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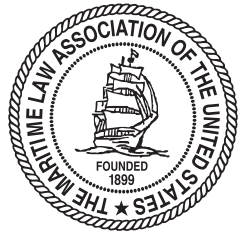

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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

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 Meeting in New York in May 2013. We are very pleased with the number of submissions and the breadth of the topics discussed.

In accordance with our practice of honoring members who have materially advanced the work of the Association, this issue of the MLA Report contains remembrances of Philip A. Berns of San Francisco, who passed away on October 5, 2013, and George F. Chandler III of Houston, who passed away on May 23, 2013.

Copies of the MLA Report are now published electronically on the Association's website. Readers will note that the editors of several newsletters have provided "links," indicated by underscoring of the text or different color fonts in the electronic version, which will permit other electronic documents to be accessed through the website. These links are particularly valuable, for example, in following up on the regulatory and criminal enforcement proceedings reported by the *Bilge & Barratry* newsletter of the Committee on Marine Ecology and Maritime Criminal Law.

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 Clyde & Co. US LLP in New York, Patrick J.R. Ward of Hand Arendall LLC in Mobile; and Amanda Amendola of Holland & Knight in Boston. We appreciate their help. However, we remain responsible for any errors or ambiguities that may have escaped their view. We also thank Kirby Aarsheim, Esq. of Clinton & Muzyka, P.C., in Boston for her legal research assistance in the preparation of the Fisheries Case Briefs and regret the inadvertent deletion of a footnote to that effect at the start of that document.

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

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

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Philip A. Berns

Phil Berns, our friend, colleague, and former MLA Membership Secretary, passed away on October 5th at his home near Las Vegas. Next year would have been Phil's 50th Anniversary as a member of the MLA. Phil was born in New York City on March 18, 1933, and despite nearly 35 years on the West Coast, he never entirely left New York, either in spirit or accent. Phil attended New York State Maritime Academy on a scholarship and graduated in 1955 with a Third Mate's license, after which he immediately signed up for the United States Navy. Lt. Berns served as Executive Officer of USS CHADRON (PC 564) from 1955 to 1957, after which he left the Navy to begin the journey that became his passion: maritime law. Phil attended NYU Law School on a scholarship in 1957 and 1958; attended Brooklyn Law School on a New York State Korean War Veteran's Scholarship, graduating in June 1960; and attended NYU Graduate Law School on a New York State Korean War Veteran's Scholarship in 1960 and 1961.

Law degree in tow, Phil was hired under the Justice Department's Honors Program as a Trial Attorney in the New York Field Office of the Department's Admiralty and Shipping Section. According to a memorandum that marks his hiring, he was told that on August 1, 1960, he would "occupy Room 1006B" at the U.S. courthouse on Foley Square in lower Manhattan. Phil was admitted as a member of the New York Bar in 1960, and to the Southern and Eastern Districts of New York in May 1962.

Dry, bureaucratic language was not Phil's style in the written or spoken word – so it's all the more ironic that the spare, understated language of two documents written in 1964 could summarize in so few words the core of what Phil's friends, family, and colleagues knew about him. In one of them, an Affidavit supporting Phil's admission to the Second Circuit, his sponsor wrote:

As a result of my association with [Phil] both socially

> and professionally I have found him to be a person of good moral character and high professional standards. In my opinion, based upon what I have observed in the petitioner, he is well qualified by reason of his moral character and experience and would be a worthy addition to practice before this Honorable Court.

The other document is a letter dated April 2, 1964, and in it Phil's supervising attorney wrote to the MLA, proposing Phil for membership in our organization. He told the Admissions Committee:

> I have had occasion to closely observe Mr. Berns and to frequently supervise his work. In my opinion he is a very industrious, conscientious, able and reliable lawyer. Since 1960, from a tyro [a beginner or novice] in the Admiralty field, he has developed into a very capable lawyer with diverse experience in all phases of Admiralty law. He has tried many cases in the District Courts and argued appeals in the Court of Appeals for the Second Circuit.
>
> Accordingly, I take pleasure in proposing Philip A. Berns for membership in the Association.

Phil's application was accepted. In 1978, Phil moved to the West Coast to head the San Francisco Field Office of the Department of Justice's Admiralty and Aviation Section, successor to the Admiralty and Shipping Section. It's debatable whether the West Coast ever changed Phil, but there's no question that the practice of admiralty law on the West Coast wasn't the same once Phil arrived. Phil brought with him a personality and skill-set of deep substance and style that was not only uniquely his, but that he demonstrated equally and without exception to all, whether client, law clerk, attorney, judge, or high level public official. Phil was unflinchingly direct, unfailingly honest, and carried with him a sense of personal and legal ethics that would not be trodden. And underlying it all was a sense of wit and humor that he used not only to cheer friends and

colleagues, but to disarm his courtroom foes (and judges, sometimes successfully).

Phil was one of the original organizers of the Pacific Admiralty Seminar; he taught as an Adjunct Professor of Maritime Law at McGeorge School of Law; he became a member of the California Bar; he headed the Department's Field Office and continued to try cases until his retirement in 2005; he wrote the "Flotsam and Jetsam" column in Benedict's Maritime Quarterly; and he mentored and befriended literally a generation of lawyers, as well as the occasional judge who acknowledged the need for neutral guidance on the finer points of maritime law.

There simply is not space to detail the large number of important cases that Phil handled over his career. Perhaps the best way to understand the legacy of case law that Phil helped create is to quote our colleagues at American Maritime Cases, where Phil served as an Associate Editor beginning in 1981, and then became a Consultant and Assistant Editor in 2005. Quoting from AMC's website: "As a testament to Phil's incredible career and tremendous work ethic, almost 150 of his cases were published by AMC, a number few if any maritime lawyers of the last 90 years even come close to."

Finally, Phil made no secret of his deep commitment to the MLA. Phil served as Membership Secretary and as a Director of the MLA between 2000 and 2008. Of all the honors bestowed on Phil during his long career, there were few, if any, that meant more to him than the appointment to leadership positions in our organization. On behalf of the MLA and the membership he served so well, the honor is ours.

We express to Phil's wife, Jane, and their three sons, David, Peter and Jay, our deepest condolences.

By: R. Michael Underhill

Remembrance

My acquaintance with Phil began in 1977 when he became a member of the new Committee on Practice and Procedure of which I was Chairman. He was an active contributor to the study and recommendations we made then on arrests and attachments. The following year he was appointed to take charge of the Admiralty and Shipping Section office in San Francisco, a post in which all of us in the West who dealt with it were interested and toward which I had an old habitual loyalty from serving eight years there as second to the redoubtable Captain Keith Ferguson. Keith was a long-time San Francisco admiralty lawyer, well-respected, who ran a tight ship. The office had drifted into doldrums of indecision and delay.

Phil was quite unacquainted with the San Francisco Bar of which he was to become a part, or those of the other Pacific cities with whom he would also deal. On his arrival, I had him to lunch, along with my partner Tom McCune, a coeval who would see more of him in practice, to welcome him cordially to our bar and acquaint him with some of our virtues and vices he might encounter, and the temperaments and eccentricities of our judges, as well as some of the old lore of the Ferguson office he would probably hear of. It was the beginning of a long friendship in which he remembered our luncheon, although events showed that he had little need of any guidance we offered.

He was quickly and efficiently in charge. In addition to his daily responsibilities in litigation, Phil was often called on by Justice in nationwide matters, and especially for many years, the rules and practices of marshals in arrests and custody of vessels and their insurance. He was always keenly attentive to the protection of his client's good name as well as her Treasury. For 35 years he also served AMC in editorial posts. He had rapidly developed cordial relations with his opponents in the bar of the Coast at large, which led eventually to its annual dinners he organized. These high-spirited gatherings of a hundred or more from all the Pacific admiralty centers have become traditional and still carry his name. He was unquestionably the Dean of the Pacific Admiralty Bar.

He had a long and facile memory of the eccentricities of other lawyers (and judges) from which he could and would recall at an instant's notice a telling analogy. And a stand-up's store of humor--he would enjoy being reminded of a joke but I could never "tell" him one because he already knew it. And speaking of humor, we used often to exchange notes on items in the morning Times and in our many colloquies we came to the joint insight that the Times really does print comics and just doesn't tell us on what pages we shall find them.

During his retirement, Phil wrote a monthly article entitled *Flotsam and Jetsam* for Benedict's Maritime Bulletin. It contained a surprising variety of comment and quotation, excursions into liberal doctrine and salty comment on current political and journalistic follies, with occasional reminiscences of judges from others, including me. He had had an interesting legal career, made more colorful by his witty participation and the telling of it.

A learned, honorable lawyer, a forthright liberal citizen, a dedicated public servant, a devoted family man, a kind and loyal friend, an outspoken critic of cant, and a memorable raconteur. *Proctor Magnificus.*

By: Graydon S. Staring

IN MEMORIAM

George F. Chandler, III

George F. Chandler, III, a former Member of the Board of The Maritime Law Association of the United States and Chairman and Vice-Chairman of several of its committees, died on May 23, 2013, in his adopted hometown of Houston, Texas, after a short illness.

Born to George F. Chandler, Jr. and the former Phyllis Hall (MacKay) and raised in Winthrop, Massachusetts, George moved from the Boston area to Maplewood, New Jersey in 1975 and to Houston in 1996. A descendant of Nova Scotia shipbuilders, George had a great passion for ships and the sea. He was a great-great-grandson of master shipbuilder Donald MacKay, who is best known for building in his East Boston shipyard the fastest clipper ships to ever sail. After completing high school in 1958, George went to Virginia Polytechnic Institute on a scholarship from the Boston Naval Yard. He graduated in 1963 with a BSME degree in naval architecture and marine engineering, and was certified as a professional engineer in Massachusetts. He was then commissioned by the U.S. Navy, eventually serving as a naval adviser in Vietnam from 1966 to 1967.

George graduated from Suffolk University Law School in 1972 and joined the maritime law practice of Bigham Englar Jones & Houston in New York. Thereafter he joined Hill Rivkins in 1978, and in 1996, moved to Houston as the managing partner of Hill Rivkins' Houston office. While serving in that capacity he helped found the Houston Maritime Arbitrators Association and served as its president from 1998 to this year. George specialized in maritime and commercial litigation and was admitted to the state and federal courts of New York, New Jersey, Massachusetts and Texas, as well as various federal appellate courts, and the Supreme Court of the United States. He was designated by the U.S. State Department to

serve as the United States' Representative to the United Nations' Commission on International Trade Law (UNCITRAL) for eCommerce from 1992 to 1994, and as adviser until 2002.

George was involved in many professional organizations, in addition to The Maritime Law Association, where he served on its Board of Directors from 1993 to 1996 and was Chairman of the Electronic Communications and Commerce Committee from 1995 to 1999. He was also Vice Chairman of the Committee on Carriage of Goods from 1987 to 1991 and Chairman from 1991 to 1995. Prior to that, he had been Chairman of the Electronic Bills of Lading Subcommittee from 1990 to 1991. When the Rotterdam Rules go into force their presence will be due, in no small part, to the hard work of proctors like George.

Thereafter, George was a Titular Member of the Comite Maritime International and served with distinction on CMI committees dedicated to the Hague-Visby Rules and Issues of Transport Law. He was also a member of the CMI/UNCITRAL Group of Experts on Electronic Contracts of Carriage. George was also a Legal Editor of Benedict's Maritime Bulletin and a member of the Society of Naval Architects and Marine Engineers where he was Chairman of the New York Section from 1986 to 1987.

Most importantly, however, and despite the heavy demands of his incredibly active professional career, George still found the time and energy to train and counsel younger attorneys whom he always treated as his equals. Of George it can truly be said that "we shall not see his like pass this way again."

By: Thomas E. Willoughby

COMMITTEE ON ARBITRATION AND ADR

Editor: Leo G. Kailas

Newsletter - May 2013

This edition of the Newsletter is dedicated to the memory of Michael Marks Cohen. Michael was a steadfast contributor to this Committee for many years and his passion for legal scholarship will be greatly missed.

I. ISSUES ARISING BEFORE ARBITRATION PROCEEDINGS COMMENCE.

Non-signatory Not Bound to Arbitrate Claims That Do Not Arise from Contract.

In *VT Halter Marine, Inc. v. Wartsila North America, Inc.*, 511 F. App'x 358 (5th Cir. 2013), the Fifth Circuit held that a non-signatory to a contract containing an arbitration clause could not be compelled to arbitrate disputes that did not arise from the contract, even if it concededly had to arbitrate other, related disputes that did arise from the agreement.

VT Halter contracted to build several vessels for a third party, Vessel Management. Vessel Management separately contracted with Wartsila for the purchase of vessel propulsion systems to be incorporated into the vessels built by VT Halter. The vessel propulsion systems were to be delivered directly by Wartsila to VT Halter. The Wartsila-Vessel Management contract included a mandatory arbitration clause. There was no contract between VT Halter and Wartsila. Wartsila built and delivered the propulsion systems as required by its contract, and one was installed in the vessel PRIDE. After the propulsion system was installed, the PRIDE failed inspection. Wartsila represented to Vessel Management that VT Halter's faulty workmanship caused the PRIDE to fail inspection. In order to avoid liquidated damages, VT Halter installed a new

propulsion system at its own cost and then sued Wartsila for damages related to replacement of the defective propulsion system.

VT Halter's suit asserted claims for (1) breach of warranty, as equitable subrogee of Vessel Management, and 2) tortious interference with a contract based on Wartsila's allegedly false representation to Vessel Management as to the cause of the failed inspection. Wartsila moved to compel arbitration for both claims pursuant to Wartsila's contract with Vessel Management. VT Halter conceded that its first claim for breach of warranty was derived from Wartsila's contract with Vessel Management, and thus was subject to mandatory arbitration. However, VT Halter denied that the tortious interference claim was subject to arbitration. The district court disagreed with VT Halter and directed it to proceed to arbitration on both claims.

The Fifth Circuit reversed the district court, finding no basis to compel VT Halter to arbitrate the tortious interference claim with Wartsila. Citing the two-prong test for compelling arbitration, which requires the court to find both that "(1) the two parties have a valid agreement to arbitrate, and (2) the dispute in question falls within the scope of that arbitration agreement," the court found that the district court never considered whether a valid arbitration agreement existed between VT Halter and Wartsila, but only considered whether the tortious interference claim arose from the agreement between Wartsila and Vessel Management. *VT Halter Marine*, 511 F. App'x at 361.

Because Wartsila acknowledged that it had no agreement to arbitrate with VT Halter, the Fifth Circuit held that VT Halter could not be compelled to arbitrate on that basis. The case was remanded to the district court for consideration of various equitable estoppel arguments.

Arbitration Clause Not Binding on Non-signatory in Complex Marine Insurance Dispute but Court Proceedings Stayed Pending Arbitration.

In *Mosaic Underwriting Serv., Inc. v. Moncla Marine Operations, L.L.C.*, Civ.A. 12-2183, 2013 WL 1556141 (E.D. La. Apr. 11, 2013), the Eastern District of Louisiana considered a motion to compel arbitration in a complex proceeding. The underlying dispute concerned the salvage of a damaged work-over barge in Terrebonne Bay, Louisiana. Moncla Marine ("Moncla"), the owner, entered into a $3.55 million "no cure-no pay" contract with a salvor, who successfully floated the vessel from the seabed. The owner had numerous insurance policies covering the vessel, which the court grouped into three categories: (1) Hull & Machinery; (2) Primary Protection and Indemnity; and (3) Excess Protection and Indemnity. The salvage costs were covered by the underwriters of the latter two categories.

The Excess P&I Underwriters sued Moncla for a declaratory judgment. This group sought a declaration that they are entitled to take title to the vessel, sell the vessel and have priority of any claims in relation thereto. Moncla denied these claims and counterclaimed against the Excess P&I Underwriters on various grounds and filed a third-party complaint against the other two categories of underwriters. Essentially, Moncla accused all underwriters of having colluded to compensate Moncla under the Primary and Excess P&I policies instead of the Hull policy, as the P&I Underwriter would receive a credit for the salvage value of the vessel, which would not be available under the Hull policy.

Underwriters for the Primary P&I and Hull policies then moved to stay proceedings and compel arbitration based on the arbitration clauses in their respective policies. The court granted those motions. Moncla then moved for the same relief with respect to the Excess P&I underwriters; however, the underlying policy did not contain an arbitration clause, so the court analyzed the six theories under which a non-signatory may be bound to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; (5) estoppel; and (6) third-party beneficiary.

The court first determined that, although the Excess P&I policy incorporated the standard form on which the Primary P&I policy was based, there was not a clear indication that the Excess policy intended to incorporate the arbitration provision contained in the Primary policy. Next, as the Excess P&I underwriters had filed suit in court and had not intervened in the arbitration, their conduct did not evidence that they assumed the obligation to arbitrate. With respect to agency, the court noted that the relationship between excess and primary policies does not automatically create an agency relationship between such entities and discredited any suggestion otherwise. The court found no credible allegations of an existence of a parent-subsidiary relationship.

The equitable estoppel analysis centered on whether the non-signatory Excess P&I underwriters had "exploited" the arbitration agreement so as to receive a direct and substantial benefit therefrom. As the Excess P&I underwriters had neither sued Moncla under the other policies containing agreements and there was no evidence that the Excess P&I underwriters demanded and received substantial and direct benefits under either policy, the court found this argument unavailing. Finally, the court examined the third party beneficiary theory, under which a court looks to the intentions of the parties at the time the contract was executed. While the Excess P&I underwriters certainly had an interest in the enforcement of the other policies, the court looked to Fifth Circuit case law, under which the clear intent to benefit must be evident in the contract. As there was no such evidence in the case at bar, the court dismissed the final theory upon which Excess P&I underwriters could be compelled to arbitrate.

The court determined that the motion to stay proceedings was governed by the three factors set forth in *Waste Mgmt., Inc. v. Residuos Industriales Multiqium, S.A. de C.V.*, 372 F.3d 339 (5th Cir. 2004): (1) the arbitrated and litigated disputes must involve the same operative facts; (2) the claims in the arbitration and litigation must be "inherently inseparable" and (3) the litigation must have a critical impact on the arbitration. Moncla argued that the first factor was satisfied because all claims arose out of the casualty and salvage of the same vessel, which the court credited. As coverage under the

Excess P&I policy was contingent on the existence on the Primary P&I policy, Moncla argued that the claims are inherently inseparable. The court agreed with the Excess P&I underwriters that there were enough differences in the exclusions and substantive clauses of the policies so that the claims were not "inherently inseparable"; however, the court found that such claims were "intertwined strongly enough" to lean in favor of a discretionary stay. Finally, the court determined that the third factor weighed in favor of a stay, as the court's potential determination that the underwriters did not conspire could influence the arbitration.

Eighth Circuit Finds Class Action Waiver Enforceable in FLSA Case.

Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013), involved the denial of a motion to compel arbitration under a provision in an employment contract that prohibited class arbitration. The plaintiff had entered into a mandatory arbitration agreement ("MAA") with her employer in which she waived arbitrating claims subject to the agreement, including any claims for violation of the Fair Labor Standards Act ("FLSA"). Under the MAA, Owens did not waive the right to file a complaint with any agency designated to investigate complaints of harassment, discrimination or other statutory violations.

Owens, on behalf of herself and other similarly situated current and former employees, sued her employer in federal court based on alleged violations of the FLSA. The employer moved to stay proceedings and compel arbitration based on the express waiver in the MAA. The district court ruled against the employer. The lower court distinguished the recent Supreme Court decision of *AT&T Mobility LLC v. Concepcion*, which it determined was not controlling in the employment context, as *Concepcion* had upheld the enforceability of a class waiver in a consumer contract. The court relied on a recent National Labor Relations Board ("NLRB") decision and a Southern District of New York decision and concluded that class waivers are invalid in FLSA cases as the statute provides for the right to bring a class action.

The Eighth Circuit reversed. The appellate court first noted that there must be "contrary congressional command" for another statute to override the mandate of the Federal Arbitration Act and that the party challenging the arbitration agreement bears the burden of proof of congressional intent. Owen argued that, because the FLSA gives an employee the *right* to bring a class action, the FLSA possesses the requisite contrary congressional command. However the FLSA also requires consent of an employee to opt in to a class action. The court reasoned that if an employee must opt in to a class action, an employee certainly has the power to waive participation as well. Additionally, Owens contended that the FLSA was enacted after the FAA and that the legislative history demonstrated congressional intent to preserve employees' rights to concerted activity. However, the court pointed out that, while the original FAA was enacted in 1925, it was reenacted in 1947, nine years after the passage of the FLSA. Thus, the court found no inconsistency in the legislative history of the FLSA and the enforceability of class waivers.

The court then distinguished the recent NLRB decision. The NLRB decision was limited to arbitration agreements barring all protected concerted action. While the MAA bars certain concerted action, it does not preclude an employee from filing a complaint with a governmental agency, such as the EEOC, NLRB or Department of Labor. The MAA does not bar any of such agencies from investigating claims or, as is in their power, from filing suit on behalf of a class of employees. In its conclusion, the court added that reversal and compelling arbitration was consistent with its sister courts that had determined that arbitration agreements containing class waivers are enforceable in FLSA cases (Third, Ninth, Eleventh, Fifth and Fourth Circuits).

II. AWARD ENFORCEMENT ISSUES

Personal Jurisdiction Required in Action to Confirm Arbitration Award.

In *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 2013 A.M.C. 273 (5th Cir. 2012), *as revised* (Jan. 17, 2013), the Fifth Circuit was called to decide an

issue of first impression for that court: does a court need personal jurisdiction over the defendant in order to confirm a foreign arbitration award under the New York Convention?

First Investment sought to enforce a $26 million award issued in London arbitration proceedings. The circumstances of the award were somewhat unusual, because Fujian's party arbitrator was arrested and imprisoned by the Chinese government while the arbitrators were exchanging drafts of the award, and the final award was signed and issued by the other two arbitrators with a copy of Fujian's appointed arbitrator's dissent attached.

Following unsuccessful efforts to confirm and enforce the award in China, First Investment petitioned the U.S. District Court for the Eastern District of Louisiana for an order confirming the award. Fujian moved to dismiss the petition for lack of personal jurisdiction, which the court granted.

On appeal, First Investment conceded that Fujian had no contacts with the United States and was not subject to personal jurisdiction under a traditional due process analysis. Instead, First Investment argued that (1) Fujian was not entitled to due process protections because it was a foreign entity with no contacts in the United States and (2) personal jurisdiction was not a defense to confirmation of a foreign arbitration award because it was not one of the enumerated defenses in the New York Convention.

The court rejected First Investment's first argument as unsupported by recent case law. While the court acknowledged some past cases holding that foreign entities do not have constitutional rights, it observed that those cases had been subsequently clarified or superseded by later decisions, including the U.S. Supreme Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). Thus, the court held that a foreign entity called to defend itself in United States courts is entitled to due process protections including the requirement of personal jurisdiction.

Turning to First Investment's second argument, the court held that personal jurisdiction is a constitutional due process right that exists independent from the New York Convention. While the Convention was a creature of the President and Congress's treaty and legislative powers, personal jurisdiction is grounded directly in the Constitution. Thus, Fujian's constitutional due process rights, including the requirement of personal jurisdiction, must be satisfied before the district court could confirm an arbitration award under the New York Convention. The court noted that all other circuits to consider the issue were in agreement, including the Second, Third, Fourth, Seventh, and Eleventh Circuits.

The court also rejected First Investment's suggestion that the confirmation of an arbitration award does not affect a party's substantial rights because it merely recognizes that which an arbitrator has already adjudicated. Instead, the court found that the confirmation of an award under the New York Convention represents a substantial change of circumstances inasmuch as the confirming party will be armed with a federal court judgment subject to fewer defenses to enforcement than an unconfirmed award.

Federal Courts Look to Federal Law, Not State Law, to Determine Whether a Dispute Resolution Procedure Is "Arbitration".

In *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140 (2d Cir. 2013), the Second Circuit held that an agreement to have an impartial doctor determine the nature of the insured's injury constituted "arbitration" within the meaning of the Federal Arbitration Act.

Bakoss was insured by Lloyds under a certificate of insurance that provided for payment to Bakoss in the event he became "Permanently Totally Disabled." The certificate further provided that each party had the right to have Bakoss examined by a physician of its choice for the purpose of determining if he was "totally disabled" and that, in the event of disagreement, the two physicians should jointly name a third physician to make a final and binding decision on the matter.

After going through the above-described procedure and being found not "totally disabled" by the jointly-appointed physician, Bakoss commenced an action in state court seeking a declaration of coverage under the certificate. Lloyds removed the action to the U.S. District Court for the Eastern District of New York, and Bakoss moved to dismiss for lack of federal subject matter jurisdiction. The court denied Bakoss's motion, finding that the third-physician clause is an agreement to arbitrate under federal common law that conferred federal jurisdiction under the FAA.

On appeal, Bakoss argued that the district court erred in applying the federal common law definition of "arbitration." Under the federal common law identified by the district court, the hallmark of an agreement to arbitrate is language that clearly manifests the parties' intent to submit certain disputes to a third party for binding resolution. Because the third-physician clause in the certificate between Bakoss and Lloyds contained such language, the court concluded that it was an agreement to arbitrate.

The Second Circuit acknowledged a split among the circuits as to whether federal or state law should apply to define "arbitration." Nevertheless, the court cited the interests of a national uniform arbitration policy to conclude that Congress must have intended for a single, uniform definition of "arbitration" to apply.

District Court Finds Personal Jurisdiction over Foreign Corporation Based on Local Agents, Confirms London Award.

In *STX Pan Ocean Shipping Co. Ltd. v. Progress Bulk Carriers Ltd.*, 12 Civ. 5388 RJS, 2013 WL 1385017 (S.D.N.Y. Mar. 14, 2013), the Southern District of New York granted a petition to confirm a London arbitration award under the New York Convention. The parties had entered into a fixture recap, pursuant to which the ship petitioner STX chartered from respondent PBC would transport a cargo of sulfur from the Persian Gulf to the Far East. The fixture recap confirmed that the vessel was suitable for the carriage of sulfur; however, shortly after the parties had entered into the fixture recap, PBC informed STX that the vessel was not equipped to carry the full

load of sulfur, which left STX unable to meet its obligation to ship the cargo. The parties proceeded to arbitration in London based on the charter's incorporation by reference of an arbitration agreement. STX prevailed in the arbitration and was awarded its costs. PBC appealed the award, which was affirmed with a further award of costs to STX. STX petitioned for confirmation of the award in New York shortly after the appeal.

The court first noted that its role in reviewing an award under the New York Convention is strictly limited and the showing required to avoid confirmation is high. Unless one of the seven defenses is proven by the party opposing the petition, the court is required to confirm. PBC did not claim any of the seven defenses to confirmation; instead, it objected to confirmation on the grounds that (1) the court lacked personal jurisdiction over PBC; (2) the petition did not state a cause of action upon which relief can be granted; (3) there was insufficient process; (4) STX failed to properly mitigate damages; and (5) the court lacked subject matter jurisdiction over the dispute.

STX asserted that the court had personal jurisdiction over PBC based on the presence of multiple agents within the state. Counsel for STX proffered evidence from a 2008 Southern District case in which Judge Crotty had determined that the court had jurisdiction over PBC because of such agents. The court acknowledged that, while four years had passed since the court's prior finding, it credited the documentation of continued use of such agents submitted by STX. As PBC merely denied personal jurisdiction without disclaiming the existence of such agency relationships, the court found that it had personal jurisdiction over PBC. As STX had served the petition on both agents, the court also rejected the objection founded on insufficient service. The court also quickly disposed of the objection to the subject matter jurisdiction of the court, as the New York Convention governs foreign arbitral awards arising out of commercial agreements. As the award issued in London and the dispute arose out of an agreement between two corporations, the court found that it had subject matter jurisdiction to entertain the petition.

Finally, the court examined the defenses based on failure to state a cause of action and failure to mitigate damages jointly. The court restated that its review of an arbitral award was very narrow in order to further the arbitral goals of efficiency and expediency. As neither of the two mentioned defenses was enumerated in the New York Convention, the court determined that PBC was merely attempting to re-litigate the underlying claim and dismissed the objections as meritless.

Arbitral Panel Did Not Deny "Fundamental Fairness" Where Party Could Not Present Evidence Regarding Joint and Severable Liability at Live Hearing.

In *NYKCool A.B. v. Pacific Fruit, Inc.*, 507 F. App'x 83, 2013 AMC 2395 (2d Cir. 2013), the Second Circuit Court of Appeals upheld the confirmation of an SMA Award in favor of the owner in a breach of contract action. The grounds asserted for vacatur were that the panel (1) manifestly disregarded the law; (2) exceeded its authority; and (3) denied the appellant a fundamentally fair hearing.

The charterers argued that the panel manifestly disregarded the law on two points. First, they challenged the panel's finding that the parties entered into an oral contract, pursuant to which the owner agreed to transport weekly shipments of bananas from Ecuador to California and Japan between 2005 and 2008. The appellate court agreed with the panel's conclusion that the parties' substantial partial performance on the contract weighed strongly in favor of formation. NYKCool had transported 30 million boxes of cargo on over 100 voyages in 2005-06 and had received compensation for such performance. Additionally, the parties had engaged in "extensive" negotiations to revise the terms of the contract. Based on the foregoing, the court dismissed any "egregious impropriety" in the panel's formation determination.

Second, Pacific Fruit argued that the panel manifestly disregarded the law by holding charterers jointly and severally liable for all contractual damages as co-promisors. Again, the appellate court denied vacatur. The court credited, *inter alia*, the charterers'

negotiation of the contract as a single unit, that the terms of the parties' initial discussions related to a single "integrated around-the world service" and that the parties presented a joint, indivisible counterclaim in the arbitral proceeding. While less certain of the panel's legal rationale on this point, the court found it "plausible to read the award as imposing joint and several liability on Charterers as the co-promisors of a single oral contract" and affirmed confirmation on this point as well.

Pacific Fruit argued that the panel had exceeded its authority by holding charterers jointly and severally liable because the two entities were originally party to separate written arbitration agreements with NYKCool, neither of which authorized the panel to impose liability on one party for the other's contractual obligations. The panel had determined that the dispute arose out of the new contract for the years 2005-08, the terms of which mirrored the written agreements in force prior to such contract. Those written agreements contained broad arbitration clauses which provided for arbitration of "any dispute" arising out of the contracts. The panel determined that the broad arbitration clause, which applied to the new agreement, empowered the arbitrators to order remedies they deemed appropriate, including joint and several liability.

Finally, Pacific Fruit sought vacatur under Section 10(a)(3) of the Federal Arbitration Act, under which a court may vacate the award based on a denial of "fundamental fairness" in the arbitration. The appellant claimed that fundamental fairness was denied as it was not allowed to present evidence in a hearing to the panel that it should not have been held jointly and severally liable with Kelso. The court noted that due process is satisfied where a tribunal notifies the parties it is considering an issue and provides them the opportunity to respond in a written presentation. Here, the panel had taken precisely that action as required. Additionally, the court was not persuaded that an evidentiary hearing would have helped the panel resolve the issue. Accordingly, the court affirmed the trial court's confirmation in all respects.

