other claim in writing before or at the time of removal of goods or, if the loss or damage was not apparent, written notice must be given within three days of delivery. The mangoes remained in the consignee's refrigeration storage rooms for the next eight days and no record was produced evidencing the temperature in this room during this period.

On December 2, 2009, the consignee requested a U.S.D.A. inspection which took place on December 2 and 3, 2009 and portions of the mangoes were noted to have "brown/black discoloration."

The bill of lading also provided that full freight was completely earned upon the receipt of goods by the carrier. On November 22, 2009 the consignee issued a check to the carrier in the amount of $4,886 for freight charges; however, the check was subsequently dishonored due to lack of funds and freight charges remained unpaid.

The defendant carrier moved for summary judgment to dismiss the complaint and to award freight cost on its counter-claim.

Initially, the court noted "a clean bill of lading ordinarily constituted prima facie evidence that the cargo was in good condition at the time of shipment, this is not the case where the ocean carrier has no opportunity to inspect the goods." *J.R.J.*, 2012 WL 1450421, at *3 (citing cases). Thus, "…where the shipper delivers a sealed container to the ocean carrier, a plaintiff will have to produce evidence beyond the bill of lading to show that the cargo was in good order at loading." *Id*. (citation omitted).

In this case, the carrier had no opportunity to inspect the pre-shipment condition of the mangoes. Because of this, the plaintiff's burden of providing evidence demonstrating that the shipment was in good order is appropriate and strict:

> The Plaintiff cannot rely solely upon the clean bill of lading to make its prima facie case, and must proffer evidence demonstrating that the cargo was in good condition when it was loaded into the container.
>
> *Id*. at *4.

The court found the plaintiff had failed to respond to the carrier's discovery request and produced insufficient evidence relating to the pre-shipment condition of the mangoes. It rejected an argument that the U.S.D.A. Foreign Site Certificate of Inspection issued in Ecuador was demonstration of good order prior to delivery. There was no evidence that the U.S.D.A. performed any inspection as to quality at the time of loading. With the exception of a "Hot Water Treated" stamp, there were no notations or descriptions concerning the quality or condition of the mangoes on the certificate. Without more, the evidence offered failed to demonstrate that the mangoes were in good condition at loading as a matter of law.

As to outturn, the plaintiff failed to satisfy the second prong of its burden. The court found testimony by the consignee to be contradictory and there was no evidence submitted as to the temperature inside the refrigerated storage room where the mangoes sat for eights days after their delivery. A marine surveyor, who regularly inspected alleged damaged cargo, observed that the chilling damage was caused by low excessively cold temperature inside the storage room of the consignee's warehouse over the eight days period.

Additionally, there was no credible evidence produced that the container's reefer unit malfunctioned. To the contrary, evidence demonstrated that the requested temperature was maintained throughout transit and that the reefer unit was properly working and the records were not tampered with or altered.

Additionally, the court noted that the plaintiff failed to notify the carrier within three days of receipt:

> A Plaintiff who fails to give notice of cargo loss or damage within three days of receipt is burdened by a presumption of delivery in good order under COGSA (citing cases).

The alternative argument of plaintiff that damage at delivery can be shown by the nature of the damages was rejected by the court:

> While that may be true in cases where the damage clearly occurred in the carrier's custody, where the nature of the damage is unclear, the Plaintiff cannot rely upon this line of cases to prove good order.
>
> *Id*. at *6.

The court found the plaintiff had not discharged its burden of making out a prima facie case under COGSA. It further found that the records and evidence demonstrated the carrier complied with the instruction to maintain the container's temperature at eight degrees Celsius and no act or omission of the carrier or their agents had been established.

As to the counter-claim for unpaid freight, the plaintiff presented no valid defenses and admitted its debt in a deposition. Accordingly, the court granted freight charges in the amount of $4,886.00, plus interest and costs. The claim for damages to the mangoes was dismissed with prejudice.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

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

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ATHENS CONVENTION REVISITED

Robert D. Peltz
Leesfield & Partners, P.A.

Over the past few years, carriers have attempted to add various disclaimers and limitations to both passenger tickets and accompanying shipboard documents in order to avoid liability for ship related activities. *See, e.g., Johnson v. Royal Caribbean Cruises, Ltd*., 449 F. App'x 846 (11th Cir. 2011). As part of this trend, some American based cruise lines have recently tried to reintroduce the limitations on damages contained in the 1976 Athens Convention to tickets for voyages sailing entirely outside of the United States.

Since the Athens Convention has never been ratified by Congress, its terms do not apply of their own force to the parties in cruise ship cases as part of the U.S. maritime law. *See, e.g., Wallis v. Princess Cruises*, *Inc*., 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002). Nevertheless, several district courts have held that the damage limitation provisions of the 1976 Athens Convention may be incorporated into the passenger's ticket of passage and applied as a matter of contract law under certain circumstances. *See, e.g., Paul v. Holland America Line, Inc*., 463 F. Supp. 2d 1203, 2006 AMC 2772 (W.D. Wash. 2006); *Mills v. Renaissance Cruises, Inc*., 1993 AMC 131 (N.D.Cal. 1992). *But see contra Dinklage v. Holland America Line-Westours*, *Inc*., No. C06-0018-JCC, 2007 WL 951844 (W.D. Wash. March 27, 2007); *Levine v. Cruise West*, No. C06-1649Z, 2007 WL 1101450 (W.D. Wash. April 12, 2007).

The courts considering this issue have generally agreed that 46 U.S.C. §30509 bars a carrier from including any ticket provisions,

which seek to relieve it for liability as a result of its own negligence on any voyage, which touches a U.S. port. Accordingly, ticket clauses seeking to incorporate the 1976 Athens Convention damage limitations are expressly voided in any voyage which stops at a U.S. port. *Henson v. Seabourn Cruise Lines, Ltd*., 410 F. Supp. 2d 1246, 2005 AMC 1964 (S.D. Fla. 2005).

In *Wallis v. Princess Cruises, Inc*., 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002), the Ninth Circuit added an additional qualification on efforts to insert the 1976 Athens Convention damage limitation in completely foreign voyages by refusing to give effect to such a provision on the grounds that it failed to pass the "reasonable communicativeness" test. The Ninth Circuit concluded that the ticket provision suffered from two fatal flaws in that it failed to describe the purported Athens Convention damage limitations and contained references to other U.S. statutes and laws making it unclear, which one actually applied in a given circumstance.

By subsequently reworking their tickets to define the limitation in terms of IMF Special Drawing Rights and/or U.S. dollars, some carriers have sought to avoid the deficiencies noted by the Ninth Circuit in *Wallis*, 306 F.3d 827, 2002 AMC 2270.

In a recent decision, *Wajnstat v. Oceania Cruises, Inc*., a federal judge from the Southern District of Florida rejected one such attempt on the grounds that the carrier's inclusion of references to multiple different conventions and statutes rendered the ticket too confusing for the typical lay person to understand. This decision is particularly significant, since the majority of passenger claims for injuries against cruise lines are filed in Florida's Southern District as a result of the forum selection clauses typically contained in virtually all of the tickets of major cruise lines.

Although noting that the ticket "cur[ed] the deficiencies present in *Wallis*," the court went on to hold that "the provision nonetheless fails because it does not meaningfully inform the passenger of what law applies in what circumstances." In this case 'more was clearly not better' as "in all, the provision appears to state

that 'foreign voyages' will be subject to the terms of two named foreign treaties, as well as various U.S. federal statutes."

While the passenger raised various public policy and conflict of laws issues, the court did not reach them in light of its invalidation of the limitation provision. Nevertheless, these arguments will obviously rise again in the future, since it is likely that carriers will modify their tickets to avoid the deficiencies noted in *Wajnstat* in the same way that they had previously sought to cure the defect found in *Wallis*.

Public policy in the maritime arena can come from either the legislative enactments of Congress or the common law decisions of the courts. The most significant Congressional action on this issue is found in 46 U.S.C. § 30509, which was formerly known as 46 U.S.C. § 183c at the time of its passage in 1936. A critical issue in determining the intent of Congress in limiting the operation of this statute to voyages visiting U.S. ports is the reason behind it. If, for example, Congress limited this statute's application because it determined that only voyages visiting the United States required such protection, an argument can be made that admiralty's underlying policy would not be offended by refusing to void such limitations to voyages conducted completely outside of the United States. On the other hand, if Congress chose to restrict the operation of this statute for a different reason, such as the now outmoded belief that it did not have jurisdiction over completely foreign voyages at the time that it passed the Act in 1936, a strong argument exists that the same policy considerations which invalidated such exculpatory clauses in tickets on voyages touching the United States would apply equally to completely foreign trips, at least when performed by carriers with American bases of operations.

Although attempting to decipher Congress' intent is always problematic at best, it is significant to note that the sub-committee reports that accompanied the legislation when it was adopted did not refer to the existence of any policy reasons or special needs for imposing a ban on such disclaimers in ticket contracts for voyages visiting United States, but not for completely foreign voyages

operated by companies based in this country. Instead, the committee reports refer to the practice of inserting disclaimers in tickets of passage with the purpose that the legislation "is intended to, and in the opinion of the committee will, *put a stop to all such practices and practices of a like character*." *See e.g. H.R. Rep. No. 2517*, 74th Cong., 2d Sess., 6 (1936)(emphasis added); *S.Rep.No. 2061*, 74th Cong., 2d Sess., 6 (1936)(emphasis added).

It is also clear that at the time that Congress first passed this statute in 1936, the prevailing view was that the United States had limited judicial reach over wrongs occurring on foreign flag vessels located outside of its territorial waters, consistent with the geographic limitations contained in the original statute. Subsequently, however, consistent with advances in international law, Congress expanded the scope of the United States Special Maritime and Territorial Jurisdiction in 18 U.S.C. § 7 to reach beyond merely voyages by foreign flag vessels plying U.S. ports to now include incidents occurring on the high seas involving U.S. citizens. *See Robert D. Peltz & Lawrence W. Kaye*., *The Long Reach of U.S. Law for Crimes Occurring on the High Seas*, 20 U.S.F. Mar. L.J. 199, 207-08 (2008).

The public policy rejecting limitations on damages is even more deeply rooted in the maritime common law and long predates the adoption of 46 U.S.C. § 183c. As observed by the Eleventh Circuit in *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1335, 1985 AMC 826, 829 (11th Cir. 1984):

> [Even] prior to 1936, the year § 183c was enacted, such provisions were held to be void under common law as against public policy. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co*., 129 U.S. 397, 441, 9. S.Ct. 469, 471, 32 L.Ed. 788 (1889).

In a pre-46 U.S.C. § 183c case, *Oceanic Steam Nav. Co. v. Corcoron*, 9 F.2d 724 (2d Cir. 1925), the Second Circuit applied this public policy to avoid limitation provisions in a ticket, which would have barred an American passenger's claim arising from

injuries sustained on a completely foreign voyage from Liverpool to Montreal. A similar result was reached in *Barndt v. Det Bergenske Dampskibsselskab*, 28 F. Supp. 815, 1939 AMC 1564 (S.D.N.Y. 1938).

Finally, although the application of the 1976 Athens Convention limitation has sometimes been referred to as a conflict of law question, it is important to note that conflict of law principles are not implicated in this analysis. The Athens Convention is a comprehensive system establishing a balanced and coordinated set of rules governing liability, defenses, damages, statutes of limitation and venue. Accordingly, it is clear that the incorporation of the damage limitation from the 1976 Convention by itself is neither the adoption of a treaty nor the choice of a foreign law.

THE ATHENS PROTOCOL 2002

Paul Edelman
Kreindler & Kreindler, LLP

Everyone who handles cruise line cases knows that the fine print in a cruise ticket now goes something like this: in the event of a voyage which does not touch a U.S. port and there is a personal injury or death, the Athens Convention shall apply which limits recoveries to about $68,000 (or $70,000 in some cases). There are conflicting decisions as to whether U.S. courts will enforce this provision since the U.S. is not a party to it. Several district and state court opinions have enforced the damage limitation as a matter of contract law in completely foreign voyages, while some have refused. The Ninth Circuit held that it would not be enforced where the ticket only mentioned the Athens Convention without stating the limitation amount. *See Wallis v. Princess Cruises, Inc*., 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002). Since this case, the tickets usually add the explanatory language. The only advantage of the old 1974 Convention to passengers is that it provides two years to sue which gives additional time to negotiate a settlement. One other case said the Convention was inapplicable where there was an

intent to cause damage, e.g. assault, rape or recklessness knowing the probable result.

The 2002 Protocol makes a radical change in the amount recoverable. On December 12th of 2011 the European Community, EC, promulgated an adherence to the 2002 Protocol. It is mandatory for each of the over 25 EC countries to follow it and make it enforceable by December 31st of this year. Ten countries are required to adhere to it to put it into force. EC Regulation (EC) No. 392/2009. As in the prior Protocol amounts are expressed in Special Drawing Rights, the value of which is made by the International Fund, and day-to-day changes are posted on its web site. At present the SDR is about $1.53.

The new Protocol makes the cruise line absolutely liable up to 250,000 SDR's and for damages based upon fault the limit is 400,000 SDR's. But the cruise line must prove it was not at fault for amounts beyond the 250,000 SDR's. Cabin luggage is up to 2250 SDR's and other baggage at 3375 SDR's. Thus there is absolute liability of up to about $384,000.

Even prior to the EC Regulation, the U.K. adopted the 2002 Protocol and in Canada damages were 175,000 SDR's for personal injury and death, and it is also domestic law. In the U.K. recovery is allowed for emotional distress where a ship caught fire and sank. Incidentally, Italy is not a signatory to the 1974 Protocol, but will be bound after December 31st of this year. The international aviation conventions also provide a large amount with absolute liability up to 113,100 SDR's.

Other important provisions include a direct action against an insurer and compulsory insurance or a bank guarantee, etc. Interest and costs are not included in the recoverable limits. The parties can agree to higher limits, but not lower limits. Periodic payments are allowed. Punitive damages are not recoverable under Article 3. Jurisdiction for suit includes (1) the residence or place of business of the defendant, (2) the place of departure or destination, (3) plaintiff's

residence if the defendant is subject to jurisdiction and has a place of business there and (4) where the ticket was issued if defendant had a place of business there and is subject to the court's jurisdiction.

The Protocol applies if a flag state is involved or the contract is issued in a party state or the state of departure or destination is involved. On adhering to the 2002 Protocol, the 1974 Protocol in force in 1987 must be renounced. A judgment must be enforced except for fraud or if there is no reasonable notice. A vessel must have a $500 million insurance policy to cover a terrorist attack on the vessel. The only defenses are acts of war, hostilities, civil war, insurrection, a natural phenomenon of an exceptional and irresistible nature, or wholly caused by a third party with an intent to harm.

How the cruise lines will react to the changes and how tickets will read after 2012 is anybody's guess. Will they stick to the $68,000 and will courts say the 1974 Protocol is no longer in effect and invalidate such language? Will the new limits be applied? What will the cruise line lobbies do about this major change? Will the courts allow enforcement of a 1974 convention involving countries which have repudiated it in favor of the 2002 Protocol? The Bahamas is signatory to the 1974 Convention and is not covered by the EU directive. Will tickets involved with this flag state still apply the lower limitation?

TOUR OPERATORS ARE LIABLE UNDER A EUROPEAN COUNCIL DIRECTIVE

Paul Edelman
Kreindler & Kreindler, LLP

Tour operators, including those in U.S. have the same liability as cruise lines and airlines under a European Council Directive which covers European travel. This is by reason of the EC Directive of June 13, 1990 (90/314 EEC). It will even cover a tour bus in Europe going over a cliff. If the tour operator (not a travel agent) organized the tour, it would be as liable as the bus operator.

The operative language of this Directive is: "Whereas the organizer and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract the obligation occurs whenever the suppliers of services are at fault." This makes the tour organizer, even an American organizer, absolutely liable.

In an English decision, *Lee & Lee v. Air Tours Holiday*, [2002] I.T. L. J. 198 (Central London County Court), the claimants suffered psychiatric injuries and loss of valuables when their cruise ship caught fire and sank. Air Tours was found liable for the psychiatric injuries both as "carrier" and "tour operator." The limits of liability were not applied to defendant as tour operator since it was not covered by the Athens Convention of 1974. The other aspect of this strict liability regime is that a forum selection clause may cover the tour operator as well as the carrier. *Morag v. Quark Expeditions* 2009 A.M.C. 2309 (D.Ct. 2008). London forum prevailed. A non-party can enforce the clause if closely related and foreseeable. (In this case the tour operator was in Connecticut.) However, successful claims have been made against U.S. tour operators for European accidents.

Is this another area for U.S. victims' claims in the COSTA CONCORDIA tragedy? What of the forum selection clause?

UPDATE ON THE LAW

PASSENGER RELEASES AND WAIVERS

Johnson v. Royal Caribbean Cruises Ltd., 449 F. App'x 846 (11th Cir. 2011)

The Eleventh Circuit reversed the lower court's decision upholding a release signed by a passenger immunizing the carrier for liability from its own negligence in connection with the operation of a FlowRider aboard one of its vessels. The lower court had ruled that 46 U.S.C. § 30509 was inapplicable to the waiver on the grounds that the injury claim occurring aboard the vessel did

not fall within admiralty jurisdiction, thereby rendering the statute inapplicable to the claim. On appeal, RCCL conceded that the lower court's conclusion that the claim was not governed by admiralty law was erroneous, however, continued to assert that the statute was inapplicable to claims that did not arise out of the main function of the vessel, which it argued was limited to the transportation of passengers. The Eleventh Circuit rejected this argument, holding that the statute was clear and unambiguous on its face and did not contain any of the limitations suggested by the carrier. As a result, the court did not reach the argument raised by the passenger that prior case law made it overwhelmingly clear that the function of a cruise ship is not limited to transportation, but includes excursions and shipboard entertainment.

PASSENGER PRODUCT LIABILITY CLAIMS

Morris v. Royal Caribbean Cruises, Ltd., 11-23206-CIV (order denying motion to dismiss) (S.D. Fla. February 7, 2012)

Where a cruise line installed and modified a Flow Rider simulated surfing attraction for its passengers, it could be held liable under both negligence and strict liability theories for a passenger's resulting injuries.

Groves v. Royal Caribbean Cruises, Ltd., 463 F. App'x 837 (11th Cir. 2012)

Where the plaintiff presented no evidence that the shipowner actually created, participated in or approved the alleged negligent design of the area of the ship where the plaintiff was injured, the carrier could not be held liable on a negligent design theory. In upholding a summary judgment in favor of the defendant, the court concluded that in the absence of the carrier's participation in the design, "under the law in this circuit, RCL can be liable only for negligent design of the dining room if it had actual or constructive notice of such hazardous condition."

MEDICAL MALPRACTICE

Although reaffirming adherence to the *Barbetta* rule, which precludes vicarious liability based upon the doctrine of respondeat superior, different district court judges from the Southern District of Florida have continued to reach differing conclusions regarding the viability of alternative theories of recovery.

Hill v. Celebrity Cruises, Inc., 2012 AMC 234 (S.D. Fla. 2011) adopting in part and rejecting in part Magistrate's Recommendations, No. 09-23815-CIV, 2011 WL 5360629 (S.D. Fla. Sept. 19, 2011)

The court departed from a long line of prior decisions in the district, including its own, in holding that the so-called *Barbetta* rule not only excluded claims based upon *respondeat superior,* but all other causes of action based upon alternative theories of vicarious liability, including apparent agency. Previously, the same judge had concluded earlier in the same case that apparent agency was a viable theory of recovery and its existence presented a question of fact for the jury. *See Hill v. Celebrity Cruises, Inc*., So. Dist. Fla.Case No.: 09-23815-Civ-Moreno.

The majority of cases reported from the Southern District of Florida have likewise recognized the viability of such claims. *See, e.g., Doonan v. Carnival Corp*., 404 F. Supp. 2d 1367, 2005 AMC 2971 (S.D. Fla. 2005); *Warren v. Ajax Navigation Corp.of Monrovia*, 1995 AMC 2609 (S.D. Fla. 1995); *Lobegeiger v. Celebrity Cruises, Inc*., 2012 AMC 202 (S.D. Fla. 2011); *Fairley v. Royal Cruise Line Ltd*., 1993 AMC 1633 (S.D. Fla. 1993); *Suter v. Carnival Corp*., 2007 AMC 2564 (S.D. Fla. 2007). Several other judges in the district, however, have refused to allow apparent agency claims. *See, e.g., Wajnstat v. Oceania Cruises, Inc*., No. 09-21850-Civ., 2011 WL 465340 (S.D. Fla. Feb. 4, 2011).

ADMIRALTY JURISDICTION

MLC Fishing, Inc., v. Velez, 667 F.3d. 140, 2012 AMC 485 (2d Cir. 2011).

The claim of a passenger who slipped and fell on a ramp leading from a marina to a floating dock which the passengers were required to traverse in order to access a fishing vessel did not come within admiralty jurisdiction.

DISCOVERY

Belik v. Carlson Travel Group, Inc., No. 11-21136-CIV, 2011 WL 4963950 (S.D. Fla. Oct. 17, 2011).

In a suit by a passenger who was injured during the course of an excursion in Cozumel, the court upheld the plaintiff's entitlement to discovery relating to other injuries occurring at the site of the excursion, even though they occurred in somewhat different manners. Despite the lack of substantial similarity between the manners in which these accidents occurred, the court nevertheless concluded that they were relevant to show Carnival's control over the area, the existence of an agency relationship with the premises owner and its knowledge of dangerous activities occurring during the course of the excursion. In reaching this conclusion, the court noted that there was a difference in the standard between the relevancy necessary to support a discovery request and that constituting admissibility of evidence at trial.

Accordingly, the court went on to allow discovery of the following: (1) documents evidencing any investigation by Carnival of the concessionaire, (2) documents regarding any investigation by Carnival relating to passenger safety or recreational activities on the area where the passenger was injured, (3) documents regarding the financial and account related transactions between Carnival and the concessionaire, (4) internal memoranda and communications of Carnival and its employees regarding passenwger visits to the

premises, safety in Cozumel and issues related to excessive drinking of passengers in relation to Cozumel, (5) Carnival passenger comments or complaints regarding the concessionaire, the area where the passenger was injured or passengers in Cozumel, and (6) Carnival web pages and other promotional documents referencing the Port of Cozumel.

In addition, the court also directed Carnival to produce incident reports and related documents regarding accidents at the subject premises. Although not ruling upon the issue, the court implied that such prior incident reports would likely not be protected by the work product privilege.

Perry v. NCL (Bahamas) Ltd., 2012 AMC 527 (S.D. Fla. 2011).

In a case involving a slip and fall of a passenger in a buffet area, the court ordered NCL to produce photographs taken by the ship's safety officer one hour after the accident occurred. The court did not rule upon the plaintiff's contention that the photographs did not constitute work product, since they were merely a factual depiction of the scene of the accident at the time that they were taken, however, concluded that they were nevertheless subject to production since the plaintiff was unable to obtain the substantial equivalent, which would constitute an exception to the work product privilege. Even though the defendant did not contend that the photographs depicted the scene as it existed at the time of the accident, the court nevertheless concluded that it was "still important for the plaintiff to have access to an accurate depiction of the physical surroundings at the time."

The court also rejected the defendant's contention that the passenger had the opportunity to obtain the substantial equivalent by taking photographs at the time of her fall or by deposing the NCL crew members who observed the scene. The court rejected the first argument noting that there was no authority to support it, while further observing that the plaintiff had been taken from the scene to the ship's infirmary immediately following the accident. The court likewise rejected the second argument noting that "a verbal

description of the given area did not substitute for photographs of the location" as "a picture is certainly worth a thousand words to a jury."

Bridgewater v. Carnival Corp., No. 10-CV-22241, 2011 WL 4383312 (S.D. Fla. Sept. 20, 2011).

In a lawsuit arising out of injuries sustained by a passenger during the course of a catamaran excursion in Jamaica, the court concluded that the defendant had failed to carry its burden of establishing that two incident reports prepared by employees of the excursion company were protected by the work product privilege, however, upheld the defendant's objection to a separate incident report prepared by the carrier, along with a witness statement taken during the course of its shipboard investigation. The court also rejected the carrier's claims that emails between it and the excursion company constituted work product.

PUNITIVE DAMAGES

Clausen v. Icicle Seafoods, Inc., 272 P.3d 827 (Wash. 2012), *cert. denied,* 133 S.Ct. 199 (2012).

The Washington Supreme Court refused to apply the one to one ratio for punitive to compensatory damages announced in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) to a maintenance and cure claim where the employer's conduct was particularly egregious in refusing to pay the seaman's benefits. The court rejected the contention that Exxon had established a broad general rule applicable to all punitive damage awards. Instead, it concluded that the Supreme Court's earlier opinion had recognized a "culpability scale," in which only those cases at the lower end (ie: reckless) were subject to the limitation. Where, however, the conduct was "near the 'most egregious' end of the culpability scale," the judicial limitation imposed by the ratio was not applicable. The court went on to further hold that there was even less of a reason to apply the limitation to maintenance and cure claims, since punitive damages

in this context were intended to serve as a deterrent to future similar conduct. Accordingly, the court upheld the jury's verdict of $1.3 million dollars, despite the award of only $37,420.00 in compensatory damages.

MEDICARE LIENS

Hadden v. United States of America, 661 F.3d 298 (6th Cir. 2011), *cert. denied,* 133 S.Ct. 106 (2012)

In a 2 to 1 decision, the Sixth Circuit concluded in a non-maritime case that Medicare was entitled to the full amount of its claimed lien (which included an agreed upon deduction for the plaintiff's attorneys fees and costs in obtaining the settlement) even though the plaintiff settled his case for only a fraction of its true value due to the extensive negligence of an uninsured non-party. The court's opinion left open the question of whether the result would be the same if the plaintiff had proceeded to trial and received only a fraction of his damages from the jury.

SHIPBOARD MEDICINE

Rinker v. Carnival Corp., No. 9-23154-CIV., 2011 WL 4072217 (S.D. Fla. Sept. 13, 2011).

In a prior opinion in the same case, the court had previously dismissed the passenger's claims based upon the purported medical malpractice of the ship's physicians on the grounds that they were not licensed to practice medicine in California, the home port of the vessel. *See Rinker v. Carnival Corp*., 753 F. Supp. 2d 1237, 2011 AMC 1386 (S.D. Fla. 2010). In an effort to get around the court's prior rulings, the passenger filed an amended complaint alleging that the ship's doctors were guilty of fraud for misrepresenting their qualifications as well as for assault and battery, based upon the argument that they were not licensed in California. The court dismissed the fraud claim for failure to comply with the provisions of Fed. R. Civ. P. 9(b), which requires that the facts giving rise to the fraud be set forth with particularity. The court also dismissed

the assault and battery claims on the grounds that the passenger had not alleged that she was in "apprehension of immediate harmful or offensive conduct [which] is an essential element of the tort of assault."

ARBITRATION

Henriquez v. NCL (Bahamas), Ltd., 440 F. App'x 714 (11th Cir. 2011)

In an unpublished opinion, the Eleventh Circuit held that a crew member's claim under the Jones Act for injuries sustained when another crew member smashed a glass bottle on his head and stabbed him while aboard the cruise ship was subject to arbitration. The court relied upon its earlier decision in *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011) to reject the public policy defenses argument based upon the claim that the arbitrator in Nicaragua was required under the contract to apply Bahamian law at the pre-arbitration phase. The court also relied upon its earlier decision in *Bautista v. Star Cruises,* 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005) to reject the argument that the seaman signed the contract under duress, because he otherwise would not have been allowed to work on the ship. The court stated that such "assertions do not amount to duress, but rather, a tough choice."

Kote v. Princess Cruise Lines, Ltd., No. 10-61146-CIV, 2011 WL 4434858 (S.D. Fla. Sept. 23, 2011).

In another post *Lindo* decision, the court rejected the seaman's asserted defenses to arbitration based upon the contention that the arbitration clause was a type of forum selection provision and therefore unenforceable under recent amendments to the Jones Act and that the arbitration would be prohibitive and overly expensive for the seaman.

Aggarao v. MOL Ship Management Co., Ltd., 675 F.3d 355, 2012 AMC 781 (4th Cir. 2012)

The Fourth Circuit joined the Third, Fifth, Ninth and Eleventh Circuits in upholding the enforceability of arbitration clauses in seaman's contracts. *See Razo v. Nordic Empress Shipping, Ltd.*, 362 F. App'x 243 (3d Cir. 2009); *Francisco v. Stolt Achievement Mt.*, 293 F.3d 270, 2002 AMC 1529 (5th Cir. 2002); *Roger v. Royal Caribbean Cruise Line,* 547 F.3d 1148 (9th Cir. 2008); *Bautista v. Star Cruises,* 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005). In reaching its conclusion, the court essentially followed the Eleventh Circuit's recent criticism in *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011) of its earlier decision in *Thomas v. Carnival Corp.*, 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009).

SHORE EXCURSIONS

Gentry v. Carnival Corp., No. 11-21580-CIV, 2011 WL 4737062 (S.D. Fla., Oct. 5, 2011).

In upholding the sufficiency of a complaint against a cruise line for injuries sustained during the course of an excursion, the court joined the growing chorus of opinions holding that the cruise lines have a duty to warn of dangers which the carrier knows or should know to exist "in places where the passenger is invited to, or may reasonably be expected to visit." *See also Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 1986 AMC 694 (Fla. Dist. Ct. App. 1985); *Tradewind Transp. Co. v. Taylor*, 267 F.2d 185 (9th Cir. 1959). In addition to denying the carrier's motion to dismiss the negligence count asserted against it, the court also concluded that the plaintiff had stated sufficient allegations to support claims based upon apparent agency and joint venture.

SEXUAL ASSAULTS

Doe v. Royal Caribbean Cruises, Ltd., 2012 AMC 761 (S.D. Fla. 2011).

The court denied the defendant's motion to dismiss a passenger's complaint seeking recovery for a sexual assault perpetrated by another passenger during the course of a cruise based upon the allegations that: (1) the vessel failed to monitor its security video cameras, (2) ship's bartenders over served the plaintiff to the point of obvious intoxication and (3) crew members saw the passenger staggering through the vessel in a state of obvious intoxication and repeatedly rebuffing attempts by her assailant without taking appropriate action to protect her. Although agreeing with the prior decision in *Mizener v. Carnival Corp*., No. 05-22965, 2006 U.S. Dist. LEXIS 44332 (S.D. Fla. July 16, 2006), which held that the mere installation of surveillance video cameras does not create a duty on the part of the ship to monitor him, the court distinguished *Mizener* in that the plaintiff in this case specifically alleged that she relied upon the fact that she would be continuously monitored during the cruise.

COLLATERAL SOURCE

Manderson v. Chet Morisson Contractors, Inc., 666 F.3d 373, 2012 AMC 573 (5th Cir. 2012).

Although the collateral source rule prohibits a reduction of compensatory damages in *tort actions* by the difference between the amount billed for medical services and actually paid, it is generally not applicable in maintenance and cure claims where the provider has accepted a lesser amount as full payment for its bills. Since maintenance and cure only applies to expenses "actually incurred," the seaman is not entitled to recover for the amount written off by the provider as part of its maintenance and cure claim. The court left open the question of whether a different rule would apply in claims under the Jones Act or for unseaworthiness.

JONES ACT

Skye v. Maersk Line Ltd. Corp., 11-21589-CIV-Allonoga/ Simonton, (order denying motion for summary judgment) (S.D. Fla. March 28, 2012).

Where a seaman sustained physical injury in the form of changes to his heart, including left ventricular hypertrophy and a torn mitral valve as a result of chronic sleep deprivation due to the employer's alleged violation of federal maritime standards, a question of fact existed precluding summary judgment on whether the seaman's claim met the requirements of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

Asenov v. Silversea Cruises, Ltd., No. 11-62360-CIV, 2012 WL 1136980 (S.D. Fla. March 28, 2012).

In upholding a forum selection provision contained in a Bulgarian seaman's employment contract, requiring that all litigation arising from his employment be heard in a court of competent jurisdiction in his own home country, the court relied upon the general principle that "in the context of international transactions, forum selection clauses are presumed to be valid," citing *Liles v. Ginn-La West End, Ltd.*, 631 F.3d 1242, 1245 (11th Cir. 2011). The court concluded that even though the parliamentary assembly of the Council of Europe had issued a ruling criticizing Bulgaria's excessive length of court proceedings, which constitute a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, the plaintiff had failed to demonstrate the inadequacy of the country's courts for his case.

CIVIL PROCEDURE

Sciacca v. Oceania Cruises, Inc., No. 11-24054-CIV, 2012 WL 527366 (S.D. Fla. Feb. 16, 2012)

The pleading of affirmative defenses are held to the same standard as claims for relief. Therefore, following the Supreme

Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the pleading of an affirmative defense "requires more than labels and conclusions, and a formulaic resuscitation of the elements . . . will not do." Failure to meet this standard will subject the affirmative defenses to being stricken.

DOHSA

Lasky v. Royal Caribbean Cruises, Ltd., 850 F. Supp. 2d 1309, 2012 AMC 2630 (S.D. Fla. 2012)

Even though the plaintiff died on land a month after his shipboard accident, DOHSA governed his cause of action, limiting his beneficiaries to the recovery of pecuniary damages. The court followed prior district court decisions in holding that "a cause of action under DOHSA accrues at the time and place where an allegedly wrongful act or omission was consummated in an actual injury, not at the point where previous or subsequent negligence allegedly occurred." *See also Balachander v. NCL (Bahamas) Ltd.*, 800 F. Supp. 2d 1196 (S.D. Fla. 2011), *Moyer v. Rederi*, 645 F.Supp. 620, 1987 AMC 1404 (S.D. Fla. 1986).

EVIDENCE

Rutledge v. NCL (Bahamas), Ltd., 464 F. App'x 825 (11th Cir. 2012).

The Eleventh Circuit affirmed the lower court's admission of a breathalyzer test on the passenger following her accident under the *Daubert* standards, even though the device's manufacture warned that it should be " used only as a screening device and is only an indication of the possible presence of alcohol in the blood of the test subject . . . BreathScan is not intended to legally determine blood alcohol presence, level or inference of intoxication." The court concluded that despite this language, the manufacturer provided a different test for different alcohol concentrations (.02%, .05% and .08%) "which at least implies that the tests are indeed able to determine alcohol levels." Accordingly, the court concluded that

while there was a contradiction in the manufacturer's accompanying materials, it only went to the weight of the evidence and not the reliability of the method itself.

INTENTIONAL TORTS

Garcia v. Carnival Corp., 838 F. Supp. 2d 1334 (S.D. Fla. 2012)

According to the plaintiff's complaint, she had a "disagreement" with a bar tender in the casino located onboard the defendant's cruise ship. As a result, she claimed that several crew members "grabbed" her, kicked and punched her, threw her to the ground multiple times, and cuffed her in a harmful manner," dragged her across the floor while handcuffed and then confined her to her cabin by placing crew members immediately outside of the door to prevent her from leaving it. According to the complaint, the crew members destroyed a camera which her travel companion had used to document the event. Rather surprisingly, the court dismissed the plaintiff's claims based upon negligence, negligent infliction of emotional distress and intentional infliction of emotional distress with prejudice, while further dismissing her count based upon false imprisonment without prejudice.

COMMITTEE ON FISHERIES

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

FISHERIES CASE BRIEFS[1]

May 2012

Oceana, Inc. v. Locke, 831 F. Supp. 2d 95 (D.D.C. 2011).

Parties

Oceana, Inc., a non-profit organization with the mission of protecting and restoring the world's oceans, brought an action challenging, under the Administrative Procedure Act (APA), Magnuson-Stevens Fishery Conservation and Management Act (MSA) and National Environmental Policy Act (NEPA), a decision of the National Marine Fisheries Service (NMFS) to adopt New England Fishery Management Council's (NEFMC's) amendment to its fishery management plan (FMP).

Regulation at Issue

This case revolves around Amendment 16 to the New England Fishery Management Council's (NEFMC) Northeast Multispecies FMP. Among other things, Amendment 16 represents NEFMC's efforts to bring this FMP into compliance with the MSA by establishing annual catch limits for each species in the Fishery, as well as measures to ensure accountability with those limits.

Oceana, Inc. challenges NMFS's decision to adopt Amendment 16 under the Administrative Procedure Act, 5 U.S.C. § 706(2). Oceana first claims that Amendment 16 violates the MSA in three ways: by failing to establish an adequate system to monitor

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[1] Based upon the legal research assistance of Kirby Aarsheim, Esq. of Clinton & Muzyka, P.C., Boston, MA.

compliance with annual catch limits, by failing to establish adequate accountability measures for five particular species and by failing to establish accountability measures for the portion of a sixth species—yellowtail flounder—caught in the separate Scallop Fishery. Oceana also argues that, in adopting Amendment 16, NMFS violated the National Environmental Policy Act (NEPA), by failing both to take a hard look at the environmental impacts of the Amendment and to consider all reasonable alternatives to one provision, the ABC Control Rule. Both sides moved for summary judgment.

Beginning with Amendment 13, fishing vessels could join "sectors," which are "temporary, voluntary, fluid associations of vessels." Fishermen who opt not to join a sector may continue to fish as part of the "common pool." Fishermen who join sectors "voluntarily agree to abide by certain fishing restrictions and work together to manage an annual allocation of fish." In exchange, participation in a sector exempts fishermen from many of the Fishery's input controls, such as the DAS program. Removing DAS limits while requiring sector vessels to adhere to fishing quotas represents a shift in management strategy from an "input-based" system to an "output-based" system. The latter hinges not on fishing efforts, but on results—i.e., the amount of fish caught, which represents each vessel's fishing "output." This shift in strategy is significant for the court's purposes because it requires changes in the manner in which overfishing is monitored.

NEFMC proposed and NMFS adopted Amendment 16 to the Multispecies FMP. In doing so, NEFMC sought to comply with the 2007 amendments to the Magnuson–Stevens Act, as well as the continuing dilemma of overfishing in the fishery, by making three major changes to the Multispecies FMP. First, Amendment 16 reduces the total number of days-at-sea allocated to common-pool vessels by 32% from 2009. Second, Amendment 16 expands the sector program and requires that each sector adhere to a hard total allowable catch (TAC), also called an "annual catch entitlement" (ACE), for each stock in the fishery. In the wake of this expansion, more than 55% of federal permit holders, who conduct more than 98% of the fishing taking place in the Multispecies Fishery, have

joined sectors. Third and most important for the instant case, Amendment 16 attempts to satisfy § 1853(a)(15)'s requirement that FMPs "establish a mechanism for specifying annual catch limits [ACLs] ... at a level such that overfishing does not occur in the fishery, including measures to ensure accountability" with those limits. It is Amendment 16's mechanism for monitoring compliance with ACLs and its alleged lack of AMs for certain species that Plaintiff challenges in the present suit.

Analysis and Holding

Amendment 16 has already survived challenges under the Magnuson–Stevens Act and NEPA in the U.S. District Court for the District of Massachusetts. *See City of New Bedford v. Locke,* No. 10–10789, 2011 WL 2636863 (D. Mass. June 30, 2011). Judge Rya Zobel found Amendment 16's ACLs to be reasonable: "The Agency decided upon the A16 ACL methodology after a reasoned and scientifically grounded process, including the Groundfish Assessment Review Meeting, a year-long effort by at least 18 fishery scientists to assess the health of groundfish stocks.... The ACLs are not arbitrary." Regarding New Bedford's NEPA claim, Judge Zobel found the Agency's decision to defer consideration of the alternative identified by the plaintiffs to a future Amendment 17 of the Multispecies FMP to be permissible, particularly in light of the MSA's time constraints for ending overfishing and instituting plans to rebuild the Fishery.

In its complaint, plaintiff alleged that Amendment 16 violates the APA by failing to comply with the Magnuson–Stevens Act in three ways: (1) by "us[ing] an inadequate performance standard for monitoring bycatch," (2) by "fail[ing] to establish accountability measures for a number of species subject to catch limits," and (3) by "fail[ing] to establish accountability measures for yellowtail flounder caught in the scallop fishery." Plaintiff further alleges that the Amendment violates the APA by failing to comply with NEPA in two ways: (1) by "fail[ing] to take a hard look at the environmental impacts of including or excluding stocks from the catch limit system," and (2) by "fail[ing] to consider any alternatives to the ABC Control

Rule other than the no action alternative." It seeks to "compel the Fisheries Service to establish an adequate management system to enforce annual catch limits, including a bycatch monitoring system sufficient to provide the catch data needed to enforce catch limits, and the required accountability measures to reduce the amount of groundfish caught as bycatch in the New England fisheries, so that overfishing is prevented and those overfished stocks can be rebuilt, as required by law."

Oceana first challenged Amendment 16's provisions relating to bycatch monitoring. It argued that Amendment 16 fails to comply with two subsections of the MSA, § 1853(a)(15) and § 1853(a)(11). Subsection (a)(15) requires that FMPs (and their amendments) establish "measures to ensure accountability" with annual catch limits. Subsection (a)(11) requires FMPs to "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery."

In light of its review of the MSA, the court found that § (a)(15) is at least ambiguous and is persuaded that NMFS's interpretation is a reasonable one. Nothing in the statute's text compels the conclusion that the "measures to ensure accountability" with ACLs required by § (a)(15) must also, by themselves, meet the requirements of § (a)(11). While it may be more efficient, from a regulatory perspective, for NEFMC and NMFS to develop one bycatch reporting methodology capable of both satisfying § (a)(11) and monitoring compliance with the ACLs established in accordance with § (a)(15), it is not the court's role to impose such a policy approach on the Agency. The court, accordingly, agreed with NMFS that the FMP (including its amendments) is sufficient so long as it independently complies with §§ (a)(15) and (a)(11).

While Amendment 16's implementing regulations do require that bycatch monitoring "must be sufficient to at least meet the coefficient of variation specified in the Standardized Bycatch Reporting Methodology and accurately monitor sector operations," 50 C.F.R. § 648.87(b)(1)(v)(B)(3)(ii), NMFS's suggestion that these implementing regulations, let alone the Amendment, mandate

coverage for a specified percentage of fishing trips is not factually accurate. Even when establishing a bycatch-reporting methodology under § (a)(11), an FMP need not necessarily mandate a specific level of observer coverage. All the Multispecies FMP must do to satisfy § (a)(15) is require bycatch monitoring adequate to support measures to ensure accountability with ACLs. Although Amendment 16 does not require observer coverage of 30% for the common pool and 38% for the sectors, it does require that bycatch be accurately reported throughout the fishing season at levels such that ACLs can be monitored and enforced. The court found Amendment 16 to be sufficient in this regard. The court concluded that Amendment 16's bycatch-monitoring provisions are both mandatory and sufficiently specific. In light of the deference owed to NFMS under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984) the court found that the bycatch-monitoring system described in Amendment 16 is sufficient to reasonably comply with §1853(a)(15). The court entered summary judgment on the issue of Amendment 16's bycatch-monitoring provisions in favor of defendants.

Oceana next argued that Amendment 16 violates § (a)(15) because it fails to establish adequate accountability measures for five species found in the Multispecies Fishery: Atlantic halibut, ocean pout, windowpane flounder, SNE/MA winter flounder and Atlantic wolffish. The court held that Oceana was correct.

The MSA requires that FMPs include "measures to ensure accountability" with ACLs "for all stocks and stock complexes in the fishery." 16 U.S.C. § 1853(a)(15); 50 C.F.R. § 600.310(h). NMFS generally defines accountability measures (AMs) as "management controls to prevent ACLs, including [sub]-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur." 50 C.F.R. § 600.310(g)(1). In accordance with this interpretation, NMFS recognizes two general categories of AMs: "Inseason AMs" (to "prevent catch from exceeding ACLs" and address predicted inseason ACL overages) and AMs "for when the ACL is exceeded" (based on annual data evaluated at the end of a fishing year). For the Multispecies Fishery, "fishing year" means May 1 through April 30 of the following year. When an ACL is

exceeded, typical AMs include closing all or part of the Fishery and imposing stricter input or output controls in the subsequent fishing season.

Neither party disputed that Amendment 16 established ACLs and sub-ACLs for the species—referred to interchangeably in this Section as "stocks"—in the Multispecies Fishery. Framework 44, in accordance with the mechanism established by Amendment 16, set total ACLs for Fishing Years 2010–2012 for each stock. It also allocated sub-ACLs—i .e., portions of each stock's total ACL—to the common pool and sectors. *See id*. Significantly, the Council and NMFS opted to allocate all of the Fishery's allotment of the annual catch for the five species to common-pool vessels and none to sector vessels.

When NEFMC established sub-ACLs for a fishery's different user groups, as it did here, NMFS's Guidelines indicate FMPs should also establish sub-AMs to ensure accountability with those sub-ACLs. For most stocks, Amendment 16 established such sub-AMs. Indeed, for the five species at issue, the Amendment also set sub-AMs for common-pool vessels. For example, for those vessels, if the sub-ACLs for the five species are exceeded in Fishing Years 2010 and 2011, "[days-at-sea] reductions and/or more strict differential [days-at-sea] counting would be put into place in the year following an ACL overage." Oceana does not claim these AMs are inadequate or fail to comply with § 1853(a)(15).

The difficulty, however, arises with sub-AMs *for the five species for sector vessels*. For these vessels, Amendment 16 creates a parallel set of sub-AMs for most other stocks, establishing a sector's annual catch entitlement (ACE) for each species—also referred to as total allowable catch (TAC)—as a hard cap. The Amendment provides: "Sectors are required to ensure that ACEs are not exceeded during the fishing year.... If the sector's ACE for a stock is exceeded, the sector must cease operations in that stock area until it can acquire additional ACE through a transfer to balance the catch, and the sector also must comply with other overage penalties that may be applicable."

The five species identified by Oceana, however, are explicitly excluded from the sectors' sub-AM regime described above. ("Sectors will be allocated a hard TAC of all regulated groundfish stocks with the exception of halibut, ocean pout, windowpane flounder, Atlantic wolffish, and SNE/MA winter flounder."). Sectors do not receive an annual catch entitlement of the five species—i.e., the sector sub-ACL is zero —and therefore sector vessels are prohibited from retaining any fish from these stocks. For this reason, NMFS indicates, the five species are not subject to an enforceable fishing quota. Oceana claimed that Amendment 16's failure to establish sector sub-AMs for these five species violates § 1853(a)(15) of the MSA.

Based upon the court's lengthy review of MSA and guidelines governing accountability measures, the court accordingly found that the accountability measures Amendment 16 establishes for the five species at issue will not *ensure* accountability with ACLs as § 1853(a)(15) requires. However, NMFS's final argument was that the court should not find Amendment 16 unlawful because the Agency intends to establish AMs for the five species in a future rulemaking. The court concluded that the adoption of Amendment 16 without the accountability measures required by the MSA for five stocks was arbitrary, capricious, and unlawful. The court remanded the issue to NMFS and NEFMC for the purpose of amending the Multispecies FMP so that it is consistent with the requirements of § 1853(a)(15).

Oceana's third and final claim under the Magnuson–Stevens Act asserted that Amendment 16 failed to establish adequate accountability measures for another overfished species—yellowtail flounder. The court determined that recent developments, however, have addressed its concern and rendered this issue moot.

Pacific Dawn, LLC v. Bryson, No. C10-4829 TEH, 2011 WL 6748501 (N.D. Cal. Dec. 22, 2011).

Parties

The plaintiffs included Pacific Dawn LLC, Chellissa LLC, James and Sandra Schones, Da Yang Seafood Inc., and Jessie's Ilwaco Fish Company, which owned three fishing vessels and two processing companies that participate in the Pacific whiting industry. The defendants in this matter were the Secretary of Commerce, National Marine Fisheries Service, and NOAA.

Regulation at Issue

Plaintiffs contended that defendants violated the Magnuson–Stevens Fishery Conservation and Management Act ("MSA" or "Act"), 16 U.S .C. §§ 1801–84, when they adopted Amendments 20 and 21 to the fishery management plan for Pacific groundfish, which includes Pacific whiting. Amendment 20 created a limited access privilege program through which participants in the trawl sector of the fishery receive permits to harvest a specific portion of the fishery's total allowable catch via individual fishing quotas ("IFQs"). Amendment 21 allocated total allowable catch for certain species in the fishery between the trawl and non-trawl sectors.

NMFS issued regulations implementing Amendment 6 to the FMP for Pacific Groundfish in 1992, to take effect on January 1, 1994. Those regulations required federal permits to participate in the limited entry segment of the fishery and established different levels of endorsements, including "A" and "B." 57 Fed.Reg. 32,499, 32,501–03 (July 22, 1992). "A" endorsements were transferable endorsements that were granted to vessels that met specific minimum landing requirements during the qualifying window period of July 11, 1984, through August 1, 1988. "B" endorsements were non-transferable and granted to vessels that "landed some groundfish prior to August 1, 1988," but that did not meet the requirements to receive an "A" endorsement. "B" endorsements expired at the end of the 1996 fishing year, by which time vessel owners must have

obtained a permit with an "A" endorsement or have left the limited entry fishery.

Analysis and Holding

The Council subsequently decided to allocate IFQs for Pacific whiting to current permit holders based on fishing history associated with such permits from 1994 to 2003 for harvesters, and from 1994 to 2004 for on-shore processors. Fishing history under "B"-endorsed permits was included when determining the total catch for the fishery in each year of the qualifying periods, but it was not included "in calculating any permit's individual qualifying history." The final rules implementing Amendments 20 and 21 were issued in October and December 2010, and implementation of the IFQ system began on January 1, 2011.

The MSA requires that: In developing a limited access privilege program to harvest fish a Council or the Secretary shall— (A) establish procedures to ensure fair and equitable initial allocations, *including consideration of*— (i) *current and historical harvests;* (ii) employment in the harvesting and processing sectors; (iii) investments in, and dependence upon, the fishery; and (iv) the current and historical participation of fishing communities. 16 U.S.C. § 1853a(c)(5). Plaintiffs contend that Defendants violated subsection (i) of this provision and failed to base their decisions on "the best scientific information available," as required by National Standard Two, in two ways: first, by not considering fishing history for harvesters beyond 2003 and for processors beyond 2004 and, second, by not adequately considering fishing history associated with "B" permits.

Plaintiffs argued that their initial IFQs would have been higher had harvests beyond 2003 and 2004 been considered. Plaintiff, Pacific Dawn, further asserted that it obtained ownership of the fishing history of the AMBER DAWN, a vessel that fished under a "B"-endorsed permit from 1994 to 1996, and that this history was not but should have been included when defendants determined PACIFIC DAWN'S initial IFQ.

Plaintiffs first argued that defendants improperly failed to consider "current" harvests when, in 2010, they based initial IFQs on fishing histories through 2003 for harvesters and 2004 for processors. Defendants assert that they adequately considered current harvests by allocating quota shares to current permit owners rather than to individuals or vessels that may have participated in the fishery in the past. However, the statute requires consideration of current harvests, not current permits, and considering historical harvests of current permits is distinguishable from considering current harvests themselves.

Defendants' main argument on this issue was that they reasonably based the end of the qualifying period on the previously published 2003 control date. The court agreed with the Third Circuit which concluded that the government need not go through formal rule promulgation procedures before setting a control date; instead, the court held that publication of a proposed control date in the Federal Register was sufficient. *Gen. Category Scallop Fishermen v. Sec'y of Commerce,* 635 F.3d 106, 113 (3d Cir. 2011). Defendants explained that they chose to base the qualifying period on the announced control date because using a later date would "reward those who disregarded the control date announcement, create perceptions of inequity, and encourage fishermen to ignore such dates in the future, negatively affecting the Council's ability to credibly use control dates."

A similar rationale was upheld by the Ninth Circuit in *Alliance Against IFQs v. Brown*. 84 F.3d 343, 345 (9th Cir. 1996). In that case, the relevant statute required that "present participation in the fishery" be "take[n] into account." The government allocated quota shares in 1993 to owners or lessees of vessels that made legal landings of halibut or sablefish during the years 1988 to 1990. The Ninth Circuit found that the most persuasive reason for a 1990 cutoff date "was that if participation in the fishery while the rule was under consideration had been considered, then people would have fished and invested in boats in order to obtain quota shares, even though that would have exacerbated overcapacity and made no economic sense independently of the regulatory benefit." The

court ultimately concluded that the three-year period between the end of the cutoff period and promulgation of the regulations was not arbitrary or capricious.

However, if three years between the end of a qualifying period and promulgation of a regulation "pushe[s] the limits of reasonableness," then the six-and seven-year periods in this case arguably fall beyond those limits. *Alliance Against IFQs,* 84 F.3d at 348. While "current" cannot "prudently be contemporaneous with the promulgation of the final regulations," it may be that a 2003 cutoff date is "so far" from "current" harvests when the regulation was promulgated in 2010 as to be arbitrary or capricious.

While defendants correctly argued that they have broad discretion to make decisions, and that no particular outcome is required by the MSA, they failed to present a reasonable explanation for relying on the 2003 control date for some purposes but not others. Consequently, the court found that defendants' failure to consider fishing history beyond 2003 for harvesters and 2004 for processors was arbitrary and capricious.

U.S. v. Cusick, 11cv10066-LTS, 2012 WL 442005
(D. Mass. Feb. 9, 2012).

Parties

The defendant, Mr. John Cusick, was indicted for two violations of 16 U.S.C. § 1857(1)(L) arising out of events that took place while defendant was working as a crew member on a commercial fishing vessel in July of 2010. Both counts charged that the defendant forcibly assaulted, impeded, intimidated, sexually harassed, hugged without consent, inserted his tongue in her ear and interfered with a federal at-sea monitor and data collector while defendant was working on commercial Fishing Vessel SEA FARMER II during a commercial fishing trip. After a four-day jury trial, defendant was convicted on the first count of the indictment and acquitted on the second count of the indictment. On December 22, 2011, defendant filed a motion for judgment of acquittal.

Regulation at Issue

This offense is set forth in section 1857(1)(L) of Title 16 of the United States Code, a federal statute. The relevant section of that statute reads as follows: "It is unlawful ... for any person ... to ... forcibly assault, ... impede, intimidate, sexually harass ... or interfere with ... any data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under [the Magnuson–Stevens Fishery Conservation and Management Act.]"

Analysis and Holding

The court included the language of section 1857(1)(L) in its instructions to the jury, along with the following instruction: "To prove a person committed the criminal offense defined by this statute, the government must establish, beyond a reasonable doubt, the following - That the defendant, on or about July 8, 2010, through July 14, 2010: (1) [f]orcibly; (2) [a]ssaulted, impeded, intimidated, sexually harassed, or interfered with; (3) [a] data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under the Magnuson–Stevens Fishery Conservation and Management Act; and (4) the defendant did so knowingly."

The defendant argued that the evidence was insufficient to permit a reasonable finder of fact to conclude beyond a reasonable doubt that the defendant forcibly assaulted, impeded, intimidated, sexually harassed, or interfered with the observer and that the defendant did so knowingly and intentionally.

The victim in this case was an observer who was placed on board the SEA FARMER II for its eight-day fishing trip. She was the only female onboard and was unfamiliar with the fishermen. She reported that the defendant made harassing comments such as asking her whether he could shower with her and, when she told him no, he said "[w]ell, you know, the bathroom lock doesn't work anyway." The observer took no further showers as a result.

The court found that the evidence supported the conclusion that the crew of this vessel did not welcome a representative of the federal government (albeit indirectly in the form of an outsourced data collector) placed by legal mandate on board the vessel in order to monitor and to catalogue the fishing activity, including fish caught, fish discarded, etc., as part of the federal government's regulation of the fishing industry.

The observer testified that the defendant's comments made her feel "[s]cared and insulted, sad." The court found that while not dispositive, this was relevant evidence supporting the jury's conclusion. *See United States v. Walker,* 835 F.2d 983, 987 (2d Cir. 1987) ("the victim's subjective state of mind is not irrelevant to determining whether the amount of force threatened or displayed was sufficient to make fear reasonable"). Simply put, the jury could reasonably conclude, especially in the context of the surrounding facts, that the defendant's face-to-face statements carried with it a present threat to use force. *See United States v. Hertular,* 562 F.3d 433, 441 (2d Cir. 2009). The court concluded that there was sufficient evidence in the record to find that the defendant violated 16 U.S.C. §1857(1)(L).

Turtle Island Restoration Network v. U.S. Dept. of Commerce,
672 F.3d 1160 (9th Cir. 2012).

Parties

Plaintiff–Appellees, Turtle Island Restoration Network, Center for Biological Diversity, and KAHEA: The Hawaiian–Environmental Alliance (collectively, "Turtle Island"), are nonprofit environmental organizations and corporations. Turtle Island sued the defendant–appellees, United States Department of Commerce, National Marine Fisheries Service ("NMFS") and Gary Locke, in his official capacity as Secretary of the Department of Commerce (collectively, the "Federal Agencies"), challenging the implementation of Amendment 18 to the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (the "Final Rule").

The Hawaii Longline Association ("Longliners") appealed the approval of a consent decree entered into by plaintiff environmental groups and defendant Federal Agencies affecting the regulation and management of the Hawaii shallow-set, swordfish longline fishery.

Regulation at Issue

Turtle Island and the federal defendants began negotiating a settlement. These settlement negotiations resulted in Turtle Island and the Federal Agencies filing a "Joint Motion to Enter Stipulated Injunction as an Order of the Court." The district court characterized this joint motion as "in essence ... a proposed consent decree that would result in dismissal of all of [Turtle Island's] claims with prejudice." Over the Longliners' objection, and after supplemental briefing, the district court entered an order approving the consent decree and denying as moot the Longliners' motion for summary judgment.

In relevant part, the Final Rule determines the annual number of allowable interactions between the Hawaii-based shallow-set longline fishery (the "Fishery") and loggerhead and leatherback sea turtles. The purpose of the Final Rule was to optimize the Fishery's yield without jeopardizing the continued existence of sea turtles and other protected resources.

The Final Rule implementing Amendment 18 changed certain substantive provisions of the 2004 Regulations governing the Fishery. The 2004 Regulations mandated (1) the use of large circle hooks, (2) the use of mackerel-type bait, (3) a limit of 2120 shallow-sets per year, (4) annual turtle incidental take limits of 17 loggerheads and 16 leatherbacks, and (5) 100% observer coverage on every swordfish-vessel fishing trip. The Final Rule kept the hook, bait, and observer provisions of the 2004 Regulations intact and implemented the following changes: removal of the 2120 set limit and increase of the loggerhead interaction hard cap from 17 to 46.

Analysis and Holding

The Longliners argued that the district court abused its discretion in approving the consent decree (1) by allowing Turtle Island and the Federal Agencies to enter a settlement that violates the Magnuson Act and the Administrative Procedures Act ("APA") and (2) by basing its determination that the consent decree is fair, reasonable, and equitable on a clearly erroneous finding of fact that a return to the 2004 incidental take limits will be more protective of loggerhead turtles.

The Longliners argued that by entering into the consent decree the Federal Agencies deviated from their statutorily prescribed courses of action and engaged in unlawful rulemaking. The Magnuson Act is silent regarding applicability of rulemaking provisions to consent decrees. Moreover, the Magnuson Act's legislative history reveals no mention of consent decrees nor any express restriction of the district court's authority to manage litigation regarding the Fishery. Accordingly, the court saw no reason to limit Turtle Island and the Federal Agencies' ability to determine the course and trajectory of the litigation.

The court noted that if the Longliners' position was carried to its logical conclusion, then any attempt by federal agencies to settle litigation involving a regulation would entail a return to the same rulemaking process by which the regulation was created—a proposition that contradicts the Supreme Court's policy determination in another context.

The Longliners next argued that the consent decree violates the APA's notice and comment requirements because the APA provides no mechanism for the Federal Agencies to repeal the Final Rule through the consent decree without engaging in public notice and comment. The Longliners contended that the district court used the consent decree impermissibly to modify substantive regulatory rules. However, the court determined that this argument failed for the same reasons discussed above regarding MSA. Specifically, the consent decree vacates only a portion of the Final Rule and

the supporting 2008 Biological Opinion and incidental take statements, thus restoring the 2004 regulations during the remand and reconsideration process. The court concluded by holding that because the consent decree did not purport to make substantive changes to the Fishery regulations, the rulemaking provisions of the Magnuson Act and the APA did not apply.

Recreational Fishing Alliance, Inc. v. Nat'l Marine Fisheries Serv.,
8:11-CV-00705-T-30AEP, 2012 WL 868880
(M.D. Fla. Feb. 24, 2012).

Parties

The plaintiff claimed that the NMFS, in formulating Amendment 17A, had failed to meet a number of national standards under the Magnuson Act.

Background and Regulations at Issue

In October 2008, the NMFS released an implementation report (the "MRIP Implementation Plan"), outlining the steps towards replacing the MRFSS with the Marine Recreational Informational Program (the "MRIP"), an improved system of regional surveys meant to replace existing marine recreational fishing data collection programs. Pursuant to the Magnuson–Stevens Fishery Conservation and Management Reauthorization Act of 2006 (hereafter as the "MSRA") and the MRIP Implementation Plan, on December 30, 2008, the NMFS promulgated a final rule establishing a national saltwater angler registry (the "National Registry Rule"). *See* 50 C.F.R. § § 600.1400–1417 (2009); 73 Fed.Reg. 79705, 79705–19 (Dec. 30, 2008).

The National Registry Rule definitively established a national registry of recreational anglers, "intended to improve existing angling effort surveys in order to improve their efficiency, to reduce possible sources of bias and to improve confidence in survey results by anglers and fishery managers." 73 Fed. Reg. 79705 (Dec. 30, 2008). All recreational anglers were required to register with the NMFS by January 1, 2010.

On December 9, 2010, the NMFS issued a final rule to implement Amendment 17A to the FMP for the Snapper–Grouper Fishery of the South Atlantic Region, as prepared and submitted by the South Atlantic Fishery Management Council (the "Council"). Amendment 17A established an annual catch limit ("ACL") of zero for red snapper, thereby prohibiting all harvest and possession of red snapper in or from the South Atlantic exclusive economic zone ("EEZ"). Amendment 17A also required that fishers use non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear north of 28°N. latitude in the South Atlantic EEZ. Lastly, Amendment 17A established a rebuilding plan for red snapper and required a monitoring program as the accountability measure for the fishery, with the intent of ending overfishing and rebuilding the stock.

In formulating Amendment 17A, the NMFS relied chiefly on the Southeast Data, Assessment and Review ("SEDAR") process. SEDAR is a cooperative process initiated in 2002 to improve the quality and reliability of fishery stock assessments in the South Atlantic, Gulf of Mexico, and U.S. Caribbean. *Id*. A new red snapper SEDAR stock assessment, SEDAR 24, was completed in late October 2010, and evaluated more recent catch data than the data used in SEDAR 15.

On April 28, 2011, the NMFS issued the final rule to implement Regulatory Amendment 10 to the FMP for the Snapper–Grouper Fishery of the South Atlantic Region, as prepared and submitted by the Council and effective May 31, 2011. The final rule, adopting Regulatory Amendment 10, removed the snapper-grouper area closure implemented through Amendment 17A. The Council found that, in light of the conclusions drawn from SEDAR 24, removing the snapper-grouper area closure approved in Amendment 17A "seeks to prevent significant direct economic loss to snapper-grouper fishermen without subjecting the red snapper resource to overfishing."

Prior to the current case being filed, a series of similar cases involving similar parties were filed in the Tampa Division of the

Middle District of Florida. These cases, collectively as the "Tampa Fish Cases," sought to enjoin the NMFS from promulgating fishing regulations similar to the regulations in Amendment 17A, but for different fisheries in the region. The central question addressed by the court in the Tampa Fish Cases was whether the NMFS had complied with the relevant provisions of § 1881(g) of the Magnuson Act requiring the completion and implementation of an improved MRFSS by January 1, 2009. The court ultimately found that, by completing and implementing the MRIP, the NMF S had complied with the relevant provisions of the Magnuson Act, and judgment was entered in favor of the NMFS in the Tampa Fish Cases.

Analysis and Holding

The plaintiff's summary judgment sought an order from the court setting aside Amendment 17A on the basis that: (1) the Secretary of Commerce violated the Magnuson Act by illegally delegating authority to the NMFS in approving Amendment 17A; (2) the NMFS violated National Standard 2 by ignoring the best available science and by using the MRFSS instead of the MRIP program; and (3) the NMFS violated National Standard 8 by failing to conduct an economic impact study of the area impacted by Amendment 17A. NMFS asserts in its Motion for Summary Judgment that: (1) the plaintiff had abandoned the claims in its Second Amended Complaint that were not raised in its motion for summary judgment; (2) the plaintiff failed to exhaust its administrative remedies by submitting comments on the proposed rule; and (3) the challenged rule should be upheld on the merits.

The plaintiff first cited to § 1854(a)(3) of the Magnuson Act, which requires that "[t]he Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period ... by written notice to the Council." 16 U.S.C. § 1854(a)(3). Based on this provision of the Magnuson Act, the plaintiff claimed that the Secretary of Commerce, and the Secretary of Commerce alone, should have approved Amendment 17A in order for it to take effect. However, the court deemed this argument improper for a number of reasons. The MSRA explicitly

amended six definitions found in the "Definitions" section of the Magnuson Act, but left the remaining forty-four definitions as they were. As such, the term "Secretary" is not specifically defined in the MSRA, but was defined by the Magnuson Act as "the Secretary of Commerce or his designee." 16 U.S.C. § 1802(39). The court further noted that if the court were to follow the plaintiff's argument then even the Secretary of Commerce would not be authorized to implement the provisions of the MSRA because the MSRA does not incorporate the definition of the word "Secretary" within its text.

The plaintiff next argued that Amendment 17A should be set aside since it was not based upon the best available science. The plaintiff argued that, since Amendment 17A was based on data collected by the MRFSS, and not the MRIP, the NMFS did use the best available science. Specifically, the plaintiff asserted that the NMFS "has chosen to ignore the mandate of Congress and has chosen to charge blindly and recklessly forward with step 2 [updating FMPs across various fisheries] without completing step 1 [completing and implementing the MRIP] ...." Since the court had already determined in the Tampa Fish Cases that the NMFS has properly complied with the Congressional mandate under § 1881(g)(3)(D), the court found that the plaintiff's argument was similarly unfounded.

Lastly, the plaintiff argued that Amendment 17A should be set aside because the NMFS "failed to do an economic impact study of the potential impact on the South Atlantic communities that will be affected by Amendment 17A and instead attempted to extrapolate a study from the Gulf of Mexico in regard to the economic impact." The court noted that nowhere in National Standard 8 has Congress explicitly mandated that the NMFS conduct a formal economic impact study as the Plaintiff argues is "required." The plaintiff cited to no provision of the Magnuson Act or the MSRA, no case law, or no legislative history to suggest that, in complying with National Standard 8, the NMFS may not rely on economic and social data provided by third-party publications. The court observed that contrary to the plaintiff's argument, the NMFS did indeed conduct an economic impact study, which, in over four-hundred pages of

analysis, addressed topics including, but not limited to, the effects on habitat environment, the effects on the biological/ecological environment, the impact on protected species, and the economic impact on commercial and recreational fisheries and fishermen.

The court found that the three claims asserted by the plaintiff in its motion for summary judgment were improper and agreed with the NMFS that the challenged regulations should be upheld on the merits.

Charter Operators of Alaska v. Blank, 844 F. Supp. 2d 122 (D.D.C. 2012).

Parties

The plaintiffs were the Charter Operators of Alaska. The defendants included the National Marine Fisheries Service ("NMFS") and the Secretary of Commerce ("Secretary"), who issued a formal rule ("Final Rule") creating a limited access system for charter vessels engaged in guided sport fishery for halibut in a designated area in the Central Gulf of Alaska. The plaintiffs, Charter Operators of Alaska, allege that the Secretary violated the Administrative Procedure Act ("APA"), by adopting the Final Rule.

Regulation at Issue

Under the Northern Pacific Halibut Act (the "Halibut Act"), 16 U.S.C. §§ 773–773k, the Secretary has broad authority and discretion to "adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Act." The "Convention" is a treaty between the United States and Canada called the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea. Under the Halibut Act, the International Pacific Halibut Commission ("IPHC"), established by the Convention, can recommend regulations regarding Northern Pacific Halibut to the U.S. Secretaries of State and Commerce. 16 U.S.C. § 773c(c). If approved by both Secretaries, the Secretary of Commerce promulgates the regulations via publication in the Federal

Register. Congress additionally granted supplemental regulatory authority over halibut to the regional councils created under the Magnunson–Stevens Fishery Conservation and Management Act ("MSA").

In January 2010, the Secretary published the Final Rule, which enacted a limited access system for charter vessels in the guided sport fishery for Pacific halibut in two areas of the Gulf of Alaska. The Final Rule limited the number of charter vessels that may participate in the guided sport fishery for halibut in the outlined areas. After enactment, all halibut guided sport fishery vessels were required to obtain a permit. In order to qualify for a charter permit, the applicant needed to meet two qualifications: (1) minimum participation in either 2004 or 2005, and (2) minimum participation in 2008. Depending on the number of logged trips, applicants either qualified for a transferrable or nontransferable permit.

Analysis and Holding

The plaintiffs did not meet the minimum participation requirements, so they did not qualify to receive any permits under the Final Rule. The plaintiffs filed a complaint in April, 2011 and subsequently filed their motion for summary judgment to challenge the Final Rule.

The plaintiffs challenged the Final Rule under the APA as violating the requirements of the Halibut Act and the MSA. Their primary argument was that the defendants violated the Halibut Act by approving a rule that is not "reasonably calculated to promote conservation" as stated in the Act. The plaintiffs alleged that the Final Rule will not limit halibut harvest, but instead, will manage the growth of fishing capacity by curtailing the charter halibut fishery. The defendants argued that the Final Rule does in fact promote conservation. The defendants asserted that the Final Rule is the first step in developing a long-term solution to ongoing conservation concerns, and that short-term growth concerns were addressed by the one-fish daily bag minimum rule promulgated in 2008. The defendants further asserted that the Final Rule will "make existing

and future harvest restrictions more effective because conservation gains from individual harvest restrictions will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut."

"[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n, v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983). Rather, the agency action under review is "entitled to a presumption of regularity" and the court must consider only whether the agency decision was based on relevant factors and whether there has been a clear error of judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971). The court determined that the Halibut Act does not specify that conservation can *only* be achieved by reducing the halibut harvest in the short term. Therefore, a long term plan may be acceptable under the Act. The court gave deference to the defendants' decision for a long term plan and held that the plan was an acceptable method under the Act.

Next, the plaintiff contended that the defendants failed to develop a fisherman management plan (FMP) that established an optimum yield for halibut prior to implementing the Final Rule. The defendants argued that the Halibut Act did not require them to develop an FMP or specify and optimum yield because the plain language of the Act references only "criteria" set for in the MSA. The court found that the Halibut Act does not expressly require that regional councils establish FMPs or optimum yield estimates. Because the statute expressly identifies the criteria and does not mention any requirements regarding an FMP or optimum yield, the court could not find that the agency's actions were an impermissible construction of the statute. The court next determined that the defendants adequately considered the economics of the fishery.

The plaintiffs failed to respond to the defendants' assertions that the Final Rule promoted fairness and equity by benefiting rural communities and providing nontransferable permits. The plaintiffs' arguments relied solely on their allegation that economic consolidation without a conservation purpose is arbitrary and

capricious. Accordingly, the court held that the plaintiffs failed to prove that the Final Rule lacked fairness and equity, and the court granted summary judgment for the defendants.

New Jersey Dept. of Envtl. Prot. v. Point Lobster Co.,
DFW-071973, 2012 WL 996605
(N.J. Super. Ct. App. Div. Mar. 27, 2012).

Parties

The defendant, Point Lobster Company, was charged with forty violations of *N.J.A.C.* 7:25–14.13a.

Factual Background and Regulation at Issue

Captain Mark Chicketano of the New Jersey Division of Fish and Wildlife, Bureau of Law Enforcement, received a tip that a truck with a Massachusetts license plate was offloading lobsters that came from Canada. Capt. Chicketano was told that the particular truck was known for its delivery of American lobster to New Jersey from Massachusetts or Canada. Knowing that Canada's size limit for American lobster is less demanding than New Jersey's limit, Capt. Chicketano and a conservation officer went to Point Lobster's market at 4:00 p.m., a time when the store was still open to the public for the sale of lobster. John Godwin, Sr., Point Lobster's owner, was not there, but his son, John Jr. was. In the store, Capt. Chicketano introduced himself and the conservation officer and told John Jr. what he had heard about the shipment. John Jr. acknowledged that Point Lobster had received a delivery of American lobster from Canada, and he told the captain he was not aware of any difference between Canada's and New Jersey's size limits. He also admitted that he had not measured the lobsters.

Capt. Chicketano informed John Jr. that he would like to inspect the lobsters and John Jr. obliged. Capt. Chicketano and his assistant measured 120 of the lobsters in the tank and determined that eighty lobsters were shorter than the three-and-three-eighths

inches required by *N.J.A.C.* 7:25–14.13a. *N.J.A.C.* 7:25–14.13a. is regulation adopted by the Commissioner of the Department of Environmental Protection (Department) pursuant to its authority to regulate "the taking and management of the lobster of the genus and species Homarus americanus [(American lobster)] in the State." *N.J.S.A.* 23:5–9e. The regulation states the minimum length of American lobster permissible to possess, buy, sell, import or export in the State. *N.J.A.C.* 7:25–14.13a.

Those lobsters were, however, long enough to meet the more lenient three-and-one-quarter inch limit set by Canada and by federal regulation applicable in the Gulf of Maine and along the coast of northern Massachusetts and New Hampshire. 50 *C.F.R.* §§ 697.18(a), 697.20(a). Pursuant to 50 *C.F.R.* § 697.6(l) if a requirement of Part 697 "differs from a fisheries management measure required by state law, any dealer issued a Federal dealer permit under [Part 697] must comply with the more restrictive requirement."

Capt. Chicketano offered to discontinue the search and cite Point Lobster for only forty of the eighty short lobsters he had found on the condition that Point Lobster agree to return the shipment. John Jr. accepted that proposal.

The judge imposed a $1200 penalty, the aggregate of the minimum $30 fine per undersized lobster. Prior to entering the guilty plea, Point Lobster moved to suppress the evidence as the product of an unconstitutional search and to dismiss the charges on the ground that the regulation violates the Commerce Clause or is void for vagueness under the Due Process Clause of the United States Constitution. The trial judge denied those applications and accepted Point Lobster's guilty plea conditioned on its right to appeal the court's rulings on the motions to suppress and dismiss. Point Lobster appealed from those determinations, and the Superior Court rejected the defendant's challenges to those rulings.

Analysis and Holding

In addition to the authority to promulgate regulations restricting the size of lobster taken and managing the resource, the Marine Fisheries Management and Commercial Fisheries Act gives the Department authority to inspect the records of those involved in the business of wholesale and retail sale of fish. *N.J.S.A.* 23:2B–9 addresses inspection of the records of persons engaged in commercial sales as follows: b. Every person engaged in the commercial buying, packing, storing, wholesaling, marketing, or processing of any fisheries resources within the State shall keep accurate records, books or accounts showing the species, quantity, and source of fisheries resources; c. Every record, book, or account referred to in subsection b. shall be open for inspection by the department at reasonable hours; d. *The department may audit the records, books, or accounts of any person referred to in subsection b.,* and of anyone who takes fisheries resources and ships directly to market in order *to determine the quantity of resources taken and other information pertinent to management*.

Inspections of property other than records without a warrant are addressed in N.J.S.A. 23:10–20, which allows a member of the Fish and Game Council and any conservation officer to search without a warrant, any receptacle for fish, when he has reason to believe violated a provision of that regulation. Search warrants are required under the law only when a demand to inspect is refused. N.J.S.A. 23:10–20.

On appeal, the defendant argued that the regulation did not apply to its purchase and sale of short lobsters that were not taken from N.J. waters. The court rejected this argument because a plain reading of the regulation states that a "A person shall not take from the marine waters of this state by any means, *import, export, or offload at any port, have in his or her possession, buy, sell or offer to buy or sell, any American Lobster less than the length"* of three and three-eighths inches. Therefore, the location of the taking is immaterial to the prohibitions against importing, exporting, buying or selling.

The court next held that any burden the regulation has on interstate commerce (in violation of the Commerce Clause) is indirect and incidental. The regulation's obvious purpose is protection and management of a resource the Legislature deems important and capable of destruction through exploitation. *N.J.S.A.* 23:2B–2a(2). The court reasoned that in numerous cases, state and federal courts have recognized that a state's prohibition against the importation, exportation, possession, sale and purchase of fish or wildlife that cannot be lawfully taken in the regulating state but can be lawfully taken elsewhere, serves the regulating state's purpose by facilitating enforcement of the state law.

The court concluded by examining whether the search of the defendant's delivery of lobsters was invalid. The court reviewed the constitutionality of the search based on the degree to which the search intruded upon the defendant's privacy, and the degree to which it was needed to promote legitimate governmental interests. *United States v. Knights,* 534 U.S. 112, 118–19, 122 (2001). Generally, under the Fourth Amendment, searches or seizures conducted without a warrant based on probable cause are considered per se unreasonable. However, an exception has been recognized for pervasively regulated businesses or industries long subject to close supervision and inspection. *United States v. Biswell,* 406 U.S. 311, 316 (1972); *Colonnade Catering Corp. v. U.S.,* 397 U.S. 72, 77, 90 (1970).

The defendant's business is closely regulated, based on the fact it is required by law to keep and make available for inspection records that include information pertinent to the management of the State's lobster resource. *N.J.S.A.* 23:2B–9; *See New York v. Burger,* 482 U.S. 691, 704 (1987). In addition, State law permits inspections of specified containers used to hold and store fish and lobster without a warrant when there is reason to believe there is a violation of a law regulating lobster. *N.J.S.A* . 23:10–20. It was not until John Jr. confirmed Point Lobster's receipt of a shipment of lobsters from Canada and his indifference to New Jersey's length restriction that Capt. Chicketano had probable cause to believe Point Lobster had short lobsters in its tanks. In this circumstance, Capt.

Chicketano's departure to obtain a warrant after acquiring probable cause would have posed the risk of frustrating the regulatory goals. Thus, the court found that in this context, a warrantless search was necessary to implement and enforce the law governing this highly regulated industry.