$25 Million Bahraini Judgment Deemed Recognizable and Enforceable in New York.

In *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros. Co.*, 957 N.Y.S.2d 602 (Sup. Ct., NY Co. 2012), the New York Supreme Court granted summary judgment to the plaintiff in its action to recognize and enforce a judgment issued by the Bahrain Chamber for Dispute Resolution (BCDR). The defendants had moved to dismiss the action on three grounds. They contended that the complaint failed to meet the statutory pleading standards, that the underlying judgment violated due process and that Bahrain was an inconvenient forum.

The court quickly disposed of the first argument. Defendants claimed that the complaint was inadequate because it did not allege four pleading requisites: (1) a final judgment, conclusive and enforceable where rendered; (2) subject matter jurisdiction; (3) jurisdiction over the parties or the *res*; and (4) regular proceedings conducted under a system that provides impartial tribunals and procedures compatible with due process. However, the court agreed with the plaintiff that only the first issue need be alleged; the remaining issues are defenses available to the party opposing enforcement. Thus, the challenge to the sufficiency of the complaint was rejected.

The court then addressed defendants' fundamental due process argument. Under CPLR § 5304(a)(1), a judgment debtor may avoid recognition where the judgment was rendered in a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. This requirement does not necessitate that the foreign tribunal maintain procedures that match those of New York courts; if a defendants is afforded notice and an opportunity to be heard, due process is met. Defendants contended that due process was not met because the BCDR proceeding was the functional equivalent of compulsory arbitration, in that the decision makers were not professional judges, that evidence was curtailed and that the rights of appeal are so limited as to be non-existent.

The BCDR is a governmental entity that was created to handle significant commercial disputes. The law establishing the BCDR created a commercial court and a commercial arbitration institution. In the commercial court where this dispute was adjudicated, the tribunal is composed of two judges who sit on the High Court of Appeals and a third non-judge who is selected from a list prepared by the BCDR and who is typically an expert in the area of the dispute.

The due process contentions centered on alleged errors by the tribunal in considering certain evidence. The court found most of such arguments irrelevant to the tribunal's findings and contrary to defendants' own submissions in the proceedings. Defendants had also demanded that an individual at the center of the dispute be joined to the proceedings, or that the proceedings be stayed until such individual was available. The individual was involved in criminal proceedings in Saudi Arabia at the time and the tribunal decided against joining him and declined to stay the dispute, as such action would only serve to delay prolong the proceedings and delay the decision. With respect to the appellate argument, BCDR judgments are directly appealed to the highest national court, foregoing an intermediate appellate court. The court found that the elimination of the intermediate stage of appeal in no way deprived defendants of a meaningful right of appeal. Thus, the court dismissed all due process arguments proffered by defendants and noted that defendants "utterly failed to establish" that the Bahrain proceeding was a compulsory arbitration.

Finally, defendants invoked CPLR § 5304(b)(7), which permits a court to refuse recognition where "in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." However, this provision only applies when jurisdiction rests solely on local service of process on the judgment debtor. As the plaintiff established that defendants were served in Saudi Arabia, the court found this argument misplaced and unavailing. Moreover, even if this section applied, the court found that there were additional bases for jurisdiction, as defendants voluntarily appeared in the proceeding

and failed to allege that their appearance was limited to contesting jurisdiction.

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[Editor's note: The editor wishes to acknowledge the contributions of Patrick O'Mea and David Cole, who wrote the case summaries appearing herein, and of the following members who took the time to contribute cases for the newsletter: Keith Heard and Peter Skoufalos.]

COMMITTEE ON CARRIAGE OF GOODS

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

CARGO NEWSLETTER NO. 61

Spring 2013

BEAMERS "FINISHED" FOR $500.00…

OOO GARANT-S v. Empire United Lines Co., Inc.,
2013 AMC 1708, 2013 WL 1338822 (E.D.N.Y. Mar. 29, 2013).

The plaintiff operated a business whereby it purchased used automobiles at auctions held in the United States and exported them to Kotka, Finland for sale. It made arrangements with defendant, whom it had engaged to transport hundreds of vehicles per year to Finland, to transport two BMV vehicles. Defendant was a licensed NVOCC and two BMW vehicles were delivered to its storage facility in Elizabeth, New Jersey. The vehicles were stolen from the facility (along with two other motor vehicles) and plaintiff filed suit against the NVOCC and its president for the loss.

Defendant moved for partial summary judgment limiting any liability to $1,000 pursuant to COGSA and summary judgment on all claims alleged against the president on the basis of alter ego liability.

The court first considered defendant's contention that the court lacked subject matter jurisdiction, contending that plaintiff's damages were limited to the amount the plaintiff paid for the vehicles at auction, thus falling below the jurisdictional amount of $75,000. The complaint alleged $80,000 in compensatory damages and the court found the complaint sufficiently alleged diversity jurisdiction (citing cases).

As to the limitation claim of $500 per vehicle, the court found COGSA to apply, the bill of lading making COGSA applicable before loading and after discharge.

Plaintiff argued that the bill of lading was not issued; however, the court noted defendant's practice was to issue house bills of lading upon loading of the cargo. Copies of these would then be electronically transmitted to a shipper. The court considered plaintiff's argument as unpersuasive.

It noted that it is not unusual to issue a bill of lading after a carrier has taken possession of cargo (citing cases) and, where a shipper has knowledge as to the contents of the carrier's standard bill of lading, the parties may be bound by its terms, even where a bill of lading has not been issued for the particular goods in question (citing cases).

The evidence demonstrated that the plaintiff had established a business relationship with defendant for some five years. The court found COGSA applied to the transaction and limited the NVOCC's liability accordingly. As to plaintiff's argument that it was denied an opportunity to declare a value in excess of $500 per vehicle, the court also found it to be without merit.

Citing cases, the court found a carrier may establish prima evidence of fair opportunity by showing the bill of lading specifically stated the shipper would have to declare an excess value in order to avoid the limitation and/or specifically incorporate COGSA by name in the bill of lading. In this case, the bill of lading did. Therefore, the plaintiff must "demonstrate that a fair opportunity did not in fact exist"; however, the plaintiff provided no evidentiary support for this conclusion. As the plaintiff did not meet its burden of showing a fair opportunity did not exist, the limitation of COGSA applied.

Finally, plaintiff contended that limitation should not apply because defendant engaged in "unreasonable deviations"; specifically, participating in or facilitating the theft of the vehicle, concealing the theft and purposely sabotaging plaintiff's efforts to locate the vehicles after the theft.

The court noted the Second Circuit has specifically limited the doctrine of "unreasonable deviation" to two situations: geographic deviation and unauthorized on-deck stowage (citing cases). Neither of these situations was present. The court went on to point out that the Second Circuit has refused to extend the doctrine to include "corrupt or criminal" acts (citing cases).

As to the president's individual liability, plaintiff did not produce any evidence substantiating that he so dominated the NVOCC that the corporation could be called his alter ego. While the company may not have observed many of the formalities usually found in a larger company, the lack of corporate formalities did not provide a basis for holding the defendant personally liable. There was no evidence of intermingling corporate funds with his own, failing to maintain adequate books and records, or otherwise using the corporation "to further personal rather than corporate ends." (citing cases).

The court found plaintiff had not established a basis for piercing the corporate veil and granted summary judgment limiting the NVOCC's liability and summary judgment on the claims alleged against the president defendant. [The court further stated "This case will be dismissed upon defendants' notifying the court that they have tendered $1,000 to plaintiff."]

SHIPPER STIFFED BY BUYER; CFU'D BY CARRIER: BUT ISSUE AS TO CALCULATION…

Savanna Auto Sales v. Mediterranean Shipping Co., S.A., 13 CIV. 1615 SAS, 2013 WL 3753155 (S.D.N.Y. July 16, 2013).

The plaintiff contracted to sell four cars and various parts to a resident of Iraq and arranged through a freight forwarder to have defendant carrier ship the cars from New York City to Iraq.

The bill of lading described the contents of the shipment to include "4 unpackaged multiple units of used autos," listing the makes and models, and "one lot of used auto parts." On the same

page, the bill of lading also stated "Total Number of Packages: 4." In stating the number of containers or packages received by the carrier, the bill merely stated that one container was received. A box for stating the declared value of the goods contained only X's. The bill of lading contained a definition of "package" as meaning "any palletised and/or unitised assemblage of cartons which has been palletised and/or unitised for the conveniences of the Merchant regardless of whether said pallet or unit is disclosed on the front hereof."

On April 29, 2012 a telex was received by carrier's personnel stating a full set of bills of lading had been surrendered by the plaintiff and that the cargo should be turned over to the purchaser; however, plaintiff denied surrendering any bills of lading and claimed against the ocean carrier as "manufacturing a fraudulent telex release."

When the carrier declined payment of a claim for $75,978.62, plaintiff filed suit seeking recovery for that amount. The ocean carrier answered and then moved for partial summary judgment on the pleadings, asking the court to determine its maximum liability as either $500 or $2,000.

The court noted that COGSA applied to every bill of lading which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, and that COGSA provided a $500 per package cap on liability, unless the nature and value of the goods had been declared before shipment and inserted in the bill of lading.

The court also noted an exception to COGSA's limitation of liability would be an unreasonable deviation; however, it also noted that, in the Second Circuit, such doctrine is limited to only two situations: geographic deviation and unauthorized on-deck stowage.

As to what constitutes a package this is, in the first instance, a matter of contract interpretation and while this reliance on the understanding of the parties prevents a concrete definition, there still must have been "some packaging preparation for transportation…

which facilitates handling" for something to qualify as a COGSA package.

The court went on to note when packages or units are shipped in a container and the number of units is disclosed in the shipping documents, then each of the units, and not the container, constitute the "package". Additionally, the container itself may not qualify as a package in the absence of clear and unambiguous language indicating an agreement on the definition of "package". If the "package" or other unit involved cannot qualify as a COGSA package, the limitation applies per "customary freight unit". In the Second Circuit, the "customary freight unit" is the "actual freight unit used by the parties to calculate freight for the shipment at issue."

The court found the COGSA limitation applicable as plaintiff did not declare a value for the goods on the bill of lading. Its recovery was limited to $500 per package or, in the case of goods not shipped in packages, per customary freight unit.

The plaintiff argued the carrier was not entitled to limitation because of an alleged fraudulent telex release, and, thus, the carrier unreasonably deviated:

> Notwithstanding the merits of Savanna's policy argument, the Second Circuit has clearly limited the application of the doctrine "to two situations: geographic deviation and unauthorized on-deck stowage." The Circuit Court has directly addressed the question of whether "corrupt or criminal misdelivery" constitutes unreasonable deviation, ruling that it does not.

Following Second Circuit precedent, the court found the doctrine of unreasonable deviation to be inapplicable.

The court found there was no clear and unambiguous agreement between the parties as to whether the container constituted a COGSA package, noting the bill of lading acknowledged receipt

of "1 cntr" but also noted the total number of packages as four. Additionally, this container did not fit the definition in the bill of lading which referred to "palletised and/or unitised assemblage of cartons which had been palletised and/or unitised for the convenience of the Merchant."

While the container was not a package under COGSA, it did not mean that the contents of the container were. Again looking to the bill of lading, although there were four cars mentioned on the face of the bill of lading and it listed the number of packages as four, every other relevant part of the bill of lading negated any inference that such number was intended to define the number of packages.

The court noted the description of the goods was stated to be "*4 un-packaged* multiple units of used autos". Secondly, the cars were not the only items shipped in the container. The bill of lading also included "one lot of used auto parts." Third, the definition in the bill of lading referred to palletised and unitised assemblage cartons, which could not be read to include "unpackaged multiple units of used autos." Thus, the court found the limitation of liability should be determined by the number of "customary freight units."

The court noted the freight charge in this instance was pre-paid and the bill of lading did not disclose the how it was calculated. Thus the court found it lacked evidence needed to determine the number of customary freight units that were shipped and, therefore could not determine the maximum potential liability of the ocean carrier without more.

RECOUPMENT ALIVE AND WELL UNDER COGSA…

United Arab Shipping Co. v. Transworld Logistics Grp., Inc., A-4684-11T2, 2013 WL 845386 (N.J. Super. Ct. App. Div. Mar. 8, 2013); Decision of Judges Harris, Hayde, and Hoffman.

Various shipments of automobiles and used-automobile parts were shipped in containers from Norfolk, Virginia to Umm Qasar, Iraq on numerous dates between June and September of 2008.

[Editors' note: The underlying matter was a business transaction for the export of automobiles and used-automobiles parts from the United States to be received and paid for in Iraq made with the defendant, an NVOCC, to transport the goods in containers to Iraq. The NVOCC in turn, contracted with an ocean carrier for transportation of these several shipments. The ocean carrier charged the NVOCC $105,373.00 for its services. By all accounts, the shipments arrived in Iraq. Some of the automobiles may not have been allowed to be imported or were delivered by the ocean carrier pursuant to an e-mail stating the carrier could release the containers without surrender of the original bills of lading. The consignee did not have possession of any bills of lading because it never paid for the services of the NVOCC. In like vein, the consignee never paid the supplier for containers that supposedly never made it into Iraq, not meeting an importation restriction.]

The ocean carrier sued the NVOCC for outstanding shipping charges, plus attorneys' fees. The NVOCC filed a counter claim against the ocean carrier seeking damages in excess of one million dollars, supposedly reflecting the value of lost cargo. **[Editors' note:** An amended answer and counter-claim was filed, which added the initial supplier as an intervenor claimant on the counterclaim and the ocean carrier filed an amended complaint which lodged direct claims against the supplier, the consignee and individual parties involved.]

The carrier moved for summary judgment, seeking dismissal of the entire counterclaim asserted against it on the basis the claim(s) were time-barred, not having been initiated within one year.

With respect to a second motion for summary judgment seeking relief against the NVOCC only, the court rejected an argument that a defense of recoupment survived its earlier ruling on the limitation of actions, concluding that the carrier had earned the right to be paid once the containers arrived at the destination port, regardless of their timeliness vis-à-vis any import deadlines. The court entered judgment in favor of the ocean carrier for the amount of $105,373, plus attorneys' fees of $20,000. (After the ocean carrier's remaining claims were dismissed, the appeal followed).

The appellate court first considered the question of time-bar, noting the amended counterclaim contained four separate counts, the first involving recoupment and the remaining three involving variously asserted claims for negligence, misdelivery, contract, etc.

The appellate court found the court below dismissed all of the counterclaims on the basis they were time barred by COGSA's three-day notice-of-claim requirement and one-year limitation of actions rule; however, the court considered this decision improvident and contrary to established decisional law interpreting COGSA.

The court considered the aspect of these defenses and agreed that counts two, three and four of the counterclaim were barred by COGSA's one year-limitation. However, count one purported to seek recoupment, a defense recognized under COGSA as not being subject to its time-bar limitation (citation omitted). The rationale for upholding a recoupment defense was stated as: "…because recoupment is in the nature of a defense it is never barred by the statute of limitations so long as the plaintiff's main action itself is timely." (Citation omitted).

The court next addressed whether summary judgment should have been granted, aside from the recoupment defense. The court found material fact questions permeated the summary judgment process, rendering the grant of summary judgment erroneous. The court commented on the various issues which the lower court should have considered, or did not consider, and found summary judgment should not have been granted in favor of the ocean carrier.

Finally, the court touched upon the NVOCC's argument that damages were limited by COGSA (package limitation). If the NVOCC wished to avoid such limitation, it was permitted to declare a higher value for its cargo. On remand, it would have the burden of demonstrating the quantum of its entitlement, if any, to damages under the application of the $500 per package or customary freight unit limitation.

In summary, the court affirmed the dismissal of counterclaim, except for the count seeking recoupment and reversed the grant of summary judgment in favor of the ocean carrier.

SOMPO SAGA CONTINUED. (SEE NO. 60). NEED WE SAY MORE?...

Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.,
07 CIV. 2735 DC, 2013 WL 4414797 (S.D.N.Y. Aug. 16, 2013)

Plaintiff's cargo underwriters sued for damages to cargo sustained during a derailment. Following extensive earlier proceedings, the court granted in part and denied in part defendants' motion for summary judgment. It also denied plaintiff's cross motion for summary judgment (see *Cargo Newsletter No. 60*). The court upheld a covenant not to sue contained in one bill of lading form; however, found a second bill of lading form needed clarification as to the intent of the parties. Thereafter, the parties filed cross-motions for reconsideration and renewed their cross-motions for summary judgment.

The court first took up the interpretation of the bills of lading. Referring to *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 33, 2004 AMC 2705, 2718 (2004), the court noted "when an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed."

The court noted that in *Kirby*, the Supreme Court held that where there are two bills of lading – one issued by an intermediary NVOCC to the cargo owner and another issued by the NVOCC's ocean carrier to the NVOCC - downstream carriers are "entitled to the protection of the liability limitations in the two bills of lading", provided they contain Himalaya Clauses extending such liability limitations to downstream carriers.

Noting the cases were "indistinguishable" from the facts in *Kirby* (a bill of lading issued by the NVOCC, who in turned

received a bill of lading from the actual carrier), the court noted that the Supreme Court interpreted both bills of lading as enforcing the liability limitation in the ocean carriers' bill of lading even though those terms were less generous than the bill of lading issued by the NVOCC.

Applying the same analysis to these cases, the court held the defendants were entitled to the protection of the liability limitations in both bills of lading. Nippon Express, as agent of Unisia, Enplas, and Fuji, had authority to bind them to the terms of the Yang Ming bill of lading. The Yang Ming bill of lading constitutes an agreement by plaintiffs not to sue any entity other than Yang Ming. The Himalaya Clause in the Yang Ming bill of lading entitles defendants to the protection of this covenant not to sue, and thus precludes plaintiffs from suing them.

While the liability limitations involved in *Kirby* happened to be dollar limitations, rather than covenants not to sue, nothing in *Kirby* could be read to exclude a covenant not to sue as a type of liability limitation.

Noting, in a footnote, that the court in *Royal & Sun Alliance Ins., PLC v. Ocean World Lines, Inc.*, 572 F. Supp. 2d 379, 2008 AMC 2237 (S.D.N.Y. 2008), distinguished covenants not to sue from dollar limitations, the court concluded the district court's reasoning in that case was irreconcilable with *Kirby* and declined to adopt it. It noted that while the court of appeals affirmed the district court's judgment (*Royal & Sun Alliance Ins., PLC v. Ocean World Lines, Inc.*, 612 F.3d 138 (2d Cir. 2010), it did so without discussing the district court's ruling on this point as the parties did not appeal the issue.

As to plaintiff's argument that binding "unsuspecting shippers" to the terms of a contract to which they did not agree would contravene industry practices and undermine *Kirby*'s concerns about "promoting nondiscrimination in common carriage", the court noted that, in *Kirby*, the Supreme Court held the limited agency rule tracks the practices of the intermodal transportation industry:

cargos often change hands many times during transport and carriers should be able to rely on liability limitations in their contract with an intermediary without the "very costly or even impossible" task of ascertaining the obligations that are outstanding among all of the parties in the transportation.

> The difference between a shipper and a downstream carrier is that the shipper authorized its intermediary to act on its behalf, and thus is bound to the terms of the contract to which its agent agreed. To the extent that there is a gap between the liability limitations in two bills of lading, the shipper's recourse is against its agent, the intermediary that was party to both bills of lading.
>
> *Sompo Japan Ins. Co. of Am.*, 2013 WL 4414797, at *7.

Finally, plaintiff argued that the Supreme Court in *Regal-Beloit* left open the question of whether the terms of a particular bill of lading would be binding on shippers when another bill of lading governing the same shipment contains inconsistent terms. As to this, the court stated the portion of *Regal-Beloit* on which plaintiff's relied was *dicta* regarding what the parties' rights might have been if the Carmack Amendment applied (the Carmack Amendment imposes its own rules; however, it is noted that such rules were inapplicable in this case because the Carmack Amendment did not control.)

The court found the defendants were entitled to the benefit of the covenant not to sue in the Yang Ming bill and such "liability limitations" encompass restrictions on what entity can be sued under the bill. Thus, the liability limitation provides that plaintiffs may not sue anyone other than Yang Ming.

Because of this conclusion, the court found it need not resolve any ambiguity in the contested provisions of the NVOCC bill of lading or construe any ambiguity against defendants.

Irrespective of the provisions of the Nippon Express bill of lading, the Yang Ming bill of lading precludes plaintiff from bringing claims against defendants and this conclusion was dispositive of the issues on which it deferred ruling in its prior opinion.

Accordingly, the court dismissed plaintiff's claims arising out of the shipments other than a single shipment (Enplas) considered separately. As to this shipment, plaintiff contended it received an assignment of Yang Ming's rights and therefore should be entitled to make claims directly against defendant railroads.

The court noted "an assignment is a contractual transfer of a right, interest, or claim from one person to another…" and "… an assignee stands in the shoes of the assignor and subject to all equities against the assignor." *Id*. At *8.(*citing cases*). The court found, as a matter of law, that the interested cargo underwriters received an assignment from the ocean carrier to any claims which it had against the railroad and authorized underwriters to receive payment and settlement of the Enplas claim. As the ocean carrier's assignee, the plaintiff's underwriter possessed all of the ocean carrier's rights under the ITA and Rules Circular between the ocean carrier and the railroad, including a right to make claims against the railroad for the damages to the Enplas shipment.

The court found the plaintiff's underwriter was entitled to a presumption of negligence against defendant because (1) derailments are extraordinary, not usual, happenings that do not occur in the absence of someone's negligence; (2) defendants did not dispute they had exclusive control over the derailed train and the track on which it ran; and (3) the derailment was not due to any voluntary action or contribution on the part of the ocean carrier.

Noting the matter had been pending for approximately six years and there was ample opportunity to conduct discovery, the court found "on the record before the Court", a reasonable jury could only conclude the defendants' negligence caused the damages to the Enplas shipment.

Accordingly, the court held as a matter of law that defendants were liable for the damages. It rejected the argument by the railroad that, because Yang Ming never paid any damages, there was no claim for indemnity for which the railroad should be held responsible. The court noted the indemnification provision was broadly worded, and permitted the ocean carrier to assign to third parties its "right to make claims" against the railroad, supporting an interpretation that the ITA afforded rights to make claims against the railroad, not merely seek reimbursement.

Second, defendants contended that specific venues in which a lawsuit could be brought were set forth in the agreement and New York City was not one of them. The court noted that defendants conceded that venue was proper in New York and that a transfer to the Northern District of Georgia was sought merely for the convenience of the parties and witnesses. At that time, defendants' motion to transfer was denied and the court discerned no new basis to reconsider the proprietary of the venue, "after the parties have litigated the case in this venue for approximately six years".

The court granted the cargo underwriter's motion for summary judgment as to the Enplas claim stipulated in the amount of $100,000, plus interest.

MOTION TO CONFIRM AWARD; HOW TO RESPOND…NOT!

STX Pan Ocean Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., 12 CIV. 5388 RJS, 2013 WL 1385017 (S.D.N.Y. Mar. 14, 2013).

Plaintiff ("STX") was retained to deliver a cargo of sulfur from the Persian Gulf to the Far East. It did not have a vessel capable of transporting 30,000 metric tons of sulfur and thus, entered into negotiations with the defendant chartering company ("PBC") (based in the Bahamas) for the use of the vessel involved. A fixture or recapitulation agreement was entered into including confirmation the vessel was "suitable for the carriage of sulphur in every respect." It is also incorporated by reference a prior charter subjecting any

disputes to arbitration in London, with disputes arising out of the agreement to be governed by English law.

Shortly after the fixture recap, the defendant informed the plaintiff the vessel was not equipped to carry the full load of sulfur, leaving plaintiff unable to meet its obligation to ship the cargo. As a result, plaintiff was unable to honor its shipping agreement.

Claiming breach of contract and seeking lost profits, arbitration proceedings were instituted by plaintiff in London. Both plaintiff and defendant appointed arbitrators in December 2004, but plaintiff did not serve defendant with its claim until almost four years later. "Following a contentious and prolonged arbitration, an arbitral tribunal issued an award for plaintiff plus interest and also awarded costs". Defendant appealed the award which was affirmed by the High Court of Justice of the United Kingdom on March 15, 2012. The court also awarded costs of the appeal to plaintiff.

Plaintiff then initiated this action approximately one month later and filed an affidavit on August 8, 2012 attesting to the service of the petition on PBC. The court ordered defendant to respond by August 22, 2012. Defendant filed its response which was submitted in the form of an answer, generally denying the allegations in the petition and asserting five affirmative defenses.

The court found the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), as implemented by the Federal Arbitration Act, permits a district court to enforce a foreign arbitral award when the party seeking to enforce the award files a petition to confirm (within three years of the award's issuance) and submits an original or certified copy of the arbitration agreement and award to the court.

The court noted it must confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention. Any party opposing enforcement has the burden to prove that one of the seven defenses under the New York Convention applies.

Defendant did not suggest any of the grounds set forth in the New York Convention for declining confirmation were applicable. Rather, defendant asserted lack of personal jurisdiction; the petition did not state a cause of action upon which relief could be granted; insufficient process; failure to properly mitigate damages; and lack of subject matter jurisdiction over the dispute.

(As stated, the response of defendant was submitted in a form of an answer; however, the court clearly stated in its order directing a response to the petition that a motion to confirm arbitration "should be treated akin to a motion for summary judgment." The court nevertheless, treated defendant's answer as a response to the petition.)

As to personal jurisdiction, the court noted defendant's New York activities (citing cases). It noted defendant was listed as having an office in New York and had designated two New York companies to serve as agents within the state, including as agents for service of process. Defendant had continuous business contacts with New York and also had a current phone number listed at one of these offices and was still advertising the other as "general agent" on its website. Defendant offered no support for its objection to personal jurisdiction or proof that such agency relationships had been altered, "beyond the bald assertion that jurisdiction does not exist." The court found proper jurisdiction.

Service of process: The court rejected this claim as well. A process server's sworn affidavit was filed with the court; however, defendant provided "no support for its claim beyond its assertion that "Petitioner has improperly and/or insufficiently served process upon the Answering Respondent." Without any "specific facts" rebutting STX's affidavit, the court had little difficulty determining that PBC's objection was without merit.

Subject matter jurisdiction: Defendant's objection with respect to subject matter jurisdiction merited "minimal attention." The New York Convention governing foreign awards arising out of commercial agreements and the Federal Arbitration Act gives

district courts original jurisdiction over actions falling under the Convention.

The awards at issue were issued by an arbitral tribunal in London in accordance with an arbitration agreement between a South Korean and a Bahamian corporation. Accordingly, the court found subject matter jurisdiction to entertain the dispute.

The court noted the strong public policy in favor of international arbitration and that courts are limited to determining whether a defense enumerated in the Convention bars enforcement of an award. The defenses asserted were not listed in the Convention. The court considered defendant was impermissibly attempting to relitigate the underlying claim and found the objections to be without merit.

The court found it had jurisdiction and concluded that none of the seven defenses under the New York Convention applied. Accordingly, the petition was granted.

FIRE STATUTE AND COGSA DEFENSE INERTED….

In the matter of the arbitration between P.T. Cabot Indonesia and Energy Transport Ltd. and Oilmar Co., Ltd. Panama under a charter party for the M.V. SAN SEBASTIAN, dated March 7, 2003; partial final liability award and final demurrage award by Donald T. Rave, Jr., Raymond J. Burke, Jr., and Peter J. Zambito, Chairman (June 12, 2013).

The M/V SAN SEBASTIAN was chartered for a voyage from various U.S. Gulf and Mississippi River ports to Malaysia, Singapore, and Thailand. The charter afforded the option to load carbon black feedstock and/or fuel oil and contained a Carbon Black Feedstock Safety Clause which included language that "… residual fuel Tank Ullage Spaces should be considered as potentially flammable and classified as 'Hazardous' and suitable precautions taken. The same precautions should be taken with Carbon Black Feedstocks. In particular, no potential sources of ignition should be permitted in or near the tank storing or carrying this product…."

A fatal explosion and fire occurred on May 2, 2003. A fitter used a flame cutting torch to cut a window on the top of the inert-gas system ("IGS") piping for the No. 5 Starboard cargo tank. The window allowed inert gas to escape and air to enter, thereby allowing a flammable atmosphere to develop in the No. 5 cargo tanks. Whether the IGS actually was operable is a matter of some conjecture; however, whether this aberration from normal operating procedures was due to infirmities in the IGS, ongoing repairs to the deck seal, ongoing repairs to the piping itself, the failure of the officers to appreciate the explosive nature of the cargo when heated, or a combination of these is not known. However, the majority concluded that the IGS was not operated during the voyage and that, by virtue of a visit by the owner's superintendent to the vessel at Gibraltar, the owner was, or at least should have been, aware of this fact.

The majority held:

> …Regardless of whether the IGS was operated during the voyage, the fact remains that something caused Nochka to cut the window in the IGS line using an oxyacetylene torch, fabricate a patch and then attempt to weld it into place with an electric arc welder, thereby causing the explosion.

By all accounts, the fitter was an experienced and hard-working shipmate, leading the panel majority to discount any notion that he had a death wish. The opinion of a vessel superintendent, stated in a post-casualty report to management, was that there was a lack of supervision of a good worker who "wanted to show his diligence and work capacity by performing the repairs in situ." The fleet manager and the chief engineer also shared this opinion.

Thus, the panel majority concluded that the vessel owner, through its superintendents, was aware that the IGS piping was in need of immediate repairs, which could not wait for a shipyard and hence would have to be done by the fitters during the voyage while the vessel was underway.

The panel majority also considered that, although the vessel manager expected the IGS piping would be repaired during the laden voyage, no adequate planning was done by, or submitted to, management in order to assure that this work would be accomplished safely. Instead, the panel majority found the owner "left the SAN SEBASTIAN and her Russian-speaking crew to their own devices to complete these repairs; and that, in fact, due to other events in Antares' business, the shoreside management of the SAN SEBASTIAN seems to have been handed off from Superintendent… to Superintendent…and then to Superintendent…."

The testimony of owner's fleet manager confirmed the panel majority's belief that, in fact, there should be documentation addressing the scope of work which had to be performed and that the shoreside staff of owner should have received such documentation.

> Whether this was willful blindness on the part of Antares, or an innocent byproduct of the management of the Vessel having been spread among three superintendents during the course of the voyage, the Panel majority considers the legal result to be the same. The Panel majority concluded that, taken as a whole, "Antares' actions and inactions were negligent."

The majority found that the risk of an explosion was a foreseeable result of owner's management's allowing the vessel to proceed from Gibraltar with officers in conscious ignorance of the properties of the cargo, the IGS lines in urgent need of repair, extra fitters who were welding experts tasked to do repairs on an urgent basis, and, most importantly, no formal plan detailing the scope of work or the methodology or supervision to be employed existed. Thus, the panel majority concluded that owner's management's design or neglect was the proximate cause of the explosion and fire, thereby depriving owner of its defense under the fire statute and the COGSA fire exception and rendering it liable for cargo-related losses to be quantified in future proceedings.