COMMITTEE ON INTERNATIONAL ORGANIZATIONS, CONVENTIONS AND STANDARDS

Chair: Alan Van Praag

REPORT OF THE SUBCOMMITTEE ON CLASSIFICATION SOCIETIES

Subcommittee Chair: Michael D. Wilson

PRESTIGE

In early 2003, the Government of Spain filed suit against the American Bureau of Shipping ("ABS") in New York federal court to recover damages arising from the November 13, 2002, sinking of the aframax tanker M/T PRESTIGE off the Galician coast of Spain. Spain claimed that ABS had been negligent and reckless or grossly negligent in developing the rules and regulations which governed the vessel and its repairs; that its management was reckless in overseeing its surveyors, and, most particularly, that its surveyors in China were reckless and grossly negligent in approving certain repairs in China during the vessel's fifth special survey. Spain asserted that these activities of ABS led to the sinking of the vessel and most particularly pointed to a claim that ABS approved improper sizes and dimensions of steel in China.

After several years of discovery, ABS moved for summary judgment on the ground that the Civil Liability Convention (CLC) barred the action because ABS was covered by the CLC as one who performed services for the vessel and therefore Spain was the exclusive forum to hear such actions. In any event, ABS argued no action had been alleged that amounted to the level of culpability required to break the CLC limits. The Southern District of New York agreed and dismissed on the ground that it lacked jurisdiction. The Second Circuit reversed and remanded, holding that the court had jurisdiction, but asked it to consider whether the doctrine of *forum non conveniens* or the like could apply. Because ABS could

not accept certain of the court's terms to be applied in the case of a *forum non conveniens* dismissal, the court did not consider the *forum non conveniens* doctrine.

ABS again moved for summary judgment in 2008 on the grounds that ABS lacked a duty to Spain under any possibly applicable law, including that of the United States and that, in any event, its actions, as analyzed after discovery, amounted neither to recklessness or even negligence. Judge Swain, finding U.S. maritime law to govern, noted that ABS had asserted:

> that it is entitled under U.S. maritime law to judgment dismissing Spain's claim because U.S. law imposed no duty on it with respect to the Prestige that is enforceable by Spain. Spain, contending that it would be entitled to recover from ABS if it could prove that ABS acted recklessly in setting its classification standards and/or certifying the Prestige as meeting such standards, argues that ABS' motion must be denied. Spain, however, has not identified, and the Court's own research has not disclosed, any precedent decisions in which a classification society has been held liable to a third party for damages caused by failure of a vessel. Although the classification society decisions to date have not addressed third party claims premised on recklessness, their reasoning and analysis are instructive.

At oral argument, Spain abandoned any action based on negligence and conceded that it would have to show recklessness in order to recover. The district court held that, at least under the circumstances as revealed in the evidence, a classification society could not be held liable even for reckless acts of the sort that might conceivably be inferred from the evidence. Spain appealed that decision. Oral argument was held before the Second Circuit Court of Appeals in early November of 2011 and the appeal is now *sub judice*.

Limitation of Liability: IMO RO Code

The International Maritime Organization (IMO) is nearing completion of a new code governing recognized organizations (ROs). Negotiations are currently underway concerning the potential liability in instances of negligence of the RO.

ABS and the Marshall Island registry have urged that a limitation of the RO's liability should be agreed between the RO and the appointing flag state to be enforceable in instances of ordinary negligence of the RO. The EU has resisted inclusion of a limitation of liability of ROs.

It is expected that the limitation of liability issue will be resolved at IMO meetings next year.

[Thanks to John E. Grimmer of New York for the PRESTIGE update.]

COMMITTEE ON MARINE ECOLOGY AND MARITIME CRIMINAL LAW

Editors: Dennis Minichello
Alexander M. Giles
Katherine F. Newman

BILGE & BARRATRY

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From the Helm

My term as Chair of the Marine Ecology and Maritime Criminal Law Committee of the Maritime Law Association of the United States will come to an end after the May 2012 meeting of the MLA. Prior to serving as Chair these past years, I served as the Vice-Chair beginning with the original formation of the Committee. During that period of time, the Committee has grown in size, scope, and participation. Our meeting times expanded to include meetings in both Washington, D.C., and New York City every spring and fall in collaboration with the Regulation of Vessel Operations, Safety, Security and Navigation Committee and the Government Counsel Committee. Our meetings have included regular presentations by representatives from the United States Coast Guard, the Federal Maritime Commission, the Department of Justice Criminal Division, Congressional staffers and many others all of whom have provided timely and useful information on issues related to the work of the three committees. Our meeting agendas have been so popular that, for the last several years, they have been among the best attended meetings out of all of the MLA committees.

Among the many accomplishments of our Committee, I am particularly proud of the initiation of this newsletter. **BILGE & BARRATRY** has enhanced the substantive work of the Committee,

been a source of information for all members of the MLA and has also afforded an opportunity for many of our fellow members to educate the rest of us on issues of particular interest to them. The success of this newsletter would not have been possible without their many contributions and I am in their debt. I look forward to the new leadership of this Committee to continue publication of this newsletter and I am sure that they will find ways to improve upon the original.

I want to express my deep appreciation to Past President Warren J. Marwedel and current President Patrick J. Bonner for appointing me to chair this committee. In addition, I want to thank Committee Vice-Chair, Alex Giles, Committee Secretary, Katharine Newman and my administrative assistants Mary Ellen Kearns and Terri Cooper for all of their work. Their commitment, time and energy were instrumental in the successful launch and continued publication of this newsletter.

Finally, a heartfelt thanks to all members of the Committee. Through your interest, attendance at meetings and helpful comments you have played a significant role in the success of our Committee. I do hope you will continue your support in the future.

Dennis Minichello,
Chair and Editor

I. NEWS FROM THE GREAT LAKES

A. Great Lakes Seaway Ballast Water Working Group Releases Ballast Water Management Report

On February 17, 2012, the Great Lakes Ballast Water Working Group ("BWWG") released its 2011 Summary of Great Lakes Seaway Ballast Water Management report. The BWWG's goal is the prevention of the introduction of aquatic invasive species into the Great Lakes through stricter ballast

water standards and a comprehensive enforcement policy. The BWWG is comprised of representatives of the United States Coast Guard, Transport Canada – Marine Safety, the St. Lawrence Seaway Development Corporation and the St. Lawrence Seaway Management Corporation.

The BWWG report disclosed that, in 2011, all of the ships bound for the Great Lakes through the St. Lawrence Seaway received a ballast tank exam with an examination of a total of 7,203 ballast tanks during 396 vessel transits. Enforcement policy required that vessels that did not exchange their ballast water or flush their ballast tanks either retained the ballast water in residuals onboard, treated the ballast water in an environmentally sound and approved manner or returned to sea to conduct a ballast water exchange.

B. The Battle Against Asian Carp

As has previously been reported in this newsletter, the subject of Asian carp has been a hot topic in the last couple of years in the area of the Western Rivers and the Great Lakes. As Asian carp have moved up the Western Rivers into the greater Chicagoland area, serious concerns developed that the Asian carp might migrate into Lake Michigan and throughout the Great Lakes devastating the native fish population. Acting on that concern, the State of Michigan, along with other states and environmental interests filed a federal lawsuit seeking the permanent closure of the waterways connecting to Lake Michigan. That effort failed although the case is on appeal to the Seventh Circuit Court of Appeals. [**Eds. Note**: The Seventh Circuit denied a request for a preliminary injunction, *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011); on remand, the district court dismissed the complaint but granted leave to amend, No. 10 C 4457, 2012 U.S. Dist. LEXIS 170968 (N.D. Ill. Dec. 3, 2012).]

In addition to the legal action, the Federal Government, working through the U.S. Corps of Engineers and the United States Coast Guard, became actively involved in looking for alternatives to

prevent the advancing Asian carp from entering into Lake Michigan other than shutting down the locks that connect the rivers to the lake system. Initially, electronic barriers were installed which have thus far proven successful in stopping the advance of the fish. The Obama Administration also developed what it determined to be a proactive and comprehensive strategy to deal with the problem.

2012 Framework

The following report is reprinted from *2012 Asian Carp Control Strategy Framework - The Obama Administration's Proactive Strategy to Protect the Great Lakes, available at* http://www.wilsoncenter.org/sites/default/files/2012%20Framework%20One-Pager%202-23-12%20FINAL.pdf.

> On February 23, 2012, the Obama Administration released the 2012 Asian Carp Control Strategy Framework (2012 Framework) outlining 58 new and continuing actions that build upon the proactive efforts to protect the Great Lakes from Asian carp undertaken in the 2010 and 2011 Frameworks. The Framework focuses on sustainable, long term controls while permanent solutions are developed.
>
> **Asian Carp and the Great Lakes**
>
> Aquatic nuisance species (ANS) have significantly degraded the Great Lakes food web in recent decades. Today, the most acute ANS threat facing the Great Lakes is Asian carp (silver and bighead) through the Chicago Area Waterway System and 18 other potential pathways that can connect the Great Lakes and Mississippi River basins. Asian carp are voracious eaters and heavy breeders. Some varieties can grow to more than 100 pounds and are capable of eating 20 percent of their body weight in a day, stripping the food web of key food sources for native species.

The Obama Administration and Asian Carp Regional Coordinating Committee

To ensure a comprehensive response, the Obama Administration formed the Asian Carp Regional Coordinating Committee (ACRCC) in 2009. Led by the White House Council on Environmental Quality's Asian Carp Director, the ACRCC includes the U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Fish and Wildlife Service, U.S. Geological Survey, U.S. Environmental Protection Agency, the National Oceanic and Atmospheric Administration, U.S. Department of Transportation, and all Great Lakes states, as well as the Great Lakes Fishery Commission, the Metropolitan Water Reclamation District of Greater Chicago, and the City of Chicago.

Since 2010, the Obama Administration has invested more than $150 million dollars to protect the Great Lakes from Asian carp. The scale of the effort has been unprecedented for invasive species prevention and unifies Federal, State and local actions, employs a Comprehensive approach to prevent a self-sustaining Asian carp population, and develops longer-term biological controls. The 2010 and 2011 Frameworks included 45 Federally-funded initiatives, all of which have been completed or are under way. The ACRCC's ongoing implementation of the Framework has proven successful in coordinating actions to comprehensively address the Asian carp threat, and can serve as a model for management of aquatic invasive species across the nation.

The 2012 Asian Carp Control Strategy Framework

The 2012 Framework outlines the priority actions planned and under way to address the threat of Asian carp invading the Great Lakes, including both management actions to prevent Asian carp introduction and establishment, and research to develop permanent controls on Asian carp populations. The Framework is designed to be flexible, ensuring the ACRCC can tailor actions to changing conditions.

2012 Framework Actions

Continuing the Great Lakes and Mississippi River Interbasin Study (GLMRIS) to identify the most cost-effective and efficient ways to prevent the transfer of aquatic nuisance species (ANS) between the Great Lakes and Mississippi River basins. An interim report has identified 90 known technologies that could prevent the transfer of ANS.

Improving the evaluation of electric barrier effectiveness through fish tagging and utilization of sonar equipment.

Beginning the construction of the permanent barrier to replace electrical Barrier 1, the original electrical barrier built in 2002.

Deploying an enhanced, more efficient system to monitor, sample, and capture Asian carp if present above the electric dispersal barriers.

Increasing collaboration with stakeholders groups, commercial fishermen, industry, and recreational boaters.

Increasing investment in research and development of long-term fish management strategies for Asian carp, environmental DNA (eDNA) sampling, and habitat assessments.

Field testing new technologies, such as water guns, to herd or eradicate aquatic invasive species.

Continuing development and field testing of biological methods to reduce Asian carp breeding.

Developing alternate traps and technologies to enhance capture rates.

Conducting research and testing to reduce the uncertainty of eDNA results.

Stopping the illegal transport of Asian carp and other ANS across State lines.

Key accomplishments since 2010

Expanded the ACRCC to include all Great Lakes states and increased stakeholder outreach.

Enhance the fish barrier system to include strengthened electric barriers, physical barricades to stop Asian carp transfer during floods, and closed off smaller waterway connections to the Great Lakes.

Utilized emergency authority provided through Section 126 of Energy and Water Development Act of 2010 to block flood waters from the Des Plaines River with a 13-mile fish barrier and a permanent block in the Illinois and Michigan Canal to keep Asian carp from crossing into the Chicago Waterway.

Installed a 1,500 foot fish barrier fence at Eagle Marsh, near Fort Wayne, IN, to block advancement of Asian carp from the Wabash River to the Maumee River and Lake Erie.

Identified 18 pathways across all the Great Lakes states with the potential to transfer ANS between the Great Lakes and Mississippi River Basins.

Implemented the Asian Carp Prevention and Control Act following the President's signing of the bill in 2010. This legislation prohibits live bighead carp from being shipped or imported across state and national lines.

Formed partnerships within Illinois enabling over 2,200 high quality meals to have been served to bolster nutritional programs within the state as part of "Target Hunger Now!".

Conducted over 40,000 hours of netting, electrofishing, and keen observation above the electrical dispersal barriers, with no new live Asian Carp having been found in the Chicago area waterway system.

. . .

GLMRIS interim reports already released:

ANS White Paper

NEPA Scoping Report

Commercial Cargo Navigation Data

Commercial Non-Cargo Navigation

ANS Control Technologies Report

GLMRIS interim reports to be released in 2012:

Commercial Fisheries Report

ANS's Controls Report for Wabash-Maumee Basins Connection, Fort Wayne, Indiana

Other Aquatic Pathways Risk Characterization Report

Great Lakes/Mississippi River Fishing Data Interim Report

Next Steps

Federal and State agencies will continue to work together and in collaboration with local agencies and other stakeholders to protect the Great Lakes from Asian carp. The Asian Carp Control Strategy Framework is an adaptive plan, allowing for new partners and new actions to be added as appropriate. For the latest information, visit www.asiancarp.us.

II. PIRACY

Piracy continues to be a serious problem for shipowners, P&I clubs, cargo interests and nations with shipping interests. Since piracy emerged as a serious issue as well as a subject for the popular media, there has been much discussion and debate as to the best methods of deterrence and protection of vessels, their crews and cargoes. Part of that discussion has included the advisability of employing private security guards on vessels. The employment of private security guards raised many issues both legal and practical. However, the seriousness of the piracy problem has resulted in some shipowners utilizing security guards on their vessels.

BIMCO has recently addressed the security issue in two very specific ways. First, it has issued its Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel

(PCASP) in Defense of a Merchant Vessel (MV), *available at* http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/Circulars/2012/BIMCO-%20Guidance%20on%20the%20Rules%20for%20the%20Use%20of%20Force.pdf. Secondly, it has developed GUARDCON, a standard contract for the employment of security guards on vessels.

The purpose for the Guidance is stated as follows:

> This Guidance is written to assist shipowners and PMSC meet the requirements listed in the References and agree RUF in support of the above References. It sets out guidelines for a graduated response by armed security guards to any actual, perceived or threatened act of piracy and/or violent robbery and/or capture/seizure by third parties in order to protect the crew and defend the vessel from being hijacked.

The Guidance includes sections on its general scope, PMSC and PCASP obligations, self-defense and the inherent right to exercise it, chain of command, graduated in proportional defense, and post incident action.

GUARDCON was developed:

> To assist the industry, and in particular shipowners and their P&I clubs, by providing a clearly worded and comprehensive standard contract on which they can conclude agreements for security services.

BIMCO, *Guardcon*, https://www.bimco.org/en/Products/Documentary_Guides/-GUARDCON.aspx

GUARDCON was developed by a subcommittee of the Documentary Committee of BIMCO with work beginning in November of 2011 and the issuance of a final draft in March 2012. GUARDCON was developed in parallel with the Guidance on Rules For the Use of Force referenced above and were intended to

compliment each other. Shortly after the publication by BIMCO, international maritime security specialist Sea Marshals, Limited announced that it had secured insurance for its operations which complies with the new GUARDCON standards. Press Release, Sea Marshals, Ltd., Sea Marshals Gain New Armed Guard Insurance (March 29, 2012), *available at*, *e.g.*, http://www.maritimeprofessional.com/News/343462.aspx.

The Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) and the GUARDCON are posted on the webpage for the Marine Ecology and Maritime Criminal Law Committee on the MLA's website, www.mlaus.org. Thanks to Grant Hunter, Chief Officer Legal and Contractual Affairs of BIMCO for authorization to post these documents.

III. U.S. COAST GUARD AMENDS REGULATIONS FOR BALLAST WATER MANAGEMENT

Ballast water management has been another one of those hot topics of critical importance to shipowners and other shipping interests alike. Prior to the new regulations, there had been no national standards with the result that states particularly in the Great Lakes Region and also New York and California issued their own regulations. Those regulations were often inconsistent, onerous in compliance and very often impossible to satisfy with current technology. The state regulations threatened to severely cripple the shipping industry in the United States.

In order to rectify the situation, the Coast Guard, in August of 2009, published a Notice of Proposed Rulemaking to address the issue. Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters, 74 Fed. Reg. 44632 (proposed Aug. 28, 2009) (to be codified at 33 C.F.R. pt. 151 & 46 C.F.R. pt. 162). The result of the rulemaking is the amending of the regulations on ballast water management with the establishment of a standard for the allowable concentration of living organisms in ships' ballast water discharged

in waters of the United States. Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters, 77 Fed. Reg. 17254 (final rule adopted Mar. 23, 2012). In conjunction with that standard, there are also regulations for engineering equipment establishing an approval process for ballast water management systems. The hope is that these new regulations will aid in controlling the introduction and spread of non-indigenous species from ships' ballast water in waters of the United States. The new regulations and commentary are posted on the webpage for the Marine Ecology and Maritime Criminal Law Committee on the MLA website, www.mlaus.org.

IV. CIVIL CASE SUMMARIES

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010,
No. 2:10-md-02179-CJB-SS, MDL No. 2179 § J (E.D. La.)

The following summaries all arise from the explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit ("MODU") on April 20, 2010. The sinking caused a riser pipe connecting the MODU to the Macando Well to break and discharge millions of gallons of oil into the Gulf of Mexico before it was finally capped approximately three months later.

The Macando Well was co-owned by BP Exploration & Production, Inc. ("BP") and Anadarko Petroleum Corporation ("Anadarko"). The DEEPWATER HORIZON was the owned and operated by Transocean Offshore Deepwater Drilling, Inc ("Transocean").

The U.S. District Court for the Eastern District of Louisiana issued many orders during the course of the litigation. The following summaries are some of the more substantive and interesting orders of the court. These orders can be accessed at http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.

Order Denying BP's Motion to Dismiss Transocean's Complaint in Intervention in the Insurance Actions

Doc. 3373, 2011 U.S. Dist. LEXIS 78840 (E.D. La. July 20, 2011)

Prior to this order, several insurers sought declaratory judgment against BP. The insurers sought declaration that they had no additional-insured obligation to BP. Transocean and others intervened to assert their own claims as "additional insureds." Transocean sided with the insurers, arguing that BP had no additional-insured rights.

BP moved to dismiss Transocean's intervening complaint. The court denied BP's motion.

BP had three arguments. Firstly, BP argued that Transocean lacked standing because the latter did not seek a declaration of its own rights or obligations. Secondly, BP averred that Transocean's complaint omitted to name necessary parties because it did not name Transocean's own insurers. Lastly, BP therefore claims Transocean had pled no actionable claim against the named defendants – Anadarko, MOEX Offshore 2007 LLC ("MOEX"), and BP.

Transocean argued it had standing because its coverage in policies where it was the sole named insured would be decreased by the coverage claimed by the defendants. On this, Transocean agreed with its own insurers. Therefore, Transocean did not name its insurers in the complaint and averred it had a valid claim. Alternatively, Transocean asked for leave to amend.

The court denied BP's motion to dismiss Transocean's complaint. The court held that Transocean had standing to intervene as a plaintiff because a ruling in favor of the defendants in the declaratory actions would decrease Transocean's insurance coverage. The court also held that Transocean did not need to amend its complaint because Transocean did not seek to challenge its insurer's positions.

[Summarized by Christian Packard, Young Lawyers Committee]

Order on Defendants' Motion to Dismiss the B3 Master Complaint Granted in Part and Denied in Part

Docs. 4159, 4209, 2011 U.S. Dist. Lexis 113424
(E.D. La. Sept. 30, 2011)
(as amended Oct. 4, 2011)

Defendants filed a motion to dismiss the B3 Master Complaint of the BP Oil Spill multi-district litigation. The B3 Master Complaint alleged personal injury claims on behalf of persons exposed to oil and dispersants connected to the oil spill. Defendants included BP, Transocean, Anadarko, MOEX, and Mitsui Oil, as well as entities involved in conducting spill response efforts ("Clean-Up Defendants") and Nalco Company for manufacturing and selling chemical dispersants Corexit. Plaintiffs made claims under general maritime law and state law asserting negligence, negligence per se, strict products liability, nuisance, and battery. Plaintiffs requested compensatory damages for present and past injuries, future medical monitoring, and attorney fees. Plaintiffs also requested a declaratory judgment that any settlement provisions related to punitive damages without a judicial determination of reasonableness are invalid.

The court first looked to its previous Order and Reasons respecting the B1 Master Complaint where it found maritime law applied to certain claims to the exclusion of state law. The court, therefore, held that the B3 claims for negligence, negligence per se, products liability, nuisance, and battery which were similarly asserted under state law were preempted by maritime law. The claim for future medical monitoring under Florida law was also preempted, and the claim for declaratory relief was dismissed as well. The B1 Order also dismissed general maritime negligence claims against Anadarko and MOEX, which were accordingly dismissed in the B3 Order.

The Clean-Up Defendants and Nalco argued that claims against them should be dismissed because they had derivative

immunity from the federal government's authorization and direction to use Corexit and other dispersants. The defendants derived this immunity from the Clean Water Act ("CWA"), 33 U.S.C. § 1321(j)(8), and the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The court found, accepting the allegations that the EPA had directed BP to use less toxic dispersants than Corexit, that the defendants did not receive government approval. The allegations led to the inference that BP was in control of the response actions or had exceeded or deviated from the scope of its authority, defeating the derivative immunity defenses in light of the motion. The court, however, did not prejudice the defendants from reasserting the defense at a later time, since a federal interest could still be implicated and therefore entitled to potential derivative immunity. The defendants also asserted that the B3 claims were preempted by the CWA. The court found these arguments unsuccessful for similar reasons as the immunity arguments, and similarly was not prejudiced from reasserting these arguments.

The defendants argued that the plaintiffs' claims should be dismissed because neither the Jones Act, 46 U.S.C. § 30401, nor general maritime law permit claims for future medical monitoring absent a manifest injury. Applying U.S. Supreme Court and Fifth Circuit case law, the district court held that plaintiffs who allegedly have suffered some effects have sufficiently pled an injury giving rise to a cause of action and potentially entitled to medical monitoring as an element of their damages. No action accrued for plaintiffs who had not alleged an injury, and therefore their claims were dismissed. The court also held all plaintiffs alleging an injury under general maritime law may seek medical monitoring damages. Plaintiffs who had alleged an "injury" sufficiently alleged facts to state a claim of negligence and gross negligence. These plaintiffs also stated a plausible products liability claim against Nalco. The court also dismissed the claim for negligence per se, but allowed plaintiffs an opportunity to amend their complaint if they wished to assert a more definite statement. Punitive damages by plaintiffs who qualified as Jones Act seaman were dismissed, but punitive damages for non-seaman were still available. The court dismissed nuisance claims to the extent they were pled under maritime law, and the

plaintiffs' battery claims were also dismissed for lack of a showing of necessary intent.

The court deferred ruling on motions to dismiss for lack of personal jurisdiction filed by Lynden, Inc. and International Air Response, but granted a request for limited discovery. Arguments that were particular to Dril Quip and Halliburton's arguments that were particular were not addressed and were preserved.

[**Editor's note:** The original Order and Reasons was filed on September 30, 2011. The Order was amended to make corrections, but no substantive changes were made.]

[Summarized by David Aaron Garfinkel, Young Lawyers Committee]

Motion to Dismiss the B4 Pleading Bundle

Doc. 4285, 2011 U.S. Dist. LEXIS 117969
(E.D. La. Oct. 12, 2011)

Several defendants filed a joint motion to dismiss all claims in the B4 pleading bundle. The B4 pleading bundle was based on a complaint filed in July 2010 by Terry Robin and twelve other plaintiffs, purporting to represent Louisiana landowners, commercial fishermen, and oil and gas industry employees, asserting claims for property damage or economic losses resulting from the discharge of oil against defendant vessels that responded to the Deepwater Horizon explosion and attempted to extinguish the fire with their fire monitors. The complaint alleged that the defendants' actions were independent of the fire and were separate and distinct causes of the resulting oil spill. The claims were asserted under general maritime law negligence, the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 702, and negligence under Louisiana law as surrogate federal law under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. 1221(a)(2)(A).

The defendants argued that they owed no legal duty to the claimants, because it was not legally foreseeable that the act of

spraying water onto and around a burning rig could cause the loss of control of the Macando Well and the resulting alleged damages. The district court immediately dismissed the OPA claims since the defendants were not directly or solely responsible for the oil discharge. The court, citing to the B1 Order, held that the case fell within its admiralty jurisdiction and that substantive maritime law applied. The negligence claims under Louisiana law were dismissed since state law could not be adopted as surrogate federal law under OCSLA, and therefore the claims were preempted by maritime law.

The court then examined the claim under general maritime law negligence. The court noted that four elements had to be met to establish such a claim: 1) the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; 3) the plaintiff sustained injury; and 4) there was a causal connection between the defendant's conduct and the plaintiff's injury. The duty element required a foreseeability of the harm. The court stated that the general sort of harm allegedly suffered here would not have been anticipated. Even if the defendants' actions fell below the standard of care, a reasonable person in the defendants' position would not foresee the resulting oil spill.

[Summarized by David Aaron Garfinkel, Young Lawyers Committee]

Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Complaints of Alabama and Louisiana

Doc. 4578, 2011 U.S. Dist. LEXIS 131069
(E.D. La. Nov. 14, 2011)

This order addressed the issues of federal preemption and presentment under the Oil Prevention Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq*. The states of Alabama and Louisiana brought suit against BP, Anadarko, Transocean, and others alleging damages to their respective state's natural resources and property and claiming general economic loss. Alabama asserted claims under Alabama law including negligence, products liability, public and

private nuisance, trespass, and fraudulent concealment. Alabama also sought civil penalties against all defendants for violations of Alabama's state pollution acts. Similarly, Louisiana asserted claims under Louisiana law but cited its own state pollution acts. Both Alabama and Louisiana also asserted claims under general maritime law and the OPA. The defendants countered that the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*., and Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq*., preempt all respective state laws. Moreover, they contended that OPA displaces general maritime law so that all the two states have left are their actions as "responsible parties" under OPA. Lastly, the defendants argued that even OPA does not apply because neither Alabama nor Louisiana properly complied with OPA's "presentment" procedure.

The court first established that both Alabama and Louisiana had the right to bring suits under general maritime law and any applicable federal statute. With that foundation, the first major issue addressed by the court was whether the CWA and OPA preempted the state law claims. The states argued (1) that their respective civil penalties only applied to damages within their state territorial waters so they were not attempting to govern extraterritorially; and (2) there is no risk to uniformity because the state laws merely added penalties. The court rejected these arguments through *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In *Ouellette*, the Supreme Court held that plaintiffs in an "affected state" must either sue under the laws of the "source state" or the CWA. The court also noted that the language of the CWA and OPA themselves support preemption. Lastly, the court rejected the states' reliance on a recent Ninth Circuit case, *Pacific Merchant Shipping Association v. Goldstene*, 639 F.3d 1154, 2011 A.M.C. 1041 (9th Cir. 2011), because, in that case, California only targeted polluting vessels that intended to pollute within those territorial waters.

The second major issue addressed by the court was presentment under OPA. In short, the statute reads that "all claims for removal costs or damages shall be presented first to the responsible party." The defendants argued that presentment is a "mandatory

condition precedent" and the states had yet to present their claims to any defendant as specifically directed. The states countered, however, that they were exempted from presentment obligations, or in the alternative, that they had complied. The court first explicitly rejected the rule in *United States v. M/V Cosco Busan*, 557 F. Supp. 2d 1058, 2008 A.M.C. 1360 (N.D. Cal. 2008), that states were exempted from presentment. However, the court held that the complexities involved in this mass litigation eased the states' presentment requirement and therefore both Alabama and Louisiana had complied.

[Summarized by Vincent C. Reuter and Daniel J. Cragg, Young Lawyers Committee]

Order Denying BP Entities' Motion for Judgment on the Pleadings in the Insurance Action

Doc. 4588, 2012 A.M.C. 552 (E.D. La. Nov. 15, 2011)

In this order, BP brought a motion seeking a court declaration that it be included as an "additional insured" in the insurance contracts procured by Transocean. BP's basis for this claim is that the drilling contract between the two parties included cross-indemnities. Transocean assumed full responsibility for above-surface pollution without regard to negligence, while BP assumed responsibility for subsurface oil pollution without regard to negligence *except* for the previously-mentioned liability assumed by Transocean. Additionally, (1) the contract declared that Transocean must include BP as an additional insured for liabilities assumed by Transocean; and (2) the insurance policy explicitly covered any entity whom Transocean is obliged by "insured contract."

BP argued that the scope of the coverage should be determined solely by the policy itself. Thus, because BP qualifies as an insured, it qualifies to full extent of that insurance. Conversely, Transocean argued that the court must incorporate the underlying drilling contract; and in it BP's status as an additional insured does not extend to any liabilities BP assumed. More directly, Transocean

argued that the policy defines "insured contract" to include only "additional insured" coverage *required* under the drilling contract, and that does not include liability assumed by BP under that same drilling contract.

The district court reasoned that BP's proposed blanket rule focusing solely on the insurance policy without regard to the underlying contract is unsupported by law. Moreover, the court found that the insurance policy itself incorporates the drilling contract by tying the "additional insured" to the "terms" of an anticipated second document. Accordingly, and after a careful analysis of applicable law and the contractual terms, the court held that the scope of Transocean's insurance obligation in the drilling contract determines the scope of the additional insurance coverage available to BP.

The court's final task was to determine the exact parameters of BP's coverage as an additional insured. Here the court labored through a delicate analysis of the contractual terms, to the point of hearing arguments over a single (missing?) comma. In the end, however, the court reasoned that Transocean's argument just made more sense. BP was essentially arguing that Transocean explicitly limited coverage for itself in the drilling contact, including its own employees, but sought unlimited additional coverage for BP, including for injuries to BP's employees. After noting this "odd" interpretation, the court found that the only reasonable interpretation is that BP is only an additional insured for those liabilities that Transaction took responsibility for, *i.e.*, above-surface pollution. Because the liabilities in this action stem from a below-surface accident, for which BP took responsibility, BP is not an additional insured in Transocean's policy.

[Summarized by Vincent C. Reuter and Daniel J. Cragg, Young Lawyers Committee]

Order Granting in Part and Denying Defendants' Motions to Dismiss the Local Government Entity Master Complaint

Doc. 4845, 835 F. Supp. 2d 175 (E.D. La. Dec. 9, 2011)

This order again addressed the issue of preemption and also the right for foreign government plaintiffs to sue under the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq*. The court responded to various state and federal law claims by a collection of government entities against BP, Anadarko, Transocean, and others. The action was first consolidated in one "Master Complaint." Additionally, the court heard arguments from other government entities listed as certain parishes in Louisiana, four cities in Alabama, and three states from the United Mexican States.

The Master Complaint asserted claims under general maritime law, state law, and OPA. The court briefly addressed the Master Complaint by citing previous orders in the litigation. The decisions by the court are as follows. Firstly, all claims pled under state law were dismissed because of preemption. Secondly, the general maritime law claims that did not allege physical damage to a property interest were dismissed. Thirdly, OPA does not displace general maritime law asserted against parties who are not "responsible parties" under OPA. Fourthly, the local government entities are subject to OPA's presentment procedure. Fifthly, there is no presentment requirement for general maritime law. Lastly, the local government entities may be entitled to punitive damages under general maritime law.

The Louisiana parishes brought claims under a Louisiana environmental protection act, La. Rev. Stat. § 56:40.1. Again by citing a previous order, the court held that the parishes' state law claim was preempted by the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*., as interpreted by *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The court did add, however, that the parishes were not prejudiced from seeking damages under OPA and general maritime law.

The court dismissed the Alabama claims with similar efficiency. The four non-coastal cities sought recovery under OPA and general maritime law. The court held that the cities failed to allege presentment according to the statute, and also, because they were inland, the complaint does not allege physical damage to a proprietary interest.

Lastly, the court addressed the Mexican States claim under OPA. The court found that a foreign claimant may recover under OPA if (1) the Secretary of State in consultation with the Attorney General has certified that the claimant's country provides a comparable remedy for U.S. claimants; or (2) that recovery is authorized by treaty or executive agreement.

The Mexican States relied solely on the treaty theory. First, they argued that the MEXUS Plan applied. Joint Contingency Plan Between the United Mexican States and the United States of America Regarding Pollution of the Marine Environment by Discharges of Hydrocarbons or Other Hazardous Substances, U.S.-Mex., Feb. 25, 2000, *available at* http://www.rrt9.org/external/content/document/2763/540879/1/2000%20MEXUS%20Plan%20English.pdf. The court rejected this argument, however, because while that treaty established a joint contingency for oil spills in the Gulf of Mexico, it was not applicable because it says nothing about removal costs or damages. Second, the Mexican States relied upon the Cartagena Convention, Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region, Mar. 24, 1983, T.I.A.S. No. 11,085, which focuses on the prevention, reduction, and control of pollution. The court again dismissed this treaty, but this time on the grounds that it does not mention OPA. Third, the Mexican States argued that the Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 973 UNTS 3, applied. The court quickly dismissed this treaty, however, because the United States was not a signatory. Lastly, the plaintiffs relied on the Treaty on Maritime Boundaries between the United

States of America and the United Mexican States, U.S.-Mex., May 4, 1978, 17 I.L.M. 1073 (1978). Again, however, the court found that this treaty does not refer to OPA. Without an applicable treaty to rely upon, the court dismissed the United Mexican States' OPA claims in their entirety.

[Summarized by Vince C. Rueter and Daniel J. Cragg, Young Lawyers Committee]

Order Granting in Part and Denying in Part Transocean and BP's Cross-Motion for Partial Summary Judgment

Doc. 5446, 841 F. Supp. 2d 988, 2012 A.M.C. 982
(E.D. La. Jan. 26, 2012)

This order involved another marine insurance dispute. Transocean sought summary judgment, asserting that the drilling contract between itself and BP required BP to defend and indemnify Transocean for *all* claims and liabilities related to pollution. BP countered that, although the contract required BP to indemnify Transocean for pollution, it only applied to "fault or negligence" and not strict liability or gross negligence.

BP's major argument was that allowing an indemnity clause to include gross negligence is void as contrary to public policy. The court addressed this argument by establishing that, unlike a release, an indemnification clause determines *which* party to a contract will ultimately bear responsibility. Accordingly, an injured third party would still have an available defendant in the event of gross negligence. The court in turn framed the question as one of "freedom of contract." The court noted that the contract as a whole allocated specified risks to both parties. Therefore, because the general public was not harmed, and provisions themselves were fairly agreed upon, the court held that public policy did not preclude a contractual indemnity for gross negligence.

Similarly, the United States and BP both contended that public policy precludes the contractual indemnity from being enforceable with respect to Clean Water Act penalties, 33 U.S.C. 1321(b)(7). The court first spent considerable effort explaining that the CWA has the primary objective of using civil penalties to punish and deter future pollution. The court reasoned that the nature of the law requires a "somewhat tailored" resolution that is specific to the defendant and situation. Thus, the penalties a polluter pays are designed specifically so *that* party will not do *that* deed again. Accordingly, based on the nature of the CWA, the court held that public policy precludes parties to a contract from enforcing an indemnity clause for purposes of CWA civil penalties.

Lastly, BP argued that Transocean breached the drilling contract by acting in a way that materially increased BP's risk as an indemnitor, and therefore those acts voided BP's indemnity obligation. The court recognized that in some cases a breach can invalidate an indemnity clause. The court further reasoned, however, that it had insufficient facts to make this determination. Therefore, the court held that whether Transaction breached is a question of fact that precluded summary judgment.

[Summarized by Vince C. Rueter and Daniel J. Cragg, Young Lawyers Committee]

Order re Cross-Motions for Summary Judgment on Liability under Oil Pollution Act and Clean Water Act

Doc. 5869, 844 F. Supp. 2d 746 (E.D. La. Feb. 22, 2012)

This order involved issues of liability under the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq*., and the Clean Water ACT ("CWA"), 33 U.S.C. §§ 1251 *et seq*. In pursuit of these claims, the United States brought a summary motion against BP, Anadarko, and Transocean, asserting that they were jointly and severally liable for the spill. BP and Anadarko did not dispute their liability under OPA. Transocean, however, disputed its liability under OPA because the discharge occurred beneath the surface of the water

and Transocean's responsibility only pertained to the MODU. With regards to the CWA, Anadarko, BP, and Transocean argued amongst themselves about the origin of the pollution and how it affected their respective liability under the law.

The first question for the court was who the "responsible parties" are when the pollution's source is the riser pipe connecting the well and MODU. The United States argued that the riser pipe is an appurtenance of the MODU and therefore Transocean should be included as a "responsible party." The court held, however, that OPA explicitly deems the owner/lessee of the MODU only to be a responsible party for discharges occurring above the water's surface. Therefore, regardless of the source of the discharge, the court held that Transocean is not considered a "responsible party" under OPA.

The court next addressed civil liabilities under the CWA. The United States argued that BP, Anadarko, and Transocean were all liable under that statute. The three defendants countered, however, that only the party responsible for the area "from which" the oil was discharged is liable under the statute. For that purpose, the issue was therefore whether the oil discharge originated from the Macando Well or the MODU. The court held that the "from which" language in the CWA means a "starting point," or where the "uncontrolled movement of oil began." Accordingly, the court again held that BP and Anadarko were responsible and not Transocean.

[Summarized by Vince C. Rueter and Daniel J. Cragg, Young Lawyers Committee]

Orders Granting Motion to Dismiss and on BP's Motion to Stay Proceedings

Docs. 2774, 2784, 792 F. Supp. 2d 925 (E.D. La. June 16, 2011)

The D1 pleading bundle compiled the claims for injunctive relief. Defendants Transocean and BP both filed motions to dismiss claims arising out of the D1 Master Complaint. The complaints alleged multiple violations of the Clean Water Act ("CWA"), 33 U.S.C. §§

1251 *et seq*., and sought further relief under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 46 U.S.C. § 9603; the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11004; and the Endangered Species Act ("ESA"), 16 U.S.C. § 1538. Further claims regarding injunctive relief under general maritime law and state law were moved to the B1 Master Complaint bundle.

The defendants argued the claims should be dismissed for: (1) lack of standing, (2) mootness, and (3) lack of an ongoing violation as required under the statutes. The court agreed with defendants and held that an injunction at this point would be useless since there was no ongoing release of oil from the well. Citizen suits for injunction under the CWA, EPCRA, and CERCLA require defendants to be involved in current ongoing alleged violations, and under the ESA they must allege future conduct by an entity that could have deleterious effects. Without an ongoing violation or even a facility from which any future violation could occur, there is no likelihood that the release can reasonably be expected to reoccur. The court therefore dismissed the entirety of the D1 Master Complaint.