The chairman of the panel filed a dissenting opinion on liability as to the explosion and fire, considering the burden of proof of claimants was not sustained by them. Referring to numerous extracts from the hearing transcripts, the dissent found any lack of production of witnesses or documentation relating to any planning for the work on the IGS or documentation relating to the actual work accomplished to be of little, if any, relevance since the evidence adduced merely reflected that no authorization from management or a permit for "hot work" would have been given or issued for the work Nochka undertook.

The dissent considered the IGS to be working properly at the time of the casualty; that the officers and crew were qualified for their job; that owner's standing safety instructions and procedure manual were proper and were "perfectly adequate" and in compliance with industry standards; that authorization to do the work the fitter undertook would never have been given; and that if supervision was lacking, such was on the part of the officers and crew, not management, and that "causation and foreseeability were lacking." The dissent concluded that claimants did not sustain the burden thrust upon them.

[The panel went on to consider demurrage relating to loading ports, trans-shipment, and discharge ports.]

[Editors' note: A motion to vacate has been filed in the U.S. District Court for the District of Connecticut.]

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

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NEWSLETTER

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THE VIABILITY OF CLASS ACTIONS AS A REMEDY FOR MASS CRUISE SHIP DISASTERS

Robert D. Peltz
Leesfield & Partners, Miami, FL

Although the scope of the tragedy arising from the recent CARNIVAL TRIUMPH fire did not in any way approach the magnitude of the injuries and deaths stemming from the sinking of the COSTA CONCORDIA, U.S. media has nevertheless filled the airways and papers for many months regarding the disturbing conditions aboard the vessel and the resulting litigation filed by passengers.

While much of the media attention directed to the legal issues arising from the CONCORDIA focused on the enforceability of Costa's forum selection provision requiring that suit be filed in Genoa, Italy, the interest following the TRIUMPH fire has been instead directed largely to the availability of class action remedies for its passengers. The likely difference for the media focus is a result of the fact that the CONCORDIA disaster resulted in many serious personal injuries and deaths, while the passenger claims from the TRIUMPH were generally limited to mental distress related claims.

Regardless of whether the courts allow the class actions filed against Carnival as a result of the fire aboard the TRIUMPH to proceed, the availability of class actions as a remedy for mass cruise line disasters will continue to arise in the future until there

is some binding precedent. Although a handful of district courts have considered this issue in the past, neither the circuit courts nor the Supreme Court have fully addressed this issue in the cruise line context.

The class action suits filed against Carnival raise two separate issues going to the basis of the remedy. The first is the class action waiver provision in the Carnival ticket. The second is whether the damages flowing from this disaster are likely to result in class certification under Federal Rule of Civil Procedure 23. Each of these issues is discussed separately below.

The Validity of the Class Waiver Ticket Provision

Because it is a relatively new feature of the ticket of passage, there is virtually no authority regarding the validity of the class action waiver provision as applicable to cruise lines. Accordingly, analysis of the validity of this waiver has been forced to focus on other types of contractual waiver provisions.

The starting point for this analysis has generally begun with the U.S. Supreme Court's recent decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012). Although each of these cases upheld the validity of class action waivers in different context (i.e. a consumer lease agreement and a nursing home contract), they were both dependent upon the fact that the class action waiver was part of an arbitration clause contained in the underlying contract. Accordingly, the Court concluded that each case was governed by the provisions of the Federal Arbitration Act, 9 U.S.C. § 2 which makes agreements to arbitrate "valid, irrevocable, and enforceable."

Although the ticket provisions for the Carnival contract provide for the arbitration of non-personal injury matters, this provision is strictly limited to such claims as 46 U.S.C. § 30509 voids any attempts by a carrier to deny a passenger the right to a jury trial for the redress of any personal injury or wrongful death injuries. Therefore, where the aggrieved passenger seeks recovery on the basis

of negligent infliction of emotional distress, the arbitration ticket provision would be inapplicable. Accordingly, neither *Concepcion* nor *Brown*, which rely upon the FAA's pre-emption of contrary state laws, would be applicable.

As to claims asserted under purely contract theories, however, these decisions would be relevant, since the FAA applies to maritime transactions. Even where these cases are applicable, however, it is significant to note that the FAA provides that agreements to arbitrate may be invalidated by generally applicable contract defenses that "exist at law and equity for the revocation of any contract. 9 U.S.C. § 2. Therefore, the normal contract defenses such as fraud, duress, unconscionability or violation of public policy would be grounds for attacking such clauses.

A complete analysis of the applicability of such defenses to these class action waivers would be extremely extensive and well beyond the scope of this article. Nevertheless, the point here is that the applicability of such clauses to the cruise line context is far from certain, particularly as to claims which are framed in personal injury causes of action.

Class Certification Under Fed. R. Civ. P. 23

If the courts refuse to enforce the class action waiver provision that is now typically found in most cruise line tickets, the passengers must still meet the provisions of Fed. R. Civ. P. 23, which contains a two-tier threshold. First, the prospective class action must meet the four prerequisites: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class ("commonality"), (3) the claims or defenses of the representing parties are typical of the claims or defenses of the class and (4) the representative party will fairly and adequately protect the interests of the class.

Although all four prerequisites must be met, the normal focus in most cruise line disaster cases is on the commonality of the questions of law and fact. This requirement looks to whether

a sufficient nexus exists between the legal claims of the named class representatives and those of the individual class members. Although the requirement may be satisfied even if there are some factual differences between each representative's claims, they must "share the same essential characteristics as the claims of the class at large…." *Neenan v. Carnival Corp.*, 199 F.R.D. 372, 374 (S.D. Fla. 2001).

Where the prerequisites of Fed. R. Civ. P. 23(a) are met, the court then looks to determine whether one of the alternative requirements of sub-section (b) of the Rule exists. One of these alternative requirements which is generally implicated in cruise line disaster cases is the so-called "predominance" requirement under which "questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." This requirement has been interpreted as meaning that the issues in the class action which are subject to generalized proof must predominate over those issues that are subject only to individualized proof. *See, e.g., Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir. 2000).

To date, only a handful of decisions have considered the applicability of class action certification to mass cruise ship disasters. Both the commonality and the predominance requirements have posed significant difficulties for litigants seeking class certification in these cases.

One of the few circuit court cases to consider this issue is *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1985 AMC 826 (11th Cir. 1984), which arose out of the failure of the sanitary system on a Carnival ship in 1982. The Eleventh Circuit Court of Appeals reversed the district court's initial denial of class certification under the "numerosity" and "typicality" prerequisites, concluding that the district court had utilized the wrong standard for its analysis. Accordingly, the court remanded the matter back to the district court to determine whether the "commonality" and "predominance" standards were met.

On remand, the district court concluded that the commonality pre-requisite had not been met, since the plaintiffs' claims had been based upon the theory of misrepresentation, which required individualized showings of the specific representations made each passenger's reliance and the resulting damage. As a result, the court concluded that the "proposed class action would deteriorate into a parade of mini trials with multiple questions of law and fact," and therefore denied the request for certification. *See Kornberg v. Carnival Cruise Lines, Inc.*, 1986 AMC 854 (S.D. Fla. 1985).

A similar result was reached 16 years later in another shipboard sanitation failure in *Neenan v. Carnival Corp.*, 199 F.R.D. 372 (S.D. Fla. 2001). In reliance upon *Kornberg*, the court likewise found a lack of commonality and denied certification.

In *Neenan*, the district court also concluded that the proposed class action failed to meet the predominance standard, which has also posed a significant hurdle in other cruise line cases as well. For example, in *Elliot v. Carnival Cruise Lines*, 02-23253-CIV, 2003 WL 25677700 (S.D. Fla. Oct. 17, 2003), the court found that the plaintiff's claim based upon the loss of accommodations and service following a shipboard fire passed the commonality test, but did not meet the predominance requirement. In reaching this conclusion, the court noted that "the threshold of commonality is not high . . . [and] to satisfy this element, the plaintiff must only allege one common question of law or fact among all class members." *Elliot*, 2003 WL 25677700 at *2.

The predominance requirement, however, is much higher and requires the court to look beyond the pleadings to the specific claims, defenses, relevant facts and applicable substantive law. Based upon this analysis, the court concluded that most of the plaintiff's claims would not be determined by the common questions or law or fact, but instead on the resolution of highly case specific factual issues. A similar result was reached in *Stobaugh v. Norwegian Cruise Line, Ltd.*, 105 S.W. 3d 302 (Tex. App. 2003) involving resulting injuries from sailing too close to a hurricane.

Attempts at class action certification have not fared much better in the context of seamen attempting to enforce their rights. In *Wallace v. NCL (Bahamas), Ltd.*, 271 F.R.D. 688 (S.D. Fla. 2010), the court concluded that a claim by stateroom attendants under the Seaman's Wage Act failed to meet the predominance requirements as both liability and damage issues would involve significant individualized proof.

Although these cases do not constitute binding precedent, in the absence of contrary circuit court decisions, these consistent holdings nevertheless provide very persuasive authority against class action certification in shipboard disaster cases such as the CARNIVAL TRIUMPH and COSTA CONCORDIA. Although involving seamen's claims, the *Wallace* case will be particularly problematic for passengers seeking to assert class action rights in such cases. If a case based upon a statutory violation seeking the recovery of purely pecuniary losses cannot meet the threshold, how can individualized claims for personal injuries as a result of negligence do so?

UPDATE: THE ATHENS CONVENTION PROTOCOL 2002

Paul S. Edelman
Kriendler & Kriendler, LLP
New York, New York

There is a new regime on the Athens Convention as of December 31, 2012, applicable to the European Union countries. 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).

Although early on there was some confusion as to whether U.S. courts would enforce this provision, since the U.S. was not a party to it, more recent cases do enforce it as a matter of contract, the only *caveat* being a case like that from the Ninth Circuit which held that it would not be enforced where the ticket mentioned only the

Athens Convention without stating the limitation amount. *Wallis v. Princess Cruises, Inc.,* 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002). Other cases have followed *Wallis*, and some have held the information properly presented. Since this case, the tickets usually add the explanatory language.

The only advantage to passengers of the old 1974 Convention is that it provides two years to sue which gives additional time to negotiate a settlement, whereas U.S. voyages usually have a one year limitation. There is however a U.S. case where despite finding coverage for the Convention, a one-year statute of limitations was applied by the Eleventh Circuit in *Farris v. Celebrity Cruises*, 487 F. App'x 542 (11th Cir. 2012). The ticket referring to the one-year limitation stated: "NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY." *Id*. at 544.

The 2002 Protocol would probably not allow this result. Article 9 provides for a three-year limitation period from the time the claimant knew or should have known of the cause of his injury, loss or damages. The forum law can toll this period but no later than five years from the date of disembarkation or when disembarkation should have occurred. Article 18 voids any contractual provision purporting to relieve any person of liability. One other U.S. case held the Convention was inapplicable where there was intent to cause damage, e.g. assault, rape or recklessness knowing the 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 was mandatory for each of the 27 EC countries to follow it and make it enforceable by December 31st of 2012. Ten countries are required to adhere to it to put it into force, so it is now enforced in 2013. 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 Monetary Fund, and day-to-day changes are on its web site. It is a

basket of currencies, dollar, euro, pound and Japanese yen. As of December 28, 2012, the last posted date for 2012, the value of one SDR was $1.536920, just over a dollar and one half.

The new Protocol makes the cruise line liable up to 250,000 SDR's and for more damages 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 liability at the end of 2012 of up to $384,230, and for 400,000 SDR's $614,768.

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 2012. The international aviation conventions also provide a large amount with absolute liability up to 113,100 SDR's.

The new Protocol has a two-tier provision for liability. The first is strict liability for personal injury or death caused by a "shipping incident." A "shipping incident" is a "shipwreck, capsizing, collision or stranding of the ship, explosion or fire of the ship or a defect in the ship." A "defect in the ship" is "any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding or when used for the launching of life-saving appliances."

The second tier puts the burden of proof on the claimant for the carrier's "fault or neglect."

In the recent case of *Myhra v. Royal Caribbean, Ltd*., 695 F.3d 1233, 2012 AMC 2678 (11th Cir. 2012) a Florida forum was denied in favor of an English forum clause. The cruise line may or

may not be aware that the 2002 Protocol amount should apply in an English court prior to December 31, 2012 where passengers were English and bought their tickets there. Depending on the facts, there might be strict liability.

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, and (4) where the ticket was issued if defendant had a place of business there and is subject to the court's jurisdiction. It is conceivable that there is a U.S. forum, although the Convention may assume an EU forum only.

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. The EC did not adopt the provisions of the 2002 Protocol dealing with jurisdiction and enforcement of judgments (Articles 10 and 11). The EC has its own law on these issues.

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. Ten countries must accede to the Protocol to put it in force and the EC countries do not count towards the ten countries. Belgium became the tenth so a new Athens Convention will come into force on April 23, 2014. It will replace the present Convention, presumably in the ten countries involved. The ten countries are Albania, Belgium,

Belize, Denmark, Latvia, The Netherlands, Palau, St. Kitts and Nevis, Serbia and Syria.

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? What of the old two-year statute of limitations? The new Protocol requires a longer period. The Bahamas is the flag state for many cruise ships. It is signatory to the 1974 Convention, and is not covered by the EC Directive. How will a new Convention effect this situation in a ticket?

CASE LAW UPDATE

Shore Excursions

Haese v. Celebrity Cruises, Inc., 2012 AMC 1739 (S.D. Fla. 2012)

A complaint against a cruise line for the negligence of a shoreside tour operator resulting in the death of one passenger and serious injuries to another while participating in a shoreside parasailing excursion was upheld under a number of different legal theories, including joint venture and third party beneficiary to a contract. The court rejected the cruise line's argument that the language in the tour operator agreement excluding the existence of a joint venture was determinative of the issue. Instead, the court noted that under the applicable law, the existence of the joint venture may be implied or inferred from the conduct of the parties or from the circumstances.

Gibson v. NCL (Bahamas) Ltd., 11-24343-CIV, 2012 WL 1952667 (S.D. Fla. May 30, 2012)

In another shore excursion injury case, the court upheld the passenger's claim against the cruise line under the theories of joint

venture, apparent agency and direct negligence. The court upheld the joint venture claim on the basis of the opinion in *Fulcher's Point Pride Seafood, Inc., v. M/V Theodora Maria*, 935 F.2d 208 (11th Cir. 1991) which cautioned that when analyzing the factors generally required to support such claims, they are to be considered "sign posts, likely indicia, but not pre-requisites." The court further rejected the plaintiff's claim that its only obligation under maritime law was to warn its passengers of latent defects or problems.

Myer v. Carnival Corp., Case No. 1:12-cv-20321-ZLOCH
(S.D. Fla. March 28, 2013)

Following a very extensive and thorough analysis, the court concluded that the activities of a cruise line in the state of Florida taken to advertise, promote and sell the excursions offered by a foreign tour operator were sufficient to establish general jurisdiction over it under Florida's long arm statute. In reaching this conclusion, the court held that it was not necessary for there to be an alter ego or joint venture relationship between the operator and the cruise line. Instead, all that was necessary was the cruise line to be acting as the tour operator's agent in promoting its business. Such activities were enough to give rise to both general and specific jurisdiction.

Reming v. Holland Am. Line Inc., C11-1609RSL,
2013 WL 594281 (W.D. Wash. Feb. 14, 2013)

During the course of a city tour excursion, the passenger fell into a sinkhole after getting out of the bus to take several photographs. Although holding that 46 U.S.C. §30509 voided the waiver of liability executed by the passenger as to his claims of direct negligence, the court refused to apply the statute to the plaintiff's claims based upon vicarious liability.

Zapata v. Royal Caribbean Cruises, Ltd., 12-21897-CIV,
2013 WL 1100028 (S.D. Fla. Mar. 15, 2013)

In a truly appalling decision, the court concluded that the plaintiff was not entitled to conduct any jurisdictional discovery in order to question or rebut the affidavit filed by the owner of an

excursion company. Instead, the court dismissed the complaint against the tour operator solely on the basis of the affidavit of its president.

Dram Shop

Doe v. NCL (Bahamas) Ltd., 11-22230-CIV, 2012 WL 5512347 (S.D. Fla. Nov. 14, 2012)

In a passenger sexual assault case involving claims based upon the over service of alcohol, the court refused to supplemental maritime law by applying Florida's Dram Shop Act (Florida Statutes §768.125), which significantly limits the liability of an entity serving alcoholic beverages. The court concluded that the application of the Florida statute was inconsistent with both the ticket provisions, which expressly adopted maritime law, as well as the principle of uniformity. Instead, the court concluded that the shipowner's general obligation of exercising reasonable care for the safety of its passengers would serve as a basis for imposing liability for injuries due to the over service of alcohol. *See also Hall v. Royal Caribbean Cruises, Ltd.*, 888 So.2d 654, 2004 AMC 1913 (Fla. Dist. Ct. App. 2004); *Doe v. Royal Caribbean Cruises, Ltd.*, 2012 AMC 761, 2011 WL 6727959 (S.D. Fla. Dec. 21, 2011); *Doe v. NCL (Bahamas) Ltd.*, 11-22230-CIV, 2012 WL 5512314 (S.D. Fla. Nov. 14, 2012).

Forum Non Conveniens

Belik v. Carlson Travel Grp., Inc., 11-21136-CIV, 2013 WL 308869 (S.D. Fla. Jan. 25, 2013) and 11-21136-CIV, 2012 WL 4511236 (S.D. Fla. Oct. 1, 2012)

In two successive opinions in the same case involving a passenger's injuries sustained during the course of a tour excursion in Mexico, the court held that where "it has admiralty jurisdiction with respect to a particular defendant, it has admiralty jurisdiction over an entire case, even when non-maritime claims – which arise from the same operative facts, as in the case here – are brought in the same suit." *Belik*, 2012 WL 4511236 at *5.

The court went on to hold that a case should not be dismissed on forum non conveniens grounds if U.S. maritime law is applicable. In its subsequent extensive analysis of the eight factors contained in the so-called *Lauritzen-Rhoditis* test, the court focused much of its attention on the base of operations factor. As part of this analysis, the court noted that the issue was whether the defendant maintained a base of operations in the United States and not where its "substantial" base of operations was located. As a result, a defendant could have multiple bases of operations. In determining whether a U.S. base of operations existed, the court closely examined the nature of the mutual benefits, both direct and indirect, which each defendant received from the other, in concluding that the Mexican tour operators also maintained a base of operations in the United States. As a result, the court denied the defendant's motion to dismiss.

Forum Selection Clauses

Veverka v. Royal Caribbean Cruises Ltd., 12-CV-03070 ES, 2012 WL 6204911 (D. N.J. Dec. 11, 2012)

In a case involving an 81 year old passenger who sustained a slip and fall injury on the defendant's cruise ship, the court denied both the carrier's motion to dismiss and motion to transfer on the grounds of the forum selection clauses contained in its ticket. Although acknowledging the validity of forum selection clauses in cruise line tickets, the court pointed out that in *Zapata*, the Supreme Court had left the door open for those situations where the plaintiff was able to establish that the passenger's physical and financial impediments to pursuing the case in the contractual forum would make it so "gravely difficult and inconvenient that [he] will for all practical purposes be deprived his day in court." *Veverka*, 2012 WL 6204911, at * 4 *quoting M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S. Ct. 1907, 1917 (1972). The court concluded that the plaintiff in this case met this threshold as a result of having sustained a fractured hip requiring replacement, followed by the development of a blood clot and other related medical conditions. The plaintiff's opposition to the cruise line's motions also contained a report from her doctor indicating that because of her medical conditions "she

should not travel outside of New Jersey at this time." Other cases refusing to enforce forum selection clauses on similar grounds have generally required a higher threshold of disability, such as paraplegia or worse. *See, e.g., Mack v. Royal Caribbean Cruises, Ltd.*, 361 Ill. App. 3d 856, 861, 838 N.E.2d 80, 84 (Ill. App. Ct. 2005); *Walker v. Carnival Cruise Lines,* 107 F. Supp. 2d 1135, 2001 AMC 741 (N.D. Cal. 2000).

Rosa-Nales v. Carnival Corp., CIV. 11-1526 JAF, 2012 WL 2076674 (D. P.R. June 8, 2012)

A forum selection clause in a passenger ticket was upheld over the plaintiff's contention that he did not personally receive a copy of the ticket.

Batiz v. Carnival Corp., 915 F. Supp. 2d 231 (D. P.R. 2012)

The court enforced a forum selection clause in a suit brought by a single mother, who was a disabled Army veteran with "serious health issues" and two minor children. Although recognizing the difficulties and inconvenience which a transfer to Florida would cause the plaintiff, the court concluded that they were not sufficient to meet the "heavy burden" necessary to invalidate such clauses. As a result, the court denied the plaintiff's request for an evidentiary hearing and required the case to be transferred.

Athens Convention

Farris v. Celebrity Cruises, Inc., 487 F. App'x 542 (11th Cir. 2012)

In an unpublished opinion, the Eleventh Circuit Court of Appeals upheld the dismissal of a passenger's lawsuit against a carrier for failure to file suit within the ticket's one year time bar provision for injuries sustained on a cruise which did not touch upon U.S. port. The court rejected the plaintiff's argument that the ticket's incorporation of the Athens Convention damage limitation also incorporated other aspects of the treaty, including its two year statute of limitations.

Discovery

Guest v. Carnival Corp., 917 F. Supp. 2d 1242,
2013 AMC 1779 (S.D. Fla. 2012)

Although 42 U.S.C. § 6308 exempts reports prepared by the Coast Guard of its marine casualty investigations from both discovery and use at trial in civil proceedings, documents, reports, photographs and other materials provided by the shipowner to the Coast Guard as part of its investigation were subject to discovery by an injured passenger in a subsequent civil action. *See also In re Complaint of Danos & Curole Marine Contractors, Inc.*, 278 F. Supp. 2d 783 (E.D. La. 2003).

Doe v. Carnival Corp.,
Case No. 12-22241- CIV- ALTONAGA/SIMONTON
(S.D. Fla. March 14, 2013)

In a case involving a passenger-upon-passenger sexual assault, the court required the cruise line to produce information regarding prior sexual assaults and sexual batteries against passengers occurring on any of the cruise line's vessels in its fleet for the three year period prior to the subject incident. Although the court upheld the defendant's objection in general to the production of its incident report, it required the carrier to produce all information which it received from the FBI as part of its investigation into the subject incident.

Matza v. NCL (Bahamas) Ltd., 12-22684-CIV, 2013 WL 825803
(S.D. Fla. Feb. 22, 2013)

Photographs taken by the ship's security officer during the course of his investigation into a fall were required to be produced in discovery. The court concluded that regardless of whether or not the photographs were work product, the plaintiff was unable to obtain the substantial equivalent "making any attempt to re-visit the scene for additional photographs problematic."

Parks v. NCL(Bahamas) Ltd., 285 F.R.D. 674 (S.D. Fla. 2012)

In a departure from prior case law, the court held that a carrier could postpone producing a surveillance video depicting a passenger's fall on its vessel until after the plaintiff's deposition. The court decided it was not necessary to determine whether the video constituted work product, since Rule 26 (d) provides the Court with broad discretion to control the sequence of discovery. The court went on to state that it agreed with the defendant's contention that the plaintiff should be required to give her deposition testimony based on her own independent recollection of the incident, without being refreshed in any way by the videotape. The opposite result was reached in the identical case of *Schulte v. NCL (Bahamas) Ltd.*, 10-23265-CIV, 2011 WL 256542 (S.D. Fla. Jan. 25, 2011) in which the court held that a surveillance video did not constitute work product and denied the defendant's request to delay its production until after the plaintiff's deposition.

Felicia v. Celebrity Cruises Inc., 286 F.R.D. 667 (S.D. Fla. 2012)

In a case involving a slip and fall in which it was determined that the cruise line's original responses to discovery concerning prior incidents were not accurate, the court upheld the plaintiff's subsequent discovery directed to determine the carrier's procedures to investigate passenger accidents in general. While agreeing with the defendant's contention that its investigative procedures might not be relevant to whether it breached its duty of care to the plaintiff in the case before it, the court nevertheless concluded that the discovery could show whether the defendant's systems for investigating accidents accurately reflected their frequency and therefore would be relevant to the issue of the cruise line's notice of potential problems. The court further observed that discovery into the defendant's policies regarding the taking of photographs and the review of surveillance video could also relate to spoliation issues. As a result, the court upheld the plaintiff's very extensive and detailed discovery into the methods and procedures utilized by the cruise line for the investigation of passenger accidents and its

retention of information and documentation generated during the course of such investigation.

Arbitration

Lobo v. Celebrity Cruises, Inc., 704 F.3d 882, 2013 AMC 740 (11th Cir. 2013)

In *Lobo v. Celebrity Cruises, Inc.* ("*Lobo I*"), 488 F.3d 891, 2007 AMC 1521 (11th Cir. 2007), the Court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") superseded the Seaman's Wage Act, 46 U.S.C. § 10313, thereby upholding an arbitration provision in a foreign seamen's collective bargaining agreement. After the seaman lost his arbitration claim, he became dissatisfied with the representation of his union, Federazione Italiana Transporti ("FIT") and accordingly, filed a class action against both the union and his employer under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, for the tips he and other cabin stewards claimed they had not received. He further asserted that his employer, Celebrity Cruises, Inc., breached the wage provisions of the collective bargaining agreement it had with FIT, while FIT breached the duty of fair representation it owed him under Section 9 (a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159. In reliance upon former U.S. Supreme Court precedents, the Eleventh Circuit dismissed the class action on the grounds that neither the LMRA nor the NLRA applied to wage disputes between foreign ships and foreign seamen.

Yuzwa v. M/V OOSTERDAM, 2013 AMC 1132, 2012 WL 6675171 (C.D. Cal. 2012)

Where the cruise line offered to stipulate to arbitration in Los Angeles with a mutually agreed upon arbitrator, limited discovery and application of U.S. maritime law, the court upheld its motion to compel the plaintiff seaman to arbitrate his Jones Act and related claims. As a result of the cruise line's stipulation, the court concluded that it was not necessary to determine whether the

arbitration clause violated public policy by depriving the seaman of his Jones Act remedy.

Slip and Falls

Bencomo v. Costa Crociere, S.P.A. Co., 476 F. App'x 232 (11th Cir. 2012); *Weiner v. Carnival Cruise Lines*, 11-CV-22516, 2012 WL 5199604 (S.D. Fla. Oct. 22, 2012); *Mendel v. Royal Caribbean Cruise Lines, Ltd.,* 10-23398-CIV, 2012 WL 2367853 (S.D. Fla. June 21, 2012).

In each of these cases, it was held that a summary judgment in favor of the cruise line was appropriate in a suit by a passenger who slipped and fell on a foreign substance where there was no evidence that the carrier had either actual or constructive notice of the condition.

COSTA CONCORDIA Update

Warrick v. Carnival Corp., 2013 AMC 1053, 2013 WL 3333358 (S.D. Fla. 2013)

In a suit by three passengers from Massachusetts for personal injuries, the district court ducked the issue of the validity of the carrier's Italian forum selection clause, however, granted the defendant's motion to dismiss on the grounds of forum non–conveniens. The court concluded that where the passenger's travel agent received the tickets only four days before the cruise, which was after the deadline for receiving any refunds, an issue of fact existed as to whether the passengers had the ability to become meaningfully informed of the forum selection clause and to reject its terms.

Nevertheless, after going through an extensive four factor *Gilbert* analysis, the court concluded that an adequate alternative forum in Italy existed, both the public and private factors weighed in favor of Italy and that the plaintiffs could reinstate their suit without undue inconvenience or prejudice. As a result, the court determined that the case presented "one of the unusually extreme circumstances in which the Plaintiff's choice of forum should be disturbed in

order to greatly reduce the cost and time necessary to resolve the controversy." *Warrick*, 2013 AMC at 1064. Central to the court's reasoning was the factual conclusion that Carnival Corporation was merely "an umbrella organization over Carnival policies, but it did not own, operate, charter, manage or staff the Costa Concordia and does not direct or control Costa's day to day operations."

Abeid-Saba v. Carnival Corp., No. 12-cv-23513
(S.D. Fla. Feb. 15, 2013)
Scimone v. Carnival Corp., No. 12-cv-23505
(S.D. Fla. Feb. 15, 2013)

Two separate lawsuits were filed in the Florida state court on behalf of a total of 104 passengers of the COSTA CONCORDIA. The cases were structured so that one contained 57 plaintiffs and the other 47 plaintiffs. The complaints in each case were carefully drafted to avoid any mention of the passenger's tickets of passage, which contained a forum selection clause. The defendants initially removed the two actions to federal court under the Class Action Fairness Act of 2005 ("CAFA"), which allows for the removal of mass actions, that are defined as containing civil claims of 100 or more persons presenting common questions of law and fact. CAFA, however, contains a specific exclusion exempting cases where the 100 plaintiff threshold is surpassed as a result of the defendant moving to consolidate the cases or to coordinate them solely for pre-trial proceedings.

While various motions to dismiss based upon forum non conveniens and the tickets' forum selection clause were pending, the court granted the plaintiff's motion to remand on the grounds that the defendant's removal under CAFA had been improperly asserted. Accordingly, the court's ruling did not address the merits of the defendant's pending motions, which will now be decided by the Florida state courts.

Limitation

In re Royal Caribbean Cruises Ltd., 2013 AMC 708, 2013 WL 425837 (S.D. Fla. Feb. 4, 2013).

In a case arising from a collision between two jet skis operated by passengers as part of a tour provided by RCCL at its own island, Coco Cay, the district court invalidated a liability waiver executed by the participants and further went on to hold that the cruise line was not entitled to either exoneration or limitation. The court relied upon the Eleventh Circuit's opinion in *Johnson v. Royal Caribbean Cruises, Ltd.*, 449 F. App'x 846 (11th Cir. 2011) to conclude that the waiver violated the prohibitions contained in 46 U.S.C. § 30509. *See also Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 2011 AMC 2941 (S.D. Fla. 2011).

Although rejecting the contention that there was sufficient evidence to establish that the leader of the jet ski tour was negligent in supervising it, the court relied upon a Second Circuit opinion to hold that when an owner allows a person to operate its jet ski that person is deemed part of the "crew." As a result, if the operator is incompetent to properly operate the jet ski, the owner can be found negligent for failing to use proper care in allowing an incompetent individual to operate its jet ski. Under such circumstances, the "vessel" is considered to be "unseaworthy" at the start of the voyage, thereby denying the owner the right to exoneration or limitation.

Jurisdiction

Huang v. Carnival Corp., No. 12-cv-23345-UU (S.D. Fla. Feb. 14, 2013).

In a suit arising out of alleged medical negligence by the shipboard medical staff occurring while the vessel was on the high seas outside of U.S. territorial waters, the court granted the motion to dismiss filed by the ship's doctors and nurses on the grounds of lack of jurisdiction over the person. Although recognizing that the plaintiff's burden was only to establish a prima facie case, the court interpreted prior state appellate court decisions as construing

Florida's long arm statute to provide specific jurisdiction only where the purported malpractice occurred in Florida territorial waters. The court further rejected the plaintiff's argument that there was sufficient evidence to establish that the medical providers were carrying on a business venture within the state or that the cruise line was acting as an insurer. The court went on to hold that the listing of Carnival's Miami headquarters as the individual defendants' local address, the maintenance of a Fort Lauderdale phone line and the use of a local bank account coupled with several trips into the state were not sufficient to give rise to general jurisdiction.

Death Claims

Borrego v. Royal Caribbean Cruises Ltd., No. 11-cv-22682-KING (S.D. Fla. Feb. 25, 2013)

Although finding a lack of precedent directly on point, the district court dismissed a passenger's personal injury claim arising from negligence occurring while the vessel was on the high seas, where the plaintiff subsequently died of unrelated causes. Although recognizing cases allowing an estate to maintain an action following the plaintiff's death, the court concluded that these cases were limited to situations where the plaintiff's death was related to the subject accident, the plaintiff was a maritime worker or the claim arose in territorial waters giving rise to state remedies.

COMMITTEE ON FISHERIES

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

FISHERIES CASE BRIEFS

May 2013

Trident Seafoods Corp. v. Bryson, No. C12-134 MJP, 2012 WL 5993216 (W.D. Wash. Nov. 30, 2012)

UPDATE TO: *Trident Seafoods Corp. v. Bryson*, No. C12-134 MJP, 2012 WL 1642214 (W.D. Wash. May 10, 2012) and *Trident Seafoods Corp. v. Bryson*, No. C12-134 MJP, 2012 WL 1884657 (W.D. Wash. May 23, 2012).

Parties and Issue

Plaintiffs own and operate on-shore fish processing plants in Kodiak, Alaska. Plaintiffs sued defendants National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and John E. Bryson as Secretary of Commerce (collectively "the Agencies") challenging the adoption of Amendment 88 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (Amendment 88).

Plaintiffs argued that Amendment 88 violates the Magnuson–Stevens Fishery Conservation and Management Act ("MSA") and National Environmental Policy Act ("NEPA") in that the Agencies erred by:

(1) Not including on-shore processing as a definition under the terms "fishing" and "fishery," and

(2) Failing to authorize Pilot Program's continuation.

Additionally, plaintiffs claimed that the Agencies should have considered reasonable alternatives to the final rule, including the Rockfish Pilot Program, prepared an environmental impact statement, and considered the effects of all reasonable alternatives on the natural environment and the attendant socio-economic effects. Plaintiffs asked the Court to "vacate the Final Rule implementing Amendment 88" and to reinstate the Rockfish Pilot Program pending reconsideration by the Council and approval by defendants of a new rule.

Analysis and Holding

Two management plans relevant to this case are: the Rockfish Pilot Program and its replacement, Amendment 88. In 2003, in response to a "race for fish," and in an effort to stabilize the fish populations, Congress enacted P.L. 108–199, mandating the creation of a pilot program to recognize the historic participation of fishing vessels and historic participation of fish processors in the Gulf of Alaska Rockfish Fishery. The Pilot Program required catcher vessel cooperatives to form an association with the on-shore processor to which it had historically delivered the most rock-fish. Under this system, known as "fixed linkages," catcher vessels could only deliver harvested fish to the on-shore processor within its own cooperative. By requiring a catcher vessel to deliver its entire harvest to a particular processor, the Rockfish Pilot Program guaranteed some on-shore processors a certain portion of the total allowable catch and eliminated their competition for harvested fish to process. Plaintiffs are on-shore processors who participated in, and benefited from, the Rockfish Pilot Program.

Under Amendment 88, NOAA considered the Pilot Program, but ultimately determined that the "fixed linkages" between harvesters and processors were not authorized by MSA. Although Amendment 88 is similar to the Rockfish Pilot Program, one key difference is the removal of the requirement for harvesters to deliver to a specific on-shore processor. Instead, Amendment 88 contains a geographic requirement, permitting catcher vessels to deliver fish only to on-shore processors in Kodiak, Alaska.

The court determined first that the plaintiffs lacked standing to bring a NEPA claim because their economic concerns fell outside the environmental zone of interest protected by the statute. Purely economic interests, such as the plaintiffs' interests, did not fall within NEPA's environmental zone of interest. Since the plaintiffs did not have standing under NEPA to challenge the Agencies' decision-making, their MSA claim, which was predicated on the NEPA violation, was meritless. Accordingly, the court granted the defendants' motion for summary judgment and denied the plaintiffs' motion.

State Dep't of Envtl. Mgmt. v. Admin. Adjudication Div.,
60 A.3d 921, 922 (R.I. 2012).

Parties and Issue

On May 22, 2007, the F/V CRACKER JAC, owned by Daniel R. Barlow, was boarded by enforcement officers of the Rhode Island Department of Environmental Management ("DEM") who discovered that the amount of summer flounder he had caught that day was thirty-seven (37) pounds more than was permitted under the applicable regulations. DEM sent Barlow a notice of violation, informing him thereby that any and all of his commercial fishing licenses would be suspended for a period of thirty days because of the violation. Barlow appealed that order of suspension and requested a hearing before the Administrative Adjudication Division of DEM ("AAD"). In mid-December of 2008, without engaging in any adjudicative process, Barlow and DEM settled the matter, and they entered into a consent agreement, concurring that Barlow's commercial fishing licenses would be suspended for a period of ten days, that he would be absolved of any liability arising from the alleged violation, and that if Barlow violated a fishing regulation in the future, DEM would impose a "first tier" penalty upon him, as if it were his first violation.

In 2010, Barlow applied to participate in DEM's Summer Flounder Sector Allocation Pilot Program ("pilot program"), that would have allowed a daily catch of between 500 and 1,500

pounds of summer flounder. That program would be lucrative for the fishermen, and Barlow expected to earn between $30,000 and $40,000 by engaging in it. However, that agency determined that Barlow was ineligible to participate in the pilot program due to the settlement of the above-mentioned allegation that Barlow had violated a state marine fisheries regulation for catch limits. The DEM contended that the consent agreement was an administrative penalty that justified disqualifying Barlow from participating in the pilot program.

Analysis and Holding

The superior court held that the AAD erred when it concluded that the consent agreement was not an administrative penalty. The court reasoned that the consent agreement had the same legal effect as an order issued based on an administrative adjudication. The court reinstated DEM's decision denying Barlow's application to the pilot program.

The supreme court found it meaningful that nowhere in the consent agreement did Barlow admit to any guilt or liability about the alleged violation. To the contrary, the consent agreement was crystal clear in its provision that it "shall operate to absolve [Barlow] from any liability arising for all violations alleged by [DEM] relative to the" inspection of Barlow's boat on May 22, 2007. The court noted that Black's Law Dictionary 8 (9th ed. 2009) defines the word "absolve" to mean "[t]o release from an obligation, debt, or responsibility." Therefore, the agreement could not properly be read as imposing liability for conduct when it specifically frees him from it.

The AAD opinion stated that "where a party is 'absolved' from all liability regarding one incident, he cannot then be subject to future consequences in another incident to which he and [DEM] have not otherwise expressly agreed." The consent agreement, by its terms, was meant to be a resolution of all disputed issues in the matter. Barlow fulfilled all of his obligations and fully complied with the terms of the agreement, yet DEM failed to uphold its end of the

bargain when it imposed additional consequences to which Barlow did not agree. Thus, DEM wrongly used the consent agreement as a reason to bar him from the program.

Lovgren v. Locke, 701 F.3d 5 (1st Cir. 2012).

Parties and Issue

Plaintiffs include a number of fishermen and cities that were major fishing ports who brought action against the Secretary of Commerce, National Marine Fisheries Service ("NMFS"), and others. Plaintiffs challenged the regulatory amendment of the Fishery Management Plan ("FMP") for the Northeast Multispecies Groundfish Fishery alleging violations of Magnuson–Stevens Fishery Conservation and Management Act ("MSA") and National Environmental Policy Act ("NEPA").

The Groundfish Fishery is composed of thirteen bottom-dwelling fish species, inhabiting waters from Maine to the mid-Atlantic, which are divided for management purposes into twenty individual "stocks." Since the MSA's inception, the Fishery has faced persistent problems with overfishing and depletion of stocks. The N.E. Council was required by law to implement changes to the Fishery's 2004 FMP by the 2010 fishing year, taking into account both the Reauthorization Act's new protections and the results of a study conducted in 2008 on the health of the Fishery's stocks of fish. The study results showed that the situation was worse than previously believed. A number of groundfish stocks were overfished and subject to overfishing; only two stocks had improved since the 2004 FMP's implementation.

The N.E. Council adopted a new proposed groundfish FMP, Amendment 16 ("A16"), which was upheld upon administrative review by NMFS and of the National Oceanic and Atmospheric Administration ("NOAA") within the U.S. Department of Commerce. The NMFS promulgated Amendment 16 through three related sets of regulations that altered and expanded the Fishery's preexisting "sector allocation program" and established new restrictions on

fishing activities to end and prevent overfishing. These regulations took effect on May 1, 2010.

Plaintiffs then filed suit in federal court alleging that A16 conflicts with the Reauthorization Act's provisions governing "limited access privilege programs," with the ten "national standards" applicable to all FMPs, and with the requirements of NEPA. They unsuccessfully sought to enjoin implementation of Amendment 16. The district court granted summary judgment for defendants as to all claims. *City of New Bedford v. Locke*, No. 10–10789–RWZ, 2011 WL 2636863 (D. Mass. June 30, 2011).

Analysis and Holding

The N.E. Council delayed the implementation of A16 so that it could review the newly imposed congressional requirements of the Reauthorization Act. The Act established new conservation mandates for all FMPs, including "annual catch limits" ("ACLs") that were set at a level "such that overfishing does not occur in the fishery," as well as "measures to ensure accountability" ("AMs") to these limits. Congress also added a section to the MSA governing the implementation of new "limited access privilege programs," or LAPPs.

The Council received the results of the third Groundfish Assessment Review Meeting ("GARM III"), a scientific evaluation of the Fishery's health. GARM III concluded that eleven of the Fishery's stocks were overfished and subject to overfishing. By comparison, GARM II, conducted in 2004, identified seven such stocks. AR 018986–87, 022347. The scientific results of GARM III had to be given weight in the development of A16. After considering all comments, the NMFS largely approved A16 and issued three related sets of regulations: (1) Amendment 16, which details A16's rebuilding program and revises existing management strategies; (2) the Sector Operations Rule, which approves seventeen additional sectors under the revised sector allocation program, and (3) Framework Adjustment 44, which establishes catch limits for each stock within the Fishery.

Extensive revisions to the Fishery's management system were necessary to meet the Reauthorization Act's mandates to end overfishing and rebuild affected stocks. Two decades of almost exclusive input-based management had left the Fishery's stocks on the brink of collapse. The necessary scope of these revisions made some economic hardship inevitable. Recognizing this fact, the N.E. Council introduced measures to mitigate such harm to the extent they deemed practicable.

Two of A16's management measures are central to this appeal. First, consistent with the mandate of 16 U.S.C. § 1853(a)(15), A16 established new "ACLs for all stocks covered by the NE Multispecies FMP," and AMs to ensure compliance with these limits. ACLs were set below the acceptable biological catch levels recommended by the Council's Science and Statistical Committee, and were subject to biennial adjustment based on the best available data. For certain stocks, A16's ACLs represented significant reductions from previous fishing levels. Plaintiffs do not challenge these reductions per se, but do attack defendants' decision to develop ACLs on a stock-by-stock basis.

Second, A16 altered and expanded the sector allocation program introduced by A13. To streamline the sector allocation procedure, A16 assigned every limited access permit holder a "potential sector contribution" ("PSC"), which represented a share of the new ACLs for each of the Fishery's stocks. PSCs were assigned for each stock based on a permit holder's historic landings from 1996 to 2006, this was a departure from the five-year time frame used under A13.

Upon a permit-holder joining a sector, his or her PSC would be combined with the PSCs of other members to determine that sector's "annual catch entitlement" ("ACE"), or the maximum amount of each fish stock that a sector's members could collectively catch. In contrast to A13, there was no DAS alternative to ACE allocations; that choice was consistent with the Council's intent to transition from input controls to output controls. Once a sector reached its ACE, it had to cease fishing activity in that stock, with

one caveat: A16 sectors could lease ACE from other sectors, subject to certain requirements, and so add to their own catch for a particular stock.

Participation by permit holders in sectors remained voluntary, and permit holders who chose not to participate had an alternative: they would fish in the "common pool. Within the common pool, all fishing activities were governed by an amended DAS input control system. As a result, for those who chose not to join a sector but to fish in the common pool, the PSCs assigned to those permit holders became irrelevant and played no role in regulating fishing activity. At the time A16 was promulgated, it was unknown who among the Fishery's permit holders would pick which option. When the sector rosters were finalized, some 812 of the Fishery's 1477 eligible permit holders had chosen to join a sector. Although this sector choice represented only 55% of the Fishery's individual permits, these vessels were responsible for 98% of the previous decade's catch.

Plaintiffs challenged A16 on a multitude of grounds. Taken together, the challenges fell into three broad categories: (1) that A16's sector program is a LAPP, an IFQ, or both under the MSA, contrary to defendants' determination, and as a result, A16 was implemented without certain protections required by the Reauthorization Act's LAPP provisions, found in 16 U.S.C. § 1853a; (2) that certain features of A16 contravene several of the MSA's ten national standards; and (3) that A16 was implemented without proper consideration of reasonable alternatives and the best available information, in violation of the NEPA.

Defendants defended A16 against legal attack on the following bases: (1) A16 is a proper exercise of the NMFS's delegated power under the MSA because (a) no element in A16's sector program meets the elements of the statutory definition of a LAPP or an IFQ, and (b) the NMFS's interpretation of the Reauthorization Act is entitled to deference; (2) A16 is consistent with the ten national standards, and the Reauthorization Act's mandatory conservation requirements explain many of the choices said to violate those standards; and (3)

the N.E. Council and the NMFS met their respective obligations under the NEPA.

At the first stage of analysis, the court agreed with defendants that the statutory text does not compel the conclusion that A16's sector program met the statutory definition of a LAPP or an IFQ. Rather, the text of the Reauthorization Act not only permitted the NMFS's interpretation, but lent support to its reasonableness at the third stage of our analysis. Moreover, federal defendants' argument that the text does not permit the conclusion that A16's sector program is subject to the referendum requirement is correct.

The court next concluded that, at a minimum, *Chevron* deference is called for and that they must defer to the agency's reasoned decision that A16's sector program is not a LAPP and is not an IFQ. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Defendants' lead argument was that, under A16's sector program, "no one—not an individual, a vessel, nor a sector—receives" an allocation that met each element in the statutory definition of a LAPP. The argument has two components: first, sectors (as a whole) do not receive a "Federal permit," as defined in 16 U.S.C. § 1802(26)(A), and as that term is understood in fishery management; and second, while fishermen and their vessels (individually) do receive a "Federal permit," that alone is not enough because it does not entitle them "to harvest a quantity of fish" for their "exclusive use," which are also essential elements in the definition of a LAPP. These elements, not present in A16's sector program, are required in the statutory definitions of both a LAPP and an IFQ. This undercut all of plaintiffs' section 1853a claims. The court concluded that the statutory definition of a LAPP permits defendants' construction. The federal defendants' conclusion that the A16 sector program does not meet the statutory elements for a LAPP or an IFQ conforms to long-standing regulations governing fisheries and is permissible.

Turning from the definition of a LAPP/IFQ, the parties point to other provisions in section 1853a to reinforce their

respective interpretations as to whether sectors are LAPPs or IFQs. Some of these provisions refer to the N.E. Council's "sector allocation" program directly, but most offer only indirect clues as to congressional intent. Three provisions in section 1853a directly acknowledge or address the status of "sector allocations." The text of the Reauthorization Act shows that Congress was well aware of sectors and other collective fishing programs and it chose to treat some differently than others. Section 1853a specifically identifies two collective entities, "fishing communities" and "regional fishery associations" ("RFAs"), as eligible to participate in a LAPP, and it sets out criteria governing both. See 16 U.S.C. § 1853a (c)(3)-(4) (fishing communities and RFAs, respectively). In contrast, there is no comparable provision addressing the eligibility of sectors to participate in a LAPP. Absent such an instruction, and in light of the considerable support for the NMFS's interpretation, the court was unable to agree that the Act mandates the conclusion that A16's sector program is a LAPP or an IFQ.

Plaintiffs argued that regardless, A16 is unreasonable because the requirements of section 1853a should be read to protect fishermen and fishing communities from any and all management systems that might encourage consolidation or drive smaller fishing businesses out of the industry. The court noted that there were two points worth making. First, whether A16's sector program in fact encourages consolidation or exerts particular pressure on small fishermen is itself disputed, and some contend that it provides greater protection against both than the alternatives. Second, defendants have opened the door to consider the concerns plaintiffs raise in their development of future FMPs. In any event, "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy ... the challenge must fail." *Chevron*, 467 U.S. at 866, 104 S.Ct. 2778. The court concluded that where, as here, "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies," it must defer to the agency's conclusions. *Lovgren*, 701 F.3d at 32.

Plaintiffs made a separate argument that A16 is not consistent with the MSA's ten national standards, as announced at 16 U.S.C. § 1851(a)(1)-(10), particularly Standards 1, 4 and 8. The court determined that the defendants met their requirements under National Standard 1 by introducing new "special access programs," which relied on gear, area, and seasonal restrictions to direct fishing efforts toward healthier fish populations. In conjunction with the expanded sector program, these efforts were meant to mitigate the short-term impact of A16's low ACLs until overfished stocks were rebuilt.

The court found that under National Standard 4, the mandate that allocations be "fair and equitable" does not predominate over other considerations announced in NS 4 and in the remaining national standards. NS 4's advisory guidelines provide that an allocation is "fair and equitable" where it is "justified in terms of the objectives of the FMP" and serves to "maximize overall benefits." 50 C.F.R. § 600.325(c)(3)(i)(A)-(B). The court reasoned that an allocation that meets these requirements, such as the allocation at issue here, is rarely deemed invalid.

National Standard 8, which addresses Economic and Social Harms, requires that FMPs "take into account the importance of fishery resources to fishing communities by utilizing economic and social data ... in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8). The plain language of NS 8 and its advisory guidelines make clear that these obligations are subordinate to the MSA's overarching conservation goals.

The court determined that the FEIS addressed the economic effects of A16 along a number of dimensions (including vessel size and gear type, home state and home port, and within sectors and the common pool), as well as the costs associated with sector formation and the potential for vessels to remain profitable under A16's dual management systems. The FEIS concluded that "[t]he economic impacts ... [on] communities are expected to be severe and in some

cases may threaten the existence of fishing businesses in some communities." The FEIS also independently considered the social impact of A16's proposed management measures and contained updated analysis on specific changes under A16 (e.g., the creation of new sectors, the relationship between sectors and the common pool, and the effects of ACLs and AMs).

In conclusion, the court rejected all challenges to A16 and affirmed the district court's judgment in favor of defendants.

Oceana, Inc. v. Bryson, C-11-6257 EMC, 2013 WL 1563675 (N.D. Cal. Apr. 12, 2013).

Parties and Issue

Plaintiff brought suit to challenge Amendment 13 to the Coastal Pelagic Species Fishery Management Plan ("CPS FMP," "the FMP" or "the plan"), alleging that it is not in compliance with the requirements of the Magnuson–Stevens Fishery Conservation and Management Act ("MSA").

Amendment 13, is an amendment to the CPS FMP, which covers a number of species within the California Current Ecosystem. Plaintiffs alleged that Amendment 13 fails to comply with various requirements of MSA and also violates the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA").

Analysis and Holding

In January 2007, Congress enacted the Magnuson–Stevens Fishery Conservation and Management Reauthorization Act of 2006 ("MSRA"), which imposed additional requirements for fishery management plans intended to strengthen the role of science and account for uncertainty in fishery management. MSRA required that each fishery management plan also "establish a mechanism for specifying annual catch limits in the plan ... at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." 16 U.S.C. § 1853(a)(15). This new requirement "shall ... take effect" in 2011 for stocks (including

those at issue in this case) that are not subject to overfishing. The MSRA also directs each Council to "develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee...." 16 U.S.C. § 1852(h)(6).

In January 2009, NMFS published the final rule implementing the revised guidelines under the MSRA. In March 2009, the Council began preparations for Amendment 13. The Council noted that "[t]he MSRA and amended NMFS guidelines introduce new fishery management concepts including overfishing levels (OFLs), annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs) that are designed to better account for scientific and management uncertainty and to prevent and end overfishing," and recognized a 2011 deadline for compliance with the new requirements. *Oceana*, 2013 WL 1563675 at *7. At that time, the Council took action to: (1) Review final NMFS guidance on National Standard 1; (2) Discuss initial issues for CPS management and potential FMP amendment to meet the new NS1 guidelines; and (3) Provide guidance on the scope and schedule for amending the CPS FMP. An advisory subpanel identified additional changes to the FMP for the Council to consider during the amendment process; none of these suggested changes are related to the challenges brought in this suit. *Id.*

Amendment 13, as proposed by the Council and finally approved, made significant changes to the harvest control rules set by Amendment 8. Rather than Amendment 8's one harvest control formula for actively managed species, Amendment 13 sets several related formulas for determining different fishery management benchmarks such as harvest guidelines ("HG"), ABC, ACL, and ACT.

Plaintiff argued that Amendment 13 violated the MSA in that it failed to set optimum yield for any of the species covered by the plan. The MSA requires that fishery management plans assess and specify optimum yield ("OY") from the fishery, and include a summary of the information utilized in making such a specification.

The MSA defines optimum yield as the level of fish harvesting that "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems." 16 U.S.C. § 1802(33). The optimum yield is thus equal to the maximum sustainable yield, "as reduced by any relevant social, economic, or ecological factor." *Id.*

Other than the general statements about the scope of Amendment 13, plaintiff did not identify anything in the record that indicates that the federal defendant considered revisiting the rule on optimum yield set by Amendment 8. In both Amendment 13 and Amendment 8, OY is defined as "the level of harvest which is less than or equal to ABC." *Oceana*, 2013 WL 1563675 at *7. Amendment 13 does, however, change the definition of acceptable biological catch (ABC), upon which optimum yield is based.

Plaintiffs challenged Amendment 13's method for specifying OY concern problems first introduced by Amendment 8. The putative problem with Amendment 8 was not changed in any meaningful way in Amendment 13. That aspect of Amendment 8 was not reopened or reconsidered by the NMFS in issuing Amendment 13. Thus, the court held that the plaintiff's challenge to Amendment 13's failure to specify OY was untimely.

Amendment 13 does not specify an MSY for the northern subpopulation of the northern anchovy, noting that the portion of the subpopulation in U.S. waters was unknown. The federal defendant argued that it lacked sufficient data to determine MSY for this population, and that the MSA does not require setting an MSY under such circumstances. The new MSY recommendation became available several months after the Council had taken its final action on Amendment 13, but before the Council transmitted the draft of the amendment to NMFS. The suggested MSY was one number. Defendants pointed to nothing in the record suggesting that it would have caused significant disruption to add the MSY estimate and a short justification in the amendment before transmitting it to NMFS. Defendants offered no explanation for why it was not "practicable"

to incorporate this number into Amendment 13 before the Council transmitted it to NMFS in January 2011, or before the notice of proposed rulemaking was published in June 2011. They merely noted that by the time the number was available, the Council had taken its final action approving Amendment 13.

The court found that, the defendants did not convincingly establish that it was not possible to incorporate the MSY proxy for the northern subpopulation of the northern anchovy into Amendment 13 at some point before the amendment was finalized. Without such an explanation, NMFS's decision to approve Amendment 13 without an MSY proxy for this population was arbitrary, capricious, and contrary to law. Accordingly, on this issue, the court granted the plaintiff's motion for summary judgment.

Plaintiff next argued that Amendment 13 failed to comply with the MSA in that the formula the amendment sets for acceptable biological catch fails to account for all known sources of uncertainty. Unlike with OY and MSY, there is no explicit statutory provision requiring that FMPs include ABC for the species in the fishery, though the MSA does note ABC as one of the metrics on which a scientific and statistical committee ("SSC") should advise its Council. Amendment 13 sets ABC for all monitored species, including market squid, at 25% of OFL. Plaintiff's challenge to the SSC's recommendations on setting a buffer value for the ABC control rule did not concern a reviewable agency action. Therefore, the court denied the plaintiff's motion for summary judgment on this issue.

Plaintiff argued that Amendment 13 violated the MSA's requirement to base conservation and management measures on the best scientific information available in two ways. First, plaintiff argued that Amendment 13 relied on erroneous data in estimating the percentage of the fish stock that occurs in U.S., rather than Mexican or Canadian, waters. Second, plaintiff argued that Amendment 13 relies on an outdated study in basing the harvest rates for the Pacific sardine partially on average ocean surface temperatures. There is no indication on the record that the Council or NMFS gave any

"serious, substantive reconsideration" of these two rules; hence, the issue has not been reopened, and plaintiff's challenge on the FMP's compliance with national standard two is untimely.

Plaintiff argued that Amendment 13 violated the MSA by failing to set a minimum stock size threshold ("MSST") for species designated as "monitored" rather than "actively managed" under the FMP. The record indicated that neither the Council nor NMFS gave consideration to changing, specifying or setting new MSSTs; hence, this issue was not reopened, and plaintiff's challenge thereto was untimely.

Federal defendant argued that even if parts of Amendment 13 did not comply with the MSA's requirements, it was not within the Secretary's power to add to or change non-complying parts of Amendment 13. While it is true that the Secretary generally may not unilaterally amend aspects of an FMP, she is permitted to disapprove parts of an amendment to the degree that it does not comply with the requirements of the MSA. Federal defendant had partially disapproved amendments to the FMP for failure to set certain benchmarks in the past. Plaintiff argued not that the Secretary should have amended the FMP herself, but that she should have disapproved Amendment 13 to the degree that portions of the amendment violate the MSA.

Federal defendant also argued that the plaintiff could not prevail on this claim because agencies have the discretion to prioritize between issues, and that NMFS did not need to address all flaws in the FMP with this amendment. While agencies may certainly prioritize in setting which initiatives they wish to pursue, here plaintiff was not alleging that NMFS failed to pursue certain policy agendas; rather, plaintiff alleged that the NMFS approved an amendment to a fishery management plan that was in violation of the MSA. The MSA explicitly provides that the Secretary has a duty to ensure that FMPs and amendments are "consistent with the national standards, the other provisions of this chapter, and any other applicable law." 16 U.S.C. § 1853(a)(1)(c). Thus, to the degree an issue was presented or reopened in Amendment 13, NMFS had

the duty to ensure compliance with the MSA. Accordingly, the court found that federal defendant's arguments on this front were meritless.

The court concluded that many of the objections plaintiff raised under the MSA were untimely. Of the timely objections, the court found that Amendment 13 violates the MSA only in that it fails to specify a maximum sustainable yield proxy for the northern subpopulation of the northern anchovy. The court additionally denied plaintiff's motion for summary judgment as to the NEPA and ESA claims.

Ctr. for Biological Diversity v. Blank, 933 F. Supp. 2d 125 (D.D.C. 2013).

Parties and Issue

The Center for Biological Diversity ("Center") initiated an action against the Secretary of Commerce, the National Oceanic and Atmospheric Administration ("NOAA"), and the National Marine Fisheries Service ("NMFS"), seeking review of a final rulemaking issued by the Fisheries Service to modify several management measures for the western Atlantic bluefin tuna fishery. The Center challenged the Final Rule under the Magnuson–Stevens Fishery Conservation and Management Act ("MSA"), the Administrative Procedure Act ("APA"), and the National Environmental Policy Act ("NEPA").

Atlantic bluefin tuna are highly migratory fish that range across most of the North Atlantic Ocean and its adjacent seas. Bluefin tuna have a lifespan of about 40 years, grow to more than ten feet in length, and can weigh up to 1,500 pounds. The global bluefin tuna population is comprised of two distinct stock categories—(1) the Eastern Atlantic and Mediterranean population, which spans from Norway to Africa and into the Mediterranean Sea; and (2) the Western Atlantic population, which spans from Newfoundland to the Gulf of Mexico—although the two stocks are known to mix to some extent.

The Center sought review of the NMFS' recent modification to some of its management measures. Notably, the Final Rule at issue in this case did *not* change the annual quota or subquota limits for the U.S. bluefin tuna fishery. Those limits were modified by an earlier rulemaking, whereby the Fisheries Service adjusted the overall U.S. quota limit to conform to recommendations of the International Commission for the Conservation of Atlantic Tunas, and adjusted the subquota limits for each fishing category. Instead, the Final Rule made adjustments to several effort-control management measures for the fishery: (1) an increase to the "General" category maximum daily retention limit; (2) an extension of the "General" category fishing season; and (3) an increase to the "Harpoon" category daily incidental retention limit.

Analysis and Holding

Along with MSA, the Atlantic Tunas Convention Act ("ATCA") provides the Secretary with additional authority to promulgate conservation and management programs for tuna fisheries. Congress enacted the ATCA as domestically-implementing legislation for the International Convention for the Conservation of Atlantic Tunas (the "Convention"). The Convention established the International Commission for the Conservation of Atlantic Tunas ("ICCAT"), and ICCAT "on the basis of scientific evidence[,] make[s] recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch." 20 U.S.T. 2887, Article VIII, § 1(a). To this end, ICCAT establishes a "total allowable catch" ("TAC") for western Atlantic bluefin tuna, and a portion of that stock is then allocated to the United States. Under the ATCA, the Secretary may not promulgate any regulations that "may have the effect of increasing or decreasing any allocation or quota of fish or fishing mortality level to the United States agreed to pursuant to a recommendation of [ICCAT]." 16 U.S.C. § 971d(c)(3)(k). Otherwise, any regulations issued under the ATCA "shall, to the extent practicable, be consistent with fishery management plans prepared and implemented under [the Magnuson–Stevens Act]." *Id.* at § 971d(c)(1)(C).

The United States implemented the ICCAT-recommended quota, through which the U.S. was allocated a total base quota of 923.7 metric tons. In short, the quota level is the total amount of bluefin tuna that the entirety of the commercial fishery can collectively harvest, and within that overall cap, each segment or category of the commercial fishery is allocated a subquota. For 2011 and 2012, the General and Harpoon categories were allocated 47.1% and 3.9% shares, respectively, of the overall baseline quota. In addition, the 435.1 metric ton baseline for the General category was further subdivided into subquotas for the January, June–August, September, October–November, and December time periods. With limited exceptions not applicable here, once the quota or subquota level for a fishery is reached, or is projected to be reached, the Fisheries Service must close the fishery, and fishing is prohibited until the opening of the next quota or subquota period.

Along with and in addition to quota levels, the Fisheries Service manages the bluefin tuna fishery through a variety of other management measures, sometimes referred to as "effort controls." Through this lawsuit, the Center challenges the Fisheries Service's modification of several of these other measures. More specifically, the Fisheries Service implemented three changes to its bluefin tuna effort controls through the Final Rule: (1) increasing the General category daily "retention limit"; (2) extending the General category fishing season to remain open until the January subquota is reached, or until the end of March, whichever occurs earlier; and (3) increasing the Harpoon category daily incidental "retention limit."