[Summarized by Jude Smith, Young Lawyers Committee]

Orders on Co-Lessee Arbitration Dispute between Anadarko and BP.

Docs. 2774, 3329, 2011 U.S. Dist. LEXIS 76848
(E.D. La. July 15, 2011)

Following the casualty and resulting oil spill of the DEEPWATER HORIZON, BP incurred significant costs in responding to and remediating the spill. BP sent bills to co-lessees pro-rata as defined in a Joint Operating Agreement ("JOA"). MOEX reached a settlement agreement with BP but Anadarko refused to pay and filed third-party claims against BP alleging Anadarko should be relieved of liability due to BP's gross negligence relating to the casualty and loss.

BP filed to compel arbitration as outlined in the JOA's mandatory arbitration clause. Anadarko challenged BP's claim alleging waiver due to limited discovery against Anadarko initiated by BP. On June 16, 2011, the court ordered both parties to submit briefs to the court on the discovery actions undertaken by BP against Anadarko regarding the issue of waiver.

On July 15, 2011 the court found that BP had not waived its right to arbitration. Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment of the other party. The court determined BP had initiated limited discovery of Anadarko largely related to information required in litigating the DEEPWATER HORIZON issue with other plaintiffs. BP had engaged in a narrow scope of discovery limited to the examination of one Anadarko employee for 75 minutes relating to BP's defense in the multi-district litigation, three requests for production to Anadarko related parties, a few dozen questions during depositions of other parties related to Anadarko, and the identification of four potential Anadarko witnesses on a non-binding list of potential witnesses.

Notably, BP had not filed cross-claims, answered Anadarko's cross-claim, nor compelled discovery requests through judicial action. Therefore, no waiver had occurred since BP had not substantially invoked the judicial process against Anadarko. The court ordered a stay of proceedings between Anadarko and BP pursuant to the JOA's arbitration clause.

[Summarized by Jude Smith, Young Lawyers Committee]

Order Granting Plaintiff's Motion on Admissibility of Boots & Coots Report

Doc. 3346 (E.D. La. July 15, 2011)

BP hired John Wright of Boots and Coots International, Inc. ("Boots & Coots") to investigate the DEEPWATER HORIZON blowout. Wright wrote a report regarding a negative pressure test

performed aboard the vessel on April 20, 2010. BP stipulated to the authenticity of the report, but argued Wright was not specifically authorized to speak on BP's behalf, and objected to the admission of the report on the basis of hearsay. Additionally, BP contended that, other than Wright's own in-document statement, the plaintiffs offered no proof that Wright was authorized to create a report on the negative pressure testing policies. The Plaintiff's Steering Council argued that the report was an admission by a party-opponent and thus admissible as non-hearsay under Rule 802(d)(2)(C) of the Federal Rules of Evidence. Wright, no longer employed by Boots & Coots, refused to testify without being paid approximately $32,000 and had filed a motion to quash a deposition subpoena served by the plaintiffs.

The court held that the Boots & Coots report was admissible under Rule 802(d)(2)(C), which provides that a statement is not hearsay if it is offered against a party and is a statement by a person authorized by the party to make a statement concerning the subject.

The court noted that BP provided several exhibits admitting to hiring Wright to perform assessments, including testimony confirming that Wright was retained to perform an investigation and to submit a report to BP. Since Wright and his employer were hired by BP to conduct an investigation of the well blowout and prepare a report, the court found the Boots & Coots report to be not hearsay and therefore admissible.

[Summarized by Jude Smith, Young Lawyers Committee]

Order Granting BP's Motion to Dismiss Plaintiffs' RICO Claims

Doc. 3330, 802 F. Supp. 2d 725 (E.D. La. July 15, 2011)

The B2 Master Complaint bundled claims brought under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-58, against the defendants. The complaint alleged BP defrauded government regulators within the Minerals

Management Services ("MMS") in connection with the safety of its drilling operations and its ability to respond to oil spills.

BP argued it was the government and not the plaintiffs who were the "direct victim" of BP's alleged fraud and that there was no causal connection between the fraud and the resulting injuries to the plaintiffs. BP argued that a RICO action could therefore only be brought by the government in this case and that the government had in fact already filed suit against BP alleging similar charges. The court agreed with BP that the plaintiffs failed to allege proximate causation, stating that some direct relation between the injury asserted and the injurious conduct alleged was required.

The court stated the economic harm the plaintiffs suffered is purely contingent upon the assumptions that MMS would have concluded that BP's safety standards were insufficient, then would have required BP to take certain safety precautions, and, ultimately, that those precautions would have prevented or lessened the effects of the spill.

The multiple steps needed to connect the alleged fraud by BP to the plaintiffs' injuries were too attenuated to sustain proximate causation and thus were deemed to be entirely distinct from the alleged RICO violation. Therefore, the court dismissed the entirety of the B1 Master Complaint Bundle for failing to allege proximate causation.

[Summarized by Jude Smith, Young Lawyers Committee]

* * *

Giuseppe Bottiglieri Shipping Company v. United States, 843 F. Supp. 2d 1241,
2012 A.M.C. 2650 (S.D. Ala. 2012)

The issue in this matter was whether the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, gives a district court jurisdiction to intervene in bond and surety negotiations between

a vessel owner and the Coast Guard after a vessel has been denied clearance pursuant to the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. §§ 1901 *et seq*. In an earlier ruling in the same matter, the district court had held that the APPS remedies were not available to the owner because it had not complied with APPS notice requirements.

M/V BOTTIGLIERI CHALLENGER arrived in Mobile on January 24, 2012. Two days later, U.S. Customs and Border Protection ("CBP") withheld the vessel's departure clearance because the U.S. Coast Guard determined there was reasonable cause to believe that the vessel's owner, operator, person in charge, or crew members were subject to a fine or civil penalty under Sections 1907 and 1908 of the APPS.

The Coast Guard and the owner began negotiations to obtain a clearance pursuant to Section 1908(e), which states that "[c] learance may be granted upon the filing of a bond or other surety satisfactory to the Secretary." On February 3, 2012, the Coast Guard demanded a bond of $700,000 and that the owner provide housing and living expenses for the vessel's crew in Mobile for 180 days. The owner refused and the vessel's departure clearance was not granted. A federal criminal charge was brought against a member of the crew, and other crew members were arrested as material witnesses. This matter arose when the owner brought a civil action in federal district court "to solicit judicial resolution of [the] stalemated negotiation between the Owner and the U.S. Coast Guard."

After ruling that the Coast Guard's "take it or leave it" offer to the owner constituted a final agency action, one of the prerequisites for judicial review, the court considered whether the Coast Guard's decision not to reduce the bond that it was demanding was an unreviewable act of agency discretion. The court held that it was and rejected the owner's argument that the court could intervene because the Coast Guard arbitrarily, capriciously, and purposefully refused to negotiate in good faith. The court reasoned that since there was no requirement for the Coast Guard to grant clearance at all, there was no meaningful standard of review and no law to apply.

The owner made several other arguments to support its case that the APA conferred the court jurisdiction. The court rejected all of them. First, the court ruled that just because an entity and a federal agency disagree over the meaning of a statute, that fact alone does not confer jurisdiction. Secondly, the court rejected the owner's argument that the court had the power to prevent a manifest injustice and abridgement of the owner's due process rights because neither of those concerns was present in the case at bar. The court reasoned that the owner had the option of bringing an administrative appeal leading to potential judicial review and, as far as the liberty of the crew members was relevant, those liberties were under the supervision of the court because it had jurisdiction over the criminal action under the pretense of which the members were being detained. Thirdly, the court ruled that an exception to the requirement of exhaustion of administrative remedies did not apply because the owner had not made a claim with an exhaustion requirement under the APPS, the rejection of which would lead to judicial review. Fourthly, the court held that its jurisdiction over criminal matters was of no help to the owner in this action because that jurisdiction does not create a private right of action for any person who desires judicial interpretation of a federal statute with a criminal component. Fifthly, the court held that the owner's argument that Rule E of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions was applicable was unconvincing because "the Supplemental Rules say nothing about customs clearances or the terms under which the Coast Guard and CBP must or may grant them." The court reasoned that the Supplemental Rules did not trump the more specific remedies available through the APPS.

In sum, the court held that the APA did not confer it jurisdiction to intervene in the negotiations between the owner and the Coast Guard.

[Summarized by Guy Manchuck, Young Lawyers Committee]

* * *

Lake Carriers' Association v. Environmental Protection Agency, 652 F.3d 1 (D.C. Cir. 2011).

The U.S. Court of Appeals for the District of Columbia Circuit rejected a challenge brought by trade associations representing commercial vessel owners and operators to the EPA's Vessel General Permit ("VGP"), a nationwide permit for the discharge of pollutants incidental to the normal operation of vessels.

The EPA developed the VGP pursuant to Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, which allows the EPA to issue permits for the discharge of pollutants upon the condition that such discharge meets the applicable requirements of the CWA. Each permit must set out specific conditions necessary to ensure that the permit holder's discharge of pollutants will comply with the water standards mandated by the CWA. In conjunction with the permitting process, Section 401 of the CWA, 33 U.S.C. § 1341, gives states an express role in approving or barring discharges into their navigable waters, and in setting out the conditions under which such discharges may occur. Specifically, Section 401 provides that limitations set by the state to ensure compliance with the CWA or *state law* "shall become a condition" on any federal permit.

The EPA published a draft VGP that set out all of the general EPA mandated conditions for vessel discharges. However, the draft did not include the approximately 100 state specific conditions that were subsequently attached to the final VGP. The trade associations filed a petition for review, asserting that the EPA failed to provide notice and an opportunity to comment before promulgating the final permit. According to the associations, they were deprived of the opportunity to comment regarding the cumulative effects of the state conditions. However, the court found that under the CWA the EPA did not have the authority to alter or reject the state certification conditions. Therefore, the court denied the trade associations' petition because the additional review requested by the trade associations would be pointless.

In so holding, the court rejected the trade associations' assertion that further consideration was necessary to address other constitutional issues" First, the court rejected the trade associations' due process argument because there was no evidence that compliance with one state's requirements made it literally impossible to comply with another state's requirements. Second, the court rejected the trade association's dormant commerce clause argument because the doctrine only applies to burdens on commerce created by state law. The laws at issue in the case were a federal statute, the CWA, and a federal regulation, the VGP. The fact that the CWA authorized and incorporated state certifications into federal law did not implicate the dormant commerce clause.

In the view of the court, if the trade associations believed that the certification conditions imposed by any particular state's law imposed an inordinate burden on their operations, they should have challenged those conditions in the state's courts. If the trade associations believed that a particular state's law imposed an unconstitutional burden on interstate commerce, they should have challenged those conditions in federal court. Finally, if neither of these avenues had proven adequate, the trade associations were free to ask Congress to amend the CWA for an exemption for incidental vessel discharges.

V. CRIMINAL CASE SUMMARIES

This section contains press releases issued by the United States Department of Justice regarding criminal cases involving maritime related defendants. These press releases have been reprinted from the United States Department of Justice public website.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Friday, September 30, 2011

Japanese Freight Forwarding Company Agrees to Plead Guilty to Criminal Price-Fixing Charge

WASHINGTON – A Japanese freight forwarder has agreed to plead guilty and to pay a $1.84 million criminal fine for its role in a conspiracy to fix certain fees in connection with the provision of freight forwarding services for air cargo shipments from Japan to the United States, the Department of Justice announced today.

According to a charge filed today in U.S. District Court for the District of Columbia, MOL Logistics (Japan) Co. Ltd. engaged in a conspiracy with others to fix and impose certain freight forwarding service fees, including fuel surcharges and various security fees, charged to customers for services provided in connection with air freight forwarding shipments of cargo shipped by air from Japan to the United States from about September 2002 until at least November 2007.

Under the plea agreement, which is subject to court approval, MOL Logistics has also agreed to cooperate with the department's ongoing antitrust investigation.

The department said that MOL Logistics and its co-conspirators carried out the conspiracy by, among other things, agreeing during meetings and discussions to coordinate and impose certain freight forwarding service fees and charges on customers purchasing freight forwarding services for cargo shipped by air from Japan to the United States. As part of the conspiracy, MOL Logistics and its co-conspirators levied freight forwarding service fees in accordance with the agreements reached and

engaged in meetings and discussions for the purpose of monitoring and enforcing adherence to the agreed-upon freight forwarding service fees.

Freight forwarders manage the domestic and international delivery of cargo for customers by receiving, packaging, preparing and warehousing cargo freight, arranging for cargo shipment through transportation providers such as air carriers, preparing shipment documentation, and providing related ancillary services.

MOL Logistics is charged with price fixing in violation of the Sherman Act [15 U.S.C. §§ 1-7], which carries a maximum $100 million fine for corporations. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

Including MOL Logistics, 13 companies have agreed to plead guilty and nearly $100 million in criminal fines have been obtained as a result of the Antitrust Division's ongoing freight forwarding investigation. On Sept. 28, 2011, six companies – Kintetsu World Express Inc.; Hankyu Hanshin Express Co. Ltd.; Nippon Express Co. Ltd.; Nissin Corporation; Nishi-Nippon Railroad Co. Ltd.; and Vantec Corporation – agreed to plead guilty for their roles in a conspiracy to fix and impose certain freight forwarding service fees charged to customers for services provided in connection with air freight forwarding shipments of cargo shipped by air from Japan to the United States from about September 2002 until at least November 2007.

> Today's charge is the result of a joint investigation into the freight forwarding industry being conducted by the Antitrust Division's National Criminal Enforcement Section, the FBI's Washington Field Office and the Department of Commerce's Office of Inspector General. Anyone with information concerning the price fixing or other anticompetitive conduct in the freight forwarding industry is urged to call the Antitrust Division's National Criminal Enforcement Section at 202-307-6694 or visit www.justice.gov/atr/contract/newcase.htm or call the FBI's Washington Field Office at 202-278-2000.

Press Release, U.S. Dept. of Justice, Antitrust Div., Japanese Freight Forwarding Company Agrees to Plead Guilty to Criminal Price-Fixing Charge (Sept. 30, 2011), *available at* http://www.justice.gov/opa/pr/2011/September/11-at-1295.html.

> **Department of Justice**
>
> Office of Public Affairs
> FOR IMMEDIATE RELEASE
> Monday, September 19, 2011
>
> **Ship Owners and Operators to Pay $44 Million in Damages and Penalties for 2007 San Francisco - Oakland Bay Bridge Crash and Oil Spill**
>
> *Proceeds Of Settlement to Fund Projects and Restore Natural Resources Largest Oil Pollution Act Settlement in History of the Law*
>
> SAN FRANCISCO – Federal, state and Bay-area officials announced a comprehensive civil settlement with the owners and operators of the M/V *Cosco Busan*, resolving all natural resource damages, penalties and response costs that resulted from the

ship striking the San Francisco-Oakland Bay Bridge in 2007, and subsequent oil spill in the San Francisco Bay. The event killed thousands of birds, impacted a significant portion of the Bay's 2008 herring spawn, spoiled miles of shoreline habitat and closed the bay and area beaches to recreation and fishing.

The U.S. Department of Justice, the state of California, the city and county of San Francisco and the city of Richmond, Calif., signed and lodged a consent decree that requires Regal Stone Limited and Fleet Management Ltd., the owners and operators of the M/V *Cosco Busan*, to pay $44.4 million for natural resource damages and penalties and to reimburse the governmental entities for response costs incurred as a result of the 53,000 gallon oil spill that occurred when the vessel struck the bridge on Nov. 7, 2007.

Officials announced the agreement at a press conference today on Treasure Island, overlooking the site of the 2007 crash.

U.S. Secretary of the Interior Ken Salazar was joined by Assistant Attorney General Ignacia S. Moreno, head of the Justice Department's Environment and Natural Resources Division; California Attorney General Kamala D. Harris; Natural Resources Secretary John Laird; National Oceanic and Atmospheric Administration (NOAA) Chief of Staff Margaret Spring; San Francisco City Attorney Dennis Herrer; and representatives of the California Department of Fish and Game, State Lands Commission; state and regional water boards; and the East Bay Regional Park District, among others.

"This settlement is great news for the Bay Area and for all who enjoy these lands and waters rich in beauty, wildlife, and recreational opportunities," said Secretary Salazar. "With this settlement, we are seeing to it that those responsible for the spill are held accountable and that they pay their share for restoring and improving our precious natural resources and public lands."

"The Cosco Busan oil spill had a major impact in the San Francisco Bay and beyond, oiling over 100 miles of shoreline," said Assistant Attorney General Moreno. "This comprehensive settlement achieves full compensation for the significant natural resources that were injured as result of the Cosco Busan oil spill. It also forms the foundation for the complete restoration of precious lost natural resources, park system resources, and compensates for lost recreation uses for the benefit and enjoyment of the people of the San Francisco Bay Area and for all Americans."

The federal and state natural resource trustees estimate that the spill killed 6,849 birds, impacted 14 to 29 percent of the herring spawn that winter, oiled 3,367 acres of shoreline habitat and resulted in the loss of more than one million recreational user-days. A result of a multi-governmental effort by federal and state agencies, and municipal governments, the settlement is expected to fully compensate (in addition to previously reimbursed costs) for the natural resources and other damages and costs resulting from the spill.

The portion of the settlement for lost human uses of the shoreline and the bay, $18.8 million, constitutes one of the largest human use recoveries for any oil spill in the United States. Of this, the

National Park Service is receiving approximately $9.75 million to improve coastal access and facilities in the bayside, coastal and estuarine areas of Golden Gate National Recreation Area, San Francisco Maritime National Historical Park and Point Reyes National Seashore.

The remaining $9 million will be disbursed either directly to local government as part of the consent decree or through a grant program to fund shoreline recreational projects throughout the impacted spill areas.

On Nov. 30, 2007, just 23 days after the spill, the United States filed a lawsuit in federal court against Regal Stone Limited, Fleet Management Ltd. and John J. Cota seeking damages for resource injuries caused by the spill and for costs incurred cleaning up the spill. The U.S. asserted claims under the Oil Pollution Act [33 U.S.C. §§ 2701 *et seq*.], the National Marine Sanctuaries Act [16 U.S.C. §§ 1431 *et seq*.], the Park System Resource Protection Act [16 U.S.C. § 19jj] and the Clean Water Act [33 U.S.C. §§ 1251 *et seq*.].

On Dec. 10, 2007, the city and county of San Francisco filed, and the city of Richmond later joined, an action in the Superior Court of California seeking damages and injunctive relief under state law and common law.

After investigating many of the impacts from the spill, on Jan. 7, 2009, the California Department of Fish and Game, State Lands Commission, and the Regional Water Quality Control Board – San Francisco Bay Region, filed a complaint in the Superior Court that included causes of action for natural resource damages under the Lempert-Keene-

Seastrand Oil Spill Prevention and Response Act [Cal. Pub. Res. Code § 8750-51], the Oil Pollution Act various other state law provisions and common law. California asserted claims for civil liability and penalties and state costs incurred responding to the spill. Each of these actions is resolved by the settlement, which is subject to a 30-day public comment period that begins with the posting of a notice in the Federal Register. [Notice of Lodging Consent Decree, 76 Fed. Reg. 59,738 (Sept. 27, 2011).] The consent decree will be available for viewing at www.justice.gov/enrd/Consent_Decrees.html.

"The Cosco Busan oil spill polluted the bay, killed wildlife and cost Bay Area residents millions of dollars in economic opportunity," said California Attorney General Harris. "This settlement properly compensates the public affected by the oil spill and will fund the environmental restoration and recreational projects necessary to undo the damage done by the spill."

"This settlement takes California a big step closer to healing the serious injuries the San Francisco Bay ecosystem suffered as a result of the spill," said California Natural Resources Secretary Laird. "For years to come, the restoration projects funded through this settlement will help recover habitat for wildlife and improve opportunities for visitors to enjoy the natural beauty of the Bay Area."

"This consent decree represents a just conclusion to the sustained and unrelenting efforts by the various government attorneys, including the San Francisco City Attorney's Office, to recover full compensation for the costs this oil spill imposed on our taxpayers and the damage it did to recreational

opportunities at our beaches and in the Bay," said San Francisco City Attorney Dennis Herrera.

"Numerous NOAA scientists and experts worked on this oil spill – playing a critical role before, during, [sic] after this incident. Thanks to the hard work we have all done as federal, state and local partners, today we stand together in declaring the importance of maintaining a safe and efficient marine transportation system both for protection of our oceans and the economy," said Margaret Spring, NOAA chief of staff. "In tough economic times we must remember that 69 million jobs are associated with healthy oceans and coasts. This settlement today once again emphatically states the importance of these jobs."

In conjunction with the consent decree, the federal and state trustees will publish a separate notice in the Federal Register seeking comments on the Draft M/V *COSCO BUSAN* Damage Assessment and Restoration Plan (DARP). [Draft Damage Assessment and Restoration Plan and Environmental Assessment for the M/V Cosco Busan Oil Spill, 76 Fed. Reg. 59,731 (Sept. 27, 2011).] After considering comments from the public, the trustees will produce a final DARP selecting projects that will be funded with approximately $32 million from this settlement. About $5 million will be used to fund bird restoration, $4 million for habitat restoration, $2.5 million for fish and eelgrass restoration and $18.8 million for recreational use improvements. An additional $2 million will fund restoration planning, administration and oversight, with any unused funds to be spent toward more restoration. The draft plan will be available shortly for public comment. Two public meetings will be held to allow for a brief overview of the restoration plan and public comments

to be made. Copies of the draft DARP, including injury assessment and restoration project details, are available at www.dfg.ca.gov/ospr/Science/cosco_busan_spill.aspx.

"This settlement marks an excellent collaboration of agencies at all levels to restore and preserve San Francisco Bay," said Bruce Wolfe, the Executive Officer of the San Francisco Regional Water Quality Control Board. "But it also reminds us that the amount of oil spilled in this incident is the equivalent of what automobile traffic deposits in the bay every year. All of us, as stewards of the Bay, must be diligent in doing all we can to protect it."

The settlement follows earlier criminal indictments brought by the Environmental Crimes Section of the Environment and Natural Resources Division of the U.S. Department of Justice and the U.S. Attorney's Office for the Northern District of California. John J. Cota, the pilot of the *Cosco Busan*, and Fleet Management were criminally prosecuted. Cota pleaded guilty in 2009 and was sentenced to 10 months in prison for negligently causing the discharge and killing migratory birds. Fleet was sentenced in 2010 after pleading guilty in the criminal case to negligently causing the discharge and obstructing justice. Fleet was ordered to pay $10 million in criminal penalties, including $2 million for local environmental projects, for its role negligently causing the Cosco Busan oil discharge and obstruction of justice charges for a subsequent cover-up in which it falsified ship records after the crash. For more information: www.justice.gov/opa/pr/2009/July/09-enrd-698.html.

"The Northern District of California contains some of the most picturesque waterways in the country. Ship owners and operators cannot be allowed to take them for granted," said U.S. Attorney Melinda Haag of the Northern District of California. "This settlement and the criminal cases we brought in 2008 against Fleet Management and Mr. Cota should send a strong message that the federal, state and local governments here will take action against anyone causing environmental harm to the San Francisco Bay."

For more information and photos of the spill and response efforts, visit: www.dfg.ca.gov/ospr/Science/cosco_busan_spill.aspx and www.darp.noaa.gov.

Press Release, U.S. Dept. of Justice, Environment & Natural Resources Div., Ship Owners and Operators to Pay $44 Million in Damages and Penalties for 2007 San Francisco - Oakland Bay Bridge Crash and Oil Spill (Sept. 19, 2011), *available at* http://www.justice.gov/opa/pr/2011/September/11-enrd-1209.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Thursday, September 8, 2011

German Shipping Company Sentenced in Puerto Rico to Pay $800,000 Penalty for Intentional Cover-Up of Oil Pollution

WASHINGTON – Uniteam Marine Shipping GmbH, a German corporation, was sentenced in federal court in San Juan, Puerto Rico, for violating the Act to Prevent Pollution from Ships (APPS) and making false statements to the U.S. Coast Guard,

announced Assistant Attorney General Ignacia S. Moreno and U.S. Attorney Rosa Emilia Rodriguez-Velez.

The company was sentenced to pay an $800,000 criminal penalty, to include a $200,000 payment to the National Fish and Wildlife Foundation to fund a community service project in the District of Puerto Rico. In addition, the company was placed on three years of supervised probation and will have to implement a comprehensive advanced training and verification program to continuously monitor vessel operations and train crewmembers to prevent pollution from any ship it operates.

"The Department of Justice will continue to prosecute shipping companies who break the laws that protect our oceans," said Assistant Attorney General Moreno. "The penalty imposed by this sentence not only holds Uniteam Marine fully accountable for violating the Act to Prevent Pollution from Ships, but also will fund projects that rehabilitate damaged marine ecosystems in Puerto Rico."

Uniteam Marine Shipping GmbH operated a 16,800 ton, 603 foot ocean going container ship named the M/V CCNI Vado Ligure that was engaged in global commercial trade. On May 10, 2010, the U.S. Coast Guard in San Juan, conducted an inspection of the vessel and discovered an excessive amount of oil in the discharge lines of the vessel's oil water separator, a pollution prevention device designed to prevent the discharge of oily waste. When the device is operated properly, there should be no oil in the discharge lines. Subsequent investigation revealed that from Jan. 8, 2010, until May 10, 2010, the crew on the vessel manipulated the oil water separator so that is failed to function properly and allowed the

illegal discharge of oily bilge wastes directly into the ocean.

All discharges of oil or oily bilge waste from a vessel are required to be recorded in the vessel's oil record book. However, none of the illegal discharges were recorded in the oil record book for the M/V CCNI Vado Ligure.

"This sentence should serve as an eye opener to vessel owners and operators that choose to violate federal and international environmental laws that destroy our marine environment," said Capt. Drew W. Pearson, Sector San Juan Commander. "The U.S. Coast Guard is committed to protecting the maritime environment and works closely with our dedicated interagency partners and the U.S. Department of Justice to bring criminal environmental offenders to justice. This outcome would not have been possible without the outstanding investigative efforts and professionalism put forth by Sector San Juan pollution investigators and the Coast Guard Investigative Service who worked diligently with Department of Justice prosecutors to properly resolve this case."

"Because we live on an island, the sea is without a doubt one of our most precious resources. This case should send a strong message that the Department of Justice and the United States Attorney's Office will prosecute any entity which pollutes our environment to the fullest extent allowed by the law," said Rosa Emilia Rodríguez-Vélez, U.S. Attorney for the District of Puerto Rico.

The National Fish and Wildlife Foundation will receive $200,000 to fund projects aimed at the restoration of marine and aquatic resources in the District of Puerto Rico, including projects intended

to protect and rehabilitate marine mammals and their habitat, including manatees.

During the period of probation, Uniteam will be required to implement an advanced training and verification program which will ensure that any ship operated by Uniteam complies with all maritime environmental requirements established under applicable international, flag state, and port state laws. The program ensures that Uniteam's employees and the crew of any vessel operated by Uniteam are properly trained in preventing maritime pollution. An independent monitor will report to the court about Uniteam's compliance with its obligations during the period of probation.

This case was investigated by the U.S. Coast Guard Investigative Service. The case was prosecuted by Marshal Morgan in the U.S. Attorney's Office in the District of Puerto Rico and by Ken Nelson in the Environmental Crimes Section of the Environment and Natural Resources Division of the Department of Justice.

Press Release, U.S. Dept. of Justice, Environment & Natural Resources Div., German Shipping Company Sentenced in Puerto Rico to Pay $800,000 Penalty for Intentional Cover-Up of Oil Pollution (Sept. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/September/11-enrd-1157.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Wednesday, December 28, 2011

Justice Department Reaches Settlement with Virginia-Based BAE Systems Ship Repair Inc.

WASHINGTON – The Justice Department announced today that it reached a settlement with BAE Systems Ship Repair Inc., a leading provider of ship repair services, to settle allegations that its subsidiary, BAE Systems Southeast Shipyards Alabama LLC, engaged in a pattern or practice of discrimination by imposing unnecessary and additional documentary requirements on work-authorized non-U.S. citizens when establishing their eligibility to work in the United States.

The department alleges, based on an extensive investigation, that since at least Jan. 1, 2009, BAE Southeast Alabama imposed different and greater requirements in the Form I-9 employment eligibility verification process on lawful permanent residents as compared to U.S. citizen employees by requiring all newly hired lawful permanent residents to present Permanent Resident Cards, commonly known as "green cards," as a condition of employment. The investigation was initiated after BAE Southeast Alabama suspended a lawful permanent resident even though he had presented valid documents sufficient under the Immigration and Nationality Act (INA) [8 U.S.C. § 1324a] to establish his work authorization on three separate occasions. The INA requires employers to treat all authorized workers in the same manner during the employment eligibility verification process, regardless of their national origin or citizenship status.

"Employers may not treat authorized workers differently during the employment eligibility verification process based on their citizenship status,"

said Thomas E. Perez, Assistant Attorney General in charge of the Civil Rights Division. "Federal law prohibits discrimination in the employment eligibility verification process, and the Justice Department is committed to enforcing the law."

According to the settlement agreement, BAE agreed to ensure that the employment eligibility verification policies and procedures of all its subsidiaries comply with the law, to train its human resources personnel about employers' responsibilities to avoid discrimination in the employment eligibility verification process, and to produce Forms I-9 for inspection for three years. BAE also agreed to pay $53,900 to the United States. The lawful permanent resident who was suspended was previously reinstated and fully compensated by BAE.

The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices is responsible for enforcing the anti-discrimination provision of the INA, which protects work authorized individuals from employment discrimination on the basis of citizenship status or national origin discrimination, including discrimination in hiring and the employment eligibility verification (Form I-9) process. OSC was represented in this matter by Equal Opportunity Specialist Joann Sazama and Trial Attorney Ronald Lee. For more information about protections against employment discrimination under the immigration law, call 1-800-255-7688 (OSC's worker hotline) (1-800-237-2525, TDD for hearing impaired), 1-800-255-8155 (OSC's employer hotline) (1-800-362-2735, TDD for hearing impaired), or 202-616-5594; email osccrt@usdoj.gov; or visit OSC's website at www.justice.gov/crt/about/osc.

Press Release, U.S. Dept. of Justice, Civil Rights Div., Justice Department Reaches Settlement with Virginia-Based BAE Systems Ship Repair Inc. (Dec. 28, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crt-1712.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Tuesday, January 3, 2012

Maersk Line to Pay Us $31.9 Million to Resolve False Claims Allegations for Inflated Shipping Costs to Military in Afghanistan and Iraq

WASHINGTON – Maersk Line Limited has agreed to pay the government $31.9 million to resolve allegations that it submitted false claims to the United States in connection with contracts to transport cargo in shipping containers to support U.S. troops in Afghanistan and Iraq, the Justice Department announced today. The government alleges that Maersk, a wholly-owned American subsidiary of Denmark-based A.P. Moller Maersk, knowingly overcharged the Department of Defense to transport thousands of containers from ports to inland delivery destinations in Iraq and Afghanistan.

The government contends that Maersk inflated its invoices in various ways. For example, Maersk allegedly billed in excess of the contractual rate to maintain the operation of refrigerated containers holding perishable cargo at a port in Karachi, Pakistan, and at U.S. military bases in Afghanistan; allegedly billed excessive detention charges (or late fees) by failing to account for cargo transit times and a contractual grace period; allegedly billed for container delivery delays improperly attributed to the

U.S. government; allegedly billed for container GPS-tracking and security services that were not provided or only partially provided; and allegedly failed to credit the government for rebates of container storage fees received by Maersk's subcontractor at a Kuwaiti port.

"Our men and women in uniform overseas deserve the highest level of support provided by fair and honest contractors," said Tony West, Assistant Attorney General for the Civil Division of the Department of Justice. "As the Justice Department's continuing efforts to fight procurement fraud demonstrate, those who put profits over the welfare of members of our military will pay a hefty price."

The settlement resolves allegations against Maersk that were filed in San Francisco by Jerry H. Brown II, a former industry insider. The lawsuit was filed under the *qui tam*, or whistleblower, provisions of the False Claims Act [31 U.S.C. §§ 3729-33], which permit private individuals called "relators" to bring lawsuits on behalf of the United States and receive a portion of the proceeds of a settlement or judgment awarded against a defendant. The relator in this action will receive $3.6 million as his statutory share of the proceeds of this settlement. In 2009, the United States resolved the relator's allegations against shipping company APL Limited and its parent company for $26.3 million.

"Contractors that submit false claims for monies they are not owed cost the government millions of dollars every year," said Melinda Haag, U.S. Attorney for the Northern District of California. "This settlement should send a strong signal that the government is committed to safeguarding taxpayer

funds by ensuring that contractors operate ethically and responsibly."

The settlement with Maersk was the result of a coordinated effort among the Commercial Litigation Branch of the Justice Department's Civil Division; the U.S. Attorney's Office for the Northern District of California; the Defense Criminal Investigative Service of the Department of Defense; the Army's Criminal Investigation Command; and the Defense Contract Audit Agency of the Department of Defense.

"Aggressively investigating any allegation of fraudulent practices, such as those taken by Maersk Line Limited in order to profit at the expense of the safety and welfare of America's Warfighters – especially those serving in dangerous locations such as Iraq and Afghanistan – as well as the security of the United States, is the Department of Defense Inspector General's and the Defense Criminal Investigative Service's highest priority," said James Burch, Deputy Inspector General for Investigations, Department of Defense Office of Inspector General. "The settlement with Maersk was only made possible through our partnership with the Army Criminal Investigation Command and the hard work by attorneys from the Department of Justice and auditors from the Defense Contract Audit Agency."

"We are fully committed to tirelessly pursuing all those who knowingly submit false claims with respect to military contracts, particularly while our nation's finest are at war," said Major General David Quantock, the Provost Marshal General of the U.S. Army and Commanding General of the U.S. Army Criminal Investigation Command. "Our commitment is to ensure taxpayer dollars are not wasted or stolen.

> During the last 10 years alone, Army CID Special Agents have been instrumental in recovering and returning $2.1 billion dollars to the Treasury and the Army from fraudulent practices involving contractors."

Press Release, U.S. Dept. of Justice, Civil Div., Maersk Line to Pay Us $31.9 Million to Resolve False Claims Allegations for Inflated Shipping Costs to Military in Afghanistan and Iraq (Jan. 3, 2012), *available at* http://www.justice.gov/opa/pr/2012/January/12-civ-002.html.

U.S. Attorney's Office

> Northern District of California
> FOR IMMEDIATE RELEASE
> February 16, 2012

U.S. Shipping Company Convicted Of False Statements Related To Oil Pollution On High Seas

> SAN FRANCISCO - Horizon Lines, LLC was sentenced Tuesday in front of the Honorable Richard Seeborg, after pleading guilty to felony charges concerning false statements relating to international and national oil pollution laws, United States Attorney Melinda Haag announced. As part of a plea agreement, the company was ordered to pay $1,500,000, with $500,000 of the monies going to environmental projects in the San Francisco Bay area.
>
> Horizon Lines pled guilty to two counts of making false statements based on their knowing failure to maintain an accurate Oil Record Book in which all transfers and discharges of oil and oily waste are required to be recorded.

"Horizon's intentional tampering with its pollution control equipment showed a blatant disregard for the environment," U.S. Attorney Haag said. "This case demonstrates our commitment to enforcing U.S. and international oil pollution laws to protect our natural resources."

According to the plea agreement, engineers aboard the *S/S Horizon Enterprise* intentionally tricked pollution control equipment that would otherwise ensure oily waste does not go overboard. This created the possibility that oily waste could be released into the ocean. To disguise this conduct from the U.S. Coast Guard, who is charged with inspecting ships to ensure compliance with U.S. and international oil pollution laws, engineers made false entries in the ship's Oil Record Book which gave the false impression that the ship's pollution control equipment had been operated properly when they knew it had not. Horizon Lines admitted that similar conduct had occurred on board this ship going back several years.

In addition to paying the $1 million fine and $500,000 for environmental projects in the Bay Area, the company must also implement a comprehensive, environmental compliance plan to minimize the chance that such wrongful conduct could again occur on the *S/S Horizon Lines* or any other vessel in the company's fleet.

"We are pleased this case has been resolved, but even more satisfied to hear the company is taking steps to prevent any further incidents of pollution," said Capt. Cynthia Stowe, the Coast Guard Captain of the Port of San Francisco. "U.S. Coast Guard inspectors and investigators are hard at work each and every day inspecting ships for compliance with

environmental protection laws and regulations. When violations are found, we will continue to work closely with our partners to ensure violators are brought to justice and steps are taken to protect and restore the maritime ecosystems and natural resources important to the environmental and economic health of our nation and coastal communities."

The case was prosecuted by the Special Prosecutions and National Security Unit of the U.S. Attorney's Office in San Francisco. The prosecution is the result of an investigation by the United States Environmental Protection Agency's Criminal Investigative Division and United States Coast Guard Investigative Services.

Press Release, U.S. Attorney's Office, N. Dist. Cal., Civil Div., U.S. Shipping Company Convicted of False Statements Related to Oil Pollution on High Seas (Feb. 16, 2012), *available at* http://www.justice.gov/usao/can/news/2012/2012_02_16_horizon.convicted.press.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Wednesday, March 28, 2012

Shipbuilder and Ship Engine Manufacturer Agree to Pay Civil Penalty and Perform Environmental Project to Resolve Clean Air Act Violations

First Enforcement Action Under Marine Diesel Engine Air Rules

WASHINGTON – Coltec Industries Inc. and National Steel and Shipbuilding Company

(NASSCO) have agreed to pay a civil penalty of $280,000 and spend approximately $500,000 on an environmental project to resolve alleged violations of the Clean Air Act (CAA) [42 U.S.C. §§ 7401 *et seq*.] and EPA's marine diesel engine air rules [40 C.F.R. pt. 1043], the Department of Justice and the U.S. Environmental Protection Agency (EPA) announced today. The project will significantly reduce nitrogen oxide emissions from a testing stack at Coltec's Beloit, Wis., engine manufacturing facility, improving air quality for residents. Coltec and NASSCO also agreed to attach the required EPA engine labels to 40 ship engines that were previously unlabeled or improperly labeled.

"This is the first time a settlement addresses Clean Air Act violations in the marine engine manufacturing and ship building industries. Under the settlement, Coltec and NASSCO will pay a just penalty and achieve compliance with the nation's Clean Air Act and EPA's emissions control regulations," said Ignacia S. Moreno, Assistant Attorney General for the Environment and Natural Resources Division. "Compliance with the Clean Air Act by all industries is essential to preventing harmful pollutants from being released into the environment, whether on land or at sea."

"EPA is committed to enforcing the Clean Air Act's standards for engines, including ship engines," said Cynthia Giles, Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance. "By ensuring that engines meet requirements and encouraging environmental projects that benefit nearby communities, we are making the air cleaner and healthier for the residents of southern Wisconsin."

The CAA prohibits marine diesel engines from being sold in the U.S. unless the engines are covered by a certificate of conformity and have an EPA label indicating that the engine meets applicable emission standards. Engines that are not certified may be operating without proper emissions controls and emitting excess carbon monoxide and nitrogen oxides. These excess emissions can cause respiratory illnesses, aggravate asthma and contribute to the formation of ground level ozone or smog.