The Center first asserts that the Final Rule violates National Standard 1 of the Magnuson–Stevens Act, which mandates that fishery management plans, as well as regulations promulgated to implement fishery management plans, "shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1). The Center argues that the Final Rule "flouts" National Standard 1's directive to prevent overfishing because, in the Center's view, "the Final Rule increases fishing for an overfished species currently subject to overfishing."

The court determined that NMFS did, in fact, evaluate whether the measures within the Final Rule complied with National Standard 1's obligation to prevent overfishing. The Center's argument that NMFS failed to even consider the issue is plainly without merit and seems borne out of an overly obtuse reading of the Administrative Record. Consequently, the Center is left to argue, as it stridently does, that the Fisheries Service just got it wrong. On this point, the court reemphasized its role in reviewing the Center's claim. It is not the court's role to make an independent determination as to whether, in its own judgment, the Final Rule actually prevents overfishing. Rather, the court's task is simply to determine whether the Fisheries Service's conclusion that National Standard 1 was satisfied "is rational and supported by the record." Framed accordingly, the court was convinced that the Final Rule passes this test.

The court also found, contrary to the Center's assertions, that NMFS rationally deemed the measures implemented through the Final Rule to be consistent with an appropriate rebuilding plan. While the Center contends that NMFS's reliance on two competing "recruitment scenarios" effectively precludes such a finding, this argument was similarly unavailing.

The court could not say that NMFS's reliance on its inability to identify a single "maximum sustainable yield" through one recruitment scenario versus another was arbitrary or capricious, particularly given the heightened deference owed to decisions based on complex scientific information within the agency's particularized area of expertise.

Ultimately, the Center simply failed to demonstrate that the Fisheries Service ran afoul of its obligation under National Standard 1 to prevent overfishing. At bottom, the Center principally inveighs against NMFS's substantial reliance on the use of quota limits and the ICCAT rebuilding plan, but the Administrative Record amply supports the Fisheries Service's conclusion that, because the effort controls challenged in this lawsuit all fall within the overall quota and subquota limits previously implemented (and are relatively minor in and of themselves), the Fisheries Service fully complied with its

obligation to prevent overfishing. While the Center may disagree with that assessment, its arguments essentially "amount to nothing more than competing views about policy and science, on which [the court] defer[s] to the agency." *Blank*, 933 F. Supp. 2d at 147 (citing *In re Polar Bear Endangered Species Act Listing*, 709 F.3d 1 (D.C. Cir. 2013)). Because the Fisheries Service's determination was the product of reasoned decision-making and is plainly supported by the Administrative Record, the court will not disturb that result. The Center's challenge under National Standard One fails.

National Standard 2 "requires that rules issued by the [Fisheries Service] be based on a thorough review of all the relevant information available at the time the decision was made, and insures that the [Fisheries Service] does not disregard superior data in reaching its conclusion." *Id.* (citing *N.C. Fisheries Ass'n*, 518 F. Supp. 2d 62, 85 (D.D.C. 2007)). The court found that the Administrative Record reflects reasoned decision-making on the part of the NMFS with respect to its compliance with National Standard Two, and the Center simply fails to clear the "high hurdle" of proving that the agency ignored "superior or contrary" scientific information in enacting the Final Rule challenged in this case. Accordingly, the court found that the Final Rule comports with National Standard Two of MSA.

The Administrative Record supports NMFS's conclusion that, given the uncertainty surrounding the two environmental impacts identified by the Center, a detailed discussion of these factors in the environmental assessment was not warranted. As a result, it was reasonable for NMFS to identify this uncertainty without preparing a detailed analysis on the cumulative effects of the oil spill. The same is true with respect to the Center's contention that NMFS failed to take a sufficiently "hard look" at the effects of illegal fishing in the Mediterranean. As stated, the impact of this issue necessarily depends upon the mixing of the eastern and western Atlantic stocks, but the Administrative Record establishes that "the nature and extent of mixing is still not well understood despite several years of research using various methods."

Finally, the court stressed the limited nature of the management measures implemented through the Final Rule. If the Final Rule had increased (or otherwise modified) the overall bluefin tuna quota limits, then the concerns raised by the Center may have merited a more robust analysis in the Fisheries Service's EA. But as it stands, the Final Rule simply made minor adjustments to effort control measures within the bounds of preexisting quota limits, and only with respect to a limited subset of the commercial bluefin fishing industry. Again, NMFS need not have examined "every possible environmental consequence," and the EA prepared to support the Final Rule establishes that the Fisheries Service reasonably evaluated the environmental consequences of its actions and the potential alternatives. This was sufficient to discharge its mandate under NEPA.

The court denied the Center's motion for summary judgment and granted the defendant's cross-motion for summary judgment.

COMMITTEE ON MARINE ECOLOGY AND MARITIME CRIMINAL LAW

Editor: Katharine F. Newman
Assistant Editors: Stephanie Jones
Charlotte Sturtz

BILGE & BARRATRY

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NORTH AMERICAN EMISSIONS CONTROL AREA (ECA)

EPA – Report of Non-Availability of Low Sulfur Fuel

The Environmental Protection Agency (EPA) launched an electronic portal through which owners and operators of vessels should electronically submit a report of non-availability of low sulfur fuel oil using a Fuel Oil Non-Availability Report (FONAR) form.

USCG Detentions -Failure to Use Low Sulfur Fuel

The U.S. Coast Guard included in its listing of IMO reportable detentions in its Port State Control (PSC) program the detention of a foreign bulk carrier for operation within the North American Emission Control Area (ECA) while using fuel oil exceeding the 1% m/m limit on sulfur content. The ship had low sulfur fuel on board, but neither the master nor the chief engineer was familiar with the current North American ECA regulations and the compliant fuel was not used. (2/4/13).

The U.S. Coast Guard included in its listing of IMO reportable detentions in its Port State Control (PSC) program the detention of a foreign passenger ship for operation within the North American Emission Control Area (ECA) while using fuel oil exceeding the 1% m/m limit on sulfur content. The ship had low sulfur fuel on board,

but the master was not familiar with the current North American ECA regulations and the compliant fuel was not used. (2/28/13).

Canada

Canada published its final implementing regulations, which are effective as of April 13, 2013. http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=694C8126-1

VESSEL GENERAL PERMIT

EPA Issues Final

The Environmental Protection Agency (EPA) published the official notice of its revised Vessel General Permit (VGP), officially known as the National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel. The revised permit comes into effect on 19 December. 78 Fed. Reg. 21938 (April 12, 2013).

Petition to Review

The Northwest Environmental Advocates and Center for Biological Diversity filed a petition for the U.S. Court of Appeals for the Ninth Circuit to review the EPA's action in issuing a new NPDES Vessel General Permit. (Case 13-71565) (May 3, 2013)

AK Seeks to Repeal Discharges

At the request of the governor, a bill (SB29) has been introduced in the Alaska Senate to amend the regulation of wastewater discharge from commercial passenger vessels in state waters. If enacted into law, the bill would, among other things repeal the requirement that wastewater discharges meet state water quality standards at the point of discharge. (1/18/13).

EPA Proposed $25,000 Civil Penalty

The Environmental Protection Agency (EPA) issued a news release stating that a proposed consent decree has been lodged in federal court that requires Lake Michigan Carferry Service to eliminate the discharge of coal ash into waters of Lake Michigan from the ferry SS Badger by the end of the 2014 navigation season. In 2013 and 2014, the ferry will reduce its discharge of coal ash and its owner will pay a $25,000 civil penalty for violating mercury water quality standards in 2012. The SS Badger is the last coal-fired ship operating on the Great Lakes. It is authorized to discharge a certain amount of coal ash in accordance with its Vessel General Permit (VGP) under the 2008 National Pollutant Discharge Elimination System (NPDES). (3/22/13).

BALLAST WATER

USCG FAQ II

The U.S. Coast Guard posted Volume II of Frequently Asked Questions (FAQ) regarding ballast water management systems (BWMS). These FAQ focus on alternate management systems (AMS) and type approval of BWMS. (12/21/12).

CA Reg. Delayed

The California State Lands Commission (SLC) posted a notice stating that the proposed changes to Article 4.7 – Performance Standards Regulations for the Discharge of Ballast Water for Vessels Operating in California Waters – have not yet been adopted. Commission staff intends to reintroduce a revised draft of the proposed regulations and all associated rulemaking documents in the future. (1/7/13)

USCG–EPA – Great Lakes Asian Carp

The U.S. Coast Guard issued a news release stating that a study conducted by it and the Environmental Protection Agency (EPA) concluded that barge ballast water tanks present a minimal

risk for incidental transport and introduction of Asian carp into waters of the Great Lakes. (2/28/13).

House – Bill Introduced To Manage Asian Carp

Representative Ellison (D-MN) and Senator Klobuchar (D-MN) introduced the Upper Mississippi Conservation and River Protection Act of 2013 (H.R. 709) (S. 365) to authorize the Secretary of the Army to take actions to manage the threat of Asian carp traveling up the Mississippi River in the State of Minnesota, and for other purposes. (2/14/13).

USCG – Great Lakes Seaway Ballast Water Report

The U.S. Coast Guard issued a news release stating that the 2012 Summary Report on Great Lakes Seaway Ballast Water Management has been posted. The report, prepared by the Great Lakes Ballast Water Working Group, shows that during 2012, 100% of the ships bound for the Great Lakes via the St. Lawrence Seaway from outside the EEZ received a ballast water exam. The 36 vessels that did not exchange ballast water before entering the Seaway retained their ballast on board until after departing the Seaway outbound. (3/1/13).

USCG – AMS Approvals

The U.S. Coast Guard issued a news release stating that it has accepted nine ballast water treatment systems as Alternate Management Systems (AMS) in compliance with its 2012 final rule on Standards for Living Organisms in Ships' Ballast Water Discharged (SLOSBWD) into US waters. An AMS may be used to meet U.S.C.G. ballast water treatment requirements for up to five years. (4/15/13).

MARPOL ANNEX V (GARBAGE)

IMO – Circular

The IMO issued a circular relating to the provisional classification of certain solid bulk cargoes under the revised MARPOL Annex V (Garbage) between 1 January 2013 and 31 December 2014. The new and more restrictive provisions of Annex V relating to discharge of cargo residues enter into force on 1 January 2013. MEPC.1/Circ.791 (10/18/12).

USCG –CVC Policy Letter 13-01

The U.S. Coast Guard issued a notice stating that it has developed CG-CVC Policy letter 13-01 entitled "Interim Guidance for Revised MARPOL Annex V Implementation". On July 15, 2011, the IMO adopted Res. MEPC.201(62) amending MARPOL Annex V (garbage) by establishing a general prohibition on discharges of garbage into the sea. The amendments entered into for on 1 January 2013. The Policy Letter provides interim guidance to assist U.S.-flag vessels (and foreign-flag vessels in US waters) regarding compliance until US regulations are updated. 78 Fed. Reg. 13073 (February 26, 2013).

USCG - Interim Rule Implementing Amendments

The U.S. Coast Guard issued an interim rule implementing recent amendments to MARPOL Annex V. Under these amendments, discharge of garbage from ships into the water is prohibited unless expressly allowed. Only certain food wastes, cargo residues, cleaning agents and additives in wash waters, and animal carcasses may be discharged. The interim rules come into effect on 1 April. Comments should be submitted by 29 May. 78 Fed. Reg. 13481 (February 28, 2013).

ANTI-FOULING

The U.S. Coast Guard updated its Anti-Fouling Systems (AFS) page to indicate that the International Convention on the

Control of Harmful Anti-Fouling Systems on Ships, 2001 came into force for the United States on 21 November 2012, following deposit of its instrument of ratification with the IMO on 21 August. (11/21/12).

DEPARTMENT OF THE INTERIOR (DOI) – BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT (BSEE)

USCG – BSEE MOU

The U.S. Coast Guard and the Bureau of Safety and Environmental Enforcement (BSEE) signed a Memorandum of Understanding (MOU) to coordinate regulatory action, review and improve oil spill response and preparedness, and improve outer continental shelf (OCS) inspector oversight, competency, and capacity. (11/27/12).

BSEE, EPA Seek Civil Penalties For Discharging Oil And Unpermitted Dispersants

The Bureau of Safety and Environmental Enforcement issued a press release stating that the United States (on behalf of BSEE and the EPA) has filed suit against ATP Oil & Gas Corporation and ATP Infrastructure Partners, LP for civil penalties and injunctive relief under the Federal Water Pollution Control Act (also referred to as the Clean Water Act) and the Outer Continental Shelf Lands Act (OCSLA) for alleged unlawful discharges of oil and unpermitted chemical dispersants from the floating oil and gas production platform ATP Innovator between October 2010 and March 2012. (2/12/13).

RESPONDER IMMUNITY

In a case of first impression, the U.S. District Court for the Eastern District of Louisiana (Judge Barbier) granted a motion for summary judgment filed by companies that responded to the explosion, fire, and oil spill on the MODU Deepwater Horizon. The companies had been sued by various plaintiffs who allegedly

were injured by the response effort, including the use of dispersants. In granting the motion for summary judgment and dismissing the complaints against the responders, the court ruled that the actions, whether brought under state law or general maritime law, are preempted by the Federal Water Pollution Control Act (also referred to as the Clean Water Act) and the National Contingency Plan. This suggests that a responder who acts in accordance with the National Contingency Plan and under the direction of the Federal On-Scene Coordinator (FOSC) is entitled to immunity for any alleged resulting harm. (Order, MDL No. 2179 (ED La., November 28, 2012)).

U.S. DEPARTMENT OF JUSTICE (U.S. DOJ) PROCEEDINGS

DOJ – Proposed NRDA $7.5 Million

The Department of Justice (DOJ) seeks comments on a proposed consent decree. The proposed consent decree would require defendants to pay $7.5 million to resolve claims for removal costs, natural resource damages, and assessment costs of the United States and the State of Hawaii relating to the February 2005 grounding of the MV Cape Flattery on coral reef habitat outside the entrance channel to Barbers Point Harbor, Oahu, Hawaii. Comments must be submitted within 30 days. 78 Fed. Reg. 1251 (January 8, 2013).

DOJ – Proposed $710,000 Civil Penalty

The Department of Justice (DOJ) issued a notice stating that it lodged in federal court a proposed consent decree in the lawsuit entitled *United States and State of Hawaii v. Marisco, Ltd.* regarding alleged pollution violations at defendant's shipyard at Barbers Point Harbor. The consent decree requires defendant to perform injunctive relief and to pay a civil penalty of $710,000. Comments on the proposal must be submitted within 30 days. 78 Fed. Reg. 20140 (April 3, 2013).

DOJ – $2.4 Million For False ORB

The Department of Justice (DOJ) issued a news release stating that a foreign fishing company and a former chief engineer on their fishing vessel were sentenced in federal court for environmental crimes and obstruction of justice. The company was sentenced to pay a criminal fine of $1.9 million and to pay $500,000 in community service following conviction of, among other things, causing the vessel to enter a U.S. port (Pago Pago, American Samoa) with a knowingly false oil record book (ORB). The former chief engineer was sentenced to 30 days in jail to be followed by two years of supervised release and to pay a criminal fine of $6,000 following conviction for failing to properly maintain an ORB and making false statements. (1/11/13).

Pay $2.2 Million for Covering Up Oil Pollution

Pacific International Lines, a Singapore-based container ship company, was sentenced today in D.C. federal court under the terms of a plea agreement that requires the company to pay $2.2 million in criminal penalties, the Department of Justice announced today. news release. Pacific International Lines previously pleaded guilty to three felony charges that it made false statements to the U.S. Coast Guard and violated the Act to Prevent Pollution from Ships by concealing illegal waster discharges. A routine U.S.C.G. boarding revealed that the oily water separator had been inoperable for months, which was not noted in the ORB. (2/22/13).

DOJ – Barge Owner Sentenced For Oil Spill

The Department of Justice (DOJ) issued a press release stating that the owner of the abandoned barge Davy Crockett was sentenced to four months in prison, eight months of home detention, 100 hours of community service, and three years of supervised release after pleading guilty to criminal violations of the Federal Water Pollution Control Act (FWPCA) by unlawfully discharging oil from the barge into the Columbia River and failing to report the discharge. The cleanup and salvage operation cost $22 million. (3/18/13).

DOJ – Companies to Pay $10.4 Million

The Department of Justice (DOJ) issued a news release stating that the owner and operator of four foreign vessels have been sentenced to pay $10.4 million after pleading guilty to obstruction of justice and violation of the Act to Prevent Pollution from Ships. The ships engaged in multiple unauthorized discharges of waste oil and sludge. In addition to the financial penalty, the companies must implement a court-supervised environmental compliance program for four years. (3/21/13).

DOJ – Proposed $4.35 Million Consent Decree

The Department of Justice (DOJ) seeks comments on a proposed consent decree relating to alleged violations of the Federal Water Pollution Control Act (aka Clean Water Act) by the Authority for the Port of Los Americas in Puerto Rico. Under the proposal, the defendant would pay a civil penalty of $150,000 and would deposit $4,200,000 into an escrow account for use for In-Lieu-Fee-Mitigation over a period of three years. Comments must be submitted within 30 days. 78 Fed. Reg. 21150 (April 9, 2013).

Emergency Petition to Release a Vessel

The M/V ANTONIS G. PAPPADAKIS was denied Customs departure clearance while the USCG investigated potential criminal violations of the Act of Prevent Pollution from Ships. In the opinion and order, the court concluded that the USCG's demands for a security agreement in this APPS/OWS case was arbitrary and capricious and violative of due process. The court made a number of findings that challenge the USCG's actions in the case, ordered the target company to post a reduced bond with the court than the government had demanded and gage the government one month to take the crew members depositions. *Angelex, Ltd. v. United States*, 2013 AMC 1902, 2013 U.S. Dist. LEXIS 65846 (E.D. Va. May 8, 2013).

WASHINGTON DEPARTMENT OF ECOLOGY

State of WA – $405,000 Oil Spill Fine Assessed

The Washington Department of Ecology issued a news release stating that it assessed a fine of $405,000 against the individual and the company that owned the derelict barge Davy Crockett that was the source of a significant oil spill as a consequence of an unauthorized salvage operation on the Columbia River in 2011. (1/28/13).

U.S. ARCTIC

NOAA – Arctic Environmental Changes

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that the Arctic region continued to break environmental records in 2012 – among them loss of summer ice, spring snow cover, and melting of the Greenland ice sheet. Among other things, the Arctic fox to close to extinction. (12/5/12).

NAP – Arctic Sea Ice

The National Academies Press (NAP) posted a new publication entitled: "Seasonal to Decadal Predictions of Arctic Sea Ice". It notes that limited understandings of the coupled and complex interactions among Arctic sea ice, oceans, atmosphere, and land hinder the ability to predict the rate and magnitude of future variations although general trends are evident. (12/11/12).

DOI – 2012 Arctic Drilling

The Department of the Interior (DOI) issued a press release stating that it is launching an expedited high-level assessment of the 2012 offshore drilling program in the Beaufort and Chukchi Seas to review practices and identify challenges as well as lessons learned. (1/8/13).

NOAA – Arctic Charts

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that it plans to develop and publish new Arctic nautical charts. (2/26/13).

CRS – Polar Ice Breakers

The Congressional Research Service (CRS) issued a report entitled "Coast Guard Polar Icebreaker Modernization". It highlights issues that Congress must decide, including the numbers and capabilities of polar icebreakers needed; the disposition of the icebreaker Polar Sea; and funding for a new polar icebreaker. RL34391 (3/15/13).

DOI – Shell's Arctic Drilling Assessment

The Department of the Interior (DOI) issued a press release stating that the assessment of Shell's 2012 Arctic operations has been completed. The Report found that Shell entered the 2012 drilling season without having finalized key components of the program and did not maintain strong, direct oversight of its key contractors. (3/14/13).

NOAA – Arctic Oil & Gas Comments

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that it seeks comments on a draft supplemental environmental impact statement (SEIS) for oil and gas activities in the Arctic Ocean. (3/21/13).

DOI Managing Change in Arctic

The Department of the Interior (DOI) issued a press release stating that an interagency working group released a report calling for an integrated management strategy for the rapidly changing Arctic. The report – Managing the Future in a Rapidly Changing Arctic – is based on input from a wide range of Arctic stakeholders. The Arctic Science Portal has also been established to provide

stakeholders with easier access to scientific information about the Arctic. (4/4/13).

CMTS – Arctic Marine Transportation System

The Committee on the Marine Transportation System (CMTS) issued a reminder that the period within which to submit comments on the draft report Arctic Marine Transportation System: Overview and Priorities for Action ends on 22 April. (4/15/13).

DISPERSANTS

NOAA– Research Re Chemical Dispersant Effects

The National Oceanic and Atmospheric Administration (NOAA) and the University of New Hampshire issued a joint news release stating that research funding provided as a result of the DEEPWATER HORIZON oil spill will fund projects to investigate the effects of chemical dispersants used in responding to oil spills. (11/14/12).

EMSA – Newsletter

The European Maritime Safety Agency (EMSA) issued its newsletter for December. Among the topics addressed are use of dispersants during the DEEPWATER HORIZON oil spill and contracts for standby oil spill response vessels for the Bay of Biscay, the South Atlantic Coast, and the Central Mediterranean. (12/10/12).

Challenge

See also BSEE, EPA Suit Above.

ENVIRONMENTAL PIRACY

Sea Shepherd Conservation Declared 'Pirates'

Judge orders environmentalists to stop aggression against Japanese whaling ships who claim harassment on the seas.

The Sea Shepherd ship BOB BARKER collided with a Japanese whaling fleet fuel tanker this week. A U.S. court has the conservation group Sea Shepherd to be "pirates" and ordered it to stop its aggressive actions against Japanese whalers.

In his 18-page opinion, chief judge Alex Kozinski of the 9th US circuit court of appeals wrote: "You don't need a peg leg or an eye patch. When you ram ships; hurl containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be." The lawsuit was brought by a group of Japanese researchers who hunt whales in the Southern Ocean, collectively referred to in the judgment as "Cetacean". Their legal action to halt Sea Shepherd comes after years of clashes at sea Alan Yuhas, Sea *Shepherd Conservation Group Declared "Pirates" in US Court Ruling*, Guardian, Feb. 27, 2013; *see also Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 2013 AMC 305 (9th Cir. 2013).

PIRACY DEVELOPMENTS

Indian Ocean – Counter-Piracy Coordination

NATO issued a news release stating that as part of the continuing efforts to coordinate counter-piracy operations amongst the various naval forces operating in the western Indian Ocean, the commander of its task force met recently with the commander of Combined Maritime Force (CMF) task force 151 and with the commander of the Chinese Task Force. (11/20/12).

EC – Software To Counter Piracy

The European Commission Joint Research Centre (JRC) issued a press release stating that it developed prototype software identifying ship positions in real-time for use by Kenya and other nations for countering piracy in the region. The software integrates data from vessel reporting and earth observation systems into a single maritime picture, taking into account a wide array of available data sources. (11/22/12).

UK – Piracy Ransoms Task Force

The U.K. Foreign and Commonwealth Office (FCO) issued a news release stating that the Piracy Ransoms Task Force, comprised of nations particularly concerned about the problem of piracy off the coast of Somalia, presented its conclusions to the Contact Group on Piracy off the Coast of Somalia (CGPCS) on how to work together to reduce the threat of piracy. The report included four recommendations: (1) develop a new strategic partnership between flag states, the private sector, and law enforcement to break the piracy business model; (2) develop a coordinated approach to information sharing to improve prosecutions; (3) strengthen coordination to prepare for potential hostage situations; and (4) encourage implementation of anti-piracy measures, including Best Management Practices. Prime Minister David Cameron is quoted as saying: “But seafarers of all nations remain at risk, and we must continue to work to break the piracy business model, with the

ultimate ambition of bringing an end to ransom payments." Foreign Office Minister Alistair Burt is quoted as saying: "Only through the international community working together to break the pirates' business model will we be able to reach a position whereby pirates are no longer able to receive or profit from ransom payments." (12/11/12).

NATO – Piracy Statistics

The NATO Shipping Centre posted its Piracy Statistics for the High Risk Area during the years 2009 through 2012. The data show suspicious activity, approaches, attacks, hijackings, and disruptions on a monthly basis and highlight the significant decline in piracy during 2012. (12/20/12).

EU – Support For New Somali Government

The Council of the European Union (EU) issued Council conclusions on Somalia. Taking note of the inauguration of a permanent government in Somalia, the Council expressed its commitment to supporting the development of the nation. Among other things, it notes that improved conditions on land will contribute to tackling the root causes piracy off the coast. (1/31/13).

EMSA – MARSURV-1

The European Maritime Safety Agency (EMSA) issued a press release stating that it developed the anti-piracy monitoring service MARSURV-1 at the request of EU NAVFOR to track vessels in the high risk area off the coast of Somalia. The service integrates and fuses multiple sources of data in a real-time environment, enhancing the ability of EU NAVFOR to understand and support the massive volume of merchant traffic that transits these waters. (2/7/13).

DOJ – Somali Nationals Convicted Of Piracy

The Department of Justice (DOJ) issued a news release stating that five Somali nationals have been found guilty by a federal

jury of engaging in piracy and committing other offenses pertaining to a February 2010 attack on the USS ASHLAND (LSD 48) in the Indian Ocean. Piracy under the law of nations carries a maximum sentence of life in prison. Sentencing is scheduled for July. (2/27/13).

Gulf of Oman – Potential Maritime Attacks By Extremists

The Maritime Administration (MARAD) issued an advisory warning mariners that vessels operating in the Gulf of Oman, the North Arabian Sea, the Gulf of Aden, and Bab el Mandeb areas should exercise vigilance. Elevated regional tensions have increased the risk of potential maritime attacks conducted by extremists. Advisory 2013-03 (3/13/13).

White House – National Emergency Re Somalia

The White House issued a notice stating that President Obama has continued for one year the National Emergency with respect to Somalia. One of the reasons for the continuation of the national emergency is the threat of acts of piracy and armed robbery at sea off the coast of Somalia. (4/4/13).

MACONDO UPDATES

3 BP Officials Face New Criminal Charges In Deepwater Explosion, Spill

> BP well-site leaders Robert Kaluza and Donald Vidrine, who failed to shut down BP's runaway Macondo well in spite of tests showing grave danger, each face 22 manslaughter charges in the deaths of 11 men killed in the 2010 DEEPWATER HORIZON explosion, according to a grand jury indictment handed up Wednesday. They were the oil giant's top two men on the rig at the time of the disaster.
>
> Meanwhile, a third BP official, David Rainey, the former vice president of exploration for the Gulf of Mexico, is charged with obstruction for allegedly

> providing Congress with bogus estimates of how fast oil was spilling from the busted wellhead in the days after the explosion [. . . .]
>
> Along with the 22 manslaughter counts, Vidrine and Kaluza each face a criminal charge of violating the Clean Water Act. The two men are set to be arraigned Nov. 28. [. . . .]
>
> A fourth BP official, engineer Kurt Mix, was charged earlier this year with obstruction of justice for allegedly deleting a series of text messages relating to BP's spill response. The messages were being sought by federal investigators when Mix deleted them, according to the indictment.
>
> Mix has pleaded not guilty.

Gordon Russell, *3 BP Officials Face New Criminal Charges In Deepwater Explosion*, *Spill,* NOLA.COM (Nov. 15, 2012).

EPA – Temporary Debarment of BP

The Environmental Protection Agency (EPA) issued a news release stating that BP Exploration and Production, Inc., BP PLC, and named affiliated companies (BP) have been temporarily suspended from new contracts with the federal government due to BP's lack of business integrity as demonstrated by the company's conduct with regard to the DEEPWATER HORIZON blowout, explosion, oil spill, and response. The BP suspension will temporarily prevent the company and the named affiliates from getting new federal government contracts, grants or other covered transactions until the company can provide sufficient evidence to EPA demonstrating that it meets Federal business standards. The suspension does not affect existing agreements BP may have with the government. (11/28/12).

DOJ – Partial DWH Settlement With Transocean

The Department of Justice (DOJ) issued a news release stating that Transocean Deepwater Inc. has agreed to plead guilty to a misdemeanor violation of the Federal Water Pollution Control Act (also referred to as the Clean Water Act) and pay a total of $1.4 billion in civil and criminal fines and penalties for conduct relating to the DEEPWATER HORIZON explosion, fire, and oil spill. The three-page Information briefly summarizes the allegations. The DOJ submitted a Notice of Lodging with the court, explaining that the Partial Consent Decree is subject to public comment and judgment should not be entered at this time. A portion of the monies recovered from Transocean will be for the benefit of states on the Gulf coast. The civil settlement secures $1 billion in civil penalties for violations of the CWA, a record amount that significantly exceeds last year's $70 million civil penalty paid by MOEX Offshore 2007 LLC, a 10 percent partner with BP in the Macondo well venture. The unprecedented $1 billion civil penalty is subject to the Resources and Ecosystems Sustainability, Tourist Opportunities and Revived Economies of the Gulf Coast States Act of 2012 (Restore Act), which provides that 80 percent of the penalty will be to be used to fund projects in and for the Gulf states for the environmental and economic benefit of the region. This civil resolution reserves claims for natural resource damages and clean-up costs.

In addition to the fines and penalties, under the civil settlement, Transocean will be on probation for a period of five years, during which time they must institute a court-monitored compliance program to improve safety on their rigs operating in US waters, reduce the risk of future oil spills and improve emergency response capabilities. Examples of these requirements include certifications of maintenance and repair of blowout preventers before each new drilling job, consideration of process safety risks, and personnel training related to oil spills and responses to other emergencies. These measures apply to all rigs operated or owned by the Transocean defendants in all U.S. waters and will be in place for at least five years. (1/3/13).

DOJ – BP Sentenced to Pay $4.5 Billion

The Department of Justice (DOJ) issued a news release stating that the federal court has accepted the guilty plea of BP Exploration and Production, Inc. to 14 criminal counts of felony manslaughter, environmental crimes, and obstruction of Congress in connection with the 2010 explosion, fire, and oil spill on the MODU DEEPWATER HORIZON. The defendant has been sentenced to pay $4 billion in criminal fines and penalties (the largest ever in a criminal settlement) . In doing so, BP has agreed to plead guilty to eleven felony charges, and one misdemeanor charge each under the Federal Water Pollution Control Act (FWPCA) and the Migratory Bird Treaty Act (MBTA). The company will also plead guilty to one count of obstruction of Congress, and pay an additional $525 million to resolve claims brought by the Securities and Exchange Commission (SEC). The criminal penalty will be paid over a period of five years. The company will also serve a term of court monitored probation for five years. (1/29/13).

DOI – DWH Oil Spill Restoration Plan

The Department of the Interior (DOI) issued a notice stating that the DEEPWATER HORIZON (DWH) oil spill Phase II Early Restoration Plan and Environmental Review have been approved. 78 Fed. Reg. 8184 (February 5, 2013).

Phase 1 of the MDL Concludes

> Phase one of the DEEPWATER HORIZON oil spill trial has ended, three days shy of the third anniversary of the explosion that set off the worst oil spill in history.
>
> The first phase was to apportion blame among BP and its contractors, including Halliburton, which made the cement used to seal the Macondo well; and Transocean the owner of the ill-fated Deepwater Horizon oil rig.

> Phase two, slated to begin in September, will seek to determine how much oil was spilled. Phase one was expected to take three months, but lasted for two.
>
> U.S. District Court Judge Carl Barbier on Wednesday congratulated counsel for both sides.
>
> "I think the quality of the lawyering and the professionalism and civility with which this case has been tried is exemplary, and I know I appreciate it. It's made my job easier," Barbier said.

Sabrina Canfield, *First BP Oil Spill Trial Concludes*, COURTHOUSE NEWS SERVICE (Apr. 19, 2013) (*available at* http://www.courthouse-news.com/2013/04/19/56861.htm)

Mississippi – State Sues BP and Others For DWH Oil Spill Damages

The Mississippi Attorney General issued a press release stating that Mississippi has filed suits against BP and other defendants in both state and federal courts seeking to recover damages caused by the DEEPWATER HORIZON Oil Disaster of 2010. (4/19/13).

Florida – State Sues BP and Halliburton For DWH Oil Spill Damages

The Florida Attorney General issued a news release stating that Florida has filed a complaint in federal court against BP and Halliburton over the DEEPWATER HORIZON oil spill. The lawsuit includes numerous federal, state and maritime counts. Under the Oil Pollution Act, the State of Florida is entitled to the revenues it lost due to the oil spill, including sales and use taxes; corporate taxes; documentary stamp taxes; cigarette surcharges; cigarette excise taxes; beer, wine, and liquor taxes; fuel taxes; rental car surcharges; and utility taxes and receipts. The State is also seeking punitive damages under maritime and Florida common law due to

the egregious nature of the misconduct that led to this environmental and economic disaster. (4/20/13).

ECOLOGY

NOAA – Southern Resident Killer Whale

The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it received a petition to delist the Southern Resident killer whale Distinct Population Segment (DPS) (which resides primarily in Puget Sound and the Strait of Juan de Fuca) under the Endangered Species Act. Comments on the petition should be submitted by 28 January 2013. 77 Fed. Reg. 70733 (November 27, 2012).

NOAA – HI Islands Insular False Killer Whale

The National Oceanic and Atmospheric Administration (NOAA) issued a final rule listing the Main Hawaiian Islands insular false killer whale district population segment (DPS) as an endangered species under the Endangered Species Act (ESA). The rule comes into effect on 28 December. 77 Fed. Reg. 70915 (November 28, 2012).

NOAA - CA TSSs to be Adjusted to Protect Whales

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that various traffic separation schemes (TSSs) off the California coast will be adjusted to increase protections afforded to whales. The IMO recently approved three proposed changes, relating to the approach to San Francisco Bay, the Santa Barbara Channel, and the approach to the Ports of Los Angeles and Long Beach. The changes are expected to reduce the number of ship strikes and are anticipated to come into effect in 2013. (12/27/12).

NOAA – North Pacific Right Whale

The National Oceanic and Atmospheric Administration (NOAA) seeks comments on the draft Recovery Plan for the North

Pacific right whale, an endangered species. Comments should be submitted by 11 March. 78 Fed. Reg. 4835 (January 23, 2013).

NOAA - AK – ESA Listing of Cold-Water Corals Not Warranted?

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that a petition from the Center for Biological Diversity to list 44 species of cold-water non-reef-building corals off Alaska as threatened or endangered does not present substantial information that listing under the Endangered Species Act may be warranted. (2/12/13).

House – Bill Introduced to Protect Columbia Salmon

Representative Hastings (R-WA) introduced a bill (H.R. 1308) to amend the Marine Mammal Protection Act of 1972 to reduce predation on endangered Columbia River salmon and other nonlisted species, and for other purposes. (3/21/13).

House – Bill Introduced Re Marine Turtle Conservation

Delegate Pierluisi (D-PR) introduced a bill (H.R. 1329) to reauthorize the Marine Turtle Conservation Act of 2004, and for other purposes. Official text of the bill is not yet available. (3/21/13).

FWS – Critical Habitat For Loggerhead Sea Turtle

The Fish and Wildlife Service (FWS) proposes to designate portions of coastal counties in North Carolina, South Carolina, Georgia, Florida, Alabama, and Mississippi as critical habitat for the Northwest Atlantic Ocean Distinct Population Segment of the loggerhead sea turtle. Comments should be submitted by 24 May. 78 Fed. Reg. 17999 (March 25, 2013).

NOAA – WhaleWatch Under Development

The National Oceanic and Atmospheric Administration (NOAA) issued a news release stating that it is working with the Oregon State University and the University of Maryland Center for Environmental Science to develop a process to forecast patterns of whale traffic in the Pacific. The WhaleWatch program is in the proof-of-concept phase but may be able to make regular forecasts within 18 months so that ships off the U.S. West Coast can better avoid interference with passing whales. (4/4/13).

DOJ – Woman Pleads Guilty to Feeding Whales

The Department of Justice (DOJ) issued a news release stating that a California woman pleaded guilty in federal court to illegally feeding killer whales in the wild (Monterey Bay National Marine Sanctuary) without a permit. Sentencing is scheduled for 6 August. (4/23/13).

Southwest Alaska – Northern Sea Otter

The Fish and Wildlife Service (FWS) announced that it is undertaking a 5-year status review of the southwest Alaska Distinct Population Segment of the northern sea otter. Comments on the review should be submitted by 25 June. 78 Fed. Reg. 24767 (April 26, 2013).

NOAA – Great Hammerhead Shark

The National Oceanic and Atmospheric Administration (NOAA) announced that two petitions to list the great hammerhead shark as threatened or endangered present substantial scientific or commercial information indicating that the petitioned action may be warranted. The agency will conduct a status review. Comments on the review should be submitted by 25 June. 78 Fed. Reg. 24701 (April 26, 2013).

[Editors' note: With considerable thanks to Dennis Bryant, whose updates and blog (www.brymar-consulting.com) have provided an invaluable resource to the generation of this newsletter].

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

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

NEWSLETTER

Spring 2013

CASE NOTES

This Floating Home Is Not A "Vessel."

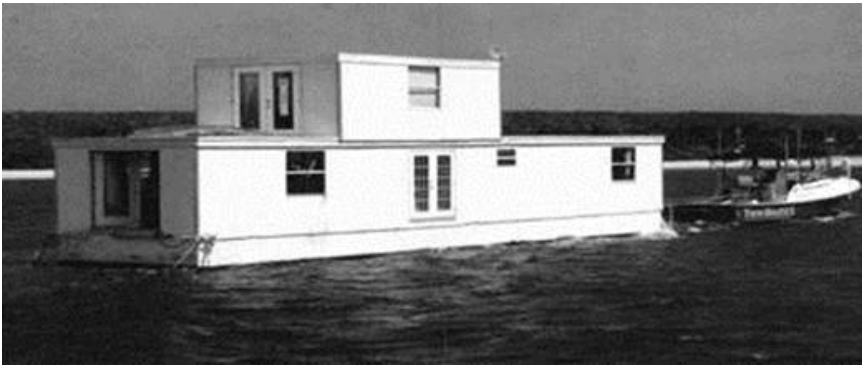
Lozman v. City of Riviera Beach, 133 S. Ct. 735, 2013 AMC 1 (2013).

In *Lozman* the Court considered whether a floating home without self-propulsion is a "vessel," as defined by the Rules of Construction Act. A vessel, per the Act, includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The Court faced the difficult task of answering whether anything that floats is always a boat. This legal voyage began in 2002, when Fane Lozman bought a 60-foot by 12-foot floating home. The home came complete with a sitting room, bedroom, closet, bathroom, kitchen, and French doors to enjoy the aquatic surroundings. An empty bilge space under the main floor kept it afloat. It had no means to propel itself and drew all its electricity from linking to a connection on land. While Lozman undoubtedly felt buoyed by his purchase, he was soon awash in conflict. In 2006, after towing his home several times between marinas, he settled in a marina owned by the city of Riviera Beach, Florida. After several disputes with Lozman and an attempt to evict him, the city brought a federal admiralty lawsuit *in rem* against his home.

Lozman argued that the district court should dismiss the case because it lacked admiralty jurisdiction. The district court disagreed, finding that the floating home was, in fact, a "vessel" and that its jurisdiction was proper. The district court awarded the city $3,039.88 in dockage fees and $1 for trespass damages. On appeal, the Eleventh Circuit upheld the district court's finding because the home was "capable" of movement over water. But Lozman's victory was short lived. The Court granted *certiori* and reversed, finding the Eleventh Circuit's interpretation of "vessel" too broad.

Not every floating structure is a vessel, Justice Breyer wrote for the Court, lest a washtub, dishpan, door off its hinges, or Pinocchio inside a whale count. With Justice Breyer writing for the majority, the Court anchored itself to a new "reasonable observer" test seeking to answer whether the "home's physical characteristics and activities" were practically designed for "carrying people or things over water." The Court held that Lozman's floating home was not a vessel. It lacked a rudder, had an unraked hull, a rectangular bottom hanging ten inches below water, no electricity without connecting to land, no means of self-propulsion, and had only traveled—under tow—a handful of times.

Seen below is the floating home under tow, as depicted in the appendix to the Court's opinion:



Justice Sotomayor (joined by Justice Kennedy) dissented. She argued that the majority had cast overboard years of precedent

guiding what constitutes a vessel. In doing so, Sotomayor argued, the Court had jettisoned well-established maritime law in favor of a new and unpredictable "reasonable observer" test. The case, she argued, should have been remanded for more information about the use of Lozman's home to better determine (with reference to established precedent) its vesselness.

[Editors' note: Our sincere thanks to Joseph G. Grasso, Esq. and his colleagues in the Appellate and Complex Legal Issues Practice Group of Wiggin and Dana LLP for the foregoing summary.]

For those readers desiring more detail, portions of the Court's Syllabus follow:

LOZMAN *v*. CITY OF RIVIERA BEACH, FLORIDA
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

****

No. 11–626. Argued October 1, 2012—Decided January 15, 2013

****

> ….The District Court found the floating home to be a "vessel" under the Rules of Construction Act, which defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," 1 U. S. C. §3, concluded that admiralty jurisdiction was proper, and awarded the City dockage fees and nominal damages. The Eleventh Circuit affirmed, agreeing that the home was a "vessel" since it was "capable" of movement over water despite petitioner's subjective intent to remain moored indefinitely.
>
> *Held*:

1. This case is not moot. The District Court ordered the floating home sold, and the City purchased the home at auction and had it destroyed. Before the sale, the court ordered the City to post a bond to ensure Lozman could obtain monetary relief if he prevailed. ….

2. Lozman's floating home is not a §3 "vessel." …

(a) The Eleventh Circuit found the home "capable of being used as a means of transportation on water" because it could float and proceed under tow and its shore connections did not render it incapable of transportation. This interpretation is too broad. The definition of "transportation," the conveyance of persons or things from one place to another, must be applied in a practical way. *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 496. Consequently, a structure does not fall within the scope of the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water. …

(b) But for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water. It had no steering mechanism, had an unraked hull and rectangular bottom 10 inches below the water, and had no capacity to generate or store electricity. It also lacked self-propulsion, differing significantly from an ordinary houseboat. …

(c) This view of the statute is consistent with its text, precedent, and relevant purposes. The statute's language, read naturally, lends itself to that interpretation: The term "contrivance" refers to something "employed in contriving to effect a

purpose"; "craft" explains that purpose as "water carriage and transport"; the addition of "water" to "craft" emphasizes the point; and the words, "used, or capable of being used, as a means of transportation on water," drive the point home. Both *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U. S. 19, and *Stewart, supra*, support this conclusion. *Evansville* involved a wharfboat floated next to a dock, used to transfer cargo, and towed to harbor each winter; and *Stewart* involved a dredge used to remove silt from the ocean floor, which carried a captain and crew and could be navigated only by manipulating anchors and cables or by being towed. Water transportation was not the primary purpose of either structure; neither was in motion at relevant times; and both were sometimes attached to the ocean bottom or to land. However, *Stewart*'s dredge, which was regularly, but not primarily, used to transport workers and equipment over water, fell within the statutory definition while *Evansville's* wharfboat, which was not designed to, and did not, serve a transportation function, did not. Lower court cases, on balance, also tend to support this conclusion. Further, the purposes of major federal maritime statutes—*e.g.*, admiralty provisions provide special attachment procedures lest a vessel avoid liability by sailing away, recognize that sailors face special perils at sea, and encourage shipowners to engage in port-related commerce—reveal little reason to classify floating homes as "vessels." Finally, this conclusion is consistent with state laws in States where floating home owners have congregated in communities. ….

(d) Several important arguments made by the City and its amici are unavailing. They argue that a purpose-based test may introduce a subjective element into "vessel" determinations. But the Court has considered only objective evidence, looking to

> the views of a reasonable observer and the physical attributes and behavior of the structure. They also argue against using criteria that are too abstract, complex, or open-ended. While this Court's approach is neither perfectly precise nor always determinative, it is workable and consistent and should offer guidance in a significant number of borderline cases. And contrary to the dissent's suggestion, the Court sees nothing to be gained by a remand….
>
> (e) The City's additional argument that Lozman's floating home was actually used for transportation over water is similarly unpersuasive. …

649 F. 3d 1259, reversed.

No Coverage Due to Failure to Give Timely Notice.

Weeks Marine, Inc. v. Am. S.S. Owners Mut. Prot. and Indem Ass'n, Inc., 510 F. App'x 52 (2d Cir. 2013).

By a summary order having no precedential effect, the Second Circuit Court of Appeals upheld a judgment of the U.S. District Court for the Southern District of New York denying coverage due to the shipowner's failure to give timely notice of claim to its mutual insurer and the insurer's manager.

Plaintiff-Appellant Weeks Marine, Inc. sued the American Steamship Owners Mutual Protection and Indemnity Association, Inc. ("American Club") and Shipowners Claims Bureau, Inc. ("SCB") seeking damages and declaratory relief for their refusal to indemnify it with respect to the judgment in an underlying seaman's personal injury action.

The terms of coverage under the American Club's Certificate of Entry for the one year period commencing February 20, 2005, provided that as to all claims by crew or employees, Weeks would bear liability up to $1 million and the Club would bear liability for claims in excess of $1 million, up to a maximum of $2 million in liability –

leaving Weeks liable for any amount in excess of $3 million. Weeks was to be responsible for the investigation, settlement, defense or appeal of any crew claim, and was required to give the Club "prompt notice" in the event that it learned of any of five conditions:

> (a) any claim, suit or proceeding that appears to involve indemnity by the American Club;
>
> (b) any occurrence, claim, award or proceeding judgment which exceeds 50% of the Insured's retention under this policy,
>
> (c) any occurrence which causes serious injury (disability for a period of nine months or more) to two or more employees;
>
> (d) any case involving: 1. Amputation of a major extremity, 2. Brain or spinal cord injury, 3. Death, 4. Any second or third degree burn of 50% of the body or more;
>
> (e) the reopening of any case in which further award might involve liability to the American Club.

Weeks was also subject, as a member, to the Club's bylaws, which in part govern the handling of claims by members against the Club.

The dispute arose out of a claim by a Weeks crewmember, Garza, following a February 15, 2006 accident that resulted in a concussion and cervical strain. After rejection of an $850,000 settlement demand Garza proceeded to trial in Texas state court in February of 2008 and obtained a judgment in excess of $3.7 million. The Texas Court of Appeals affirmed in 2010. After briefing in the instant case was completed the Texas Supreme Court reduced the award by $2.5 million.

Two days after entry of the initial judgment for Garza in 2008, Weeks gave its first notice of the claim to the American Club and SCB. After they rejected the claim for failure to give prompt notice, Weeks brought the present action. In the lower court Weeks opposed the defendants' motion for summary judgment asserting lack of timely notice on two grounds: 1. compliance with the notification provision in the insurance coverage; and 2. defendants were required to show that they were prejudiced by the lack of timely notice in order to deny coverage. The district court rejected both arguments, finding that New York's traditional "no prejudice" rule applied and that the defendants were not required to show prejudice to disclaim coverage after being notified of a claim post-judgment. The court also rejected Weeks' arguments that it was not contractually obligated to report the claim.

On appeal from the district court's entry of summary judgment for the defendants the Second Circuit affirmed.

Weeks argued on appeal that the lower court erred in applying New York's "no prejudice" rule rather than the established common law rule. The court of appeals disagreed, finding that it is settled New York law that the notice provision of a primary insurer operates as a condition precedent and thus the insurer need not show prejudice in order to rely on a late notice defense. Exceptions to that rule in the cases of reinsurance contracts and supplemental underinsured motorist coverage were inapplicable to these facts. The Club was not a reinsurer and its Certificate was not a reinsurance contract or supplemental underinsured motorist policy.

Weeks further argued that the Certificate's specific requirement of notification of brain or spinal cord injuries did not require reporting of Garza's concussion because Weeks had the discretion to determine that a concussion is not a brain injury. The appellate court rejected the argument out of hand and agreed with the lower court that it is beyond dispute that the symptoms of a concussion are caused by trauma to the brain.

Finally, Weeks argued that the Club's coverage of two prior claims involving crewmember back injuries, in the amounts of $2.35 and $1.8 million, despite untimely notice, created a fact issue as to whether the Club should be estopped to deny coverage in this instance. The Second Circuit, relying on reasons given by the district court in its opinion, found that argument to have no merit as well.

[Editors' note: Our sincere thanks to Keith Heard, Esq. of Burke & Parsons for bringing the foregoing case to our attention.]

No Coverage Due To Failure To Give Timely Notice.

Weeks Marine, Inc. v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n, Inc., 511 F. App'x 78 (2d Cir. 2013).

In a second, separate case*, Weeks Marine, Inc. v. American Steamship Owners Mutual Protection and Indemnity Association, Inc. and Shipowners Claims Bureau, Inc.*, a different panel of the Second Circuit Court of Appeals issued a summary order upholding a judgment of the U.S. District Court for the Southern District of New York denying coverage for the failure of Weeks to comply with the Club's notice of claim rules.

Weeks brought suit against the American Club and SCB seeking indemnity and reimbursement of funds allegedly owed to it under its insurance contract. The underlying liability stemmed from Weeks' defense and settlement of tort claims by Smith, a Weeks employee who was assaulted while sleeping in his quarters on a Louisiana-based barge. The District Court granted the Club's motion for summary judgment, holding that the Club Rules required Weeks to notify the Club of Smith's claim within three years after learning of the assault.

The district court rejected Weeks' argument that the Crew Claims Procedures in the Certificate of Entry (a collateral agreement specifically between the Club and Weeks) displaced and rendered inapplicable the three-year notification requirement.

Noting that its review of the district court's grant of summary judgment on a question of contract interpretation is *de novo*, the court of appeals recited the relevant portions of the Club Rules:

> [I]n no event shall any claim be recoverable from the Association unless written notice thereof has been given to the Managers within three years after the Member has knowledge of the happening or occurrence giving rise to a claim.

The "Crew Claims Procedure" in the Certificate of Entry provides:

> The Insured shall be responsible for the investigation, settlement, defense or appeal of any claim made or suit brought, or proceeding instituted against the Insured and shall give prompt notice to Shipowners Claims Bureau, upon the Insured's Risk Management department being notified of any of the following:
>
> > (a) any claim, suit or proceeding that appears to involve indemnity by the American Club;
> >
> > (b) any occurrence, claim, award or proceeding judgment which exceeds 50% of the Insured's retention under this policy….

The assault occurred in June 2005 and Weeks became aware of it almost immediately. Smith sued Weeks in Louisiana state court in April 2006, and that court awarded judgment in Smith's favor on September 4, 2009. Weeks appealed, then settled the case with Smith, then notified the Club of the Smith claim for the first time on September 23, 2009. The court concluded that Weeks "undisputedly failed to provide the Club with notice of the Smith claim within the three-year period required by the Club Rules."

The issue, as framed by the appellate court, was whether the three-year notification requirement applied to, and barred indemnity for, the Smith claim, or instead, as Weeks argued, Weeks was only required to give "prompt notice" of the claim once it satisfied one of the criteria in the Certificate's Crew Claims Procedures.

Weeks had argued that because its policy covered only liability in excess of $1 million, until the claim was resolved in September 2009 "prompt notice" was not required because the claim did not appear to involve indemnity by the American Club, since there had not been an award or judgment exceeding 50% of Weeks' $1 million retention. The court concluded that those arguments were not at issue in the appeal before it, and that several related arguments had recently been rejected by the panel in *Weeks Marine, Inc. v. Am. Steamship Owners Mut. Prot. and Indem. Ass'n,* 510 F. App'x 52 (2d Cir. 2013). (See preceding case summary).

Under New York law, which the parties agreed applied, words and phrases in a contract are to be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions, which should be read together as a harmonious whole, if possible. Given those rules of construction, the court of appeals concluded:

> The three-year notice requirement provides a general, outer-limit time bar for Club members to notify the Club of any claims on which they might seek to recover. The Crew Claims Procedure imposes an additional, "prompt notice" requirement on Weeks to notify the Club of certain specific events, and it applies only in the context of crew claims. There is no conflict between the two provisions. To the contrary, to read the Crew Claims Procedure as abrogating in part the three-year notice requirement would conflict with the plain language of the requirement, which provides that "[i]n no event" will a member collect on "any claim" when the requirement has not been satisfied. Accordingly, we agree with the District

> Court that both provisions applied to the Smith claim and that the three-year notice requirement barred Weeks' claim.

Weeks, 511 F. App'x at 79.

This is the "plain meaning" of the contract's terms, disposing of Weeks' claim that the result was not what the parties intended.

Thus the three-year notice requirement applied to "any claim," which barred this one. That Weeks might also have been required to give "prompt notice" after the entry of an award meeting the policy criteria, which might be satisfied by notice of a judgment more than 3 years after the event giving rise to the claim "does not render any less clear the meaning of the term 'any claim.'"

[Editors' note: Our sincere thanks to Keith Heard, Esq. of Burke & Parsons for bringing the foregoing case to our attention.]

Terms Of Umbrella Policy, Not Drilling Contract, Governed Whether BP Was An Additional Insured.

In re Deepwater Horizon, 710 F.3d 338, 2013 A.M.C. 609 (5th Cir. 2013).

In this appeal in coverage litigation arising out of the explosion and sinking of Transocean's DEEPWATER HORIZON in April 2010, the Fifth Circuit Court of Appeals addressed the obligations of Transocean's primary and excess liability insurers to cover BP's pollution-related liabilities resulting from the ensuing oil spill in the Gulf of Mexico. Applying Texas law, the court of appeals held that the terms of the umbrella insurance policy, not the indemnity provisions of the Transocean – BP Drilling Contract, controlled the extent to which BP was covered for its operations under the contract. Because the policy imposed no relevant limitations upon the extent to which BP was covered, the appellate court reversed the judgment of the U.S. District Court for the Eastern District of Louisiana and remanded for entry of an appropriate judgment in accordance with its opinion.

Transocean owned the DEEPWATER HORIZON, a semi-submersible, mobile offshore drilling unit, which sank in the Gulf of Mexico in April 2010 after burning for two days following an onboard explosion, while engaged in exploratory drilling under a drilling contract between the predecessors of appellant BP and appellee Transocean. That contract required Transocean to maintain certain minimum insurance coverages for the benefit of BP. The extent to which those policies covered BP's pollution-related liabilities was the subject of the appeal.

Transocean held a primary liability policy with Ranger Insurance Ltd. ("Ranger") as well as policies with several excess liability insurers led by London market insurers ("Excess Insurers"). The Ranger primary policy provided at least $50 million of general liability coverage and the policies with the Excess Insurers provided at least $700 million of additional general liability coverage.

The Ranger and Excess policies contained materially identical provisions. As the district court noted and the insurers did not dispute, this allowed the courts to treat all of the insurers as one for purposes of analyzing the issues in the case. The key policy terms were "Insured" and "Insured Contract." The policies defined "Insured" as including the Named Insured, other parties, and:

> (c) any person or entity to whom the "Insured" is obliged by any oral or written "Insured Contract" (including contracts which are in agreement but have not been formally concluded in writing) entered into before any relevant "Occurrence", to provide insurance such as is afforded by this Policy….

The policies also defined "Insured Contract," as follows:

> The words "Insured Contract", whenever used in this Policy, shall mean any written or oral contract or agreement entered into by the "Insured" (including contracts which

> are in agreement but have not been formally concluded in writing) and pertaining to business under which the "Insured" assumes the tort liability of another party to pay for "Bodily Injury," "Property Damage," "Personal Injury" or "Advertising Injury" to a "Third Party" or organization. Tort Liability means a liability that would be imposed by law in the absence of any contract or agreement.

The Drilling Contract defined the obligations of BP and Transocean to one another, and also contained a separate provision imposing an insurance requirement on Transocean:

20.1 INSURANCE

> Without limiting the indemnity obligations or liabilities of CONTRACTOR [Transocean] or its insurer, at all times during the term of this CONTRACT, CONTRACTOR **shall maintain insurance covering the operations to be performed under this CONTRACT as set forth in Exhibit C.** (court's emphasis).

Exhibit C, entitled Insurance Requirements, established the types and minimum levels of coverage that Transocean was to maintain at its own expense, and specified that the policies should be endorsed to provide that there would be no recourse against BP for payment of premium. Exhibit C also specifically stated:

> [BP] its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers and agents **shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this Contract.** (court's emphasis).

Thus, BP was an *additional insured* in each of Transocean's policies at issue before the Court.

Following the incident, BP notified the insurers of its losses. Ranger and the Excess Insurers filed substantively identical declaratory judgment actions against BP, requesting a declaration that they had no additional-insurance obligations to BP with respect to pollution claims against BP as a result of oil emanating from BP's well.

The insurers acknowledged that the Drilling Contract "requires additional insured protection in favor of certain BP entities." The court of appeals concluded that all parties had conceded that the Drilling Contract was an "insured contract" under the policies and that the policies provide some coverage to BP as an additional insured. The only issue in dispute was "the scope of BP's insurance coverage."

Relying on Texas and Fifth Circuit precedent enunciated in *Evanston Ins. Co. v. ATOFINA Petrochems., Inc*, 256 S.W. 3d 660 (Tex. 2008) and in *Aubris Res. LP v. St. Paul Fire & Marine Ins., Co.*, 566 F.3d 483 (5th Cir. 2009), BP argued that it was an additional insured under the policies at issue, and that the policies *alone*, and not the indemnities detailed in the Drilling Contract, governed the scope of BP's coverage rights as an additional insured.

The district court found *ATOFINA* and *Aubris* distinguishable and denied BP's Rule 12(c) motion, reading Transocean's insurance obligation to be to name BP as an additional insured in each of its policies for liabilities assumed by Transocean under the terms of the contract. The district court's interpretation, according to the Fifth Circuit, led the lower court to conclude that Transocean was *only* required to name BP as an insured for liabilities that Transocean explicitly assumed under the contract. The district court then concluded that under Article 24 of the Drilling Contract BP was not covered under Transocean's policy for pollution-related liabilities deriving from the incident, because the spill originated below the surface of the water, and Article 24.1 of the Contract limited

responsibility to "pollution or contamination" that originated "on or above the surface of the land or water." Article 24.2 went on to provide that BP would protect and hold Transocean harmless from any loss or liability for pollution arising out of or connected with operations under the Drilling Contract and not assumed by the Contractor in Article 24.1.

The district court entered a partial final judgment on the insurers' complaints, holding that its order on BP's motion for judgment on the pleadings, by its terms and reasoning, not only denied BP's motion but also granted judgment on the pleadings against BP and in favor of the insurers on their complaints against BP. BP timely appealed.

The court of appeals reviewed the lower court's grant of judgment on the pleadings under Rule 12(c) *de novo.* The standard for dismissal is the same as that under Rule 12(b)(6) – to survive the motion a plaintiff must plead facts sufficient to state a claim for relief that is plausible on its face. Issues of contract interpretation are also reviewed *de novo.*

The parties agreed that Texas law governed the interpretation of the policies under their choice of law provisions. The same general rules apply to the interpretation of contracts and insurance policies. Courts are to consider them as a whole, affording each part effect. The court's primary concern is to discern the parties' true intent, and it may not adopt an interpretation that renders any portion of the policy meaningless, useless or inexplicable.

If an insurance coverage provision, in particular, is susceptible to more than one reasonable interpretation, the court concluded that it must choose the interpretation that favors the insured, so long as it is reasonable. It must do so, the court of appeals stated, "even if the insurer's interpretation is *more* reasonable than the insured's." In particular, the court reasoned, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured; any intent to exclude coverage "must be expressed in clear and unambigious language." (citing *ATOFINA,* 256 S.W. 3d at 668).

If there is ambiguity, it should be liberally construed in favor of the insured.

Continuing to cite *ATOFINA* and *Aubris,* the court further found that under Texas law, to determine whether an umbrella policy purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party, the court must "look to the 'terms of the umbrella insurance policy itself,' instead of looking to the indemnity agreement in the underlying service contract…." *Id.* at 664; *Aubris*, 566 F. 3d at 488-89. Moreover, that analysis will apply "so long as the indemnity agreement and the insurance coverage provision are separate and independent." *ATOFINA*, 256 S. W. 3d at 664, n. 5.

Considering first whether the umbrella policy between the insurers and Transocean itself limited coverage for any additional insureds, the court looked to *ATOFINA*, a case with parallel facts, in which ATOFINA, a refinery owner, hired Triple S under a services contract which stipulated that ATOFINA was to be named an additional insured in each of Triple S's policies. After a Triple S employee drowned while servicing the ATOFINA refinery, his estate sued both companies, which disagreed regarding whether ATOFINA was an additional insured and thus covered by virtue of the clause in the services contract, which read:

> [ATOFINA], its parents, subsidiaries and affiliated companies, and their respective employees, officers and agents shall be named as additional insured in each of [Triple S's] policies, except Workers's Compensation; however, such extension of coverage shall not apply with respect to any obligations for which [ATOFINA] has specifically agreed to indemnify [Triple S].

The Texas Supreme Court noted that ATOFINA sought coverage on the basis that it was Triple S's additional insured, and had not sought indemnity directly from Triple S. The court next looked at the wording of the Triple S policy, which defined an "insured" as:

> A person or organization for whom you have agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

Because the section, by its terms, covered ATOFINA with respect to operations performed by its contractor, Triple S, the Texas court found that it provided ATOFINA direct coverage even for its sole negligence.

The Fifth Circuit clearly saw parallels between that ruling and the case before it, noting that it had "applied *ATOFINA*'s teachings in *Aubris,"* another service contract case involving facts analogous to those before it. *In re Deepwater Horizon*, 710 F.3d at 345. There, United hired J&R Valley to service its oilfields under a services contract that required J&R Valley to name United as an additional insured under its commercial general liability policy, and also contained a general indemnity provision requiring United to indemnify J&R Valley for causes of action deriving from United's own negligence. The court in *Aubris* started with the insurance policy, which defined an additional insured as:

> Any person or organization that you agree in a written contract for insurance to add as an additional protected person under this agreement is also a protected person for the following **if that written contract for insurance specificallly requires such coverages** for that person or organization[.]