On Sep. 30, 2010, the United States filed a complaint which alleged that Coltec violated the CAA by manufacturing and selling 32 marine diesel engines that were not covered by an EPA-issued certificate of conformity and that NASSCO violated the CAA by installing those engines in ships that NASSCO built and sold to the U.S. Navy. The complaint also alleged that the 32 uncertified Coltec engines, plus eight more certified engines Coltec sold to NASSCO, had missing or improper emissions compliance labels required by EPA's regulations. Finally, the complaint alleged that NASSCO further violated the CAA by manufacturing and selling ships containing an additional six uncertified engines.

The settlement also includes a supplemental environmental project in which Coltec and NASSCO will install a nitrogen oxide (NOx) control system to an engine test stand exhaust stack connected to Coltec's Beloit engine manufacturing facility. The engine test stand is used for testing large marine diesel engines that are manufactured and sold by Coltec for use in U.S. Navy ships. The NOx controls required by the settlement are estimated to reduce levels of NOx by at least 85 percent, from approximately 102 pounds emitted per hour to approximately 16 pounds

per hour. The estimated cost to implement the project is $500,000 and will benefit the city of Beloit by improving air quality near the facility, particularly in the adjacent Merrill neighborhood.

Coltec is a subsidiary of EnPro Industries Inc. and operates Fairbanks Morse Engine (FME), which supplies marine propulsion and ship service systems to the U.S. Navy and U.S. Coast Guard.

NASSCO is a subsidiary of General Dynamics. NASSCO designs and builds support ships, oil tankers and dry cargo carriers for the U.S. Navy and commercial markets.

The consent decree, lodged in the U.S. District Court for the District of Columbia, is subject to a 30-day public comment period and court approval.

For more information on the settlement, visit: www.epa.gov/compliance/resources/cases/civil/caa/coltec.html.

Press Release, U.S. Dept. of Justice, Environment & Natural Resources Div., Shipbuilder and Ship Engine Manufacturer Agree to Pay Civil Penalty and Perform Environmental Project to Resolve Clean Air Act Violations (Mar. 28, 2012), *available at* http://www.justice.gov/opa/pr/-2012/March/12-enrd-390.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Monday, March 5, 2012

Italian Shipping Company and Chief Engineer Charged with Environmental Crimes and Obstruction of Justice

WASHINGTON – Italian-based shipping company Giuseppe Bottiglieri Shipping Company S.P.A., owner and operator of the Motor Vessel Bottiglieri Challenger, and Vito La Forgia, the vessel's chief engineer, have been charged in a four-count indictment with the illegal dumping of waste oil and oil-contaminated waste water in violation of the Act to Prevent Pollution from Ships (APPS) [33 U.S.C. §§ 1901 *et seq*.], conspiracy and two counts of obstruction of justice, the Department of Justice announced today.

Engine room operations on board large ocean going vessels such as the Bottiglieri Challenger generate large amounts of waste oil and oil-contaminated waste water. International and U.S. law requires that all overboard discharges of waste oil be recorded in an oil record book, a log that is regularly inspected by the U.S. Coast Guard.

According to the indictment, on or about Jan. 25, 2012, the Bottiglieri Challenger arrived in Mobile, Ala., and was boarded by Coast Guard officials who conducted an inspection to determine the vessel's compliance with U.S. and international law. The Coast Guard's inspection uncovered evidence that Giuseppe Bottiglieri Shipping Company, acting through its agents and employees and chief engineer Vito La Forgia, conspired to and failed to maintain an accurate oil record book that reflected all disposals of oil residue and discharges overboard, in violation of federal law.

> Giuseppe Bottiglieri Shipping Company and Vito La Forgia are also charged in the indictment with obstructing the Coast Guard's inspection by ordering that an illegal bypass pipe, also referred to as a "magic pipe," that was used to transfer oil-contaminated waste overboard, be removed prior the vessel's arrival in Mobile. The indictment further alleges that the shipping company and La Forgia obstructed the inspection by having one of the waste tanks rinsed out with sea water before reaching the port in Mobile.
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> If convicted, Giuseppe Bottiglieri Shipping Company faces a fine and other possible penalties. La Forgia faces a maximum penalty of 20 years in prison for the obstruction of justice charge.
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> An indictment contains only allegations. The defendants are presumed innocent unless and until proven guilty.
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> This case was investigated by the U.S. Coast Guard Investigative Services and the Environmental Protection Agency, Criminal Investigations Division. The case is being prosecuted by the U.S. Attorney's Office for the Southern District of Alabama and by the Environmental Crimes Section of the Environment and Natural Resources Division of the Department of Justice.

Press Release, U.S. Dept. of Justice, Environmental & Natural Resources Div., Italian Shipping Company and Chief Engineer Charged with Environmental Crimes and Obstruction of Justice (Mar. 5, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-enrd-282.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Tuesday, April 17, 2012

Former Chief Engineer of South Pacific Tuna Vessel Pleads Guilty to Covering up Environmental Crimes

WASHINGTON – A former chief engineer from the tuna fishing vessel San Nikunau pleaded guilty today in federal court to violating the Act to Prevent Pollution from Ships (APPS) [33 U.S.C. §§ 1901 *et seq*.], announced Assistant Attorney General Ignacia S. Moreno and U.S. Attorney Ronald C. Machen Jr.

Rolando Ong Vano served as the chief engineer on the vessel, which was owned and operated by Sanford Ltd., a New Zealand company, during several fishing trips in the South Pacific between March 2006 and July 2011. Sanford Ltd. and another prior chief engineer from the vessel have been charged with obstruction of justice and APPS violations, and are currently awaiting trial.

According to the plea agreement, it was routine practice onboard the vessel to discharge directly into the sea oily bilge waste from the engine room and other areas of the vessel without using required pollution prevention equipment. Before such waste can be discharged into the sea, it must first pass through an oil water separator, and the operation must be recorded in the vessel's oil record book.

Vano admitted to falsifying the oil record book and lying to U.S. Coast Guard inspectors that the oil water separator was used on the vessel when in fact it was not. The Coast Guard discovered the violations during an inspection of the vessel in American Samoa in July 2011. Sentencing in this matter is currently scheduled for September 2012.

This case was investigated by the U.S. Coast Guard. The case is being prosecuted by the U.S. Attorney's Office for the District of Columbia and by the Environmental Crimes Section of the Environment and Natural Resources Division of the Department of Justice.

Press Release, U.S. Dept. of Justice, Environmental & Natural Resources Div., Former Chief Engineer of South Pacific Tuna Vessel Pleads Guilty to Covering up Environmental Crimes (Apr. 17, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-enrd-487.html.

Department of Justice

Office of Public Affairs
FOR IMMEDIATE RELEASE
Tuesday, March 27, 2012

Greek Shipping Company Sentenced in New Orleans to Pay $2 Million for Intentional Cover-Up of Oil Pollution and Obstruction of Justice

WASHINGTON – Ilios Shipping Company S.A. was sentenced today in federal court in New Orleans for violating the Act to Prevent Pollution from Ships (APPS) and obstruction of justice, announced Assistant Attorney General Ignacia S. Moreno and Jim Letten, U.S. Attorney for the Eastern District of Louisiana.

Ilios operated the M/V Agios Emilianos, a 738 foot, 36,573 ton bulk carrier cargo ship that hauled grain from New Orleans to various ports around the world. According to the plea agreement, from April 2009 until April 2011, oily bilge waste and sludge was routinely discharged from the vessel directly into the sea without the use of required pollution prevention equipment. During that time, the crew intentionally covered up the illegal discharges of oil waste by falsifying the vessel's oil record book. The master of the vessel, Valentino Mislang, previously pleaded guilty to and was sentenced for conspiracy to obstruct justice for his role in destroying evidence and instructing crewmembers to lie to the Coast Guard during an inspection of the vessel in April 2011. According to Mislang, a senior manager of Ilios directed the destruction of computer records and ordered Mislang to tell crewmembers to lie to the Coast Guard.

The chief engineer of the vessel, Romulo Esperas, previously pleaded guilty to and was sentenced for conspiracy to obstruct justice for his role in falsifying the vessel's oil record book and directing the discharge of oily bilge waste and sludge directly into the sea. According to Esperas, a senior manager of Ilios directed him to discharge the vessel's oily waste into the sea and refused to provide funding for the proper discharge of the oily waste to shore-side facilities. Both Mislang and Esperas were sentenced to three years of unsupervised release and are not permitted to re-enter the United States during that time.

"The Department of Justice will continue to prosecute shipping companies who break the laws that protect our oceans," said Assistant Attorney

General Moreno. "The penalty imposed by this sentence holds Ilios fully accountable for violating the Act to Prevent Pollution from Ships, and a part of the penalty will fund projects that will help restore precious marine and aquatic resources in Louisiana."

"We owe a debt of gratitude to the men and women of the U.S. Coast Guard, their partners in the Environmental Protection Agency and our brethren in the U.S. Department of Justice Environment and Natural Resources Division, along with our own U.S. Attorney's Office professionals, for their continued vigilance in this and other cases protecting our precious environment, coastline and water resources from those unscrupulous companies and individuals who clandestinely and wantonly discharge oily waste into our waters," said U.S. Attorney Letten. "We will not falter in our commitment to do everything within our power to apprehend and punish these violators in defense of our environment."

"Unfortunately, we continue to see many environmental crimes cases involving ocean-going commercial vessels. The Coast Guard will continue to hold non-compliant companies and operators accountable when they break the law and endanger the marine environment or public health. I applaud the efforts of Coast Guard Sector New Orleans, the Coast Guard Investigative Service, our Eighth District legal staff and the Department of Justice for their tireless efforts in investigating and prosecuting this case," said Rear Admiral Roy A. Nash, Eighth Coast Guard District Commander.

All discharges of sludge or oily bilge waste from a vessel are required to be recorded in the vessel's oil record book. However, none of the illegal

discharges were recorded in the oil record book for the M/V Agios Emilianos.

The court ordered Ilios to pay an overall criminal penalty of $2 million. The National Fish and Wildlife Foundation will receive $250,000 to fund projects aimed at the restoration of marine and aquatic resources in the Eastern District of Louisiana.

As a condition of probation, Ilios is required to implement an environmental compliance plan which will ensure that any ship operated by Ilios complies with all maritime environmental requirements established under applicable international, flag state and port state laws. The plan ensures that Ilios's employees and the crew of any vessel operated by Ilios are properly trained in preventing maritime pollution. An independent monitor will report to the court about Ilios's compliance with its obligations during the period of probation.

This case was investigated by the U.S. Coast Guard and the Environmental Protection Agency. The case was prosecuted by Emily Greenfield and Dorothy Manning Taylor from the U.S. Attorney's Office of the Eastern District of Louisiana and by Ken Nelson in the Environmental Crimes Section of the Environment and Natural Resources Division of the Department of Justice.

Press Release, U.S. Dept. of Justice, Environmental & Natural Resources Div., Greek Shipping Company Sentenced in New Orleans to Pay $2 Million for Intentional Cover-Up of Oil Pollution and Obstruction of Justice (Mar. 27, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-enrd-378.html.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

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

NEWSLETTER - SPRING 2012

Case Notes

MARINE INSURANCE POLICY FOUND TO BE VOID *AB INITIO*

In the case of *State Nat'l Ins. Co. v. Anzhela Explorer, L.L.C.*, 812 F. Supp. 2d 1326 (S.D. Fla. 2011), the trial court found that based on an insured's material non-disclosure concerning the Coast Guard's assessed deficiencies in the water tight bulkhead systems of a 70' catamaran, there was a breach of the duty of good faith or *Uberrimae Fidei* such that the policy was void *ab initio*. The court also held that the unsatisfactory condition of the water tight bulkhead system rendered the vessel unseaworthy at the time coverage was bound, therefore violating the absolute warranty of seaworthiness at the time of policy inception. Because the court found the policy void *ab initio,* it held that such a finding provides a complete affirmative defense to the insured's breach of contract counterclaim.

Plaintiff, State National Insurance Company ("State National"), filed an eleven (11) count complaint for a declaratory judgment against defendants, Anzhela Explorer L.L.C., Jeff Dorsey, and Mark Rosandich (collectively "Anzhela") seeking a declaration of non-coverage by the court on an insurance policy issued by State National to Anzhela based on the theories of: breach of continuing and absolute duties of seaworthiness and breach of navigation warranty. The plaintiff also sought declarations by the court of no coverage for pollution as well as no coverage for fines and penalties or reimbursement for costs pertaining to the marking and removal of the wreck. The defendants counterclaimed for breach of contract

and conversion of property. The facts of the case are lengthy but are summarized herein as follows:

Purchase of Vessel

On July 7, 2006, Rosandich, on behalf of Dorsey, entered into a purchase agreement for a 70' twin-hull catamaran to be used as a commercial passenger/dive vessel, primarily geared toward servicing the oil and gas industry in Louisiana.

Rosandich was retained by Dorsey to assist in the location and purchase of the vessel, as well as to utilize Rosandich's experience in bringing vessels up to date with Coast Guard Certificates of Inspection ("COI").

The vessel, now named ANZHELA EXPLORER, was formerly certified for commercial use as a small passenger vessel, but its COI for such use expired in 2003, requiring it to obtain a new inspection to engage in its intended commercial use.

An August 22, 2006 Coast Guard initial inspection resulted in a "Critical Deficiency Report" listing 34 different deficiencies that had to be remedied before the Coast Guard would issue the COI.

A second inspection on December 15, 2006 resulted in the vessel being issued a "hull credit," which, while representing an important step towards gaining a COI, does not represent the attainment of the required certification. At the time of this inspection, six issues identified in the 8/22/06 inspection had not been fully resolved or corrected.

The hull credit confirms the vessel's compliance with Coast Guard regulations with respect to various parts of the hull's underwater body, but notably does not include compliant bilge pumping systems.

Of the remaining items to be addressed:

- Three involved administrative paperwork issues;
- One involved non-water tight bulkheads compromising the integrity of the watertight compartments; and
- One involved deficiencies in the bilge pumping system.

The facts provided suggest that the remaining work to be done on the vessel to achieve its COI was to be accomplished in Louisiana, which is where the vessel would be operated.

Insurance Application and Policy

In February 2007, Rosandich (again acting for Dorsey) contacted USI, an insurance brokerage, to procure insurance for the vessel. At that time, Rosandich indicated that the vessel would be used for commercial purposes (as a dive boat) out of Golden Meadow, Louisiana.

The facts indicated that USI acted as agent for Anzhela in procuring insurance.

USI then prepared and submitted materials to WFT, the managing agent for State National with authority to bind marine insurance. The application was processed by an underwriter for WFT.

On February 15, 2007, the underwriter received an email from USI (via Robichaux) which had as an attachment an email from Rosandich with a written survey dating from August of 2006, indicating that that the vessel did not currently possess a COI.

The survey was not a complete survey, and was of the limited variety used for insurance purposes.

The survey indicated the bilge pump capacity as "good" and similarly indicated the watertight compartments as being in "good" condition.

On February 15, 2007, at 1:04pm Robichaux (USI) sent another email to WFT indicating that the vessel did have a current COI.

In total, and on the same day, WFT had in its possession three written documents saying that the vessel did not have a current COI, and two saying that it did. The underwriter did not follow up to reconcile the discrepancy.

The facts specified that the navigational limits of the policy were to be the "Gulf of Mexico, not to exceed 100 miles offshore."

On March 22, 2007 USI requested that coverage be bound and WFT agreed to bind coverage.

USI received a binder for coverage sent by WFT. USI then informed Anzhela of the binding of coverage within navigational limits.

Evidence showed that on March 19, 2007, USI and WFT reached an oral agreement for "trip coverage" that would cover the vessel while en route to Golden Meadows.

Loss of the ANZHELA EXPLORER

The original plan was to move the vessel from Ft. Lauderdale, up the intra-coastal waterway to Stuart, where the vessel would cross the Okeechobee east-west canal to the gulf coast, stopping at Ft. Myers, Florida for repairs to the propeller.

Evidence and testimony from the defendants suggested that at the time the vessel was set to depart for Golden Meadow, LA that it was in a seaworthy condition.

This assurance came both from defendant Dorsey, who had taken the vessel for several test runs after undergoing unspecified repairs, as well as the crew provided by "Fish Offshore," the company who would be operating the vessel at its base of operations in Golden Meadow.

Fish Offshore was known personally to the underwriter from WFT, and provided some "comfort" to her in agreeing to bind coverage for the vessel and trip.

The facts indicated that the fixed bilge pump in the starboard hull was not installed; however the facts also indicated that the vessel had multiple sources of bilge pumping capability.

The vessel departed on March 24, 2007 on its intended voyage and course; however, upon reaching the eastern lock (St. Lucie), the Captain was informed that there was not sufficient water in the passage on the other side of the state for the vessel to proceed based on its draft. Despite Rosandich's testifying that he ordered the vessel to return to Ft. Lauderdale the same way it had departed, the Captain ordered the vessel to proceed through Jupiter Inlet, known to be shallow and difficult to pass, and into the open Atlantic, where winds were in the 15-20 knot range and seas up to six feet.

The facts indicated that the deckhand called Rosandich and notified him of the change in course; Rosandich apparently did not order the vessel to return to the intra-coastal waterway.

The crew denied any groundings occurring in the passage through Jupiter Inlet, although the court would later speculate that groundings likely did occur.

At approximately 9:00 pm on March 24, the vessel allegedly began experiencing a steering problem with the starboard "paddle" (used to steer the vessel by directing the forward thrust). The Captain claimed this was the result of a hydraulic hose leak that he could see, but chose not to fix due to the existing challenging conditions. The

vessel was then anchored in 28' of water approximately one quarter mile off Golden Beach, Florida.

The crew gave no indication of any engine overheating problems or high-heat alarms. However, the court later suggested that there was evidence of overheating on the starboard engine, and no evidence was provided of any leaking hydraulic hoses. The court further inferred that the likely engine overheating was possibly due to unreported groundings which caused sand to collect in the water strainers, limiting the ability of the engine to properly cool its exhaust gases.

Rosandich testified that after the loss, the crew told him they had experienced high heat alarms; this was later denied at trial.

At approximately 1:00 am on March 25, the engineer woke the rest of the crew to alert them that the starboard exhaust line had broken open and water was spilling into the starboard engine room. Three of the four portable submersible pumps were put into operation and the hull was de-watered to the point where only about six to eight inches of water remained.

Once they had the hull de-watered, the Captain and deckhand left the engineer to stay on watch. They chose not to try and fix the exhaust hose. At approximately 4:30 am on March 25th, the engineer again woke the crew to alert them that the vessel was listing hard to starboard. Water in the engine room at this point covered the engine in the starboard hull. The port hull, with engine doors apparently still open, was also beginning to fill with water due to the wave action, which had now risen to eight feet. Deciding it was too dangerous to try and pump out the vessel, the crew made the decision to abandon ship. The Captain called Rosandich and requested that he alert the Coast Guard. Rosandich then called both the Coast Guard and Sea Tow. The Coast Guard arrived just in time to evacuate the crew before the vessel sank.

Post-Loss Claims

After the vessel was lost, Rosandich signed a salvage contract on a per diem/hourly basis with Sea Tow the morning of the sinking. No representative for insurers was present.

Rough weather prevented the vessel from being raised immediately; therefore the superstructure of the vessel was battered by the seas, ultimately being destroyed and scattered across the bottom of the ocean.

A day after the sinking, Dorsey signed a Notice of Tender of Abandonment to Harold Heno, a claims representative initially assigned to the claim. The insurance company rejected the tender, reserving its rights.

Shortly thereafter, Dorsey was advised to proceed as a reasonably prudent uninsured until coverage could be determined.

On March 27, Surveyor Ian Cairns became involved.

Recognizing the vessel to be a CTL, he advised both State National and Anzhela to abandon the salvage contract with Sea Tow.

"Days" later, State National decided to pay for the wreck removal under a full reservation of rights. This was done in part to limit potential environmental costs and under the threat of the Coast Guard nationalizing the process.

Cairns then sought competitive bids to raise the wreck on a fixed price, "no cure-no pay" basis.

After one unsuccessful round of bidding, Sea Tow came in as the lowest bidder, aided in part by a contingency whereby Sea Tow would be permitted to retain and dispose of the superstructure and/or scrap aluminum not attached to the vessel's hull with no offset to bid price or for monies received for the scrap value of the aluminum.

Rosandich did not object to the contingency, but complained of the high price of the removal operations.

Factual/Legal Conclusions Concerning the Loss of the Vessel

Despite the many competing and concurrent causes which ultimately led the vessel to sink, the court came to the conclusion that the negligence of the crew in responding to the emergency situations on board was the proximate cause of the vessel's sinking. This was based in part on the crew's ability to initially de-water the starboard hull with the equipment on board in the first instance of trouble. This demonstrated to the court that the existence of penetrations in the watertight bulkhead system did not serve as the proximate cause of the vessel's sinking. Had the crew remained vigilant and awake (the court suggested that the engineer likely fell asleep), the evidence indicated they could have continued to de-water the vessel.

The following issues were presented to the trial court:

1. Do sufficient grounds exist stemming from material misrepresentations and omissions in the formation of the contract for insurance to void coverage under the policy *ab initio?*

2. Did any conduct by the defendants or their agents subsequent to the formation of the contract for insurance provide grounds for voiding the contract and absolving plaintiff of liability or obligations under the policy?

3. Did the policy exclusions in place properly limit the plaintiff's exposure to certain environmental, regulatory, and chemical/fuel spill-related costs?

4. Do any of defendant's counterclaims have merit such that it affects plaintiff's recovery and/or plaintiff being absolved of liability or obligation under the policy?

The trial court found as follows:

1. Based on the material non-disclosure concerning the Coast Guard's assessed deficiencies in the water tight bulkhead systems, there was a breach of duty of good faith or *uberrimae fidei* such that the policy was void *ab initio*. The court also held that the unsatisfactory condition of the water tight bulkhead system rendered the vessel unseaworthy at the time coverage was bound, therefore violating the absolute warranty of seaworthiness at the time of policy inception. The court reasoned that alleged misrepresentations concerning the vessel's COI status, its intent to breach its navigational warranty, and grounding occurring prior to coverage being bound did not meet the requirements for a breach of the duty of good faith.

2. Several incidents alleged by plaintiffs to have occurred after policy formation did not rise to the standard required to void an insurance policy: (a) Due to the fact that an oral agreement was reached binding coverage for the journey from Fort Lauderdale, FL to Golden Meadow, LA, in addition to a "held covered" clause providing for coverage in the event of a violation of one of several listed express warranties (navigational warranty included), the fact that the vessel sank outside of the identified navigational limits did not breach that warranty; (b) The plaintiff could not meet the required showing for a violation of the warranty of continuing seaworthiness, which required a showing that an unseaworthy condition existed at the time the vessel departed on the voyage, that the owner knew of the condition, and that it proximately caused the loss. Though the crew's negligence was deemed to be the proximate cause of the loss, the crew as a whole was not deemed to constitute an unseaworthy condition, therefore

defeating a continuing seaworthiness claim premised on any other alleged unseaworthy condition.

3. Based on the court's finding that the policy was void *ab initio*, the policy exclusion claims were mooted.

4. The defendant's surviving counterclaims both failed as: (a) A finding of the policy being void *ab initio* provides a complete affirmative defense to the defendant's breach of contract counterclaim; and (b) The defendant's counterclaim for conversion under state law, for the scrap parts obtained by the salvor during recovery operations, was not substantiated and therefore judgment was entered in plaintiff's favor on this count.

The trial court ultimately held that State National was entitled to reimbursement of costs in the amount of $613,421.50 advanced on behalf of Anzhela, less all premiums paid to date by Anzhela on the policy.

[Editor's note. - Our sincere thanks to Michelle Otero Valdes of Miami, Florida, for submitting this detailed discussion of an interesting case. If you are interested in receiving a full copy of this lengthy decision, please contact her at mov@chaloslaw.com].

LHWCA CAPS BENEFITS BASED ON YEAR CLAIMANT BECOMES DISABLED

In *Roberts v. Sea-Land Servs., Inc*., 132 S. Ct. 1350, 2012 AMC 609 (2012), the Supreme Court held 8-1 that the Longshore and Harbor Workers' Compensation Act (LHWCA) caps disability benefits based on the year in which an employee becomes disabled, and not on whether or when a formal compensation order is issued on his behalf. The LHWCA compensates employees for injuries occurring upon the navigable waters of the United States. Benefits are capped at twice the national average weekly wage for the fiscal

year in which the employee is "newly awarded compensation." Most employers pay benefits voluntarily, without formal administrative proceedings. Only a small minority of cases proceed to a hearing before an administrative law judge, who then issues a compensation order.

Petitioner Dana Roberts slipped and fell on a patch of ice at Sea-Land's marine terminal in Alaska in 2002, and did not return to work. Sea-Land voluntarily paid him benefits until 2005. Roberts filed a formal claim, and in 2007, an ALJ awarded him benefits at the maximum rate based on the year he was injured, 2002. Roberts moved for reconsideration, arguing that the ALJ should have based the maximum rate on the year he was "newly awarded compensation" by the ALJ's order, 2007. (The difference was $966 versus $1144 per week.) The ALJ rejected Roberts' argument, as did the Department of Labor's Benefits Review Board, the Ninth Circuit, and the Supreme Court.

Writing for all the Justices except Ginsburg, Justice Sotomayor found that the language, "newly awarded compensation," could go either way. "Award" most often means "give by judicial decree," but it can also mean "grant," or "confer or bestow upon." The LHWCA "grants" benefits to disabled employees, and so can be said to "award" them compensation by force of its entitlement-creating provisions – with or without a judicial decree. The Court found that only the second interpretation fit with the LHWCA's overall statutory scheme. The statute requires employers to pay benefits voluntarily, and in fact, most do. It would be strange to say that the vast majority of beneficiaries haven't been "awarded compensation" simply because they don't have a court order in hand. Also, there would be no way to determine their applicable statutory cap. The Court rejected Roberts' clever proposal to require orders in every case as "a solution in search of a problem," adding that "[c]onstruing any workers' compensation regime to encourage gratuitous confrontation between employers and employees strikes us as unsound." Applying the national average weekly wage at the time of the onset of disability avoids disparate treatment of similarly

situated employees, and discourages employees from gaming the claims process by making later (or even repeated) claims to obtain new "award" orders. Finally, the requirement that employers pay interest sufficiently deters employers from wrongfully withholding and contesting benefits, without punishing those who v oluntarily pay at the proper rate from the time of their employees' injuries.

Justice Ginsburg concurred in part, and dissented in part. Like the Court, she rejected petitioner Roberts' argument that an employee is "newly awarded compensation" only in the year she receives a formal compensation award. The LHWCA contemplates that employees may be given or "awarded" benefits voluntarily or by order. Unlike the Court, however, Justice Ginsburg did not read the LHWCA to "award" benefits as soon as an employee becomes disabled, by virtue of the statutory entitlement. After all, no person who slips and hurts herself on a negligently maintained sidewalk would tell her friends the next day, "Guess what, I was newly awarded damages yesterday." Justice Ginsburg would hold that an injured worker is "newly awarded compensation" only when (1) an employer voluntarily undertakes to pay benefits, or (2) when an ALJ or court issues an order. In Ginsburg's view, this approach is more consistent with the LHWCA's goal of encouraging employers to pay legitimate claims promptly.

[Editor's note: - Our sincere thanks to Joseph G. Grasso of Wiggin and Dana for submitting the summary of this case.]

Additional Insured is Subject to Club's Forum Selection Clause

Am. Steamship Owners Mut. Prot. and Indem. Assoc., Inc. v. The Am. Boat Co., LLC, 2012 A.M.C. 1504, 2012 U.S. Dist. LEXIS 21739 (S.D.N.Y. February 17, 2012)

Plaintiff American Steamship Owners Mutual Protection and Indemnity Association (the "Club") brought an admiralty and maritime action seeking a determination of its rights and obligations

under a policy of insurance issued to The American Boat Company ("American Boat").

American Boat moved to dismiss for lack of personal jurisdiction and improper venue. The court denied the motion on the basis of a governing forum selection clause in the policy.

The court found that the Club issues a Certificate of Entry to each insured, outlining the terms of that insured's policy. Policies are also governed by the Club's Bylaws and Rules ("Rules").

A non-party, American Tugs, Inc. ("American Tugs"), was a shipowner insured by the Club at all material times under a Certificate stating that it was subject to the Rules. American Boat was listed as an additional assured under American Tugs' Certificate, which spelled out responsibilities with respect to additional assureds in a "misdirected arrow clause":

> Notwithstanding the fact that Companies listed above are hereby named as Additional Assureds in this Certificate of Entry, the cover of [the Club] will only extend insofar as they may be found liable to pay in the first instance for loss or damage which is properly the responsibility of American Tugs, Inc., and nothing herein contained shall be construed as extending cover in respect of any amount which would not have been recoverable from [the Club] by American Tugs, Inc. had the claim in respect of such loss or damage been made or enforced against him. Once [the Club] has made indemnification under such cover it shall not be under any further liability and shall not make any further payment to any person or company whatsoever, including American Tugs, Inc., in respect of that loss or damage.

American Boat did not pay a premium to be listed as an additional insured, nor did American Tugs pay an increased premium to have it so listed.

The Rules expressly provide that they apply to all insurances issued by the Club. A "Member" is an owner, operator or charterer of a vessel insured by the Club who is entitled to membership under the By-Laws, and where the context permits, shall include "a joint Member, Co-assured and Affiliate."

Section 1.47 of the Rules, the "Disputes" clause, is a forum selection clause applicable to any dispute between the Club and a Member concerning construction of the Rules; insurance afforded by the Club; or any amount due from the Club to a Member. It specifies that any such suit against the Club and/or its agents must be brought in the U.S.D.C. for the Southern District of New York.

In 2009 an American Tugs vessel covered by the Certificate was being renovated at an American Boat facility in Illinois. Employees of both companies were engaged in the work. One of them who was allegedly injured while doing so sued both companies in an Illinois state court. American Tugs subsequently filed a limitation of liability action in the Southern District of Illinois.

American Boat requested that American Tugs or its insurers, including the Club, defend and indemnify it in the personal injury action. The Club denied the request and filed this action in the Southern District of New York, seeking a declaration that it was not obligated to defend American Boat in the personal injury action and citing the forum selection clause as a basis for jurisdiction and venue.

American Boat moved to dismiss for lack of personal jurisdiction and venue. The court denied the motion, finding that the forum selection clause applied, that it had personal jurisdiction over American Boat, and that venue was proper.

The court began its analysis by noting that parties can consent to personal jurisdiction through forum selection clauses in contracts. When a forum selection clause is found to be valid and enforceable,

it is not necessary to analyze jurisdiction under New York's long-arm statute or federal constitutional requirements of due process.

The party seeking to enforce the clause must demonstrate that: (1) the clause was reasonably communicated to the party resisting enforcement; (2) the clause was mandatory, not merely permissive; and (3) the claims and parties involved in the suit are subject to the clause. If all three criteria are met, the clause will be enforced unless the opposing party can make a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for reasons such as fraud or overreaching.

The first two prongs of the standard were satisfied because American Boat did not claim the clause was not reasonably communicated, or that the clause was permissive rather than mandatory. Nor did it argue that the clause was unreasonable or unjust. It argued that the clause did not textually apply to the case because:

1. American Boat is not a "Member" of the Club, and the clause applies only to suits by Members; and

2. The suit was brought *by* the Club, and the clause applies only to suits *against* the Club.

The court analyzed and rejected both arguments.

The Rules define "Member" to include "a Joint Member, Co-assured and Affiliate." They do not state that the term "Member" includes an "additional assured," as American Boat is designated on the Certificate – nor that it does not. But American Boat can only claim coverage from the Club if it is treated as a Member. If it is not subject to the rights and restrictions applicable to a Member under the Rules, then the forum selection clause is inapplicable, but so are the provisions providing coverage for liability and costs of defense. If the term "Member" excludes American Boat as an "additional assured" for purposes of the forum selection clause, then the term should be construed in the same fashion in the coverage clauses.

For its coverage claims "to be colorable, the term 'Member' must be read to encompass it not only for purposes of coverage, but for the purposes of the forum selection clause, too." This reading is consistent with a line of cases, largely in insurance coverage disputes, holding non-signatories to be estopped from disclaiming obligations under a contract while enjoying benefits flowing directly from that contract. Under this "direct benefits theory of estoppel," American Boat is estopped from arguing that it is a non-Member and not subject to the forum selection clause.

Comparing other clauses defining "Co-assured" with the language of the "misdirected arrow clause," the court concluded:

> Whatever the reason for the identification on the Certificate of American Boat as an "additional assured" rather than a "Co-assured," in substance, if not form, American Boat is, effectively, a co-assured under the Rules. And co-assureds are explicitly classified as "Members," and thus covered, under the Rules, by the forum selection clause.

The court found the other argument, that the forum selection clause only applies to suits "against" the Club, unpersuasive. American Boat had already made a demand that American Tugs and the Club pay for its defense in the underlying personal injury action, and presumably indemnify it if it is found liable. Since the Club declined that demand a suit between it and American Boat as to the duty to defend and indemnify was "realistically' a matter of when, and not if." Under the circumstances, which party initiated that suit should not be determinative. The substance of such lawsuits would be identical. This result is strongly supported by the decision in *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997), a case with parallel facts.

[Editor's note: - Our sincere thanks to Keith W. Heard of Burke & Parsons for calling this case to our attention.]

Disclaimer of Coverage Not Made as Soon as Reasonably Possible Held Ineffective Under New York Law

George Campbell Painting v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 937 N.Y.S. 2d 164 (N.Y. App. Div. 2012).

This is a non-marine case that is expected to have a significant impact on disclaimers and reservations of rights under marine policies governed by New York law.

On cross-appeals from an order the Supreme Court, New York County, granting plaintiffs' motion for summary judgment and denying defendant's cross motion for summary judgment, the appellate court unanimously concluded that the trial court's order should be modified to deny plaintiffs summary judgment on the issues of defendant's pro rata share of the settlement of the underlying personal injury action and the dollar amount of such pro rata share, and otherwise affirmed.

A section of the New York Insurance Law (now designated as §3420[d][2]) requires that a liability insurer give the insured or the injured person written notice of disclaimer of a personal injury claim "as soon as is reasonably possible." In a 2004 decision, the court of appeals ruled that despite the statutory language, "[a] n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer." *DiGuglielmo v. Travelers Prop. Cas.*, 776 N.Y.S. 2d 542 (N.Y. App. Div. 2004). The court declined to follow, and expressly overruled, the *DiGulielmo* rule, finding it to be inconsistent with the text of the statute and decisions of the court of appeals interpreting it.

The court held, in agreement with the decision in *City of New York v. Northern Ins. Co. of N.Y.,* 725 N.Y.S. 2d 374 (N.Y. App. Div. 2001), that the section precludes an insurer from delaying issuance of a disclaimer on a ground the insurer knows to be valid (here, late notice of claim) while investigating other possible grounds for disclaiming. Here, the insurer had sufficient information to disclaim coverage for late notice no later than January 19, 2006, so a disclaimer issued on that ground on May 17, 2006, was ineffective

as a matter of law. Once the insurer had the information needed to determine that the plaintiffs, who sought coverage as additional insureds, had failed to give timely notice of the claim as required by the policy, it "had no right to delay disclaiming on the late-notice ground while it continued to investigate whether plaintiffs were, in fact, additional insureds" (which it ultimately determined them to be). The court in *Northern* had reasoned that the insurer could not delay issuing the late-notice disclaimer while investigating an additional insured issue, because that investigation was unrelated to the reason for the disclaimer, and the lack of additional insured status could be asserted at any time.

The dispute before the court in *Campbell* arose from an occurrence during renovation work on the Henry Hudson Bridge, owned by plaintiff Triborough Bridge and Tunnel Authority ("TBTA"), on which plaintiff George Campbell Painting ("Campbell") was the general contractor. An employee of a subcontractor, Safespan, was injured in August of 2003 when he fell at the work site. Safespan was required under its contract to obtain liability insurance covering Campbell and TBTA as additional insureds.

At the time of the occurrence, Safespan had a $1 million primary policy with Gulf Insurance Company ("Gulf") and excess coverage of $10 million under an umbrella policy issued by defendant National Union Fire Insurance Company ("NUFIC"). The Gulf policy provided that it would cover any person or organization that Safespan had agreed should be added as an additional insured. The NUFIC policy provided that it would furnish excess coverage to any person or organization included as an additional insured in the Gulf policy.

The injured employee sued Campbell and TBTA in December of 2003. In January of 2004 they both tendered their defense to Gulf, Safespan's primary insurer. Gulf accepted the tender and appointed counsel to defend them.

NUFIC was not notified of the lawsuit when the defense was tendered to Gulf. In an August 2004 status report to Gulf, counsel for Gulf/TBTA reported that the claim was for "severe injury,"

including 3 herniated discs, nerve impingement, a bulging disc and a shoulder injury. Plaintiff alleged a multi-million dollar future wage loss claim, which if successful would far exceed Safespan's primary coverage. Nevertheless, NUFIC, the excess insurer, was not given notice until November 2005, more than a year later.

NUFIC responded in writing to that notice on December 23, 2005, reserving its rights and raising the possibility that the notice may have been untimely under the terms of Safespan's policy. NUFIC's letter cited a policy provision requiring that if a claim is made or suit is brought "that is reasonably likely to involve this policy," the party seeking coverage "must notify us in writing as soon as practicable."

The NUFIC letter requested a number of documents and an explanation for the delay in giving notice. In a further letter dated January 17, 2006, the NUFIC claims adjuster pointed out that there had been no response to the December letter. Counsel for Campbell/TBTA responded by letter dated January 19, 2006, enclosing Safespan's certificate of insurance under the Gulf policy, the TBTA/Campbell and Campbell/Safespan subcontract and copies of previous reports evaluating liability and damages issues, including the August 2004 status report. The letter also promised a copy of the Gulf policy.

Rather than promptly disclaim in January on the ground of late notice, NUFIC sent counsel for Campbell/TBTA two more letters requesting the Gulf policy, which was finally received about May 1, 2006.

NUFIC's claims adjuster concluded after reviewing the Gulf policy that Campbell and TBTA were additional insureds under its umbrella policy, but rejected the claim on the ground of late notice in a letter dated May 17, 2006. That letter cited the information on the seriousness of the claim available in August of 2004, the failure to give notice until the tender letter of November 2005, almost two years after suit was filed in January of 2004, and the further delays in actually producing a copy of the Gulf policy, all without any explanation.

About two years later the underlying personal injury action was settled for $5,500,000, funded by the Gulf policy limits and by Campbell's primary and excess insurers with Campbell/TBTA reserving the right to bring an action challenging NUFIC's refusal to provide coverage. They commenced this action in December of 2008, seeking a declaration that NUFIC's late-notice disclaimer was untimely under the statute, and recovery of NUFIC's pro rata share of the personal injury claim settlement. The lower court granted summary judgment to Campbell/TBTA for what it found to be NUFIC's pro rata share of the excess layer settlement in the personal injury action. The appeals court modified to deny Campbell/TNTA summary judgment as to the amount NUFIC was obligated to pay, and otherwise affirmed. [The court's discussion of that issue may warrant separate treatment in the next newsletter.]

The court summarized its basis for concluding that NUFIC's disclaimer was ineffective as a matter of law as follows:

> In determining whether NUFIC's disclaimer was timely under *Insurance Law* §3420(d), we begin with the statutory language, which, on its face, requires the insurer to disclaim "as soon as is reasonably possible." This plain language cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim. If the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of the "reasonably possible" by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all. Stated otherwise, the Statute mandates that the disclaimer

be issued, not "as soon as is reasonable," but "as soon as is reasonably *possible*" (emphasis added).

Here, NUFIC's May 17, 2006 disclaimer letter itself demonstrates that NUFIC had all the information it needed to disclaim on late-notice grounds as of January 19, 2006. As set forth in the excerpt from the May 2006 disclaimer quoted earlier in this opinion, the information on which NUFIC relied in disclaiming — that, as of August 2004, Campbell/TBTA knew from Conklin's first bill of particulars that "coverage under the NUFIC [umbrella] Policy may be implicated" because there was a significant likelihood that the value of the claim would exceed the amount of primary coverage — was received by NUFIC on or about January 19, 2006, when it received a copy of the August 2004 status report describing the contents of Conklin's first bill of particulars. By NUFIC's own account, the contents of the August 2004 status report — which, to reiterate, NUFIC received in January 2006 — were sufficient to put Campbell/TBTA on notice that the *Conklin* action was "reasonably likely to implicate the excess coverage" (*Century Indem. Co. v Brooklyn Union Gas Co.,* 58 A.D.3d 573, 574 (N.Y. App. Div. 2009) (internal quotation marks omitted). Nonetheless, NUFIC did not receive notice of the claim from Campbell/TBTA until November 2005, more than a year after the August 2004 status report. To be clear, not a single document or piece of information that NUFIC's May 17 letter referenced in setting forth its basis for disclaiming on late-notice grounds came into NUFIC's possession *after* January 2006.

Notably, the possible basis for denial of coverage that NUFIC was investigating while withholding its late-notice disclaimer until May 17 — the possibility that Campbell and TBTA were not additional insureds

> under Safespan's NUFIC policy and therefore not covered at all — would not even have been subject to § 3420(d) had it proven meritorious (*see Zappone v Home Ins. Co.,* 55 N.Y.2d 131, 138, 432 N.E. 2d 783, 447 N.Y.S. 2d 911 [1982] ["the Legislature in using the words denial of coverage' did not intend to require notice when there never was any insurance in effect"]). *Zappone* supports Campbell/TBTA's position in this appeal, since that case establishes that a timely disclaimer on the ground of late notice would not have prejudiced NUFIC's ability to reject the claim subsequently on the additional ground that Campbell and TBTA were not insured, had NUFIC ultimately discovered that the facts justified such a position.

937 N.Y.S. 2d at 171.

The court declined to follow *DiGuglielmo* because it found the holding in that case to be inconsistent with the text of the governing statute and appellate jurisprudence on that statute. The notion that an insurer can hold a known ground for disclaiming coverage in reserve while investigating other grounds for denying the claim is rejected. Failure of the insurer to give notice of disclaimer as soon as reasonably possible after it first learns of the ground for disclaimer of liability or denial of coverage precludes effective disclaimer or denial under the New York statute.

Any uncertainty as to the existence of coverage is irrelevant to the insurer's ability to issue a timely disclaimer based on the insured's breach of a condition precedent to coverage, such as late notice of claim, that is known to the insurer. Such a disclaimer will not prejudice the insurer's ability later to take the position that no coverage exists, should that prove to be the case.

[Editor's note: - Our sincere thanks to Michael Marks Cohen, Esq. of Nicoletti Hornig & Sweeney for calling the foregoing case to our attention.].

COMMITTEE ON MARINE TORTS AND CASUALTIES

Chair: Mary Elisa Reeves

May 2012

ADMIRALTY JURISDICTION

MLC Fishing, Inc. v. Velez, 667 F.3d 140, 2012 A.M.C. 485 (2d Cir. 2011).

Defendant was unsuccessful in asserting maritime jurisdiction where plaintiff's injury occurred on ramp leading to floating dock. The defendant appealed the district court's holding that maritime jurisdiction was not present. The Second Circuit held that given that floating docks are considered extensions of land for purposes of determining whether an incident occurred on or over navigable waters, it stands to reason that a ramp leading from the land to a floating dock should likewise be so considered. Accordingly, because plaintiff's alleged accident occurred on such a ramp, the district court was correct in ruling that the defendant cannot satisfy the locality prong of the two-part test for invoking federal admiralty tort jurisdiction.

PUNITIVE DAMAGES

Clausen v. Icicle Seafoods, Inc., 272 P. 3d 827 (Wash. 2012)

The plaintiff, Dana Clausen, worked on board Icicle Seafoods' BERING STAR as second engineer when he sustained his injuries. Clausen encountered persistent difficulties in getting Icicle and its adjusting firm to meet its obligation to pay him maintenance and cure. Despite being advised over one year prior by its adjusting firm that Clausen's injuries were likely career-ending, Icicle filed suit in federal court against Clausen to terminate Clausen's right to maintenance and cure alleging that he impeded their right and obligation to investigate his claim. The jury found that Icicle was

callous or willful and wanton in its failure to pay maintenance and cure, awarding Clausen $37,420 in compensatory damages for maintenance and cure, plus $1.3 million in punitive damages for Icicle's willful misconduct. Icicle appealed alleging, inter alia, that the punitive damages cannot exceed compensatory damages, relying on *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The court disagreed, opining that *Exxon* cannot be read as establishing a broad, general rule limiting punitive damage awards, primarily because nowhere in the opinion can such a rule be found. The court noted that the *Exxon* decision seemed to embrace an approach of applying a variable limit, based on the tortfeasor's culpability, and that the Icicle's actions were at the extreme end of the scale and substantial deterrence was needed.

In re Osage Marine Servs., Inc., No. 4:10-CV-1674,
2012 WL 709188 (E.D. Mo. March 5, 2012).

Plaintiff owned M/V CARRIE ELIZABETH, a horsepower towboat that provides barge switching and towing services on the Mississippi River. Claimant Woodfin was employed as a mate on the towboat. On July 1, 2010, Woodfin sustained injuries to his left foot when it came in contact with a deck fitting on a barge that the towboat was preparing to switch. Plaintiff argued that the general maritime law does not permit the recovery of punitive damages for claims based on the doctrine of unseaworthiness, citing *Miles v. v. Apex Marine Corp.*, 498 U.S. 19 (1990). Plaintiff contended that punitive damages are not available in unseaworthiness actions because non-pecuniary damages are not recoverable under the Jones Act, and therefore, it would be inconsistent to award such damages under general maritime law. *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994)("Under the analysis prescribed in [*Miles*], an admiralty court may not extend the remedies available in an unseaworthiness action under general maritime law to include punitive damages or damages for loss of parental or spousal society."); *Miller v. Am. President Lines, LTD*, 989 F.2d 1450, 1458 (6th Cir. 1993)("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages

are not recoverable under the [FELA]. Punitive damages are not therefore recoverable under the Jones Act.")

Claimant argued that *Miles* applies only to wrongful death actions, not to cases involving personal injury. Furthermore, claimant contended that cases relied upon by plaintiff have been overruled by the recent Supreme Court decision in *Atlantic Sounding Co. Inc., v. Townsend*, 129 S.Ct. 2561 (2009). Following the analysis of *Atlantic Sounding Co*., the court held that unseaworthiness is a general maritime action that was well established before the passage of the Jones Act and that punitive damages are therefore available. Furthermore, punitive damages were well established as a remedy in general maritime law before the passage of the Jones Act.

JONES ACT EMPLOYER

Soler v. Maersk Line, No. 11 Civ. 7666, 2012 WL 1340067 (S.D.N.Y. April 17, 2012).

Plaintiff alleged that Maersk should be equitably estopped from claiming that it was not plaintiff's employer under the Jones Act because, *inter alia*, she was paid by Maersk. Plaintiff admitted that the United States Government had operational and administrative control of the vessel. The court held that when looking at the venture as a whole, the United States Government, and not Maersk, was plaintiff's Jones Act employer as the ship is a public vessel owned by the United States government; the ship's mission was to support the United States Navy; the United States had operational and tactical control of the ship, which includes control of the ship's movements; and Maersk's duties were "expressly and intentionally limited" by the General Agency Agreement to, among other things, "provide personnel, operational and technical support"

VESSEL STATUS

Smith v. Kanawha River Terminals, LLC, 829 F. Supp. 2d 401 (S.D.W.V. 2011).

A coal transporter barge was found to be a vessel where it was only moored for eleven months, a relatively brief period according to the court, and the barge could be removed without great difficulty were it necessary for maintenance of the watercraft, the hopper, the excavator or for some other business purpose. The court's inquiry focused on the capability of the transloader for transportation – concluding that future use of the transloader barge in transportation was a practical, and not merely theoretical, possibility.

Mendez v. Anadarko Petroleum Corp., 466 Fed. App'x. 316 (5th Cir. 2012).

By contrast, a floating gas-production platform "spar" moored in ocean water 5,000 feet deep and 210 miles from shore is not a vessel. The court focused on the impracticality of cost ($42 million) to unmoor and move the *watercraft*. **[Editor's emphasis]** The court opined that disconnecting the spar from the sea floor would make disconnecting a casino boat from the shore look as easy as unplugging a toaster, distinguishing theoretical capability which it has, and practical capability, which it does not.

ALLOCATION OF FAULT IN COLLISION

Otal Inv., Ltd. v M/V CLARY, 673 F.3d 108, 2012 A.M.C. 913 (2d Cir. 2012).

Owners of three vessels involved in a collision in the English Channel appealed the district court's apportionment of fault. The appellate court remanded, instructing the district court to consider the relative culpability of each vessel and the relative extent to which the culpability of each caused the collision. The district court focused on how extensively each ship departed from

a proper standard of care, here, the standard of care as set forth in the COLREGS, and analyzed the COLREG violations of each vessel. The district court then examined the issue of causation, or "the extent to which each ship's culpable conduct contributed to causing the collision." In order to reach the ultimate allocation of liability, the district court "considered culpability and causation as equally determinative and computed the average of each vessel's culpability and causation percentages." The appellate court upheld the calculation of liability, noting that the district court's opinion contained "sufficient explanation to provide a reviewing court with some general understanding of the basis for the decision."

SEAMAN STATUS

Zeghibe v. Conoco Phillips Co., 793 F. Supp. 2d 478, 2012 A.M.C. 147 (D. Mass. 2012).

Plaintiff, a ship captain, unsuccessfully asserted a Jones Act claim manifesting itself while he was at home. Plaintiff argued that his time away from home destroyed his marriage and caused a mental breakdown. Despite admitting that he lacked time underway, plaintiff argued that he remained a ship master based upon his special assignment to his employer's vessel construction project. The court held that, even if were to ignore *Chandris'* 30% rule of thumb, plaintiff still would not qualify for seaman status under the Jones Act because he was at home and on leave from work at the time of his breakdown, and by his own admission, was not exposed to the perils of the sea. The court likewise denied jurisdiction as to general maritime negligence claims based upon plaintiff's inability to meet the location prong, having been 3,000 miles from his alleged vessel at the time of his breakdown. The court further held that any purported vessel construction-related injuries do not fulfill the *Grubart* location test because they were not caused by a vessel in navigation.

RECENT CASES ADDRESSING LIMITATION OF LIABILITY ISSUES

Christina K. Schovajsa
Eastham, Watson, Dale & Forney LLP

A. Cases concerning Subject Matter Jurisdiction.

Limitation of Liability Act Does Not Confer Admiralty Jurisdiction Over any Action not Already Encompassed Within the Jurisdictional Grant of the Admiralty Extension Act of 1948.

MLC Fishing, Inc. v. Velez, 667 F.3d 140,
2012 A.M.C. 485 (2d Cir. 2011).

While attempting to board the CAPT. MIKE at a marina, Velez slipped and fell on a ramp leading from the marina to a floating dock that passengers were required to cross in order to board the vessel. MLC's complaint, which was brought pursuant to the Limitation of Liability Act, was dismissed by the district court for want of subject matter jurisdiction.

Relying on the test for admiralty jurisdiction set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), the Second Circuit upheld the dismissal on the basis that the ramp was considered an extension of the land such that the accident was not "caused by" the vessel or its appurtenances.

While MLC had also contended at the district court level that the Limitation of Liability Act provided an independent basis for federal jurisdiction, it did not raise that issue on appeal. However, noting that "federal courts have an independent obligation to…raise and decide jurisdictional questions that the parties either overlook or elect not to press", the Second Circuit joined its sister circuits and held that the Limitation of Liability Act does not confer admiralty

jurisdiction over any action not already encompassed within the jurisdictional grant of the Admiralty Extension Act of 1948.

Limitation of Liability Act Cannot Create Subject Matter Jurisdiction Supporting Removal.

Stewart v. Atwood, 834 F. Supp. 2d 171 (W.D.N.Y. 2012).

[Editor's note: This case was originally reported in the Fall 2011 Newsletter. At that time, the Magistrate Judge had issued his Report and Recommendation. Since our last Newsletter, the Article III judge adopted the Magistrate's Report and Recommendation.]

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

The court held that the case should be remanded to state court for two reasons. First, the court held that it lacked jurisdiction because "[c]ommon law maritime cases filed in state court are not removable to federal court, due to 28 U.S.C. § 133's 'saving to suitors' clause." Because plaintiff chose to file her claim in state court, it effectively deprived the federal district court of admiralty jurisdiction. Second, the court held that Atwood's pleaded defense under the Limitation of Liability Act was insufficient to create federal jurisdiction for removal purposes. The court cited *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 430-31 (1999) holding that "an anticipated or actual federal defense does not qualify a case for removal." Accordingly, the case was remanded back to Pennsylvania state court.

B. Case Concerning Dismissal in Light of Statutory Conflicts.

Claims by United States for Damage to Public Works on Navigable Waters are not Subject to Limitation of Liability Section, But May be Pursued Against the Vessel Owner, in Personam, Pursuant to the Rivers and Harbors Act.

In re Am. River Transp. Co., No. 411-CV-523CEJ, 2012 WL 830497 (E.D. Mo. Mar. 12, 2012).

American River Transportation Company ("ART") was the owner of the towboat M/V JULIE WHITE and the four barges she was towing at the time of the incident made the basis of the suit. While towing the barges in the Mississippi River, they separated from the tug, allided with structures appurtenant to Lock and Dam 25, and sank.

ART received a written notice of claim from the United States Army Corps of Engineers for the damages sustained by the lock and dam structures. ART subsequently filed a complaint under the Limitation of Liability Act.

The United States filed a claim in the action, seeking damages for the lock and dam structures. The United States also filed a motion to dismiss ART's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), therein alleging that the government can recover damages from ART, *in personam*, under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq*. Specifically, the United States sought dismissal of ART's complaint so that it could pursue ART under section 408 of the Rivers and Harbors Act, which imposes a strict liability standard of liability against "any person" that "injure[s]" or "in any manner whatever impair[s] the usefulness" of any "work built by the United States…for the preservation and improvement of any of its navigable waters." 33 U.S.C. § 408.

The court looked at the positions of two circuit courts on the issue at bar: the Sixth and Fifth Circuits.

The Sixth Circuit, relying upon the Seventh Circuit's rationale set forth in *United States v. Ohio Valley Co*., 510 F.2d 1184, 188 (7th Cir .1975), found that applying the Limitation Act to restrict the United States' right to recovery would violate the liability language of § 408. *See Hines, Inc. v. United States*, 551 F.2d 717, 727 (6th Cir. 1977).

Conversely, the Fifth Circuit determined that the United States does not have an *in personam* remedy against the owner of a vessel that damaged a public work. *In re Barnacle Marine Mgmt., Inc*., 233 F.3d 865 (5th Cir. 2000).

Noting that the Eighth Circuit had acknowledged the issue in 1978 and subsequently declined to address it while allowing *in personam* claims to go forward, the ART court declined to adopt the Fifth Circuit's reasoning on the basis that such a holding would cast doubt on the outcomes of the Eighth Circuit cases. Accordingly, the court held that that the United States could bring an *in personam* action against American River and, further, that such action was not subject to the Limitation of Liability Act.

C. Cases Concerning Value of Security and the "Flotilla Doctrine."

"Flotilla Doctrine" Applies to Increase Posted Security.

In re War Admiral, C.A. No. 09-3217, 2011 WL 5826083 (E.D. La. Nov. 18, 2011).

This case concerns the collision of the M/V WAR ADMIRAL and the M/V ACCU VI. The owner of the M/V WAR ADMIRAL filed a petition pursuant to the Limitation of Liability Act and posted a letter of undertaking as security in the amount of $750,000, the stated value of the WAR ADMIRAL. Troy Hamrick, a deckhand aboard an involved barge who allegedly suffered injury, filed a claim in the limitation action.

Hamrick moved to increase the limitation fund based on his contention that at the time of the collision, the WAR ADMIRAL

was part of a common fleeting enterprise and, therefore, that the value of other vessels should be included in the limitation fund. He alleged that the WAR ADMIRAL, the M/V BLACKBEARD, the M/V OMAHA, and the M/V SECRETARIAT were all Turn Services vessels working together to build a tow for a customer, the MISS KRISS, at the time of the collision. Claimant also argued that the value of the fund should be increased by the pending freight, which he contended was the value of any contract under which the flotilla was working at the time of the subject collision.

The court found that the "flotilla doctrine" applied to increase the amount of security to be posted. The "flotilla doctrine" applies "[w]here vessels are owned by the same person, engaged in a common enterprise, and under a single command." *Complaint of Tom–Mac, Inc*., 76 F.3d 678, 684 (5th Cir. 1996). There was no dispute that petitioner owned all of the vessels. The court thus examined the "common enterprise" and "single command" elements of the flotilla doctrine.

The evidence before the court revealed that the OMAHA, BLACKBEARD, and WAR ADMIRAL all planned to work together in a common enterprise to build the 17–barge tow for the MISS KRISS. The SECRETARIAT, however, was used as a "trip boat" that would not assist in building or breaking a tow for a customer. Thus, the court concluded that the OMAHA, BLACKBEARD, and WAR ADMIRAL were all part of a common enterprise.

The evidence also revealed that the WAR ADMIRAL was the "lead fleet boat" and "Dispatch notifies the WAR ADMIRAL, because they're the lead fleet boat, and the WAR ADMIRAL then disseminates the information" to the fleet boats [the OMAHA and the BLACKBEARD]." The court found that a dispatcher communicating information regarding a particular tow-building job necessarily exercises oversight such that he qualifies as shared vessel-management personnel and accordingly found that the vessels were being operated under a single command.

Based on the foregoing, the court held that the WAR ADMIRAL, BLACKBEARD, and OMAHA constituted a flotilla and required the petitioner to increase the security to include the value of petitioners' interest in the three vessels.

Turning to the value of "pending freight," the court found that the value of the job undertaken by the flotilla at the time was the appropriate measure by which to increase the limitation fund. The court noted that the fund should be increased only by the contractual value of the phase ongoing at the time of the collision. The evidence before the court was that there was a fee for barges coming in and a fee for barges coming out. The pending freight was thus easily calculated and ordered to be added to the limitation fund.

"Flotilla Doctrine" Does not Apply to Increase Posted Security in "Pure Port" Cases.

In re AEP River Operations, L.L.C., 838 F. Supp. 2d 573, 2012 A.M.C. 2295 (S.D. Tex. 2012).

The M/V SAFETY QUEST was towing three barges of scrap metal through the Houston Ship Channel when one of the barges in tow hit an electrical tower owned by CenterPoint Energy. AEP River Operations was the bareboat charterer of the SAFETY QUEST and filed a petition under the Limitation of Liability Act. CenterPoint Energy filed a claim and argued that the security should be increased to include the value of the three AEP barges in tow at the time of allision.

Relying upon *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48 (1919), the court held that in "pure tort" cases, where no contractual or consensual relationship exists between owner and claimant, only the offending vessel itself need be tendered for limitation purposes.

The court also examined *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927), which held that the rule is different when there is a contractual relationship between the claimant and the offending

vessel owner. In distinguishing *Liverpool*, the *Sacramento Navigation* court reasoned that:

> The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simple inquiry was, What constituted the "offending vessel"? Here we must ask, What constituted the vessel by which the contract of transportation was to be effected?, a very different question. If the British ship which here was struck by the barge were suing to recover damages and a limitation of liability were sought by the owner of the tug and barge, the *Liverpool* case would be on point.
>
> *Id*. at 332.

The court also cited to *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548 (2d Cir. 1933) in support of its holding. In *Standard Dredging*, the court applied the flotilla rule to the case of a seaman injured while working on a barge and a dredge engaged in a common venture because his employment relationship with the vessel owner formed the necessary "contractual obligation."

D. Case Concerning Entry of Default.

Entry of Default Judgment Declaring that all Claimants who have Failed to Plead or Otherwise Defend Shall Take Nothing and their Claims be Dismissed is Appropriate.

In re Reef Innovations, Inc., No. 6:11-cv-1703-Orl-31GJK, 2012 WL 195531 (M.D. Fla. Jan. 6, 2012).

This case concerns a fire that started aboard a yacht while docked at the Port Canaveral Yacht Club. The owner of the yacht filed a complaint pursuant to the Limitation of Liability Act and one claimant came forward alleging damages as a result of the incident.

In the complaint, the petitioners identified eight additional parties that might come forward to assert claims against them as a result of the fire. The clerk issued a "Notice to Claimant of Complaint for Exoneration From or Limitation of Liability" directing all persons that had a claim against petitioners arising out of the fire to file their claims on or before December 7, 2011. The petitioners presented evidence that they published the Notice once a day for four weeks as required by court order that they mailed a copy of the complaint, by certified mail, return receipt requested, to the eight additional parties identified in the complaint.

By December 13, 2011, only one claimant of the nine identified in the complaint had come forward to file a claim. Petitioners then moved for a clerk's default "against any and all claimants who have failed to plead or otherwise defend ... in that any and all claimants were required to plead or otherwise defend on or before December 12, 2011, and have failed to do so." Finding that petitioners had complied with the requirements set forth in the Supplemental Admiralty Rules concerning notice to prospective claimants, the court entered a default judgment against the eight parties named in petitioners' complaint that had not filed a claim in the limitation action.

E. Cases Concerning Prescription/Notice Requirements.

If Doubt Exists as to the Total Amount of the Claims or Whether they will Exceed the Value of the Ship, the Owner will not be Excused from Satisfying the Statutory Time Bar Since he May Institute a Limitation Proceeding Even When the Total Amount Claimed is Uncertain.

In re Eckstein Marine Serv., L.L.C., 672 F.3d 310, 2012 A.M.C. 305 (5th Cir. 2012).

Lorne Jackson ("Jackson") was a crew member of the M/V ST. ANDREW, a 65–foot tug owned and operated by Marquette Transportation Company Gulf–Inland LLC ("Marquette"). While on deck on February 28, 2009, Jackson allegedly became entangled

in a line and was pulled into a mooring bit, seriously injuring his left leg. On April 28, 2009, Jackson served Marquette with a Texas state court complaint alleging that the February 28th accident was caused by the unseaworthiness of the M/V ST. ANDREW and by the negligence of Marquette and its employees. Marquette filed an answer on June 10, 2009.

Jackson made a demand for damages in the amount of $3 million on December 2, 2009. On January 18, 2010, Marquette filed an action for exoneration from or limitation of liability in federal district court to cap its liability at $750,000, the value of the M/V ST. ANDREW and its pending freight at the time of the accident. Jackson filed a motion to dismiss the limitation action, which was granted by the district court. In the state court trial that followed, Jackson won a judgment in excess of $750,000. Marquette then appealed the district court's dismissal of its limitation action.

The court of appeals first found that the district court's treatment of Jackson's motion to dismiss as an attack on subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) was proper. The court reasoned that although many statutory deadlines are not jurisdictional, the Limitation Act's six month filing requirement is jurisdictional.

Next, the court found that Marquette received written notice of Jackson's claim on April 28, 2009, when it was served with the Texas state court petition. Marquette contended that it did not receive written notice until Jackson made his $3 million demand and that the Limitation Act's six-month timeline does not automatically begin to run when a vessel owner simply learns a claimant has filed a lawsuit; but, rather, that it is triggered only if and when the written notice reveals a "reasonable possibility" that the claim will exceed the value of the vessel, and therefore that the vessel owner might benefit from the Limitation Act's protection.

While Jackson's state court petition did not allege a certain quantum of damages, Jackson did allege that he "sustained serious and debilitating injuries when he was struck by a mooring line,"

causing him to "suffer[ ] serious and disabling injuries of a permanent nature." The petition also listed damages for which Jackson claimed he would require compensation for the remainder of his lifetime, including past loss of earning, future loss of earning capacity, past and future disability, past and future disfigurement, past and future medical and hospital expenses, past and future pain and mental anguish, and maintenance and cure. The court held that when there is uncertainty as to whether a claim will exceed the vessel's value, the reasonable possibility standard places the risk and the burdens associated with that risk on the owner. In other words, if "doubt exists as to the total amount of the claims or as to whether they will exceed the value of the ship the owner will not be excused from satisfying the statutory time bar since he may institute a limitation proceeding even when the total amount claimed is uncertain." The court further supported its holding by noting that Marquette had monitored Jackson's medical condition since the accident as part of its cure obligation, and was thus aware of the extent of Jackson's injuries and the reasonable possibility that his damages would exceed the value of the vessel.

Although Claimant's State Court Petition did not Specify Vessel on which he was Injured, Vessel Owner Should Have Determined the Identity of the Vessel. Further, State Court Petition Contained Sufficient Information for "Reasonable Possibility" Test.

In re Envtl. Safety & Health Consulting Servs., Inc., 463 Fed. App'x. 383 (5th Cir. 2012).

Avery Diaz ("Diaz") claimed he was injured on August 25, 2008 while working aboard a "small, unnamed boat." On the day in question, Diaz was working for Team Labor Force, a subcontractor of Environmental, Safety & Health Consulting Services, Inc. ("ES&H"), assisting in ES&H's clean-up of an oil spill in the Mississippi River near the Port of New Orleans. Diaz filed a claim in Louisiana state court on July 19, 2010, and served ES&H with process in conjunction with that claim on August 4, 2010.

ES&H then filed a complaint pursuant to the Limitation of Liability Act on March 14, 2011. Diaz moved to dismiss the action on the basis that it was not filed within six month of ES&H having received written notice of his claim. The district court granted Diaz's motion and ES&H appealed.

ES&H claimed that because Diaz's state court petition did not specify the vessel on which he was injured, ES&H had no way of knowing whether Diaz's claims would exceed the value of the vessel. Relying on the "reasonable possibility" test, the Fifth Circuit upheld the dismissal of ES&H's action on the basis that ES&H should have determined, within six months of Diaz's petition, that it owned the boat on which Diaz worked the day he was injured, and that there was a reasonable possibility that Diaz's claim was subject to limitation.

Because Vessel Owner Spoke with Claimant Immediately After Collision and Conducted Investigation, There was a "Reasonable Possibility" That the Claim was Subject to Limitation and Letter Written Only Days After Incident Was Sufficient Written Notice.

In re McGee's Landing, Inc., No. 11-0937, 2011 WL 5402651 (W.D. La. Nov. 2, 2011).

Terrence Colegate ("Colegate") alleged that he sustained serious injuries on July 24, 2010, while operating a vessel that collided with the CAPTAIN TEE, a swamp tour vessel owned by McGee's Landing, Inc. ("McGee's"). Immediately after the incident Colegate spoke with David Allemond ("Allemond"), the owner of McGee's, and told him about the incident.

Five days after the collision, Allemond received a letter from counsel for Colegate indicating that he had been retained to represent Colegate "in a claim for personal injuries and property damage arising out of a collision involving your tour boat on July 24, 2010" from which Colegate "sustained serious injuries" and "property damage." After receiving the July 29, 2010, letter

from Colegate's attorney, McGee's performed an investigation of the collision and took photographs of Colegate's vessel. McGee's attorney responded to Colegate's letter on September 15, 2010, by disputing the estimated damages to the vessel and requesting medical records related to the incident. On December 3, 2010, Colegate filed an action for personal injury and property damage in federal court naming McGee's as a defendant. McGee's was served on January 24, 2011.

On June 22, 2011, McGee's filed an action for exoneration from or limitation of liability and Colegate promptly moved for dismissal on the basis that it was not timely filed. Colegate contended that the prescriptive six month period began with his July 29, 2010, letter. The court found that the July 29, 2010, letter indicating Colegate's claim for serious injuries, coupled with Allemond's personal knowledge of the incident, his knowledge of the value of the vessel, and the September 15, 2010, letter from McGee's attorney, established that there was a "reasonable possibility" that the claim was subject to limitation. As more than six months had passed since the July 29, 2010, letter, McGee's limitation action was dismissed.

Mailing of Notice to Counsel for Estate was Proper under Rule F.

In re Yanicky, No. 11-cv-6287, 2011 WL 5523600
(W.D.N.Y. Nov. 14, 2011).

Ken Yanicky ("Yanicky") was the owner of a 22' Hydra Sport Runabout motor vessel. On September 2, 2010, Michael Steger ("Steger") was a passenger on Yanicky's vessel and Yanicky was aboard acting as captain.

According to Yanicky, while they were trolling Lake Ontario, Steger jumped out of the vessel and into the water, despite Yanicky's express order to remain in the vessel. When rescued, Steger was unconscious and not breathing. He was later pronounced dead.

On December 22, 2010, Yanicky received a letter from attorney Leo G. Finucane, who claimed to represent Steger's Estate in a wrongful death action. The letter specifically requested that Yanicky direct all correspondence relating to the wrongful death action or the incident upon which it was based to attorney Finucane's office. Yanicky then filed his limitation action on June 10, 2011, and mailed notice of the action to the attorney for Steger's Estate.

Steger's Estate contended (without citing to any authority) that the court should dismiss Yanicky's Complaint based on his failure to specifically comply with the notice requirements of Rule F, which provide that in an action for limitation of liability involving death "notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death." The court found that although Yanicky did not mail the notice directly to Steger's Estate Administrator, he complied with the spirit of Rule F by mailing the notice to the attorney representing the Estate. Thus the court found dismissal was inappropriate on this basis.

Steger's Estate also argued that Yanicky's mere presence on the vessel precludes the limitation action. However, the court refused to dismiss on that basis because such a premise was not the law of the circuit, relying upon *In re Messina*, 574 F.3d 119, 126 (2d Cir. 2009) ("the mere presence on board of an owner does not constitute such privity as will preclude limitation of the owner's liability.")

Notice of Contribution and Indemnity Claim Without Specific Information Concerning Underlying Action was not Sufficient to Serve as Written Notice under the Limitation of Liability Act; but, Filing of Claim in First Limitation Action, Which is Dismissed for Want of a Real Controversy, will Serve as Written Notice and Begin Tolling of Prescriptive Period for Second Limitation Action.

In re Down S. Marine, LLC, C.A. No. 11-3086, 2012 WL 711216 (E.D. La. Mar. 5, 2012).

This case concerns two limitation actions. David Williams ("Williams") and Terrence Hankton ("Hankton") claimed to have sustained injuries while riding aboard the M/V MR. GAGE on July 30, 2010, as a result of rough weather and/or sea conditions. In March 2011, Williams and Hankton filed a Jones Act personal injury action against Country Boy Construction, which is not a party to the limitation action, in Louisiana state court.

Down South Marine, LLC ("DSM") was not a party to the state suit; however, in connection with the alleged incident forming the basis for the state claim, DSM filed a limitation of liability action on May 6, 2011. DSM commenced the first limitation action after allegedly being put on notice of a demand for a defense and indemnity by Country Boy Environmental Services by letter dated April 4, 2011.

Williams and Hankton filed claims in DSM's first limitation action on June 16 and 27, 2011, and subsequently moved for summary judgment. The court granted the motion, finding that no real controversy existed between the complainant in limitation, DSM, and the party allegedly claiming indemnification, Country Boy Environmental Services. DSM filed an appeal to the Fifth Circuit and on December 16, 2011, filed a second limitation action in the district court. In the second action, DSM "seek[s] exoneration from or limitation of liability based on the explicit and unequivocal allegations of Williams and Hankton that DSM was at fault for and or should be held liable for the alleged incident of July 30, 2010 aboard the M/V MR. GAGE."

Williams and Hankton again moved for summary judgment on the basis that the second limitation action was filed more than six months after DSM received written notice of any potential claim. Williams and Hankton claimed that DSM received written notice of their claims through the April 4, 2011 letter from Country Boy Environmental Services. Based upon the contents of that letter, the court found that it did not serve as written notice sufficient for the Limitation of Liability Act. Instead, the court held that DSM received written notice of the potential claims of Williams and Hankton when they filed their claims in the first limitation action, on June 16 and 27, 2011. Therefore, the court found DSM to have timely filed its second limitation action and denied Willaims and Hankton's motion.

F. Cases Concerning Privity and Knowledge.

Second Circuit found District Court's Findings Clearly Erroneous and Facts on the Record were Insufficient for Finding that Vessel Owner had Privity and Knowledge that Vessel Sometimes Failed to Keep a Proper Lookout.

Otal Inv. Ltd. v. M/V CLARY, 673 F.3d 108, 2012 A.M.C. 913 (2d Cir. 2012).

In 2003, on a foggy night in the English Channel, three vessels—the M/V KARIBA (the "KARIBA"), the M/V TRICOLOR (the "TRICOLOR"), and the M/V CLARY (the "CLARY")—came into close proximity of one another. The KARIBA altered course to avoid the CLARY and, in doing so, struck the TRICOLOR, causing it to sink. Among other holdings, the district court did not permit the CLARY's owners to limit their liability under the Limitation of Liability Act.

On appeal, the CLARY owners contend that the district court erred in denying its motion for limitation of liability. In addressing the CLARY owners' limitation of liability argument, the district court cited trial testimony of the CLARY's Second Officer Toncic "that the standard practice on the ships operated by Mineralien

[vessel manager] was for lookouts to work all day and then be put on standby for call up to the bridge if there was trouble." The court found that Toncic's testimony established that the CLARY "did not always have a person on watch from 12 a.m. to 4 a.m." but, if someone was needed, Toncic knew "who should be called on the bridge. They were not always on the bridge."

Without a citation to the record, the court then stated that "[i]f a lookout worked at night, he would be paid overtime" and that "the CLARY's shoreside owners would have been aware of whether overtime was being logged and paid for lookout duty on a regular nightly basis." On this basis, the district court found that that the CLARY's owners should have known that the CLARY sometimes failed to keep a proper lookout." Thus, the only factual finding made by the district court to support its conclusion that the CLARY owners had "privity or knowledge" of the CLARY's failure to keep a proper lookout was its statement that "[i]f a lookout worked at night, he would be paid overtime."

As this was a finding of fact, the Second Circuit reviewed whether this finding was clearly erroneous. Indeed, the court reviewed the trial testimony and found that the district court had essentially misinterpreted Toncic's testimony. The court determined that Toncic's testimony indicates that only ordinary seamen could be paid overtime, but they were not; and there was no testimony that able–bodied Seamen were paid overtime. The court did not find support in the record for the district court's finding of fact that all "lookouts" were paid overtime (regardless of which type of seaman they were), and thus, that finding was clearly erroneous and must be set aside.

Vessel Manager's Actual Knowledge of Unseaworthy Condition will be Imputed to Vessel Owner and Instructions to a Subordinate to Remedy that Unseaworthy Condition will not Negate the Vessel Manager's Actual Knowledge.

In re Leo, LLC, 2012 A.M.C. 471, 2011 WL 5335288
(W.D. Wash. Nov. 7, 2011).

Matthew Flora ("Flora") worked as a seaman aboard the M/V LEO, a fish tender vessel that operated off the western coast of Alaska. The LEO was an ex-U.S. military landing and recovery craft that was modified by its new owner, Leo LLC, who was also Flora's employer. The modifications to the LEO included the installation of two "knuckle" cranes. In the winter of 2008/2009, the vessel manager, Kevin Kennedy, was aware the port side knuckle crane hook lacked a requisite safety clasp. Kennedy testified that he told the captain to fix the crane hook, but did not prohibit the use of the crane until it was fixed, or make sure that the crane hook was fixed before the vessel sailed, or even follow-up with the captain regarding whether the crane hook was fixed.

On June 12, 2009, Flora sustained serious injuries when, during operations, the scale and brailer came out of the portside crane hook. The court found that this was due to the lack of a safety clasp on the crane hook.

Based upon these facts, the district court refused to allow the petitioner to limit its liability under the Limitation of Liability Act. The court relied upon the longstanding rule that a shipowner may not limit its liability if the ship is unseaworthy due to equipment which was defective at the commencement of the voyage. Furthermore, because the vessel manager, Kennedy, knew of the defective crane, the owner was imputed to have privity or knowledge of the unseaworthy condition.

The petitioner claimed that because the vessel manager instructed the captain to fix the crane, it lacked privity or knowledge

of the unseaworthy condition. Relying on various circuit court cases, the district court rejected petitioner's argument and held that limitation was denied because when a manager has actual knowledge of an unseaworthy condition, that knowledge is imputed to the petitioner and any instructions to remedy the unseaworthy condition do not negate the manager's actual knowledge.

Presence of Supervisors and Vice President at Time of the Incident Together with an Injury Report Indicating that Management was at Fault was Sufficient to Preclude Summary Judgment on Basis that There was a Triable Issue Fact Regarding the Privity and Knowledge of the Limitation Defendant.

Kahue v. Pac. Envtl. Corp., 834 F. Supp. 2d 1039
(D. Hawaii 2011).

Cedric Kahue ("Kahue") alleged that he was rendered a partial quadriplegic when he fell from the second story of a PENCO building while preparing for a hazardous waste spill response.

PENCO provides environmental remediation and spill cleanup services, primarily on land, involving hazardous material and oil spill response operations on roads and in warehouses, factories, piers, and shipping containers. A primary issue in this matter was whether Kahue was a "seaman."

PENCO asserted an affirmative defense of limited liability under the Limitation Act and sought summary judgment on its affirmative defense, asserting that there was no evidence that it had any privity and knowledge that its employees would violate safety procedures, and, barring such evidence, PENCO was entitled to limit its liability under the Limitation Act.

Kahue presented evidence regarding whether the supervisors and vice presidents were present and directing the manner of work being done at the time of the accident. Kahue claimed that supervisors and a vice president were present at the time of his injury. Further, the report of injury specifically says management was at fault for the

accident and caused Kahue to hurry. PENCO did not contest this evidence on summary judgment.

Accordingly, the court found that there was a triable issue of fact as to PENCO's privity and knowledge and denied summary judgment.

Despite Lack of Evidence to Suggest Petitioner had Privity and Knowledge, Summary Judgment was Denied to Allow Claimant to Cure Standing Issues.

In re Anderson, No., 847 F. Supp. 2d 1263 (W.D.Wash. 2012).

James T. Anderson ("Anderson") purchased the CATSHOT, a catamaran, from a South African builder, who arranged for delivery of the vessel to Anderson in Port Townsend, Washington, by a small crew. Per South African law, Anderson took title to the CATSHOT prior to departure.