(emphasis in original). Given the definition's reference to a "written contract for insurance," the court then looked to the additional insured provision in the services agreement to determine whether coverage was required. It stated in relevant part:

> **UNITED**…shall be named as additional insureds in each of [J&R Valley's] policies, except Workers' Compansation; **however, such extension of**

> **coverage shall not apply with respect to obligations for which UNITED has specifically agreed to indemnify [J&R Valley].**

(emphasis in original).

J&R Valley's insurer argued that this provision of the services agreement prevented United from being covered, but the court disagreed, concluding on the basis of *ATOFINA* that in determining whether there is coverage, a court looks only to the additional insured provision itself – indemnity "is a separate, and later arising, question from coverage." *Aubris*, 566 F.3d at 488. Again, United sought coverage from J&R Valley's insurer, just as ATOFINA had sought coverage from Triple S's insurer, not indemnity from the contractor.

The *Aubris* court held that it is not material to the *ATOFINA* rule whether the additional insured provision is finally determined in the policy or with the aid of the service contract. The separate indemnity provision is not applied to limit the scope of coverage. The *ATOFINA* court made this clear when it said:

> We have noted that where an additional insured provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity clause.

Id. at 489.

The court further noted that the *ATOFINA* reasoning had been followed in a 2012 Texas Court of Appeals decision holding that only the policy, and not a clause in a services agreement expressing the parties' intent to limit additional insured coverage to listed indemnities, could "limit the scope of additional insured status." *Pasadena Refining System, Inc. v. McCraven*, Nos. 14-10-00837-CV, 14-10-00860-CV, 2012 WL 1693697 (Tex. App. May 15, 2012)

The cited case law made it clear to the Fifth Circuit that only the umbrella policy itself could set limits on the extent to which an

additional insured is covered in situations such as the one before it. As in *ATOFINA* and *Aubris*, BP was not seeking indemnity from Transocean, but rather seeking coverage from the insurers. The umbrella policy in question defined an "additional insured," "insurance contract," "insured," "bodily injury," "property damage," "personal injury," and "third party" in language the court described as very similar to that in the umbrella policies in *ATOFINA, Aubris* and *Pasadena Refining*, so in the case before it, as in those 3 cases, the policy itself did not contain any limitation on additional insured coverage, nor did it incorporate any limits from the underlying drilling contract.

The insurers argued, however, that the additional insured provision in the drilling contract specifically limited BP's coverage as an additional insured to those liabilities Transocean assumed under the contract, which provided in part:

> [BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers and agents shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this Contract.

The language on which they relied was virtually identical to that in the *ATOFINA* service agreement, and similar to that in *Aubris* and *Pasadena Refining*. In light of *ATOFINA* the Fifth Circuit found that the clause, being in the Drilling Contract, was "insufficient to limit coverage" because "we are bound to look only to the policy itself to determine whether BP is covered" in the current case. *In re Deepwater Horizon*, 710 F.3d at 348. Because the language in the policy's additional insured clause was similar to that in the cases cited, the court concluded that "there is no relevant limitation on BP's coverage under the policy as an additional insured, so long as the insurance provision and the indemnitees clauses in the Drilling Contract are separate and independent." *Id.*

Thus the question became whether the Drilling Contract's additional insured provision and indemnity provisions were

separate. Again relying on *ATOFINA* and cases discussed therein, the court determined that the provisions were separate, concluding that "Texas law only requires the additional insured provision to be a discrete requirement," which it was. *Id.* at 349. It need not be a separate contract clause, and its independent status is not altered by a provision requiring the relevant party to obtain insurance for its liabilities under the Contract.

Under Texas case law, the court concluded, the provision in the Drilling Contract extending direct insured status to BP was unmistakably separate and independent from BP's agreement to forego contractual indemnity in various other circumstances. Moreover, the court went on, "Texas law compels us to interpret coverage provisions in favor of the insured, so long as that interpretation is reasonable – and **even if the insurer's proffered interpretation denying coverage is more reasonable**." *Id.* at 349-50 (emphasis added).

Thus the court concluded that BP was entitled to coverage under each of Transocean's policies as an additional insured as a matter of law.

[Editors' note: This opinion was withdrawn on August 29, 2013 and subsequently was replaced by *In re Deepwater Horizon,* 728 F. 3d. 491 (5th Cir. 2013).]

Aftermath/Analysis:

The decision has been the subject of questions and criticism since it was issued. In a recent presentation, John M. Woods of Clyde & Co. US LLP analyzed the decision and the questions it raises. A summary of his remarks follows:

> *In Re DEEPWATER HORIZON–Fifth Circuit decision dated March 1, 2013.*
>
> The Fifth Circuit decision announced on Friday arises from two declaratory judgment actions commenced by Transocean's insurers in 2010 after

BP sought blanket additional assured status under Transocean's liability policies. In other words, BP was seeking the benefit of Transocean's $950 million in coverage to pay for BP's own liabilities arising from the spill, including clean up costs, third party claims and CWA civil fines and penalties.

BP's additional assured status under Transocean's policies arose from the provisions of the Drilling Contract between BP and Transocean, which required Transocean to have BP named as an additional assured in its liability policies. Not unusual.

Additionally, it was not unusual that the Drilling Contract also provided for cross indemnities in respect of pollution liabilities – with Transocean responsible for (and indemnifying BP against) all liabilities arising from pollution originating at or above the surface of the water. BP had a reciprocal obligation with respect to all pollution "not assumed by the Contractor" (Transocean).

Transocean intervened in the two cases to protect its insurance coverage, and BP moved for judgment on the pleadings. In opposing the motion, Transocean and its insurers argued that BP's status as an additional assured was limited to the scope of Transocean's liability to BP as assumed under the Drilling Contract, i.e. only with respect to pollution originating at or above the surface.

In November, 2011 Judge Barbier agreed with Transocean's argument and denied BP's motion. Judge Barbier found that the Drilling Contract provisions were relevant to the interpretation of the insurance contract and BP's coverage as an additional assured, pursuant to the reasonable expectations of the Parties. Otherwise, Judge Barbier said, it would

lead to the "absurd result" that the Drilling Contract would allocate responsibility for pollution liabilities, as it did here, in the indemnity provisions, and then undo the allocation of risk by giving one party (BP) blanket additional assured status under the other's (Transocean's) policies.

Well, that "absurd result" has now come to pass. The Fifth Circuit has since ruled that, under Texas law, which is applicable to the insurance policies, the courts may only look at the insurance policies themselves to determine the scope of coverage, not the Drilling Contract.

Moreover, the test of insurance contract interpretation under Texas law is extremely favorable to the insured, in this case BP. Here's the test –

> If an insurance coverage provision is susceptible to more than one reasonable interpretation, the court must interpret that provision in favor of the insured, so long as that interpretation is reasonable. [citation omitted]. The court must do so even if the insurer's interpretation is *more* reasonable than the insured's—"[i]n particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured," [citation omitted], and '[a]n intent to exclude coverage must be expressed in clear and unambiguous language.' [citations omitted].

You can see how broadly favorable it is to the assured. The more reasonable interpretation of the policy by the insurers and Transocean is trumped by the assured's less reasonable interpretation.

Another important holding of the decision is that (and I quote):

> *Only* the Umbrella Policy itself may establish limits upon the extent to which an additional insured is covered in situations such as the one before us now.

In re Deepwater Horizon, 710 F.3d at 347.

In other words, ignore the Drilling Contract as well.

The unanswered questions and, more importantly, the unintended consequences of this decision are obvious:

1. BP has no insurance and massive liability. Transocean has its $950 million in liability coverage. If BP is an additional assured under Transocean's coverage for all purposes, who gets the benefit of the coverage?

2. How do you allocate the $950 million?

- first come first served? There would be a race to admit liability.

- pro rata? how? by total liability? by category of loss?

3. In almost any scenario, Transocean loses most if not all of its $950 million in insurance coverage to BP, although the courts will have to decide these issues.

Most of Transocean's insurers have, some time ago, filed interpleader actions, essentially leaving it up to the court to decide how the insurers' money gets paid out.

This protects the insurers from competing claims on the policies, although to do so they have to tender limits.

How do the Transoceans of the world protect themselves going forward? At the very least it will require a close look at their liability insurance policies and it will require modifications to those policies which give unrestricted additional assured status to the named additional assureds.

Additionally, I think the standard form drilling contracts must be amended, to make clear that the obligation to name a party to a drilling contract as an additional assured under the other party's liability policies is limited to the extent of the original assured's liability to the additional assured under the drilling contract.

Something for probably everyone in this room to think about.

Dueling Claims of Normal and Abnormal Bad Faith.

Oliver v. M/V BARBARY COAST, 901 F. Supp. 2d 1340 (S.D. Ala. 2012).

This case arose out of the salvage of the M/V BARBARY COAST, owned by Atchafalaya Marine, LLC ("AM"), and a resulting insurance dispute. AM and Rodd Cairns ("Cairns") asserted claims for breach of contract, abnormal bad faith and normal bad faith against third-party defendant National Union Fire Insurance Company of Pittsburgh, Pa. ("NU").

The matter was before the court on NU's motion for summary judgment against AM and Cairns and AM/Cairns' motion for partial summary judgment against NU.

AM purchased the M/V BARBARY COAST in September 2008. Starting in 2009, Eagle Inland Towing and AM entered into an oral agreement pursuant to which Eagle used the vessel and AM's crew to haul wood chips, and paid AM for their use.

In March of 2009 NU issued a policy to Eagle covering 3 other vessels. By an endorsement (#17) to that policy, AM was

listed as an additional insured and coverage was extended to any "subsidiary, affiliated, or interrelated companies of the Assured," whether they be "owners and/or charterers and/or operator and/or in whatever capacity." The endorsement further provided that no party would be deemed an additional assured or granted a waiver of subrogation on any insured vessel which was not actually engaged or involved in the intended operations at the time of any loss.

By subsequent endorsements, the M/V BARBARY COAST was added to the schedule of vessels on Eagle's policy as of June 2, 2009, all other terms and conditions to remain unchanged (#18); deleted from the policy as of September 2, 2009, all other terms and conditions to remain unchanged (#19); and added back to the policy as of December 21, 2009 (#23). Endorsement #23 also added Eagle River Towing, LLC as a named insured, added ICF Solutions, Inc. as an additional insured, and provided that all other terms and conditions remained unchanged.

In January, 2010, the M/V BARBARY COAST ran aground on the Tombigbee River in Alabama during a "rescue operation" engaged in by Eagle to free a grounded barge, sustaining severe damage. AM, which did not have a copy of the insurance policy, ultimately obtained the name of the insurer and in September, 2010, notified NU of the loss.

On January 21, 2010, the M/V BARBARY COAST was deleted from Eagle's policy by endorsement #25, all other terms and conditions to remain unchanged; and on March 18, 2010, Eagle's policy coverage was "cancelled in its entirety" by endorsement #26.

With respect to the cross motions for summary judgment before it, the court observed:

> The "supporting" documents…establish the presence of a genuine factual dispute with regard to the actions taken (or not taken) by National Union and Atchafalaya/Cairns regarding the insurance claim for the damage to the M/V BARBARY COAST. In

> synopsis, while Atchafalaya/Cairns claim bad faith on the part of National Union, National Union contends that it honored coverage for the damages to the vessel notwithstanding "solid justification to deny coverage" such that requisite elements of bad faith are absent.

Oliver, 910 F. Supp. 2d at 1343.

In reciting the standards for resolving motions for summary judgment, the court noted that the moving party bears the initial burden of informing the court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. If it does so and the nonmoving party then fails to make a sufficient showing on an essential element of its case on which it has the burden of proof, the moving party is entitled to summary judgment. But in reviewing whether the nonmoving party has met its burden, the court must stop short of "weighing the evidence and making credibility determinations" as to the truth of the matter. Rather, the evidence of the non-movant is to be believed, and justifiable inferences drawn in its favor. When parties cross-move for summary judgment, the court must separately evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is then under consideration.

The court applied Alabama law throughout in resolving the competing summary judgment motions, beginning with those of AM and Cairns against NU for "abnormal" bad faith. The basis for those claims was the allegation that a valid insurance contract existed and that NU intentionally failed to determine whether there was any lawful basis for refusal to pay, and refused to indemnity AM without any legitimate reason.

NU cross-moved for summary judgment both as to the claims for "abnormal" bad faith and separate claims for "normal" bad faith made by AM and Cairns, asserting that both of them lacked standing because they were not parties to the contract and were not additional assureds; it never denied that the vessel was covered, and

paid all insurable damage, so the breach of contract (failure to pay) that is a prerequisite for a bad faith claim did not exist; and it had sufficient, if debatable, reasons to deny coverage, precluding claims of bad faith.

Turning first to Cairns, the court noted that his claim to the status of additional insured rested on the fact that AM owned the vessel and Cairns owned AM. The record showed that he was a member of AM, but was never listed on the policy as an additional assured. More important, under Alabama law a member of an LLC does not have a right to pursue a claim of the LLC under an insurance policy issued in favor of, and to, the LLC. Cairns lacked standing to bring the claims on his own behalf because he had not demonstrated injury in fact, causation, or redressability – that NU had invaded his legally protected interests. While under some Alabama case law one does not need to be named in an insurance policy to be an insured, the facts relating to Cairns were distinguishable, and the case law did not obviate an Alabama statute providing that a member of a limited liability company is not a proper party to proceedings by or against the limited liability company "except where the object is to enforce a member's or manager's rights against liability to the limited third party company." *Id.* at 1345. Moreover, even if Cairns was construed to be a third-party beneficiary, other case law precludes bad faith insurance claims by third-party beneficiaries in Alabama. Since Cairns lacked standing, NU's motion as to him was granted and all of his claims were dismissed. The AM/Cairns motion for summary judgment was denied for the same reasons.

Turning to the various claims contained in AM's motion for summary judgment, the court began by citing a guiding principle in the Alabama case law:

> (A)n insurance policy is written by the insurance company. Most insureds depend upon the company to provide the coverage they seek. When doubt exists as to whether insurance coverage is provided, the language used by the insurer must be construed for the benefit of the insured.

Id. at 1346.

AM sued NU for "normal" bad faith and "abnormal" bad faith, both of which are recognized under Alabama law, providing that there existed a valid insurance contract to which AM was a party, which was disputed. The court concluded after examining the chronology of events and series of policy endorsements that AM was added as an additional insured by endorsement 17, and remained so through the time of the loss because all of the subsequent endorsements provided that all other terms and conditions remained unchanged. Moreover, while endorsement 19 deleted the M/V BARBARY COAST (later reinstated by endorsement 23), no endorsement ever either deleted AM as an additional assured, or deleted endorsement 17. During the period that the vessel was not insured, the court reasoned, coverage as to AM was "dormant," but was "revived, since it was never deleted, once the vessel was again added." *Id.*

According to Alabama case law, what mattered was AM's status and its insurable interest at two specific points: 1. at the inception of the policy; and 2. at the time of the loss. At the time of inception, AM and the vessel were included in the policy, and the same was true at the times of the loss in the first two weeks of 2010. Construing the policy in favor of the insured, AM was covered "because at those critical junctures its insurable interest (the vessel) was included on the policy." *Id.* at 1347. Accordingly, NU's motion for summary judgment as to AM's additional assured status was denied and AM's motion for summary judgment on the same issue was granted.

Turning finally to AM's bad faith claims, the court first explained the bases for the "abnormal bad faith" and "normal bad faith" claims. AM claimed that NU committed "abnormal" bad faith because it issued a valid insurance contract covering the vessel, but after receiving notice of the loss, failed and refused to adequately investigate and indemnify AM for the loss without any reason, and intentionally failed to determine whether there was any lawful reason not to pay in circumstances where it had failed to deliver a copy of the policy to AM, as required by Alabama law. The claim of "normal" bad faith also rested on NU's failure, after receiving notice of the loss, to timely indemnify AM, with no legitimate reason.

According to Alabama case law, proof of abnormal bad faith would include evidence that: 1. NU failed to properly investigate the claim or to subject the results of investigation to a cognitive evaluation and review; and 2. NU breached the contract for insurance coverage with the insured when it refused to pay the claim.

To establish that NU committed normal bad faith, AM needed to prove: 1. the existence of the insurance contract and a breach by the insurer; 2. intentional refusal to pay the claim; 3. absence of a legitimate or arguable reason for the refusal; 4. the insurer's actual knowledge of the absence of an arguable reason; and 5. if the intentional failure to determine the existence of a lawful basis theory is relied on, also prove the insurer's intentional failure to determine whether there was a legitimate or arguable reason to pay the claim. To support a bad faith claim or a breach of contract claim, AM of course also had to establish that NU denied its claim, either expressly or constructively.

The court concluded that AM was an additional insured and that a valid insurance contract existed between it and NU. However, the record revealed a significant factual dispute in regard to: 1. whether NU or AM breached the contract at issue – the insurance policy – since NU ultimately paid insurable damages; and 2. whether NU committed bad faith of any sort – that is, whether there were debatable reasons to initially deny coverage, and whether it either intentionally or recklessly failed to investigate. Accordingly, both NU's and AM/Cairns' motions for summary judgment on the bad faith claims were denied.

Thus, NU's motion for summary judgment was granted and all the parties' other motions for summary judgment were denied.

No Duty to Defend or Indemnify as to Claims in Underlying Seamen's Injury Action.

Composite Structures, Inc. v. Cont'l Ins. Co., 903 F. Supp. 2d 1284 (M.D. Fla. 2012).

Plaintiff Composite Structures, Inc., d/b/a Marlow Marine Sales, sought a declaration that defendant The Continental

Insurance Company owed a duty to defend and indemnify Marlow in an underlying lawsuit against Marlow. On cross motions for summary judgment the court denied Marlow's motion and granted Continental's motion, holding that Continental had no duty to defend or indemnify Marlow for the claims in the underlying action.

The court found that the dispositive question was when, if ever, it is appropriate to look beyond the complaint in an underlying action to determine an insurer's duty to defend. While the general rule is that the duty to defend is determined solely from the underlying complaint, an exception arises where that pleading would not be expected to disclose the facts necessary to determine that duty. The instant case fit squarely within that exception and the evidence showed that the underlying claims were excluded from coverage, so no duty to defend arose.

The underlying action was brought by two seamen who alleged that they were exposed to carbon monoxide fumes while working aboard a yacht designed, manufactured and sold by Marlow. They claimed they began working on the boat in June 2004.

Continental insured Marlow under four policies:

- two marine services commercial general liability policies;
- a marine excess liability policy; and
- a boat dealers and marine operators coverage policy.

Marlow's insurance broker provided a copy of the complaint to Continental on March 7, 2007. His cover letter, only referring to the boat dealers and marine operators coverage policy (H1014716), requested that a claim file be opened and an adjuster assigned. Continental responded that it was attempting to locate the relevant policy, and that it could not determine its duty to defend or indemnify until it did so and investigated the circumstances surrounding the claims. It stated that it would provide a coverage determination

when the policy was located and when Marlow provided certain additional information; reserved its right to deny or limit its coverage based on the policy terms; and noted that Chubb had advised that counsel had already been retained by Chubb to provide a defense for Marlow in the underlying action.

In March of 2007 the seamen filed a memorandum in the underlying action stating that the period of initial carbon monoxide exposure was from July 5, 2004 through January 22, 2005, when the defect was supposedly repaired by Marlow. Continental learned of the dates set forth in the memorandum some two weeks later. On April 9, 2007, Chubb informed Marlow that its defense would be withdrawn because its policy period began after the date on which the seamen had acknowledged that they were first exposed.

In May of 2007 Continental issued a letter denying coverage under its four policies. Marlow conceded for purposes of this action that the excess policy and boat dealers and marine operators coverage policy did not apply if there was no coverage under one of the marine services commercial general liability (CGL) policies. Continental denied coverage under the CGL policies based on an exclusion that read:

> MARINE SERVICES LIABILITY POLICY POLLUTION BUY BACK
>
> The exclusion relating to pollution and/or contamination is deleted and replaced by the following:
>
> A. This insurance does not apply to:
>
> 1. Any loss, damage, cost, liability, expense, fine or penalty:
>
> (a) Which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time; ...

> Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, oil, petroleum products, chemicals and waste ....
>
> * * *
>
> C. *Paragraph A. above shall not apply, however, provided that you establish that all of the following conditions have been met*:
>
> 1. The "occurrence" was neither expected nor intended by the insured. An "occurrence" shall not be considered unintended or unexpected unless caused by some intervening event neither foreseeable nor intended by the insured.
>
> 2. The "occurrence" can be identified as commencing at a specific time and date during the term of this policy.
>
> 3. *The "occurrence" became known to the insured within seventy-two (72) hours after its commencement.*
>
> 4. *The "occurrence" was reported in writing to us within thirty (30) days after having become known to the insured.*
>
> 5. The "occurrence" did not result from the insured's intentional and willful violation of any government statute, rule or regulation.

Composite, 903 F. Supp. 2d at 1286-87 (emphasis by the court).

Continental argued that Marlow "was unable to establish that Plaintiffs' exposure to carbon monoxide became known to them within seventy-two (72) hours after its commencement on or about July 5, 2004." *Id.* at 1287. (Continental further argued that

the excess and boat dealers and marine operators policies did not provide coverage, which Marlow did not attempt to refute).

Marlow brought the instant action after settling the underlying claims. Continental contended that there was no coverage because the third and fourth required conditions were not met – that is, Marlow learned of the carbon monoxide emissions and crew members' exposure after it commenced, and failed to report the incident to Continental within the next 30 days. Marlow did not dispute those two facts, but argued that Continental's duty to defend was established by the underlying complaint filed against it by the victims, which was silent as to whether some of the five circumstances enumerated in the exception to the exclusion did or did not exist.

After reciting the summary judgment standard, the court noted that an insurer's duty to defend its insured arises when the complaint alleges facts that "fairly and potentially bring the suit within policy coverage." *Id.* at 1288. However, if the facts show the applicability of a policy exclusion, the insurer has no duty to defend. The insurer relying on an exclusion must demonstrate that the allegations of the complaint are "solely and entirely within the policy exclusion and are subject to no other reasonable interpretation." *Id.* But if there is an exception to the exclusion, the burden "is placed on the insured to demonstrate the exception to the exclusion." *Id.*

Citing Florida case law, the court found that the general rule in deciding these conflicting possibilities is that an insurer's obligation to defend is determined solely by the claimant's complaint if suit has been filed. However, there are natural exceptions to the rule where an insurer's claim that there is no duty to defend is based on facts that would not normally be alleged in the underlying complaint. Here, the underlying complaint was devoid of any allegation addressing the third and fourth requirements for the exception to the exclusion. It was silent as to when the "occurrence" became known to Marlow or when the "occurrence" was reported.

The question then became whether these were facts that would normally be alleged in an underlying suit, in this case products

liability claims based on theories of negligence and strict liability. After reciting the elements of each cause of action under Florida law, the court concluded that neither one requires a plaintiff to allege the specific date on which he informed the defendant of his injuries or the specific date on which the defendant informed its insurer. Before filing suit, an injured plaintiff would be unlikely to know if or when a defendant informs its insurer of an incident. Since those facts would not normally be alleged in the underlying complaint, the duty to defend can only be determined by reviewing outside evidence. Here the outside evidence showed that Marlow failed to satisfy the exception's requirements that the occurrence be known to the insured within seventy-two hours after its commencement and that it be reported in writing to Continental within thirty days after becoming known to the insured. The record showed that the occurrence - exposure to carbon monoxide gas - commenced beginning in June 2004; became known to Marlow in early 2005; and was reported in writing to Continental in March of 2007. Hence, Continental was entitled to enforce the clause and deny coverage, which it did only after obtaining enough information to confirm that Marlow received notice well beyond the required 72 hour period, and/or failed to notify Continental within 30 days thereafter.

Marlow further argued that the pollution buyback exclusion transformed its occurrence based policy into a claims-made policy, but did not develop the argument or explain how it would preclude enforcement of the exclusion's plain language.

Finally, again citing Florida case law, the court concluded that a determination that there is no duty to defend against a particular claim carries with it the inevitable conclusion that there is no duty to pay an eventual judgment that may be entered on the underlying claim.

Excess Policy Covered Debris Removal and Cost of Cleanup.

Fireman's Fund Ins. Co. v. Great Am. Ins. Co., 2013 AMC. 631, 2013 WL 1195277 (S.D.N.Y. March 25, 2013)

Plaintiffs Fireman's Fund Insurance Company ("Fireman's Fund"), One Beacon Insurance Company ("One Beacon"), National Liability and Fire Insurance Company ("National Liability"), and QBE Marine & Energy Syndicates ("QBE") initiated this insurance coverage action against Great American Insurance Company of New York ("Great American"), Max Specialty Insurance Company ("MSI"), and Signal International, LLC ("Signal"). Cross-claims and counterclaims were subsequently filed by MSI, Great American and Signal.

The case concerned a floating drydock (the "Drydock") that had been in Signal's possession since 2003, which Signal purchased outright in 2005, that sank at its berth in Signal's Port Arthur, Texas dockyard facility in 2009. The Drydock was wrecked beyond repair and rendered a constructive total loss.

Plaintiffs moved for summary judgment against MSI, seeking a declaration that it must contribute on a pro-rata basis toward the cost of removing and cleaning the wrecked drydock, or in the alternative, that MSI be compelled to allocate $5 million of a $10 million payment made by Signal's primary insurer to wreckage removal coverage. The motion was granted.

Of Signal's five lines of insurance in effect at the time of the sinking, the two mainly at issue in the motions were a primary property policy issued by Westchester Surplus Lines Insurance Company for $10 million (the "PPI Policy") and a following form excess property policy with limits of $15 million in excess of the PPI Policy, issued by MSI (the "EPI Policy").

The PPI policy provided that the insurer's limit of liability in a single "occurrence" regardless of the number of "locations" or coverages involved, should not exceed the policy limit of liability,

$10,000,000. When a limit of liability for a location or other specified property was shown, the limit would be the maximum amount payable for physical loss, damage or destruction of the type insured at the location, or other specified property. Sub-limits stated in the policy applied as a part of, not in addition to, the policy limit of liability, and did not include the amount of any applicable deductibles. Unless otherwise stated, limits of liability applied per occurrence. When a sub-limit of liability was shown as applying in the aggregate during any policy year, the insurer's limit of liability would not exceed that limit during any policy year, regardless of the number of locations and coverages involved.

Property damage and "time-element" coverages were subject to sub-limits of $5,000,000, or 25% of the property damage and "time-element" claim payable, whichever was greater, with respect to claims for "Debris Removal and Cost of Cleanup."

Included among "additional coverages" with respect to Property Insured were Debris Removal and Cost of Cleanup, specifically expenses "necessarily and reasonably incurred in removal of debris of such property" from the "location" and/or "Cost of cleanup at the 'location' made necessary as a result of physical loss, damage or destruction of property" of the type insured, by a peril insured against.

A further "additional coverage" for Contamination Cleanup applied to costs incurred "to clean up and/or remove polluted or contaminated land and/or water from an insured 'location,'" where the contamination or pollution resulted from physical loss, damage or destruction of insured property by a peril insured against.

The EPI policy insured Signal in excess of the PPI policy, at a Participation Layer of "$15,000,000 per occurrence excess of $10,000,000 per occurrence." Covered Perils included "All Risks of Direct Physical Loss or Damage excluding Named Windstorm, Flood, Storm Surge/Ensuing Flood, and Earthquake."

There was also an Occurrence Limit of Insurance Endorsement to the EPI Policy, which deleted the limits of insurance sections and replaced them with terms that included the following:

> **Occurrence Limit of Insurance <u>$15,000,000</u>**
>
> The most we will pay for loss or damage in any occurrence is the Occurrence Limit of Insurance shown above, irrespective of the number of locations involved.
>
> In the event of loss or damage we will not pay more that the **least** of the following:
>
> 1) The actual amount of the adjusted loss as defined elsewhere throughout the policy, or
>
> 2) The stated value for each scheduled item of coverage applicable to the lost or damaged property, as shown on the Statement of Values on file with the Company, or on MBM106 if attached to this policy, plus any additional limits of Insurance for Property Additional Coverage or Coverage Extensions included in, or that modify the Property Coverage Parts; and Schedules of any limit(s) of Insurance as shown on Coverage Declaration(s)
>
> 3) The Occurrence Limit of Insurance shown above.
>
> Less applicable deductibles(s).

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED

***

Commercial Property Supplemental Declarations Primary/Underlying Insurance

Item No.	
1. **Schedule Of Primary / Underlying Carrier**	**Primary Carrier: Westchester Surplus Lines Company: Signal International, LLC Policy Number: D37362220 001 Term: 1/30/2009-01/20/2010**
2. **Attachment**	**$15,000,000 per occurrence excess of $10,000.000 per occurrence**
3. **Participation and Layer Limit(s)**	**LIMIT P/O PER OCCURRENCE Primary: $10,000,000 100% (Subject to Occurrence Limit of Liability)**
4. **Perils**	**All Risks of Direct Physical Loss or Damage including Earthquake and Flood**
5. ***	***
6. **Sublimits**	**n/a**

Additional clauses provided that:

> (1) the Insurer(s) agreed to indemnify the Insured in respect to "Direct Physical loss or damage" to property described in the Declarations caused by any of the perils set forth in the declarations and which were covered by and defined in the policies specified in the Declarations and issued by the named Primary Insurer(s); (2) except as otherwise provided, the excess policy was subject to the same warranties, terms and conditions as the primary policy; (3) the limits of liability were those set forth in Declarations under the designation Excess limits, and the excess insurer would be liable to the full extent of those limits; and (4) "loss" was defined to mean each and every loss or series of losses arising out of one 'loss occurrence.'"

Following the sinking of the drydock, Signal made a demand upon its insurers. Signal was warned by the Texas General Land Office that it would initiate legal action if Signal failed to take immediate action, because the sunken drydock posed a threat to public health and safety. Signal hired Weeks Marine to remove the drydock, for which two of the plaintiff insurers (the "MGL" and "Bumbershoot" insurers) agreed to pay on a without prejudice basis. Plaintiffs ultimately paid West Marine $12,395,026.00 to remove the wrecked drydock and clean up the site.

Westchester paid Signal its full $10 million layer of insurance. MSI paid $3.6 million, less deductible, to Signal on its property damage claim, but denied any responsibility for payment and/or contribution toward removal and/or cleanup of the drydock, resulting in the present suit.

After complaints and answers, as well as a counter-claim and cross-claim (and responses thereto) were filed, plaintiffs moved for summary judgment against Great American and MSI. Those motions

were denied by the judge to whom the case was originally assigned. Following reassignment, plaintiffs filed a motion for summary judgment against MSI, claiming that MSI was liable for the removal and cleanup of the drydock wreckage because coverage for removal was triggered under the PPI policy as a matter of law, meaning that coverage must triggered under the EPI policy as well. MSI responded that the EPI policy did not adopt the Debris Removal and Cost of Cleanup coverage of the PPI policy, and that even if it did, the cleanup and removal of wreckage were not covered by the PPI policy.

Reviewing the standards for interpreting an insurance contract under New York law, which it found to be controlling under federal choice of law rules, the court noted that whether a contract is ambiguous is a threshold question of law to be determined by the court. If the terms, or inferences readily drawn from the terms, are ambiguous, the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during formation of the contract. If that inquiry does not yield a conclusive answer, the court may apply other rules of construction, including the rule of *contra proferentum*, which provides that where an insurer drafts a policy, any ambiguity in its terms should be resolved in favor of the insured.