There were many setbacks during the delivery process. Due to weather conditions, the CATSHOT had to return to Aruba. In Trinidad, two of the original three crewmen decided to "jump ship"—a decision that delayed the ship's progress for several weeks as the contracted yacht delivery company looked for replacement crew members with "more staying power." Though replacements were eventually found and flown to Trinidad, they too did not last long. Both left the vessel in Marina del Rey, California, a move that prompted the captain to hire Richard Beckham ("Beckham") and a third person to help him complete the delivery. Unfortunately, that crew would never reach their destination. After stopping again in San Francisco, the ship was caught in a severe storm off the coast of Oregon. In winds in excess of 100 mph, the CATSHOT is believed to have capsized and broken apart. The entire crew was believed dead, though, Beckham's body was the only one ever recovered.

Anderson filed a complaint pursuant to the Limitation of Liability Act and Sonia Beckham, Richard Beckham's widow, filed a claim in the limitation action. Anderson moved for summary

judgment on a number of grounds, including that there was no evidence that any unseaworthy condition caused the loss of the CATSHOT and its crew or, if there is, that he had no privity or knowledge of that condition. Anderson also contended that Sonia Beckham lacked standing to bring any claim on behalf of the Estate of Beckham because she had never been appointed Beckham's personal representative.

The court found that Sonia Beckham lacked standing because she had never been appointed as the decedent's personal representative. The court also noted that the only evidence was that the CATSHOT was lost not as a result of an unseaworthy condition or act of negligence but because it had the misfortune to be caught in a severe storm off the coast of Oregon—"an Act of God or peril of the sea" for which Anderson could not be liable. Despite noting there was no evidence to suggest that the death of Beckham was the result of an unseaworthy condition or an act of negligence, the court decided not to grant summary judgment at the time in order to allow Sonia Beckham time to cure her standing issue and present evidence of an unseaworthy condition or negligence on behalf of Anderson.

[Editor's note: At the time of this newsletter, the docket report reveals that Sonia Beckham has filed an answer to Anderson's Complaint and that she appears to have cured her standing issue. However, from that Answer, it does not appear that she has alleged any new evidence regarding the existence of an unseaworthy condition or negligence on the part of Anderson. Indeed, Anderson has recently filed a request for a ruling on his previous motion for summary judgment, now that the standing issue has been cured.]

COMMITTEE ON MARITIME BANKRUPTCY AND INSOLVENCY

Chair: John E. Bradley

Newsletter - May 2012

Noteworthy Chapter 15 Decisions

In re Daewoo Logistics Corp., 461 B.R. 175 (Bankr. S.D.N.Y. 2011).

U.S. bankruptcy court recognized as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code a rehabilitation proceeding commenced by the debtor in Korea. The court's recognition order expressly granted stay relief to the debtor. Months after the recognition order was entered, the debtor's rehabilitation proceeding in Korea was closed, although the foreign representative of the debtor never advised the court of this fact as required under Section 1518 of the Code. Following the close of the Korean rehabilitation proceeding, a creditor of the debtor arrested a vessel belonging to the debtor that was situated in the State of Texas. The debtor's foreign representative sought to stop the arrest proceeding on grounds that it violated the automatic stay built into the original Chapter 15 recognition order. ***Held***, given the purposes of Chapter 15, and in the absence of other compelling circumstances, the automatic stay imposed by a recognition order is coterminous with the foreign proceeding to which it is associated, and does not prohibit third party actions action the debtor or its property in the United States after the close of the foreign proceeding.

In re The Containership Co (TCC) A/S, 466 B.R. 219 (Bankr. S.D.N.Y. 2012).

U.S. bankruptcy court recognized as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code a reconstruction proceeding commenced by the debtor in Denmark.

The debtor, a defunct liner shipping company, listed among its principal assets in the reconstruction proceedings, certain minimum quantity commitment ("MQC") claims against dozens of shippers, all arising under service contracts entered into by the debtor and the shippers prior to the debtor's financial demise. Following the entry of a recognition order by the court, the foreign representative of the debtor commenced separate adversary proceedings against each of the shippers, seeking to recover monies allegedly due from them under the service contracts (so-called minimum commitments). The shipper-respondents sought relief from the stay, claiming that the debtor violated various provisions of the Shipping Act of 1984, and asserting that the Federal Maritime Commission ("FMC") had exclusive and/or primary jurisdiction over their Shipping Act claims against the debtor. The court found that the technical expertise of the FMC was not required in connection with these claims and, therefore, the FMC had neither exclusive nor primary jurisdiction with respect to the claims. ***Held***, that, in the absence of compelling reasons to defer to the expertise of the FMC, the presence of alleged violations of the Shipping Act which might give rise to defenses or counterclaims by shippers in MQC litigation brought by an ocean common carrier does constitute "cause" sufficient to modify the automatic stay under section 362 of the Code (following analysis of the 12 factors set forth by the Second Circuit in *In re Sonnax Indus*., 907 F.2d 1280 (2d Cir. 1990).

SNP Boat Serv. SA v. Hotel Le St. James, 2012 WL 1203823 (S.D. Fla. Apr. 11, 2012), amended and superseded by No. 11-cv-62671-KMM, 2012 WL 1355550 (S.D. Fla. Apr. 18 2012).

Debtor SNP became embroiled in a commercial dispute with a Canadian company (St. James) concerning the condition and value of a vessel transferred by the Canadian company. SNP brought suit against St. James in France, and St. James brought a countersuit against SNP in Canada. Debtor then commenced a *sauvegarde* proceeding (functional equivalent of reorganization) in France, and St. James submitted a claim, thereby submitting itself to the jurisdiction of the French court. During the pendency of the

proceeding, St. James obtained a default judgment against the debtor in Canada and domesticated that judgment in the U.S., later seizing two vessels belonging to the debtor which were located in Florida. Before the vessels could be sold, a foreign representative of the debtor commenced Chapter 15 proceedings, which were formally recognized by a U.S. bankruptcy court The foreign representative then sought a court order which would entrust the seized vessels to him for eventual distribution to creditors in France. St. James opposed the motion and sought discovery on the fairness of the French proceeding in which it was then participating. Following a series of discovery disputes, and the entry of an order by the bankruptcy court to allow discovery on the issue of due process in France, the court denied the entrustment motion and dismissed the proceeding as a sanction against the foreign representative. Foreign representative appealed to the district court and the district court reversed, in part. ***Held***, under principles of comity, a U.S. bankruptcy court may only determine if foreign jurisprudence provides due process in principle to foreign litigants; inquiries into the relative fairness of a foreign main proceeding with respect to an individual creditor are not allowed. **[Editor's Note:** the Amending and Superseding Opinion will be addressed in the next Report].

In re Atlas Shipping A/S, 404 B.R. 726 (Bankr. S.D.N.Y. 2009).

U.S. bankruptcy court recognized as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code a reconstruction proceeding commenced by the debtor in Denmark. Following recognition, foreign representative of the debtor sought to vacate nine Rule B attachments totaling $4.3 million (obtained by non-U.S. creditors of the debtor) and entrust the attached funds to the foreign representative for administration in the Danish bankruptcy proceeding, based upon principles of comity and the statutory wording of Chapter 15. The foreign representative established that the attachments (both pre-bankruptcy and post-bankruptcy) would be dissolved under Danish law. The attaching creditors opposed the relief sought by the foreign representative. ***Held***, the vacatur of Rule B attachments and the entrustment of attached funds to a foreign

representative is supported by principles of comity and sections 1521(a)(5) and 1521(b) of Chapter 15 insofar as it constitutes turnover relief; a turnover order does not constitute avoidance under applicable provisions of the Code.

COMMITTEE ON RECREATIONAL BOATING

Chair: Lars Forsberg
Editor: Daniel Wooster

BOATING BRIEFS

Volume 21, Number 1, Spring 2012*

FINANCE

Yacht Mortgage Foreclosure Stalled by Competing Chains of Title

Branch Banking & Trust Co. of Virginia v. M/Y Beowulf, No. 11-80692-CIV, 2012 WL 464002, 2012 U.S. Dist. LEXIS 17381 (S.D. Fla. Feb. 13, 2012)

A federal district court in Florida denied a yacht mortgagee's request for final judgment in a foreclosure case after a third party—who had purchased the yacht without notice of the mortgage lien—appeared in the case and claimed that the mortgagor did not own the yacht when he granted the mortgage and that the mortgage lien should in any event be equitably subordinated.

The yacht in question was a custom "Sculley 60" sportfisherman built by Sculley Boatbuilders in 2003. When construction was complete, Sculley Boatbuilders issued a builder's certificate naming Sculley Boatbuilders' president as the person for whom the yacht was constructed. The president then pledged the yacht as collateral for a personal loan of about $1 million. He signed several loan documents, including a security agreement and a preferred mortgage. The mortgage and the application for Coast Guard documentation identified the president as the yacht owner, but

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* Contributors to this issue: Meighan Burton, Alberto Castañer-Padró, David Garfinkel, Jeffrey Kuhns, Joseph Kulesa, Christian Packard, Patrick Ward, and Justin Woodward.

other loan documents identified Sculley Boatbuilders as the yacht owner. After receiving the builder's certificate and the application for documentation, the Coast Guard assigned an official number, issued a certification of documentation, and recorded the mortgage.

Sometime later, Sculley Boatbuilders purported to sell the same yacht to a third party. To do this, it created another builder's certificate. This certificate, unlike the first one, named Sculley Boatbuilders as the person for whom the yacht was constructed, but it listed the same official number and hull identification number that had been assigned to the "first" Sculley 60. After this second certificate was submitted to the Coast Guard with the new buyer's application for documentation, Sculley Boatbuilders wrote a letter to the Coast Guard stating that the second certificate mistakenly showed the same hull identification number that was used for the "first" Sculley 60. The letter asked the Coast Guard to issue a different official number for the "second" Sculley 60. The Coast Guard complied with this request, and in this way the "second" vessel came to be documented in the new buyer's name. There were now two chains of title, only one of which showed the mortgage. The buyer later conveyed the yacht back to Sculley Boatbuilders, and the yacht was sold twice more, finally to Sunfish.

Shortly before the yacht was sold to Sunfish, the president of Sculley Boatbuilders defaulted on his loan agreement with the bank. After failed attempts at a workout, the bank filed a foreclosure proceeding in the Southern District of Florida, moved for summary judgment *in rem*, and requested that the yacht be sold at auction to enforce the mortgage lien. Sunfish, as a *bona fide* purchaser for value without notice, made a claim to the yacht, objected to the sale, and sought to defeat or subordinate the mortgage lien. In particular, Sunfish argued that the president of Sculley Boatbuilders was not the owner of the Sculley 60 when he signed the mortgage, and that without good title he could not have conveyed a valid security interest to the bank. Alternatively, Sunfish argued that the mortgage lien should be subordinated to Sunfish's interest because the bank

had engaged in what Sunfish characterized as reckless lending practices by not verifying the mortgagor's ownership of the yacht and not promptly foreclosing when the mortgagor defaulted.

As to the first issue, the court held that the documents initially recorded by the Coast Guard—including the builder's certificate naming the president as the initial transferee of the vessel—were not "documents of title" under Florida's Uniform Commercial Code and were not conclusive evidence of ownership. Given the inconsistencies in the loan documents, the bank had not proved that Sculley Boatbuilders' president was the owner of the yacht when he granted the mortgage in his personal capacity. Accordingly, the bank's motion to sell the yacht was denied pending further proceedings.

As to the second issue, the court decided that there was enough evidence to warrant a trial on Sunfish's equitable subordination claim. The loan documents contained contradictory information about the yacht owner's identity, and the bank was apparently aware from outset that the yacht's hull identification number was not permanently affixed to the transom as required by Coast Guard regulations. (Presumably Sunfish's argument was that a properly affixed hull identification number might have alerted potential purchasers to the competing chain of title.) In addition, when the mortgagor defaulted, the bank allegedly agreed to extend the loan for five additional years without checking up on the yacht, demanding proof of insurance, or properly assessing the borrower's creditworthiness. While this evidence would not necessarily sustain an equitable subordination claim, it was in the court's view sufficient to create a genuine issue of material fact.

Accordingly, the disposition of the yacht would have to await a full hearing.

Borrower Liable for Mortgagee's Expenses in Freeing Yacht from Drug Seizure and Litigating Insurance Dispute

Markel Am. Ins. Co. v. Díaz-Santiago, 674 F.3d 21 (1st Cir. 2012)

MDS Caribbean Seas Ltd., incorporated by Michael Díaz-Santiago, obtained a loan to purchase a yacht. The note and preferred mortgage, which were guaranteed by Díaz-Santiago, required MDS to insure the yacht and cover the bank's expenses in defending suits relating to the debt. When Díaz-Santiago applied for insurance, he incorrectly stated that he (not MDS) was the owner of the yacht.

Later, the yacht was seized by U.S. Customs for drug smuggling and was damaged during the agents' search for drugs. The bank incurred significant expense securing the yacht's release. As the loss payee under the insurance policy, the bank made a claim to the insurer to try to recover the costs related to seizure. The insurer then rescinded the policy on the grounds that Díaz-Santiago made material misrepresentations during the marine insurance application process by declaring himself to be the owner of the yacht instead of MDS.

Coverage litigation ensued, and the insurer and Díaz-Santiago entered into a consent decree stating that the identity of the owner was a material fact that should have been disclosed to the insurer. Accordingly, the court entered judgment for the insurer and declared the policy null and void.

The bank then requested partial summary judgment against Díaz-Santiago and MDS, claiming that the misrepresentation to the insurer was a breach of the preferred mortgage, which specifically required MDS to "fully and adequately" insure the yacht and to pay all "advances and expenditures" that the bank incurred in defending suits related to the mortgage and note. The district court granted the bank's motion for partial summary judgment, awarding the bank about $75,000 for the fees and expenses it incurred in dealing with the seizure and the insurance dispute.

Díaz-Santiago and MDS appealed, but they did not identify any genuine issues of material fact that would have precluded summary judgment for the bank. They merely alleged that the bank knew about the discrepancy in the insurance policy concerning the yacht owner's identity but still accepted the ship mortgage and promissory note in MDS's name despite such knowledge. The court described the appeal as "nothing more than a smokescreen to try [to] artfully evade the writing on the wall." No one disputed the validity of any of the loan agreements, and both MDS and Díaz-Santiago contractually bound themselves to reimburse the bank for any costs it incurred in defending suits related to the mortgage or promissory note. Thus, the First Circuit affirmed the district court's grant of partial summary judgment for the bank.

INSURANCE

No Coverage where Yacht Carried More Passengers than Policy Allowed

Northern Assurance Co. of America v. Keefe, 845 F. Supp. 2d 406, 2012 A.M.C. 958 (D. Mass. 2012)

A yacht policy's chartering endorsement provided coverage during charter trips but stated that "NO MORE THAN 6 PASSENGERS may be carried on board the yacht." The endorsement further stated that the policy would become null and void if the insured violated any of the endorsement's terms and would remain null and void so long as the violation continued.

While on a charter trip and carrying 18 passengers, the yacht grounded on a shoal. The hull was punctured and the yacht flooded, though the parties disagreed whether the puncture occurred simultaneously with the grounding or sometime later, after the passengers had safely disembarked. In any event, the insurer denied coverage and filed a declaratory judgment action.

In deciding the coverage dispute, the court examined both maritime law and Massachusetts law. Under maritime law, the court held, the policy's condition limiting charters to no more than six passengers functioned as a warranty, and the established rule was that an insured's breach of a warranty excuses a marine insurer from payment regardless of whether the breach contributed to the loss.

The court went on to examine Massachusetts law, which distinguishes a warranty from a condition. Under a Massachusetts statute, breach of a warranty will ordinarily not defeat coverage unless the breach increased the risk. Mass. Gen. Laws ch. 175, § 96. However, under Massachusetts case law, a violation of a condition precedent will defeat coverage regardless of whether the violation was related to the loss. Here, the court held that the limit on the number of passengers was a condition precedent under Massachusetts law because the chartering endorsement expressly stated that the policy would be void during any period in which the insured violated the endorsement's terms. Exceeding the allowed number of passengers therefore deprived the insured of coverage even though the violation did not contribute to the loss.

As a backup position, the insured argued that most of the damage occurred after the passengers disembarked from the yacht and that coverage should be reinstated for losses occurring after the breach was cured. Discerning no established federal maritime rule on the subject, the court examined Massachusetts marine insurance cases from the 1800s and determined that insurance coverage does not reattach when a breach is cured unless the risk to the marine insurer after the cure is no greater than it was before the breach began. Here, the risk was clearly higher after the yacht grounded, so there was no coverage even for damage sustained after the passengers left.

Finally, the owner contended that the violation of the chartering endorsement affected only the coverage for personal injury liabilities, not the coverage for hull damage. The court

applied Massachusetts law because there was no federal maritime rule on point. Under Massachusetts law, this was a question of basic contract interpretation, and here the chartering endorsement plainly meant that a violation of its terms would suspend the entire policy, not merely the liability coverage.

Accordingly, there was no coverage for any losses related to the grounding.

Coverage Claim Dismissed Due to Insured's Unwillingness to Submit to Examination Under Oath

Kerr v. State Farm Fire & Casualty Co., No. 11-113-FJP-CN, 2012 WL 786342, 2012 U.S. Dist. LEXIS 30234 (M.D. La. Mar. 7, 2012)

After his boat, motor, trailer, and other property disappeared, the insured made a claim on his insurance policy. As part of its investigation, the insurer required the insured to submit to an examination under oath (EUO). Instead of submitting to the EUO, the insured hired an attorney and sued the insurer for breach of contract. The insurer moved for summary judgment, arguing that the insured's failure to cooperate was a material breach of the insurance contract and under Louisiana law barred any claim for coverage.

Among the insured's "duties after loss" specified in the policy was the duty to "submit to examinations under oath." The policy also provided that no lawsuit could be brought against the insurer "unless there has been compliance with the policy provisions."

The insured claimed that he viewed the insurer's demand for an EUO as an accusation of fraud, since the demand was accompanied by a letter stating that the insurer might deny coverage for various reasons, including fraud.

Although the insurer had the burden of showing that the insured's breach of a cooperation clause was material and prejudicial, cases from the Eastern District of Louisiana and the Fifth Circuit established that an intentional refusal to submit to an EUO constitutes a material breach of the contract.

The court then examined whether the insured's failure to participate in the EUO prejudiced the insurer. While a failure to attend an EUO might not prejudice the insurer if the insured has a reasonable explanation for the failure to attend and expresses a willingness to submit to an alternative form of examination, here the insured's refusal deprived the insurer of the contractual right to investigate the claim thoroughly, and it also deprived both parties of a potential opportunity to settle the claim without litigation. Feeling accused of fraud was not a sufficient reason to refuse to submit to an EUO. In the circumstances, the court held that the insured's refusal to submit to the EUO was a material breach that prejudiced the insurer, and the insurer was therefore granted summary judgment.

Inner Tubes Rafted Together were not "Watercraft" as Defined by Policy

Wood v. Scottsdale Indemnity Co., 467 Fed. Appx. 654 (9th Cir. 2012) (unpublished)

A 12-year-old girl drowned while inner tubing with three other minors on the Trinity River in California. The group had been floating down the river on inner tubes tied together with rope. The girl's parents sued the chaperone, who was insured under a personal umbrella policy for liabilities "[w]ith respect to automobiles or watercraft to which this policy applies." The district court held that the term "watercraft" was ambiguous but that the policyholders did not have an objectively reasonable expectation that the policy would cover the kind of liability at issue here.

On appeal, the Ninth Circuit affirmed, but on different grounds, holding that the inner tubes were not "watercraft" as defined in the policy. The policy defined "watercraft" as "any craft, boat, vessel, or ship designed to transport persons or property on water." The court applied the "ordinary meaning" of craft, boat, vessel, and ship—i.e., their dictionary definitions—and concluded that the inner tubes were not a "craft" or "boat" because they were not propelled by oars, paddles, sail, or power. Nor were the inner tubes a "vessel" or "ship," since they were not used for navigation. The court did not, however, consider whether the inner tubes might qualify as vessels under the broader definition used in maritime law.

More importantly, a watercraft as defined in the policy had to be "designed to transport persons or property on water." Consulting the dictionary, the court read the words "designed to transport" as suggesting that the watercraft "must be designed to actively move persons or properties on water rather than merely float [with] the natural flow of a river." In the Ninth Circuit's view, the inner tubes were therefore not "watercraft" as defined by the policy.

LIMITATION OF LIABILITY

Second Circuit: No Jurisdiction to Hear Limitation Action Arising from Passenger's Injury on Land

MLC Fishing, Inc. v. Velez, 667 F.3d 140, 2012 A.M.C. 485 (2d Cir. 2011)

The U.S. Court of Appeals for the Second Circuit has held that the federal courts have no jurisdiction to hear a boat owner's limitation action if the underlying incident giving rise to the action was not itself subject to admiralty jurisdiction.

The CAPT. MIKE was a recreational fishing vessel that, on the date in question, was moored to a floating dock at Capt. Mike's Marina in Howard Beach, Queens, New York. In order to board the CAPT. MIKE, customers would walk from the marina onto a ramp that led to the floating dock, and from there would traverse the floating dock to reach the vessel. Julio Angel Velez, on his way to the vessel for a charter fishing outing, slipped and fell while walking down the ramp toward the floating dock. The vessel owner filed an action for limitation of liability. The trial court dismissed it for lack of subject matter jurisdiction, and the Second Circuit affirmed.

An incident is subject to admiralty jurisdiction if (1) it occurred on or over navigable waters (or was caused by a vessel on navigable waters) and (2) the activity giving rise to the incident was substantially related to traditional maritime activity such that the incident had the potential to disrupt maritime commerce. Here, the incident occurred not on navigable waters but on a ramp, which the court concluded was an extension of land in the same way a pier or floating dock would be. Although an injury on land may be within admiralty jurisdiction if it was caused by a vessel on navigable waters, the vessel here did not cause the accident, nor was the ramp an appurtenance of the vessel.

The Second Circuit also addressed an issue raised by the owner but not discussed by the district court: whether the Limitation Act provides an independent basis for federal jurisdiction. Answering "no," the Second Circuit observed that every federal appellate court to reach the question has concluded that the Limitation Act does not permit a federal court to hear a limitation action if the claim for which limitation is sought would not itself be cognizable in admiralty. But compare *Richardson v. Harmon*, 222 U.S. 96, 2001 A.M.C. 1207 (1911).

Limitation Action Survives Despite Arguably Defective Notice to Claimant

In re Yanicky, No. 11-CV-6287, 2011 WL 5523600, 2011 U.S. Dist. LEXIS 131027 (W.D.N.Y. Nov. 14, 2011)

During a fishing trip on Lake Ontario, a passenger on a Hydra Sport Runabout jumped into the water and drowned. Expecting to be sued by the passenger's estate, the vessel owner—who was aboard the vessel at the time of the incident—brought an action in federal court for exoneration or limitation. The passenger's estate moved for dismissal, arguing that the owner did not plead a proper claim for exoneration or limitation and did not give proper notice of the limitation action.

The limitation complaint alleged that the passenger jumped into the lake even though the owner told him not to, and that the drowning was not the owner's fault. These allegations, the court held, were sufficient to withstand the motion to dismiss. And contrary to the estate's argument, the owner's mere presence on the vessel did not prevent him from seeking limitation.

The court also denied the estate's motion to dismiss for insufficient notice of the limitation action. By rule, an owner filing a limitation action must mail notice of the action to all known claimants and, in a death case, "to the decedent at the decedent's last known address." Here, rather than mailing notice to the decedent's address, the owner mailed the notice to a lawyer representing the estate. That lawyer had previously written to the owner advising of the estate's intent to file a wrongful death suit and asking that all correspondence be sent directly to him.

Yet there was no evidence that the estate was prejudiced by receiving notice through the lawyer rather at than at the decedent's last known address. By communicating through the lawyer, the estate could reasonably be seen as having waived the right to receive

notice in the manner specified by rule. Accordingly, the limitation action would not be dismissed for insufficient notice.

TORTS

Damages Capped at Pre-Casualty Value Where Allision Rendered Yacht a Constructive Total Loss; Pretrial Settlement Wipes out Award

F.C. Wheat Maritime Corp. v. United States, 663 F.3d 714, 2012 A.M.C. 186 (4th Cir. 2011)

A moored yacht was struck by a U.S. Army Corps of Engineers vessel whose captain fell asleep at the helm. The U.S. government admitted liability for the allision and settled with the yacht's hull insurer for $682,500, which the hull insurer then paid to the yacht owner. Seeking a greater recovery, the yacht owner proceeded to trial against the government but stipulated that any amount the court awarded for the physical damage to the yacht would be reduced by $682,500.

After a bench trial, the court found that the yacht was a constructive total loss and awarded $440,000, which the court found to be the pre-casualty value. Because the award was less than the $682,500 the government already paid to the hull insurer, the trial court molded the award into a take-nothing judgment. The yacht owner was dissatisfied and appealed to the Fourth Circuit Court of Appeals.

The primary issue on appeal was whether the yacht was a constructive total loss, i.e., whether the cost of repairing the damage exceeded the pre-casualty value. If the yacht was a constructive total loss, then the award was properly limited to the pre-casualty value. If the yacht was not a constructive total loss, then the owner should have been awarded reasonable repair costs, which were alleged to greatly exceed $440,000.

The trial court heard valuation testimony from three experts, two of them experienced marine surveyors testifying for the government and the third a yacht broker testifying for the owner. The government's two witnesses relied on soldboats.com, an online database of sale prices, as well as on a personal inspection of the yacht. They estimated the yacht's pre-casualty value at $440,000 and $470,000, respectively. The owner's expert, by contrast, opined that the vessel was worth $900,000 before the allision. However, the owner's expert based his opinion largely on asking prices rather than actual sale prices. In addition, he had an ongoing social relationship with the owner, he did not undertake a detailed inspection of the yacht, and by his own admission his valuation lacked scientific certainty. Accordingly, the Fourth Circuit saw no error in the trial court's decision to credit the government's experts over the owner's expert or in the trial court's determination that the pre-casualty value of the yacht was $440,000.

Aside from challenging the $440,000 valuation, the yacht owner also argued that the concept of constructive total loss should not even apply because this yacht had many custom upgrades and a market valuation did not reflect its true worth to the owner. While recognizing the possibility that replacement cost, rather than market value, might be the appropriate measure of damages for a vessel having a unique use not reflected in her market price, here the Fourth Circuit declined to apply that exception. This owner used the vessel as a yacht, and such use was not "so idiosyncratic as to lack any market comparables." The award was therefore limited to the pre-casualty value as determined by the trial court.

Finally, in light of the pretrial settlement between the government, the hull insurer, and the owner, the Fourth Circuit agreed that the trial court properly converted the $440,000 award into a take-nothing judgment. As part of the settlement, the owner had already been paid $682,500 for the damage done to the yacht, and that figure entirely offset the $440,000 awarded at trial.

Jet Ski Rental Company Defeats Claims of Negligent Instruction and Supervision

DiNenno v. Lucky Fin Water Sports, LLC, 837 F. Supp. 2d 419 (D.N.J. 2011)

Two rented Waverunners collided off Wildwood, New Jersey, breaking the leg of a passenger on one of them. The injured passenger sued the rental company. (As reported in Vol. 20:1, the court denied the rental company's motion for summary judgment.) The case was tried to Senior District Judge Irenas, who found for the rental company.

Although the parties seemed to assume that New Jersey law applied, the collision gave rise to admiralty jurisdiction and the court observed that general maritime law should therefore govern the liability issues. But since New Jersey's common law of negligence was not in conflict with federal maritime law, the court applied New Jersey common law consistent with the parties' assumptions.

Before the outing began, the rental company required all renters to sign a lease agreement, which included a set of detailed riding rules. The renters were then transported via pontoon boat from shore to a floating dock adjacent to the riding area, where safety instructions were given to the group of eight renters, four operators and four passengers. Safety equipment, including a whistle to be used in emergency situations, was provided to each person, and everyone was instructed to keep a 300-foot distance between vessels.

The renters were then allowed to operate the Waverunners in the riding area in accordance with the written rules and verbal instructions. The riding area was square, measuring 880 yards by 880 yards, and had large buoys at each of the four corners.

The plaintiff rode aboard a Waverunner operated by George R. Djukanovic, Jr. Another Waverunner was operated by Marc M. Roy, Jr. David Reynolds, a co-owner of the rental company, rode a separate Waverunner and supervised the renters.

Shortly before the accident, Reynolds reprimanded Roy for riding too close to another Waverunner. Reynolds did this by approaching Roy, using hand gestures, and verbally explaining the rule violation when he was close enough to do so.

Despite these warnings, Roy began following Djukanovic's Waverunner too closely, but Reynolds was 70 to 80 yards away and unable to signal either vessel. Djukanovic then made a sudden turn without looking behind him, and Roy was unable to avoid a collision. Roy subsequently pleaded guilty to operating the craft at an unsafe speed.

The plaintiff sued the rental company for negligent entrustment, but his complaint focused on allegations of negligent instruction and negligent supervision. In the final pretrial order, the plaintiff omitted any claim for negligent entrustment and instead complained of negligent instruction, an unsafe riding area, and negligent supervision. Since the pretrial order takes the place of pleadings at that point in the litigation, the omission of a negligent entrustment claim constituted a waiver of that claim, and the plaintiff's post-trial attempts to amend the pretrial order were denied. Therefore, the court considered only whether the rental company was negligent in instructing its customers, setting up the riding area, and supervising the Waverunners.

Plaintiff's first remaining claim—that the company breached its duty of care by failing to adequately instruct the renters on the proper way to overtake another Waverunner—was unsuccessful. Even if the rental company had breached its duty of reasonable care regarding safety instructions, the court found that the plaintiff had

not proven that the breach was the proximate cause of the collision. Reynolds had instructed the renters not to travel within 300 feet of, and not to follow directly behind, another Waverunner. Had Roy followed these instructions, the accident would not have occurred.

Plaintiff's second remaining claim—that Reynolds had a duty to signal Djukanovic and Roy with his whistle in order to alert them to the danger—was similarly unsuccessful. The court determined that, even if such a signal should be used when danger is spotted, Reynolds could not have prevented the collision, as he could not have foreseen that an accident was going to occur until Djukanovic suddenly turned, at which point there was no time to warn anyone.

Finally, the claim that the riding area was too small and unorganized, and that the riders should have been required to ride in a circle, likewise failed for lack of causation, as there was no evidence that riding in a circular motion would have prevented Roy from operating his Waverunner too close to, and directly behind, Djukanovic. Indeed, requiring the riders to follow each other in a circle may have been even more likely to cause a collision.

Judgment was therefore entered for the rental company.

Resort That Dropped Off Drunken Patron at His Boat Wins Dismissal of Negligence and Dram Shop Claims

Vollmar v. O.C. Secrets, Inc., 831 F. Supp. 2d 862,
2012 A.M.C. 1921 (D. Md. 2011)

After a night of heavy drinking at a resort in Ocean City, Maryland, Scott Shepard was driven by one of the resort's water taxis—the TIPSY III—to his moored boat. Later, Danielle Vollmar, another resort patron, rode the resort's water taxi and debarked at Shepard's boat. Shepard, still intoxicated and with Vollmar onboard,

got underway and allided with cement pilings. Vollmar was seriously injured and brought suit against the resort for negligence, civil conspiracy, and dram shop liability. The resort moved to dismiss.

First, the district court analyzed Vollmar's maritime negligence claim, which required Vollmar to show a duty owed by the resort to Vollmar, a breach of that duty, an injury, and a causal connection between the breach and injury. The resort did owe a duty of ordinary care to deliver Vollmar safely to her destination and not to put her in danger. But as to the breach element, the court determined that Vollmar failed to allege sufficient facts to show that the resort negligently violated its duty. "There are no allegations that make it plausible to contend that the water taxi operators knew, or should have known, that Shepard would be the person—of the group delivered to the boat—who would operate the boat," the court wrote. Finally, the court held that intervening causes negated any plausible finding of proximate cause: after being dropped off by the water taxi and boarding the boat, Vollmar and other passengers observed Shepard to be in a "conspicuously intoxicated" state but still allowed him to drive the boat.

Next, the court considered the plausibility of Vollmar's maritime civil conspiracy claim. Due to the absence of federal maritime law on civil conspiracy, the court applied Maryland law, which does not recognize civil conspiracy as an independent tort. Instead, Maryland law will hold a defendant liable for torts committed by a co-conspirator within the scope of the conspiracy. According to the court, Vollmar failed to plead facts sufficient to support an allegation that Shepard and the resort agreed to negligently transport her from the resort to Shepard's boat while knowing Shepard was intoxicated.

The court then analyzed Vollmar's claim for maritime dram shop liability. Although federal courts have disagreed about whether there is a maritime claim for dram shop liability, the court held that even if such a claim existed, Vollmar failed to state sufficient facts

to support it. Since the provision and consumption of alcohol in this case occurred entirely on land rather than on the water taxi, the only possible claim for dram shop liability would be under Maryland state law. Yet Maryland law does not recognize dram shop liability.

Finally, the court addressed Vollmar's state law negligence claim. Because this claim was substantively governed by the same elements as her maritime negligence claim, it fared no better than the maritime negligence claim and had to be dismissed.

Illinois Appeals Court: Unexpectedly Shallow Water in a Natural Lake Is an Open and Obvious Danger

Bezanis v. Fox Waterway Agency, 967 N.E.2d 293
(Ill. App. Ct. 2012)

A teenager dived head first from a boat into a shallow area of a lake, about 400 feet from shore, and was rendered quadriplegic when his head struck the lake bottom. He sued the state waterway management agency and the county sheriff having jurisdiction over the lake, claiming that they should have warned of the danger of diving into the water. The trial court dismissed the claim, and the appellate court affirmed, deciding that the danger of shallow water in a natural lake was an open and obvious danger of which the defendants had no duty to warn.

The court relied on several Illinois cases holding that a property owner ordinarily owes no duty to warn of the danger of diving into a natural body of water. Illinois law generally presumes that people will take care to avoid dangers inherent in a natural body of water and will ascertain the depth of water before diving in. While the depth of a natural body of water usually increases farther from shore, one cannot assume that this is always the case. The trial court's dismissal was therefore affirmed.

Maritime Conflict of Laws Analysis Leads to Dismissal of Parental Consortium Claim

Donais v. Green Turtle Bay, Inc., No. 5:10-CV-167-TBR, 2012 WL 399160, 2012 U.S. Dist. LEXIS 14534 (W.D. Ky. Feb. 7, 2012)

A Tennessee boat owner decided to take his boat from Nashville to New Johnsonville, Tennessee, by way of the Cumberland River and Lake Barkley, which is in Kentucky. While on Lake Barkley, the boat hit a submerged object. The owner hired a marina on Lake Barkley to repair the damage. About a month later, the owner returned to the marina to pick up the boat. An explosion and fire erupted moments after he started the boat's engines, and he was killed.

His adult daughter brought a wrongful death action in the Western District of Kentucky against the marina, claiming that the fire was caused by faulty repairs. She included a claim for loss of her father's companionship, love, and support.

Both parties moved for partial summary judgment on this parental consortium claim. The daughter argued for application of Tennessee law, under which an adult child may recover for loss of parental consortium when a parent dies as a result of a tortious act. The marina argued for application of Kentucky law, which does not recognize a claim by an adult child for loss of parental consortium.

This case was subject to admiralty jurisdiction because the injury occurred on navigable waters and the general character of the activity at issue—the repair and maintenance of a vessel used on navigable waters—was significantly related to traditional maritime activity. Applying the maritime conflict of laws factors in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and the Restatement (Second) of Conflict of Laws, the court found that Kentucky had the most significant relationship to the case because the injury and the allegedly faulty repairs took place there. Accordingly, the court dismissed the daughter's claim for loss of parental consortium.

Maritime Law Preempts Louisiana Statute That Barred Recovery for Death of Intoxicated Boater

In re Antill Pipeline Construction Co., 866 F. Supp. 2d 563, 2012 A.M.C. 1091 (E.D. La. 2011), *appeal dismissed*, No. 12-30122 (5th Cir. May 23, 2012)

An apparently intoxicated operator of a recreational fishing vessel died in an allision with a moored barge in Louisiana navigable waters. The barge owner filed a limitation action and then moved for partial summary judgment, arguing that under Louisiana state statute the decedent's intoxication barred his estate from any recovery.

The statute in question—La. Rev. Stat. § 9:2798.4—prohibits recovery for the injury or death of a person operating a motor vehicle, aircraft, watercraft, or vessel while legally intoxicated, so long as the operator is found to be more than 25% negligent due to the intoxication and his negligence is found to be a contributing cause of the accident.

Because this accident happened in territorial waters, the estate's claim against the barge owner was governed by general maritime law, which recognizes a cause of action for the wrongful death of non-seamen killed in territorial waters. A maritime wrongful death claim is subject to the ordinary rule of comparative fault, by which recovery is reduced according to the decedent's percentage of fault but not eliminated unless the decedent was 100% at fault.

The barge owner argued that under *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 1996 A.M.C. 305 (1996), a state statute barring recovery for an intoxicated operator's death could be properly applied in a maritime case. The court noted that *Yamaha* did allow state remedies to supplement the general maritime remedies of non-seamen killed in territorial waters but did not permit state law to control the allocation of liability.

To answer the question, the court applied *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 1996 A.M.C. 2076 (1917), which required the court to evaluate whether the Louisiana statute (1) conflicted with an act of Congress, (2) would work material prejudice to a characteristic feature of general maritime law, or (3) would interfere with the uniformity of general maritime law. If the state statute did any of these things, it would be preempted.

Although the statute did not conflict with a federal statute, it still could not be applied because it would interfere with the way in which fault is apportioned under general maritime law. Barring recovery for the death of someone who was not entirely at fault would undermine the maritime principle of pure comparative fault.

The statute would also interfere with the uniformity of general maritime law, as an accident occurring in Louisiana waters could produce a completely different liability allocation than would a similar accident occurring in some other state's territorial waters. Accordingly, the court held that that the Louisiana statute barring recovery for the death of a vessel operator whose intoxication renders him more than 25% negligent is incompatible with general maritime law and could not be applied here.

MARINAS

Question of Fact Whether Indemnification Clause Survives Expiration of Written Dockage Agreement

In re Gingrich, No. 0901898, 2011 WL 6001347, 2011 U.S. Dist. LEXIS 137268 (D.N.J. Nov. 30, 2011) (unpublished)

This case arose after a fire at a yacht club; the issue was whether the yacht club had a contractual right of indemnity against the owner of the yacht on which the fire started. The yacht owner claimed that there could be no contract of indemnity since the

parties' written dockage agreement had expired two months before the fire, but the court ruled that the issue would be resolved at trial.

In the years before the fire, the yacht owner and the yacht club had entered into four identical agreements for dockage. These agreements included an indemnification clause requiring the yacht owner to indemnify the club against any damage the yacht caused to someone else's property (including damage by fire). The most recent agreement expired two months before the fire.

The club sued the yacht owner to force him to indemnify the club for damages relating to the fire. The owner moved for partial summary judgment, saying that there was no implied contract between him and the club, at least not one that required him to indemnify the club.

The parties submitted conflicting statements about whether a new agreement had been mailed to the yacht owner before the fire. Either way, the yacht owner never signed a new agreement, did not pay a new deposit, and did not speak to the club's staff about continuing to keep his yacht there. However, between the expiration of the old agreement and the time of the fire, the club did help him move the yacht between docks so that a dock could be resurfaced. The club also continued to supply the yacht with electricity, and the owner continued to pay for it. He also manifested an intent to hook his yacht up to the club's winter water supply, and he continued to pay for dockage.

In the circumstances, the court denied the yacht owner's motion because there was a genuine issue of material fact as to whether the written agreement was still in effect. Under maritime law, the court noted, contracts do not need to be written. In addition, contract law generally permits a contract to remain in force even after its formal date of lapse if the parties continue to act as though they are performing under the contract. But maritime law also requires exculpatory or indemnification clauses to be clear and unequivocal.

Considering all the facts, the court held that the contract could have survived past its expiration date. Every prior agreement between the parties included the indemnification clause, neither party ever challenged the inclusion of this clause, and neither party expressed any wish not to be bound by the contract after its lapse. Because the language of the contract had always been explicit and clear in requiring indemnification, a reasonable jury could find that the yacht owner was obligated to indemnify the club.

Absence of Pickup and Pennant Rendered Mooring Defective

Podgurski v. Town of North Hempstead, 824 F. Supp. 2d 358 (E.D.N.Y. 2011)

A boater kept his twin-engine catamaran sailboat at the Town of North Hempstead mooring area in Manhasset Bay. All of the moorings had been installed by a service contractor hired by the Town. After the boater was directed to use a different mooring for the upcoming season, he complained to the contractor that the new mooring was difficult to use, and he asked that a "pickup" and pennant be installed on the mooring. About a week later, the mooring still did not have a pickup or pennant. When the boater attempted to untie his boat from the mooring, the middle finger of his right hand got caught between a carabineer and a shackle and was crushed. The finger was repaired through surgery, but his use of the finger remained impaired, and he would need further medical attention in the future.

The boater filed suit against the contractor and the Town for negligence, and the judge held a bench trial. Applying maritime law, the court found that the boater established by a preponderance of the evidence that his injury was the result of the contractor's negligence. The contractor had a duty to exercise reasonable care when it set up the mooring, and in light of the ease and practice of installing pickups and pennants, it should have installed them on this mooring.

The court declined to impose any liability on the Town, however, because the boater rented the mooring from the contractor, not the Town, which had nothing to do with the installation or maintenance of the mooring.

The court then examined whether the plaintiff himself was negligent. At trial, the plaintiff's own expert stated that the plaintiff's attempt to unfasten his vessel was awkward and that he had put his finger in a poor place. The court apportioned fault equally between the parties, i.e., 50% each.

The court recognized that the plaintiff had sustained a serious injury, and that he would require surgery and would never regain full use of the finger. But the court saw no evidence of lost earnings and little evidence of medical expenses. After reviewing past awards for comparable injuries, the court awarded $125,000 for past pain and suffering, $125,000 for future pain and suffering, and $45,000 for future medical expenses. The award was reduced by 50% to account for the plaintiff's comparative negligence, resulting in a net award of $147,500.

SALVAGE

Citing Easy Salvage Operation, Arbitrators Reduce Contractual Salvage Award

Atlantic Coast Marine Group, Inc. v. Williford, No. 11-727 (BoatU.S.) (Koster, McAlpin, & Welte, arbs.)

While operating near Morehead City, North Carolina, shortly after midnight, the 32-foot Regulator motor yacht SOUNDMATE ran aground in soft sand. The winds were approximately 15 to 25 knots and the seas were 2 to 3 feet. Unable to free their vessel, the operators called for assistance. A salvage boat arrived about an hour later, and although no precise terms were discussed, it was

understood that the salvor's services would be treated as salvage, not as towage. The salvor passed a line to the vessel, pulled her off the sand, and towed her to Morehead City; the entire operation took about 15 to 25 minutes.

The salvor then presented a form of salvage contract, and both parties signed it. The contract provided that the vessel would pay the salvor 20 percent of the salved value, or about $20,000 based on a salved value of $100,000.

The Boat U.S. salvage panel noted that a salvage contract typically enjoys presumptive acceptance, but that the presumption can be overcome where the payment called for by the contract "is in an excessive degree too large or too small for the services actually rendered." The panel then found that the $20,000 price term bore no reasonable relationship to the salvage operation, which was a simple tow of an otherwise sound vessel from a soft grounding in moderate seas and weather. The contractual award was therefore subject to modification. After evaluating the usual factors for determining a reasonable salvage award, the panel set the salvage award at $9,500.

WARRANTY

Bernoulli's Principle, Not Dealer, Was to Blame for Wet Ride

Paulsen v. Spellman's Marina, LLC, 813 N.W.2d 247
(Wis. Ct. App. 2012) (unpublished)

A man purchased an Alumacraft powerboat and bought a canvas canopy and side curtains as add-ons, all from the same dealer. Later he decided to deploy the canopy and curtains while the boat was underway. With the canopy and curtains deployed, spray from the wake would blow over the transom and into the passenger area. When the canopy and curtains were not deployed, this problem did not occur. The dealer offered to install a stern curtain and make

other adjustments to try to correct the problem, but the man rejected the offer and sued the dealer for breach of warranty and breach of contract. The trial court granted summary judgment to the dealer, and the appellate court affirmed.

The dealer submitted multiple uncontradicted affidavits showing that the canvas coverings were meant to protect boat occupants from sun and rain but were not meant to be deployed when the boat was underway. Deploying them underway created a low pressure area near the stern, drawing spray and exhaust fumes into the cockpit—a phenomenon known as the "station wagon" effect. The owner's manual for the boat also warned against using canvas coverings while underway due to the risk of drawing carbon monoxide into the passenger area. Moreover, there was no evidence that the dealer ever represented or warranted that the coverings were suitable for use underway.

Based on this record—and the fact that the water spray did not occur when the boat was operated without the coverings—the appellate court agreed that the problem lay not with the boat itself but rather with the owner's imprudent decision to use the coverings when underway. Summary judgment for the dealer was affirmed.

PRODUCT LIABILITY

Plaintiff's Expert Allowed to Testify that Outboard Engine was Defective Because it Could Run Without a Kill Switch Lanyard

McGarrigle v. Mercury Marine, 838 F. Supp. 2d 282 (D.N.J. 2011)

While operating a 12-foot aluminum fishing boat equipped with a 15-horsepower Mercury Marine outboard engine, the plaintiff was ejected overboard. The boat began circling around him, getting closer to him with every circle. As he attempted to climb back aboard, the boat ran over him, the propeller striking his face and neck. The marine patrol officer investigating the accident noted that the water

was "choppy" and "rough" for such a small vessel, but no small craft advisory had been issued that day. The officer also opined that the plaintiff was operating the boat at an excessive speed, although the officer had no personal knowledge of that fact.

The engine should have been fitted with a kill switch lanyard, which stops the engine in the event the operator is thrown overboard. Unlike some Mercury engines, this engine model could run without the operator having to insert a lanyard. There were no warnings on the engine advising the operator to use a lanyard or to read the owner's manual.

When the plaintiff's father purchased the engine, he received an owner's manual describing the function and purpose of a kill switch lanyard and the dangers of failing to use one. But neither he nor his son read the owner's manual, and he did not receive a lanyard with his purchase.

Plaintiff brought a product liability action against Mercury, alleging that the engine was defective because it could be operated without a kill switch lanyard and that Mercury failed to adequately warn of the danger of operating the engine without a lanyard. In its opinion, the court decided three issues: (1) whether the plaintiff's expert witness would be permitted to testify that the engine was defective, (2) whether Mercury could introduce evidence of the plaintiff's operating the boat at high speed in choppy seas and his trying to climb back aboard, and (3) whether Mercury could introduce evidence that the plaintiff and his father never read the owner's manual.

Plaintiff's Expert

Mercury argued that the plaintiff's expert had no education, training, or employment experience with this particular type of engine. In addition, Mercury alleged that his testimony was not reliable because it was based on (1) the American Society of Testing and

Materials (ASTM) F 1166-07 standard and (2) the U.S. Coast Guard's Navigation and Vessel Inspection Circular No. 4-89 regarding the application of human factors engineering to the design, construction, overhaul, and maintenance of vessels. In Mercury's view, neither the ASTM nor the 4-89 Circular applied to recreational boats.

As to the witness's qualifications, the court held that his experience with safety features used on larger commercial vessels was sufficient to qualify him as an expert in this case. As to reliability, the court stated that Mercury's challenge to the expert's "reliance on the ASTM F 1166-07 is more a disagreement in methods than a showing of unreliability" and that the ASTM standard could be applied by analogy to recreational vessels. But the court agreed with Mercury that the witness could not give testimony based on the Coast Guard's 4-89 Circular because the plaintiff failed to show that it could be applied to smaller crafts. Finally, the court deemed the expert's opinion—that the engine was defectively designed because it allowed the operator to start and operate it without using the lanyard—relevant and likely to assist the jury because the expert had examined the outboard engine involved in this case, reviewed certain regulations and codes, and reviewed the owner's manuals published by Mercury as well as those of its competitors.

Plaintiff's Comparative Negligence

Mercury sought to introduce evidence that the accident was caused by the plaintiff's decision to operate the boat in choppy waters at high speed and by his attempt to climb back aboard when the boat was circling around him. Although under New Jersey law the conduct of a plaintiff is generally not relevant in determining whether a product was defectively designed, a plaintiff's conduct may be relevant to the issue of what caused the injury. Here, the court would allow Mercury to present evidence of the manner in which the plaintiff operated the boat and of his attempt to climb back aboard, but only on the issue of proximate cause, not as evidence of comparative negligence.

Plaintiff's Failure to Read Manual

Mercury knew that some operators do not read the manual before operating their engines. Under New Jersey law, in applying strict liability in tort for design defects, manufacturers cannot escape liability on grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable. Here, since the father and son's failure to read the owner's manual was foreseeable, Mercury would not be permitted to introduce evidence on that subject.

Court Allows Action Against Houseboat Manufacturer for Too Steep Stairway

Donlon v. Gluck Group, LLC, No. 0905379 (JEI/KMW), 2011 WL 6020574, 2011 U.S. Dist. LEXIS 138662 (D.N.J. Dec. 2, 2011)

While walking aboard a 49-foot Aqua Cruiser houseboat that she was considering buying, the plaintiff fell down a flight of stairs from the sundeck to the main deck. The plaintiff had previously ascended and descended the stairway without incident, though she expressed concern about how steep the steps were. She later climbed the stairway again, and on her way back down she slipped on the top step and fell down the entire stairway. She lost all memory of the incident.

Claiming that the stairs were steeper than allowed by ASTM standards and that the stairs' handrail was loose, she sued several defendants, including the houseboat owner, the houseboat manufacturer, and the selling broker who accompanied her on the tour. The defendants moved for summary judgment.

As an initial matter, the court noted that maritime law could have applied but that the plaintiff had failed to plead admiralty jurisdiction. Without an affirmative statement pleading admiralty, the court chose to apply land-based law, here the law of New Jersey.

As to the claim against the owner, the court held that the owner did have a duty to conduct a reasonable inspection of the houseboat. A reasonable inspection, the court held, would not have turned up the stairs' deviation from ASTM standards, but it would have revealed the loose handrail. Failure to inspect the boat and discover the loose handrail therefore breached that duty. But because the plaintiff had no memory of the fall, and there was no evidence that the loose handrail contributed to the accident, the plaintiff could not show causation and therefore could not maintain a negligence action.

As for the claim against the broker, there was a genuine issue of material fact as to whether the broker should have discovered the loose handrail, but here again there was no evidence that the handrail caused the accident. Absent such evidence, the claims against the owner and the broker had to be dismissed.

The court next addressed the plaintiff's design defect claim against the houseboat manufacturer. In New Jersey, a plaintiff claiming a design defect must prove that: (1) there was a defect in the product, (2) the defect existed when the product left the defendant's control, (3) the defect caused an injury to a reasonably foreseeable user, and (4) a safer alternative design was available.

Regarding the first element—defect—the plaintiff's expert noted that the stairs' dimensions, nosing, and angle of inclination did not meet ASTM standards. The manufacturer's expert countered that the stairs could nevertheless be descended safely if the user faced the stairs, as if descending a ladder. In the circumstances, the court held that a reasonable jury could find that the stairs were defective.

Regarding the second element, no one argued that the stairs were different than they were at the time of construction. A jury could find this element satisfied.

As to the third element, no one disputed that the plaintiff fell on the stairs. In addition, because there was no warning anywhere advising a user to descend the stairs backwards, it was reasonably foreseeable that a person might chose to descend the step while facing forward. The court held that a jury could find the third element was satisfied.

Finally, by relying on the ASTM standards, the plaintiff presented sufficient evidence to support the fourth element. Accordingly, she could present her design defect claim to a jury.

GOVERNMENT LIABILITY

Coast Guard Could not be Sued for Allowing Vessel to Operate with Noncompliant Navigation Light

In re Steinle, 835 F. Supp. 2d 437 (N.D. Ohio 2011)

One night on Sandusky Bay, Lake Erie, a Coast Guard crew spotted a 41-foot Formula leaving a dock without its masthead or stern lights illuminated. The Coast Guard crew boarded the Formula and decided that the Formula could proceed on its brief voyage using a 360-degree light as a temporary replacement for the masthead and stern lights. (The sidelights were working properly.) While en route to a nearby marina, the Formula collided with a Sea Ray. One passenger on the Sea Ray was ejected and drowned and another was seriously injured.

The Sea Ray passengers sued the federal government, claiming that the Coast Guard was negligent in allowing the Formula to operate without proper navigation lights. The government moved to dismiss for lack of subject matter jurisdiction.

The main issue was whether the Coast Guard exercised discretion in its handling of the Formula's lighting violations such

that the court lacked subject matter jurisdiction under the Suits in Admiralty Act, 46 U.S.C. §§ 30901 *et seq*. Courts apply a two part test to determine whether a particular claim falls under the discretionary function exception: (1) whether the challenged conduct involved a true discretionary choice, and (2) whether it was the kind of conduct that the discretionary function exception was designed to shield.

Here the plaintiffs argued that the Inland Navigation Rules, 33 C.F.R. §§ 83.01 *et seq*., left the Coast Guard no alternative but to act. Yet the court decided that the Coast Guard has discretion—rather than an obligation—to enforce the Inland Navigation Rules. By statute, any decision to direct a noncompliant vessel to return to the dock is committed to "the judgment of the official." 46 U.S.C. § 4308. The plaintiffs were unable to point to any statute, regulation, or policy that would have required the Coast Guard to order the vessel back to the dock or to ensure that its lights were in all respects compliant.

A court should also consider whether the government's conduct implicates public policy considerations. Here the conduct did, because the Coast Guard must balance considerations of safety and economics in deciding how best to deal with a noncompliant vessel.

Accordingly, the court dismissed the case.

REGULATORY DEVELOPMENTS

Maryland Proposes to Regulate VOC Emissions from Pleasure Craft Coating

Reprinted from Maryland's Proposed Regulations on Volatile Organic Compounds Emissions, ***Boatinglaw.com, www.boatinglaw.com/maritimearticles/MDGeneralAssembly/2012/-mdeVOCs2012.html***

The State of Maryland's Department of the Environment (MDE) has proposed new regulations to govern the emission of volatile organic compounds (VOCs) from pleasure craft coating operations. VOCs, for the purposes of this regulation, are chemicals commonly found in many products used in boat construction and maintenance, such as bottom paints and gelcoats. The proposed regulations (Md.Code Regs. § 26.11.19.27-1) will affect many marinas and private boat owners throughout the state by making some commonly used paints and coatings obsolete, and by imposing greater potential liability upon the yards where coating operations are performed.

Maryland is following a recent trend of states adopting stricter regulation of VOC emissions. The EPA initially promulgates the emission standards; this lowers the amount of VOCs that are permitted in various coatings. States can then adopt more stringent standards, as Maryland is endeavoring to do. Four categories of coatings will be affected by the proposed regulations: finish primer/surfacer; antifouling sealer/tiecoat; other substrate antifoulant; and extreme high gloss.

The proposed regulations affect pleasure craft and fiberglass boat coating operations at premises with actual VOC emissions of more than 15 pounds per day from coating operations (such as bottom painting or gelcoat spraying). Once a premises has exceeded the 15 pounds per day threshold, only products that satisfy the new, lower limits can be used. These thresholds are very low and will affect almost every marina that allows work to be done on vessels while they are on the hard. As an example, the new proposed limits for antifoulant coatings are

3.3 pounds of VOCs per gallon. Many bottom paints have VOC pounds-per-gallon ratios well in excess of 4 pounds of VOCs per gallon. After the proposed regulations take effect, many common products will no longer be permissible, and, if they are used, the marina could be subject to liability.

The language of the proposed regulations raises some questions. "Premises" is never clearly defined. Does the entire marina/boatyard constitute a "premises," or is the definition limited to just the actual painting and/or spraying operation itself? If a boatyard allows subcontractors to paint or spray, must the yard aggregate their collective emissions? A business runs the risk of coming to a different interpretation than the MDE, which could result in fines or other liability.

These rules will likely result in additional record keeping requirements for small businesses. Because the threshold for applicability has been lowered, more business will be required to maintain statistics concerning the monthly total volume of VOCs used, and to make those records available for inspection by the MDE.

Another potential issue concerns the ability of boat owners to perform work on their own vessels while they are stored on the hard. Smaller marinas that perform only a limited amount of work may prohibit owners from working on their own vessels so as not to rise above the VOC emissions threshold. Because averages are calculated monthly, a yard that performs only limited painting and coating operations may simply prohibit owners from working on their own vessels to "save" the VOC emissions for their own

workers. Alternatively, yards may just prohibit boat owners from using the higher VOC paint.

Fortunately, these will likely be short term—rather than long term—issues. Coatings, particularly antifoulants, that meet the proposed standards do exist. Manufacturers are likely to shift toward making and marketing products that satisfy these stricter standards, especially as more states move toward more stringent regulations. Until this happens, however, boat owners and marinas alike will have one more regulatory hoop to jump through.

[Thanks to Todd Lochner and Josh Parks of Annapolis for submitting this article]

COMMITTEE ON SALVAGE

Editor: Jason R. Harris[1]

Spring 2012

RECENT DEVELOPMENTS IN SALVAGE LAW

Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 2011 A.M.C. 2409 (11th Cir. 2011).

Held: Court lacks subject matter jurisdiction over the remnants and cargo of sunken NUESTRA SENORA DE LAS MERCEDES and releases her to Spanish authorities.[2]

This action continues the dispute over a shipwreck believed to be the Spanish Frigate NUESTRA SENORA DE LAS MERCEDES ("MERCEDES") that exploded and sank in 1804 during naval combat in international waters off the Straits of Gibraltar. On appeal, the issues before the court were (1) whether the discovered shipwreck is the MERCEDES; and, if so, (2) whether the Foreign Services Immunity Act (28 USC §1602, *et seq*.) ("FSIA") precludes the court's jurisdiction over the *res*; (3) whether the ship's cargo is severable from the ship itself for *res* purposes; and (4) whether a U.S. District Court has the power to release the *res* into the custody of Spain.

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[1] Walsh and Harris, LLP, 636 Court Street, Jacksonville, NC 28540 (P.O. Box 1398, Jacksonville, NC 28541), Telephone: (910) 347-0161, Facsimile: (910) 347-0164, Email: JRHarris@welchharris.com. Mr. Harris would like to thank the MLA's Salvage Committee and the MLA's Young Lawyers Committee (which kindly offered the high quality (and affordable!) assistance of several of its members who reviewd cases and prepared several of the written summaries available herein).

[2] This update was prepared by Daniel J. Cragg and Vince Reuter, attorneys at Eckland and Blando, LLP, 1020 Lumber Exchange, 10 South Fifth Street, Minneapolis, MN 55402, Telephone: (612) 236-0160, Email: dcragg@EcklandBlando.com.

First, the court held that the historical evidence strongly suggests that the remnants of the shipwrecked vessel had been the MERCEDES. The court then interpreted the FSIA to determine whether an exception to sovereign immunity applied which would have given the district court jurisdiction over the *res*. The salvor argued that the MERCEDES had been engaging in commercial activity which triggered an exception in the FSIA by virtue of its incorporation of another treaty. The court rejected this argument, however, because, although the MERCEDES had been carrying gold specie to Spain from South America, its purpose was to carry it for the sovereign and not for general commerce. Moreover, the MERCEDES was not an ordinary commercial vessel, but a heavily armed frigate commanded by naval officers and carrying marines.

The salvor next tried to separate the vessel from the gold specie and other cargo it carried. The court rejected this argument, however, on the grounds that (1) other statutes and treaties for shipwrecks have always treated cargo as part of the vessel, and (2) international comity suggests the cargo and the vessel are treated as the same *res*.

Lastly, the salvor argued that, because the court found that it did not have jurisdiction over the *res*, it cannot order its "transfer" to Spain. The court rejected this argument on the basis that the district court was not "transferring" property at all, but merely acting as the custodian of a *res* that belonged to Spain. Moreover, because the salvor was still in control of parts of the *res*, it acted as a substitute custodian, and, therefore, must release the *res* to its rightful owner.

Navigea, Ltd. v. Kelvin-Hughes NDR 2002 Voyage Data Recorder Prop. of the M/V Explorer, No. C11-0541 JLR, 2011 WL 2551287 (W.D. Wash. June 27, 2011).

Held: Salvor cannot disseminate contents of voyage data recorder.[3]

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[3] This summary was prepared by Jessica Link Martyn, attorney with Troutman Sanders, LLP, 150 West Main Street, Suite 1600, Norfolk, VA 23510, Telephone: (757) 687-7706, Email: Jessica.Martyn@troutmansanders.com.

The plaintiff recovered a voyage data recorder (VDR) from the deck of the M/V EXPLORER in approximately 4,000 feet of Antarctic waters. Plaintiff filed a complaint for the arrest of the VDR, *in rem*, a salvage award, and a claim under the doctrine of finds for title to the VDR and its electronic data. The issue before the court is the plaintiff's motion for appointment of a qualified third-party to download electronic data recorded on the VDR. Though the plaintiff never explained its interest in it, it was apparent to the court that the plaintiff intended to publicly release the data. The vessel owner did not oppose *extraction* of the data, but objected to *dissemination* of the data.

The court found that, although the plaintiff may have a lien on the VDR as a result of its salvage claim, the salvage claim provides no basis for allowing the plaintiff to obtain and disseminate the data contained in the VDR in contravention of the VDR's owner's wishes. The court further found nothing in the nature of the plaintiff's law of finds claim that provided a basis for the court to permit the plaintiff to extract electronic data from the VDR. The court was also concerned about jurisdictional issues involved in the plaintiff sending the VDR to a third party, not subject to the court's jurisdiction. The court denied the plaintiff's motion, but due to the potential fragility of the data remaining on the VDR, the court encouraged the parties to resolve the issues surrounding extraction of the data.

Williamson v. Recovery Ltd. P'ship, No. 2:06-cv-292, 2011 WL 2181813 (S.D. Ohio. June 3, 2011).

Held: The two year statute of limitations for salvage claims provided for in 46 U.S.C. 80107(c) applies to claims by and between a salvor and the res and in personam claims against the party that benefited from the salvage (pure salvage claims), but does not apply to a contract to aid and assist a salvor in making a salvage.[4]

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[4] This update was prepared by Daniel J. Cragg and Vince Reuter, attorneys at Eckland and Blando, LLP, 1020 Lumber Exchange, 10 South Fifth Street, Minneapolis, MN 55402, Telephone: (612) 236-0160, Email: dcragg@EcklandBlando.com.

This case arises out of the salvage of the S.S. CENTRAL AMERICA, a steamship bound for New York City from Panama, which sank several hundred miles off the coast of South Carolina during a hurricane in 1857. Approximately 130 years later, a group led by the defendant located the CENTRAL AMERICA and was able to salvage most of its precious cargo. Litigation over the initial salvage lasted for over a decade, but was finally resolved in the year 2000.

The plaintiffs entered into contracts with the defendant to aid in the salvage, which required certain conditions to be met, certain services to be performed, and a promise of confidentiality. In return, the plaintiffs were promised a (small) percentage of the net recovery of the CENTRAL AMERICA'S treasure. A dispute arose between the parties which was determined to be maritime in nature.

The defendant moved for summary judgment on the grounds, *inter alia*, that the two year statute of limitations for salvage claims found at 46 U.S.C. 80107(c) had lapsed decades ago. The court held that this statute was only applicable to quasi-contractual "pure" salvage claims and had no applicability to an express contract between parties to undertake a salvage operation together. The court also noted that the CENTRAL AMERICA had not been positively identified until after the two year period would have expired, and that the treasure was not sold until many years after that. If 46 U.S.C. 80107(c) did apply, the plaintiffs would have been required to file suit before the defendant even breached because no net profit would have accrued by that time.

O'Hagan v. M&T Marine Group, LLC, 424 Fed. Appx. (11th Cir. 2011).

Held: Shares of a salvage award due to a non-suing co-salvor are credited to the owner, not the suing salvor.

On the morning of Hurricane Wilma, five men rendered assistance to three yachts with a collective pre-casualty value

of $1,950,000.00. The post-salvage repairs to the vessels cost $12,000.00. Both the district court and Eleventh Circuit approved the use of the pre-casualty book values for the yachts, less the costs of repairs after salvage as a permissible method for calculating post-salvage, pre-repair value. Two of the five men made a claim for salvage. The district court awarded $290,700.00, being 15% of the post-salvage value, plus pre-judgment interest.

The court relied on *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir. 1983) and *J.M. Guffey Petroleum Co. v. Borison*, 21 F. 594 (5th Cir. 1914), in concluding that the non-claimant salvors' (two of which apparently worked for one of the claimants) share of the salvage inured to the benefit of the owner of the salvaged vessels and not to the claimant-salvors. In discussing the voluntariness element of salvage, the court distinguished between a pre-existing duty owed between owner and salvor (which negates salvage) and a co-salvor's pre-existing duty to his co-salvor employer, neither of which employee nor employer had a pre-existing duty to the owner (in which case they each have a claim for salvage).

H.R.M., Inc. d/b/a Safe Sea v. S/V ILENE, SMA
(Arb. At N.Y. 2011).

Held: 5% salvage award for simple tow despite poor weather conditions; salvor to reimburse owner's insurer a portion of interim salvage fee.

En route from New York to Rhode Island, the S/V ILENE (operated by an experienced yachtsman with U.S. Navy Reserve credentials who was a retired attorney from New York) diverted to Point Judith Pond to wait-out stormy weather conditions prevailing outside on Long Island Sound. She drifted outside of the marked channel and touched bottom. A written salvage contract was signed, the vessel was towed off the sandbank and moored to a nearby marina. The owner's insurer later paid the claimant an interim salvage fee of $27,840.00.

The claimant sought a salvage award of $43,750.00, plus a 10% equitable uplift (over $2,000.00), and attorney's fees of nearly $6,000.00, plus pre-judgment interest, and arbitrators fees, for what the claimant "vividly" described as a salvage operation in conditions that were "extremely dangerous with the yacht aground in shallow waters in a falling ebb tide at night, with limited visibility, extremely violent winds threatening to take the ILENE into a shore-side rock wall, posing potentially disastrous consequences" likening the area to the "Cape Horn of the North".

The arbitrators acknowledged that the operation took place in "severe weather condition, an ebbing tide and in growing darkness." However, the yacht was just outside the marked channel, on sandy bottom, was not pounding up-and-down, and apparently could never have reached or been driven to a rock wall referenced by the claimant. This was an "almost painlessly quick extraction from the grounding – one line, one pull-effort by one single manned boat" and "did not ... amount to the salvage operation under difficult and challenging condition [claimant] has painted." The arbitrators awarded 5%, resulting in the claimant having to reimburse the insurer. Each party was held responsible for its own attorneys' fees and 70% of the arbitrators fees were assessed to the claimant.

Atl. Coast Marine Group, Inc. d/b/a TowBoatUS Beaufort v. Stephen C. Williford, BoatUS
Salvage Arbitration Case #11-0727 (November 9, 2011).

Held: Vessel owner escapes written agreement's salvage price term of 20% for "relatively simple salvage operation".

Following a tow of a yacht off of Atlantic Beach, North Carolina, at night, the claimant and vessel operator executed a written agreement including a 20% award provision. The post-casualty value was considered to be roughly $85,000.00-$100,000.00. The

arbitrators relied on Article 7 of SALCON 89[5] and *The Elfidra*[6] in rendering a $9,500.00 award (significantly less than the 20% appearing in the written agreement) with each party bearing their own attorneys' fees and arbitration costs.

Reliable Salvage and Towing, Inc. v. *35' SEA RAY*, No. 2:09-cv-329-F&M-99SPC, 2011 WL 2038576 (M.D. Fla. May 20, 2011).

Held: Court uses its equitable powers to grant an in personam award greater than the owner's bond.[7]

This case is part of a series of disputes between the above-reference parties (see our Spring 2011 issue of RECENT DEVELOPMENTS IN SALVAGE LAW). On January 19, 2011, the plaintiff won a salvage judgment of $14,000.00, plus attorney's fees. Soon after this judgment was entered, the owner brought a Rule 52(b) motion arguing, in part, that the judgment was deficient because the $14,000.00 award was in excess of the his $9,500.00 bond.

Although the defendant had support for his position, the court noted that the law is changing and that courts may now use their equitable powers to award the most appropriate amount. Accordingly, the court reasoned that the defendant's bond merely covered the plaintiff's salvage claim of $7,523.10 while the *in personam* judgment against the defendant for $14,000.00 was

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[5] Annulment and modification of contracts. A contract or any terms thereof may be annulled or modified if: (a) The contract has been entered into under undue influence of the influence of danger and its terms are inequitable; or (b) The payment under that contract is in an excessive degree too large or too small for the services actually rendered.

[6] 172 U.S. 186 (1898); regarding fixed price salvage agreements: "[i]f when the salvage contract is made the price agreed to be paid appears to be just and reasonable, in view of the value of the property at stake, the danger from which it is to be rescued, the risk to the salvors and the salving property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, this sum ought not to be reduced by an unexpected success in accomplishing the work unless the compensation for the work actually done be grossly exorbitant".

[7] This update was prepared by Daniel J. Cragg and Vince Reuter, attorneys at Eckland and Blando, LLP, 1020 Lumber Exchange, 10 South Fifth Street, Minneapolis, MN 55402, Telephone: (612) 236-0160, Email: dcragg@EcklandBlando.com.

based on the salvage work actually performed. The court denied defendant's effort to reduce the judgment award. In a subsequent ruling (2011 WL 2418891), the court allowed attorneys' fees for the owner's willfully, persistently and frivolously refusing to pay for the services rendered.

N. E. Taylor Boatworks, Inc. v. M/V Sir Winston, No. 8:10-cv-01844-T-33EAJ, 2011 WL 5358701 (M.D. Fla. Nov. 2, 2011).

Held: Salvor survives summary judgment and may argue for both tow contract and salvage in same operation when conditions worsen during operation.[8]

The court denied defendants' motion for summary judgment against the salvors, who sought a pure salvage award in addition to the pump and tow fees anticipated by contract.

A dinner cruise vessel ran aground and the vessel owner requested that the salvor "pump and tow" the vessel from the sandbar. At the time the work order was signed, both parties believed that pumping and towing were the only services necessary to free the vessel.

The salvor alleges that, although the parties initially contracted for pumping and towing, by the time the plaintiff returned to the vessel, the vessel's condition and the weather had worsened to the extent that the vessel was in imminent marine peril and in danger of becoming a total loss. Due to the salvor's additional efforts, beyond pumping and towing the vessel, it sought a salvage award in addition to the pump and tow fee anticipated by the contract.

The defendants challenge the plaintiff's entitlement to a voluntary salvage award on the basis that the plaintiff had a

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[8] This summary was prepared by Jessica Link Martyn, attorney with Troutman Sanders, LLP, 150 West Main Street, Suite 1600, Norfolk, VA 23510, Telephone: (757) 687-7706, Email: Jessica.Martyn@troutmansanders.com.

contractual duty to render assistance. The court found that a fact finder could reasonably find (1) that a mutual mistake of fact existed as to the condition of the vessel during the formation of the contract, such that no valid contract existed and (2) that weather conditions worsened appreciably enough to transform a pump and tow contract into a salvage venture. Because these are genuine issues of material fact, the court denied summary judgment for defendants.

Turner v. Neptune Towing & Recovery, Inc., No. 8:09-cv-1071-T-27AEP 2011 WL 4542265 (M.D. Fla. Sept. 23, 2011).

Held: Maritime lien for salvage available to tower of abandoned vessel at a dock when pump out required before towing.[9]

Plaintiff vessel owner entered into a dockage agreement, failed to pay the agreed fees, then effectively abandoned the vessel. The court found that the dock owner had the right to have her towed. The dock owner called the defendant, advised that the vessel had been abandoned and authorized the defendant to tow her. When the defendant arrived to tow the vessel, it found that the vessel had long been neglected and was not seaworthy. The defendant voluntarily pumped the vessel out and safely and successfully towed her to a marina. Though the defendant was not entitled to a lien for necessaries, it was entitled to a salvage lien for $3,000.00, considering the efforts required to pump the vessel out and safely tow the vessel to a marina.

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[9] This summary was prepared by Jessica Link Martyn, attorney with Troutman Sanders, LLP, 150 West Main Street, Suite 1600, Norfolk, VA 23510, Telephone: (757) 687-7706, Email: Jessica.Martyn@troutmansanders.com.

N. Assurance Co. v. Keefe, 845 F. Supp. 2d 406, 2012 A.M.C. 958 (D. Mass. 2012).

Held: Removal of passengers during a salvage operation does not cure insured's breach of warranty of maximum passenger capacity.[10]

Defendant, Daniel J. Keefe, Jr., the owner of the S/Y WILHELMINA (the "Vessel"), maintained a recreational yacht insurance policy containing a Chartering Coverage Endorsement, which limited the amount of passengers aboard for a charter to a maximum of six passengers. Despite this endorsement defendant chartered the Vessel with eighteen passengers aboard. During the charter, the Vessel grounded on a shoal and became immoveable. After the grounding, all passengers were removed by another vessel without injury; salvage operations began and after the tide receded as a result of the passengers' debarkation, the Vessel laid over and the bottom of the Vessel was punctured.

The insurer of the Vessel filed this action seeking a declaratory judgment that it is not obligated to indemnify defendant for any costs, expenses or damages relating to the grounding of the Vessel as a result of a breach of the warranty in the Chartering Coverage Endorsement, which Northern Assurance claimed voided coverage under the policy. Defendant counterclaimed alleging, among others, declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, and Massachusetts state law bad faith claims.

In this matter, the court considered the interplay between federal maritime law and Massachusetts state law in marine insurance cases alleging breach of warranty. Though the court found federal maritime law controlling, it noted that the same result would be reached under Massachusetts law.

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[10] This summary was prepared by Samuel P. Blatchley, attorney at Pierce Atwood LLP, 10 Weybosset Street, #400, Providence, RI 02903, Telephone: (401) 588-5113, Email: sblatchley@pierceatwood.com.

On the issue of whether the policy provisions are revived after the breach of the warranty is cured (*i.e.*, passengers were removed from the Vessel prior to the destruction of the hull and less than six passengers were on the Vessel when the hull was punctured), the court held that under Massachusetts law, policy coverage is not revived after a warranty breach unless the risk to the insurer at the same level as it was prior to the breach.

COMMITTEE ON YOUNG LAWYERS

Chair: Carolyn Elizabeth Bundy

Volume 2012-1, April 2012

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program is entering its second full year and continues to blossom. The purpose of the program is to assign one YLC member to each of the MLA's standing committees to serve as a liaison. The obvious goal of this program is to increase the flow of communication between the standing committees and the YLC, which hopefully will lead to opportunities for our members in those standing committees and allow for the mobilization of our membership to assist in projects being undertaken by the standing committees. Additionally, liaisons will provide a brief status report at each YLC Spring meeting pertaining to the work of that particular standing committee.

A chart identifying the appointed liaison volunteers is posted on our page of the MLA website for everyone's reference. Let this serve as a reminder to our liaisons that this committee is ready to work. Spread the word to your respective committees and please call on us if we can be of service.

Additionally, the MLA has recently established a new Bankruptcy Committee with John Bradley of New York as the first Chair. If you would be interested in volunteering to serve as the YLC Liaison to this new committee, please e-mail **Betsy Bundy**. Any other questions regarding the YLC Liaison Program or a request for volunteers can likewise be directed to Betsy at bundy@freehill.com.

ONGOING PROJECTS

MLA Resolutions Project - The Secretary of the MLA, Hal Watson, requested the assistance of the Committee for a project to

research and compile all of the Resolutions passed by the Association since its formation in 1899. This project was spearheaded by former Chair **Alex Giles** and has since been taken over by Vice Chair **Norman Stockman**. Our members have been tirelessly working to finalize this project, which is nearing completion. We would like to thank the following individuals for their contributions thus far: **Patrick Ward, Joseph Peck, Tara Voss, Patricia O'Neill, and Luis Raven**. A few new volunteers may be needed for the final completion of this project. Anyone available to assist should contact Norman via e-mail at nstockman@handarendall.com.

Marine Insurance Definition Project - Thanks to our YLC Liaison to the Committee on Marine Insurance and General Average, **Stephanie Espinoza**, the YLC has been asked to assist on a project to analyze the definition of Ocean Marine Insurance in U.S. jurisprudence and regulation, and create a proposal for a uniform definition. This project will build on the initial research of Graydon Staring, former president of the MLA, and will hopefully provide a comprehensive analysis that can be used in practice. Work on the project began last year and continues to move forward. The committee expects that the project will be completed by the fall meeting. We would like to thank the following YLC members who have worked on the project thus far: **Jonathan Wright, Scott Sheffler,** and **Abby Nitka**.

RECENT PROJECTS

We have had an onslaught of recent requests for volunteers to assist in drafting various committee newsletters, primarily by summarizing recent and relevant decisions. The response from our members that are ready, willing, and able to volunteer has been overwhelming.

At the request of **Jason Harris**, Vice Chair of the Salvage Committee, and led by YLC committee liaison **Scott Sheffler**, **Jessica Martyn, Sam Blatchley,** and **Daniel Cragg,** have assisted in preparing the Salvage Committee's latest edition of the newsletter

"Recent Developments in Salvage Law," which should be completed at the end of this month.

At the request of **Dennis Minichello**, the Chair of the Marine Ecology and Maritime Criminal Law Committee, several volunteers including **Christian Packard**, **David Garfinkel**, **Jude Smith**, **Guy Manchuck**, and **Vince Reuter** assisted by summarizing cases for publication in this Spring's committee newsletter.

At the request of Dan Wooster, Editor of "BOATING BRIEFS," the Recreational Boating Committee newsletter, volunteers **Christian Packard**, **Patrick Ward**, and **David Garfinkel** assisted in summarizing recent cases for inclusion in the next edition.

CALL FOR PROJECTS

To the Standing Committees: Please let us know how we can help with your projects. If you have projects in need of research or have writing opportunities that are well suited for younger lawyers, please keep our committee in mind. Additionally, we can usually find a YLC member to assist with staffing your meeting (handling CLE paperwork, sign-in sheets, handouts, and assisting with presentation set up, etc.) if and when the need arises.

TABLE OF CASES