The court then proceeded to review the coverages under the PPI policy, and those under the "following form" EPI "excess property policy" issued by MSI.

The threshold question, as framed by the court, was "whether the PPI Policy covers the cost of removing the wrecked Drydock." *Fireman's Fund*, 2013 WL 1195277 at *7. The PPI policy promised to cover expenses "necessarily and reasonably incurred in removal of debris of such property from the 'location' of the insured physical loss," as well as the cost "of clean up at the 'location' made necessary as a result of physical loss, damage or destruction of the type insured" by the policy caused by a peril covered by the policy.

MSI argued that the PPI policy's coverage of "debris removal" did not include the wrecked drydock. The court rejected

the argument, concluding that whether or not the wrecked drydock constituted "debris," the PPI policy unambiguously covered the costs of cleanup at the location due to physical loss, damage or destruction of the covered property. The drydock indisputably suffered such physical loss, making the cleanup necessary.

The court also agreed with plaintiffs that the PPI policy language unambiguously covered removal of the wrecked drydock, noting that the dictionary definition of "debris" includes "the remains of something broken down or destroyed," which the drydock was post-sinking. Other dictionary definitions indicate that "wreckage" and "debris" are synonymous. Thus removal of the wrecked drydock, as well as the subsequent cleanup, were covered by the PPI policy "as a matter of law."

Turning to the EPI policy, the court found that it clearly was "for the most part, written on the same 'terms and conditions' as the PPI Policy." *Id.* at *8. (MSI's answer to the complaint had admitted the allegation that MSI issued its policy "on a full following form to the [PPI] policy issued by Westchester…."). As the court observed, the purpose of an excess policy is to provide coverage for a loss covered by a primary policy that exceeds the amount of coverage provided by the primary policy.

The EPI policy did provide for certain limits on its following of the PPI policy, in particular that the perils insured against were subject to the same warranties, terms and conditions (except as to premium, amounts and Limits of Liability other than the deductible or self-insurance provision, and the renewal agreement, "AND EXCEPT AS OTHERWISE PROVIDED HEREIN)."

The question then became whether the EPI policy provided an exception to the debris removal and cost of cleanup coverage. MSI pointed to a section of the EPI policy that stated, in the court's words, "somewhat cryptically, that 'sublimits' are 'n/a.'" *Id*. Rather than agreeing with MSI that this meant the EPI policy did not provide coverage for any sublimits in the PPI policy, the court concluded that it was more sensible to read the language as "providing that

there are no sublimits in the EPI Policy, rather than as an exception to following the PPI Policy." *Id.* If the EPI policy meant to exclude all coverage under the PPI sublimits, the court reasoned, the EPI policy would have read "sublimit coverage" is "n/a," or better yet "is excluded." This reading, the court observed, is consistent with the EPI policy's provision that it follows form "except as regards the …. Limits of Liability" in the PPI policy. *Id.* The court concluded that the EPI policy followed the different "areas" of coverage in the PPI policy, but removed any sublimits for any particular coverage.

In addition, the language of the PPI policy clearly contemplated the EPI policy providing excess coverage for claims under the debris sublimit. The language of that section "would be superfluous," the court concluded, unless the PPI policy contemplated the sublimit being covered by the EPI policy. *Id.* Because the EPI policy "explicitly eschews all 'limits of liability' in the PPI Policy and does *not* provide for an exception for 'Debris Removal and Cost of Cleanup,'" the court concluded that the EPI policy provided excess coverage of debris removal and cost of cleanup unambiguously and as a matter of law. *Id.* at *9.

COMMITTEE ON MARINE TORTS AND CASUALTIES

Chair: Mary Elisa Reeves

Newsletter - Spring 2013

RECENT CASES ADDRESSING LIMITATION OF LIABILITY ISSUES

Christina K. Schovajsa
Eastham, Watson, Dale & Forney, LLP

A. CASES CONCERNING NEGLIGENCE/ UNSEAWORTHINESS AND PRIVITY OR KNOWLEDGE.

Court Found No Privity or Knowledge When Only Evidence of Causation was an Act of God or Peril of the Sea.

In re Anderson, 2013 AMC 1369, 2012 WL 1301162 (W.D. Wash. Apr. 16, 2012).

An interlocutory decision from this case was originally reported in the Spring 2012 Update (*In re Anderson*, 847 F. Supp. 2d 1263 (W.D. Wash. 2012)). (*See* MLA Report, Spring 2013, MLA Doc. No. 806 at 17036).

Richard Beckham died after the catamaran CATSHOT capsized when it got caught in a 100-mile-per-hour-wind storm while en route to its new owner, James Anderson. Beckham's wife ("claimant") filed suit as his personal representative under the Jones Act and the Death on the High Seas Act. Anderson filed a petition under the Limitation of Liability Act in federal district court, and the court enjoined all other related pending actions.

Anderson filed a motion for partial summary judgment seeking the court to conclude that he was entitled to limit his liability to the value of the vessel under the Limitation of Liability Act. In finding that Anderson was entitled to limit his liability, the court first acknowledged that the Act, which applies to both commercial vessels and noncommercial "pleasure craft", limits

shipowner liability arising from the unseaworthiness of the shipowner's vessel or the negligence of the vessel's crew unless the condition of unseaworthiness or the act of negligence was with the shipowner's privity or knowledge. The claimant alleged a long list of unseaworthy and negligent conditions including, but not limited to: 1) failure to provide life vests or survival suits; 2) presence of malfunctioning vessel tracking system; 3) faulty communication equipment; 4) knowledge that the master had no experience sailing in the area; 5) knowledge that the vessel had experienced stress related damage that rendered it unsafe; 6) knowledge that prior crew members had departed the vessel due to safety concerns; and, 7) negligence in selecting the route given the weather and the season.

Because a shipowner's privity or knowledge of unseaworthy conditions is limited to conditions that exist at or prior to the commencement of a vessel, the court quickly dispensed with all the allegations of conditions that arose post-departure, noting that "stress-related damage, crew departures, or changing weather, have no bearing on limitation absent circumstances not raised here." *In re Anderson*, 2013 AMC at 1379, 2012 WL 1301162, at *6. With regard to the remaining allegations, the court found that none precluded summary judgment because the shipowner met his burden of demonstrating prima facie entitlement to limitation and the claimant failed to rebut the showing. For example, the claimant conceded that the vessel was equipped with both life vests and a lift raft and made no allegation that these items did not function as intended. Instead, she argued that more safety gear or better safety gear could have been provided. However, that is not the standard. The warranty of the shipowner is not one of unconditional safety, but of reasonable fitness for the purpose it was intended. Thus, a vessel need only be structurally fit and reasonably safe for the voyage. Moreover, even assuming the safety equipment on board (or alleged lack thereof) amounted to an unseaworthy condition, the court found that the claimant presented no evidence that any of the alleged unseaworthy conditions contributed to the decedent's death. In this context, the court noted that the only evidence before it was that the vessel and its crew were lost because they had the terrible misfortune to be caught in a 100-mile-per-hour-wind storm off the coast of Oregon

– an Act of God or peril of the sea. Because claimant failed to establish that unseaworthiness caused the accident, those conditions could not preclude limitation. Finally, on regard to the route issues, the court found "no negligence, and certainly no causation…[t]hat the route selected months before happened to place the [vessel] and [its] crew in the cross hairs of that storm cannot be considered an act of negligence." *Id.* at 1381, 2012 WL 1301162, at *7.

One-Time Error on Part of Captain and Crew Did Not Warrant Denial of Limitation

McAllister Towing of Virginia, Inc. v. United States,
2013 AMC 428, 2012 WL 1438770 (E.D. Va. Apr. 25, 2012)

McAllister Towing, the owner and operator of the tug KATIE G. MCALLISTER, filed an action for exoneration from or limitation of liability for damages caused to sensors and monitoring devices belonging to the U.S. Navy. Specifically, the KATIE G, with another boat in tow, released too much tow wire, which snagged an unknown object from the seabed, and dragged it through the U.S. Navy's Degaussing Range in Chesapeake Bay. This caused substantial damage to many sensors and monitoring devices.

Following a three-day bench trial, the court first found that the KATIE G's crew negligently released the tug's tow wire. The court then applied the traditional two-step analysis in deciding whether McAllister was entitled to the protections of the Limitation of Liability Act: 1) whether the accident was caused by the negligence of the vessel, and 2) whether the vessel owner had privity and knowledge of the events that caused the accident.

In holding that McAllister was entitled to limitation, the court found that the evidence showed the Captain and his crew were clearly competent to man the vessel and to navigate her though the area at issue. Additionally, the court found that the company's manuals demonstrated that the company had limited control over the master of the tug, who was in sole command of the vessel. Further, the credible evidence indicated that McAllister's failure to provide

written instructions on the proper procedures for lengthening tow wire did not amount to negligence on the part of the owner to warrant a denial of limitation of liability under the act. There was no credible evidence that these written procedures were a common practice in the industry. Finally, the court found that there was no evidence that the KATIE G had any prior incidents related to lengthening of tow wire.

Owner of Pushboat Not Entitled to Limitation

In re J.R. Nicholls, LLC, 2012 AMC 1770, 2012 WL 1802588 (S.D. Tex. May 17, 2012)

The underlying incident occurred while the push boat J.R. NICHOLLS was operating as a light boat (i.e., not pushing a barge) in the Houston Ship Channel. As the J.R. NICHOLLS was passing astern of the tugs, which were assisting the docking of a tanker, she encountered the wheel wash of one of the tugs which was operating ahead full. The J.R. NICHOLLS took an abrupt list to port, flooded and sank within a few minutes. The master and three of the four other crew members were able to escape and survive; however, one crew member was found in the engine room after the vessel was raised.

After a bench trial, the court found that the petitioners were not entitled to limitation of liability. First, the court found that the vessel was unseaworthy due to a combination of a lack of stability, a lack of proper training or instruction to the crew to keep watertight doors shut while in operation, and the failure to remedy the master's practice of operating the push boat "with the head down." The court found that the petitioners' managing agents were aware of these unseaworthy conditions and this knowledge and privity was imputed to the petitioners.

Noting that a vessel owner will not be denied limitation of liability "merely on error in navigation or other negligence by master or crew", the court also found that while the record established that the master was negligent in encountering the wheel wash, this case

presented far more than mere navigational errors. More particularly, the court held that the J.R. NICHOLLS would not have been rolled on its side so easily absent severe issues with its stability, and would not have sunk so quickly (if at all) had it not been operating with its watertight doors pinned down. "Thus, this is not a case where a mere navigational error was the *sole* cause of the accident, and petitioners' attempt to place all of the blame on [the master] in this respect does not change the court's ruling because the unseaworthiness of the J.R. NICHOLS played a substantial part in the incident regardless of any other potential concurrent causes of the casualty." *In re J.R. Nicholls, LLC*, 2012 AMC at 1776, 2012 WL 1802588, at *4.

Finally, the court noted that the purpose of the Act would not be served by a finding of limitation in this case because the Act was meant to address a situation, and the attendant risk to an owner, that was simply not present in this case because the J.R. NICHOLLS was operated within the Houston Ship Channel at the time of the incident, and the captain and crew were in daily, close contact with ownership and supervisory personnel.

Claimant Not Entitled to Summary Judgment on Limitation But was Entitled to Have Stay Lifted as Single Claimant

Sailing Shipps, Ltd. v. Alconcel, 11-00171 SOM/BMK, 2012 WL 2884861 (D. Haw. July 12, 2012)

Sailing Shipps filed an action seeking to limit its liability to Jason Alconcel, who fell off a zodiac boat owned by Sailing Shipps and operated by Chimo Shipp. Sailing Shipps is a Hawaiian corporation. Melany Shipp owns 50% of the company and the other 50% is owned by her three adult children, one of which is Chimo Shipp.

Alconcel moved for summary judgment of Sailing Shipps' right to limitation and, in the alternative, asked the court to lift the stay and allow his negligence claim to proceed in state court.

With regard to the motion for summary judgment, Alconcel asked the court to adjudicate the limitation issue before Sailing

Shipps' liability was resolved, claiming that his case was analogous to *Fecht v. Makowski*, 406 F.2d 721, 1969 AMC 144 (5th Cir. 1969) and to *Complaint of Ingoglia*, 723 F. Supp. 512, 1990 AMC 357 (C.D. Cal. 1989), which relied on *Fecht*. *Fecht* involved a claimant that had been injured while a boat was being operated by one of the individuals that owned the boat. In *Fecht*, the Fifth Circuit explained that when an owner is in control of and operating his pleasure craft, he has privity or knowledge with respect to its operation therefore he is not entitled to limitation for accidents arising from his negligence. Similarly, *Ingoglia* involved an injury to a passenger that occurred while a boat owner was operating the boat. Relying on *Fecht*, the U.S. District Court for the Central District of California granted summary judgment in favor of the injured passenger in the limitation action before liability was determined because it was apparent that the boat owner had knowledge of his own alleged negligence.

Alconcel argued that because Chimo Shipp was a part owner of Sailing Shipps, the court should treat him like the boat owners in *Fecht* and *Ingoglia*. The court disagreed, because unlike the boats in *Fecht* and *Ingoglia*, the boat in this case was owned by a corporation. Chimo Shipp was a shareholder in the corporation, not a direct part-owner as an individual. When a shareholder's negligence is in issue, the corporation had knowledge of the negligence or was in privity with the shareholder only if the shareholder was a managing officer or a supervisory employee. Nothing in the record established that Chimo Shipp was a managing officer or supervisor such that the record did not demonstrate that the corporation could be deemed to have known of the shareholder's alleged negligence or that the company was in privity with the shareholder.

While the court declined to resolve the limitation issue before Sailing Shipps' alleged liability was determined, the court agreed that lifting the stay to allow Alconcel's negligence claim to proceed in state court was appropriate under the single claimant exception and Alconcel made the necessary stipulations for same.

Claimant Failed to Show That it Was "Truly Impossible Under Any Set of Circumstances" for Shipowner to Establish a Lack of Privity or Knowledge

In re Cedar Bay Boat Rentals, LLC, 2:11-CV-673-FTM-29, 2012 WL 3230982 (M.D. Fla. Aug. 6, 2012)

Cedar Bay Boat Rentals rented a vessel to Stephen Mariani. Passenger Dianne Canavan claimed she was injured as a result of Mariana allegedly driving the rented vessel too fast. Cedar Bay filed a petition in federal district for Limitation of Liability Act. Canavan moved to dismiss the limitation. While the motion was couched as a motion to dismiss for lack of subject-matter jurisdiction, the court "doubted that the challenge related to subject-matter jurisdiction" because the motion was not based on whether the court had the power to adjudicate the case, but rather, whether the allegations the plaintiff made entitled her to relief. More particularly, Canavan sought dismissal based on her claim that the shipowner was ineligible for limited liability because (1) she only intended to pursue claims for negligent entrustment and negligent supervision; (2) privity or knowledge are elements of these torts; and (3) the Eleventh Circuit has stated that if it is truly impossible under any set of circumstances for the petitioner to establish its lack of privity or knowledge, then the limitation action should be dismissed, and the claimants should be allowed to try liability and damages in state court. Canavan's motion failed in this case because (1) the owner of the vessel was not an individual, but a limited liability company; and (2) neither party had identified the person responsible for entrusting the boat to Mariani, nor had they demonstrated the person's privity or knowledge was imputed to the LLC. As such, the claimant failed to establish that it was truly impossible under any set of circumstances for the LLC to establish it lacked privity or knowledge.

Court Holds it Would be Premature to Determine Privity or Knowledge Before Finding Negligence or Unseaworthiness

Nassri v. Inland Dredging Co., CIV.A. 11-853, 2013 WL 173806 (M.D. La. Jan. 16, 2013)

Fayez Nassri filed suit in state court against Inland Dredging Company under both state law and general maritime law, from injuries he suffered when the pleasure boat he was in struck the IDC-120 (a pipe tank owned by Inland). The IDC-120 was part of Inland's equipment deployed for dredging operations. The IDC-120 had been moored to a crane barge but was no longer moored to the crane barge at the time of the incident. Inland removed the suit to federal court, and in its answer asserted, among other defenses, the protections of the Limitation of Liability Act.

Nassri moved for summary judgment seeking a finding that as a matter of law the Limitation of Liability Act was unavailable to Inland because it had knowledge of and was in privity with the negligence that caused his injury. While noting that Inland faced considerable challenges in establishing that as the owner of a drifting vessel it was not negligent and that it lacked privity or knowledge, the court held it would be premature to determine whether the shipowner had privity and knowledge of the negligence or the unseaworthy condition where, as here, there has not been a finding of negligence or unseaworthiness.

Owner Not Entitled to Limit Because Owner Failed to Move Yacht in Light of Pending Storm

Crowley v. Costa, 924 F. Supp. 2d 402 (D. Conn. 2013)

Cliff Crowley's 44-foot sailboat, THE MOONDANCE, struck Angelo Costa's pier when it came unmoored during a storm. Crowley brought a declaratory judgment action regarding his liability for damage to the pier. The court dismissed two counts and converted the remaining counts, including a count for limitation of liability, into affirmative defenses to Costa's counterclaims.

The court articulated the traditional two-step test to determine whether the Limitation of Liability Act applies: 1) was the accident caused by conduct that is actionable, that is, by negligent conduct; and, 2) was the actionable conduct without the vessel owner's privity or knowledge.

As to the first step, the court found that that THE MOONDANCE's allision with the pier was caused by the negligence of Crowley. The court cited *The Louisiana* rule from *The Louisiana*, 70 U.S. 164, 2008 AMC 1811 (1865), which states that a moored vessel that breaks away from its mooring is presumed to be at fault. While the presumption can be rebutted, the court found in this case that Crowley failed to exercise reasonable care when he did not have someone move THE MOONDANCE once forecasters predicted inclement weather.

As to the second step, the court held that where the owner's negligent act caused the alleged injury, all of the requirements of 'privity and knowledge' are satisfied. Consequently, because Crowley's negligence in not having THE MOONDANCE moved during inclement weather caused the injury to the pier, he was not entitled to the protections of the Limitation of Liability Act.

B. CASES CONCERNING SUBJECT-MATTER JURISDICTION.

A Claim Must Be Made Against the Shipowner Before a Federal Court has Subject-Matter Jurisdiction Under the Limitation of Liability Act

In re Complaint of Down S. Marine, L.L.C., 478 F. App'x 865 (5th Cir. 2012)

This case was originally reported in the Spring 2012 Newsletter (*In re Down S. Marine, LLC,* 2012 AMC 1021, 2012 WL 711216 (E.D. La. Mar. 5, 2012)). *See* MLA Document No. 806 at 17031. At that time, the court held that the filing of a claim in the first limitation action, which was dismissed for want of a

real controversy, could serve as written notice and begin tolling of a prescriptive period for the second limitation action. Yet another decision in this case (*In re Down S. Marine, LLC,* CIV.A. 11-3086, 2012 WL 2567148 (E.D. La. July 2, 2012)) is included below under Section D: "Other Cases".

Two plaintiffs filed personal-injury claims against the charterer of the M/V MR. GAGE, Country Boy Construction and Environmental, in Louisiana state court. In response, Country Boy sent a letter to the owner-operator of M/V MR. GAGE, Down South Marine, LLC, demanding indemnity on the basis that Down South added Country Boy to its insurance policy as an additional insured. Thereafter, the owner-operator, along with LeBlanc Marine, initiated a limitation of liability action in the U.S. District Court for the Eastern District of Louisiana to limit their liability to Country Boy.

The Fifth Circuit Court of Appeals affirmed the Eastern District of Louisiana's dismissal of the limitation action because there was no case or controversy at issue and, therefore, the court lacked subject matter jurisdiction. The reasoning underlying this decision was that adding a person to one's insurance policy does not give rise to indemnification. Consequently, there was no "indemnity" claim against Down South, and thus, no case or controversy as to Down South's liability that would allow it to invoke the Limitation of Liability Act.

Shipowners' Motion to Dismiss was Manifestation of Intent to Relinquish Exclusive Federal Jurisdiction and Protection of the Limitation of Liability Act

In re Blessey Enterprises, Inc., 2012 AMC 1798,
2012 WL 1565347 (M.D. La. April 30, 2012)

After settling all of the personal injury and property damage claims filed against them in connection with a collision, the owners of the M/V CHARLES CLARK and the M/V HELEN G. CALYX moved to dismiss their consolidated limitation of liability actions. At that time, Midship Marine, Inc., the manufacturer of the M/V HELEN G. CALYX, was also a claimant in the limitation. (Midship

had product-liability claims pending against it and was seeking contribution and indemnity from the shipowners in connection with same.) Noting that the shipowners had manifested their intent to relinquish their right under the Limitation of Liability Act to proceed in a federal forum and waive their right to invoke whatever protections the Limitation of Liabilities Act, the court found there was no support for Midship's position that continuing jurisdiction was mandatory or a prudential reason why the action should be maintained against the express wishes of the shipowner. "Midship's attempts to 'concern troll' for the shipowners' limited liability rights are unavailing. Indeed, they are directly contrary to Midship's own interests; with the liability cap removed, they have no worries that their recovery, if any, against the shipowners will be diminished." *In re Blessey Enterprises, Inc.*, 2012 AMC at 1803, 2012 WL 1565347, at *3.

Third Party Complaint Filed Against State Within Limitation Barred by the 11th Amendment

In re Manson Const. Co., 883 F. Supp. 2d 659 (E.D. La. 2012)

Louisiana oyster harvesters filed a lawsuit in Louisiana state court against several defendants, including the State of Louisiana, and two vessel owners, Manson Construction Company and Great Lakes Dredge & Dock Co., LLC. The oyster harvesters claimed that as part of the State of Louisiana's Barrier Berm Project, Manson Construction and Great Lakes dredged and pumped sand near or on their oyster-bed leases, causing them damage.

Manson Construction and Great Lakes each filed complaints in the USDC for the Eastern District of Louisiana. The oyster harvesters answered and filed claims in each of the limitations (consolidated herein). The oyster harvesters also filed a third-party complaint against the state of Louisiana claiming that the state should be liable for negligently authorizing and supervising the operations.

On the state of Louisiana's motion to dismiss the third-party complaint, the Eastern District of Louisiana found that the

11th Amendment to the Constitution of the United States deprived it of subject-matter jurisdiction over the oyster-harvester's claims *against the state*. In reaching its decision, the court recognized that limitation proceedings do not constitute suits *against a state.* (See *Magnolia Marine Transp. Co. v. Oklahoma*, 366 F.3d 1153, 1156, 2004 AMC 1249 (10th Cir. 2004)(state of Oklahoma's motion to dismiss limitation action denied because a limitation action does not constitute a suit commenced or prosecuted against a state.) The instant matter was readily distinguishable from *Magnolia Marine* because the state of Louisiana was not seeking to have the limitation action dismissed; rather, it was only seeking to have the oyster harvesters' third-party complaint against it dismissed.

Shipowner's Failure to Timely File a Limitation of Liability Action Deprived Court of Subject-Matter Jurisdiction

In re Marquette Trans. Co., LLC, 2013 AMC 77,
2012 WL 5289353 (E.D. La. Oct. 24, 2012)

Marquette Transportation Company's towing vessel, the MISS KATE, towed Great Lake Dredge & Dock Co.'s ("GLDD") dredge, the TEXAS, aground in the Brownsville Ship Channel. After the casualty, the dredge was out of commission undergoing repairs for 17 days. On February 24, 2011, GLDD wrote to Marquette notifying it that GLDD intended to hold Marquette liable for its repair bills *and* its consequential damages. At that time, GLDD specifically sought reimbursement for the invoiced repairs of $636,970.06. Marquette paid invoiced repairs totaling $626,970.06. When GLDD later asked Marquette to pay additional repair costs totaling $155,083.16, Marquette twice asked whether there would be any more expenses asking GLDD whether it was in a position to submit a final claim. Two months later, GLDD told Marquette that GLDD's remaining losses exceeded $2.3 million. Three months later, on December 7, 2011, GLDD submitted its economic impact claim and supporting documentation in which its remaining damages were alleged to exceed $4 million. Six months after receipt of the December 7th letter and supporting materials, Marquette filed its petition for exoneration from or limitation of liability and posted a bond for the limitation fund in the amount of $2.1 million.

GLDD then filed a motion to dismiss Marquette's limitation proceeding as untimely, thus challenging the court's subject matter jurisdiction.

The Limitation of Liability Act gives vessel owners six months after a claimant gives written notice of its claim to file a petition for limitation of liability. The court emphasized that when there is uncertainty as to whether a claim will exceed the vessel's value, the reasonable probability standard places the risk and burdens on the owner. In other words, the shipowner will not be excused from satisfying the statutory time bar because it was unsure of the amount of the claim.

The court found here that GLDD's February 24, 2011, letter notifying Marquette that it would hold it responsible for its consequential damages put it on notice that the claim might exceed the value of MISS KATE. The reasonable possibility standard requires that Marquette bear the burden of that risk. Because Marquette's petition was filed 16 months after that date, it was untimely and divested the court of jurisdiction over the limitation.

The Act Does Not Provide an Independent Basis for Subject-Matter Jurisdiction

Hickam v. Segars, 905 F. Supp. 2d 835 (M.D. Tenn. 2012)

Wade Hickam, the owner of a jet-ski that allegedly injured Terry Segars, Jr. filed a petition seeking the protections of the Limitation of Liability Act. Segars was injured when Hickam's jet-ski began pulling an inner-tube that had been sitting on the shore of a lake, and the tow line broke, hitting Segars in the face. Segars moved to dismiss the limitation action on the basis that the court did not have subject-matter jurisdiction.

The court held that the Limitation of Liability Act does not independently confer federal subject-matter jurisdiction. Also, young adults utilizing a privately owned pleasure craft at the shoreline to pull a land-based inner-tube onto a lake, does not show

a "substantial relationship to traditional maritime activity" to give the court the general maritime jurisdiction allocated to it by Article III, § 2 of the United States Constitution. Consequently, the court dismissed Hickam's limitation action.

Court Holds that Limitation of Liability Act Petition is a Nullity When Filed in Improperly Removed Suit over Which Court has no Jurisdiction

Speranza v. Leonard, 925 F. Supp. 2d 266 (D. Conn. 2013)

Barbara Speranza brought an action in state court seeking compensation for the death of her husband allegedly caused by the negligence of several defendants, including Carpe Diem Three, LLC. Specifically, Speranza alleged that her husband was a passenger on board a 70-foot power boat when the craft encountered rough seas, causing her husband to be thrown overboard and killed. The defendants removed the action to the U.S. District Court for the District of Connecticut on three bases: (1) the Death on the High Seas Act Claim preempted the plaintiffs' state law claims; (2) federal courts have original jurisdiction over admiralty or maritime law civil cases; and (3) diversity. Plaintiffs then filed a motion to remand. After the case was removed and after plaintiffs filed the motion to remand, Carpe Diem filed "on this docket" a petition for exoneration or limitation of liability after the case was removed.

The court found that removal was improper on each of the grounds asserted by defendants and, as such, the court lacked jurisdiction *ab initio*. Because the action was improperly removed from state court, the court never had jurisdiction to hear the action. Due to the foregoing, the court found that it lacked jurisdiction to consider Carpe Diem's limitation petition and had to deny same as moot. Further, the court found that even if it had jurisdiction over the petition, the petition did not comply with the prerequisites prescribed by the statute or by the Federal Rules and thus could not be considered by the court. More particularly, the court noted that the Act gives vessel owners the express right to bring a civil action in district court and Supplemental Rule F specifically allows

for the filing of a complaint in the appropriate district court. The court found that Carpe Diem did not commence an action under the Limitation of Liability Act; instead it filed a petition in an improperly removed case in which the court had no jurisdiction. Moreover, the fact that the action was improperly removed and the court had no jurisdiction rendered the petition for limitation a nullity because it neither commenced an action nor was filed in an action. Thus, Carpe Diem's petition for liability was denied as moot.

C. CASES CONCERNING ENJOINDER OF STATE COURT PROCEEDINGS.

All Claimants Must Join Protective Stipulation Before Stay May be Lifted in Fifth Circuit

In re Linton, 1:12CV22-LG-JMR, 2012 WL 2367604 (S.D. Miss. June 21, 2012)

Davis suffered injuries while riding as a passenger on a vessel owned by Linton. Linton died as a result of the accident. Davis filed suit in Mississippi state court against Linton's estate for her injuries. She also named manufacturers, designers, assemblers, installers, distributors, and sellers of the vessel and its individual parts as defendants. Linton's estate filed a limitation action with the U.S.D.C. for the Southern District of Mississippi, claiming that the vessel was only worth $7,000.00. Several of the estate's co-defendants in Davis' state-court action filed claims in the limitation action seeking indemnification, contribution, attorneys' fees, and costs from the estate. The Southern District of Mississippi, in accordance with the Limitation of Liability Act, enjoined all other suits against Linton's estate.

Davis moved the court to lift its injunction. She agreed to stipulate that the federal court has exclusive jurisdiction over the limitation action and that she would not seek to enforce a damage award greater than the value of the ship and its freight until the federal court litigated the limitation action. Davis' lawyer was the only person to sign the stipulation.

The court articulated the two exceptions in which federal courts must allow a state-court action to proceed when a limitation action is pending: 1) when the total amount of the claims do not exceed the shipowner's declared value of the vessel and its freight, and 2) when *all claimants* stipulate that the federal court has exclusive jurisdiction over the limitation proceeding, and the claimants agree that they will not seek to enforce a damage award greater than the value of the ship and its freight until the shipowner's rights to limitation has been determined by a federal court.

Based on this rule, the court held that *all* claimants, including those seeking indemnity, contribution, and attorneys' fees, must sign a stipulation protecting the shipowners' rights under the Limitation Act before a federal district court can lift a stay and permit the claimants to proceed in state court. The court recognized contrary holdings from courts of other federal circuits, but stated that it had not located any Fifth Circuit authority providing that a stay may be lifted where fewer than all claimants have joined in a protective stipulation. Accordingly, the court denied Davis' motion to lift the injunction.

Limitation of Liability Action Stayed to Allow Sole Claimant to Litigate in State Court Forum

Brown Water Marine Serv., Inc. v. Alvarado, CIV.A. V-12-6, 2012 WL 2994459 (S.D. Tex. July 20, 2012)

Alvarado, a seaman employed by Brown Water Marine Service, Inc., was allegedly injured while attaching barges to Brown Water's towing vessel, the M/V BROWN CANAL. Alvarado filed suit against Brown Water and a related entity, Brown Canal, Inc. in state district court. Brown Water then filed suit in this court seeking a declaration of its obligation of maintenance and cure to Alvarado. Brown Water and Brown Canal subsequently filed a limitation of liability petition in federal court. Alvarado then moved the federal court to dissolve the limitation action and dismiss the declaratory judgment action so that he could proceed with his state-court action.

The court acknowledged the friction between a vessel owner's right to cap its liability by filing a limitation action and a plaintiff's right to file in state court under the savings to suitors clause. Relying on *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001), the court found that state courts, with all of their remedies, may adjudicate claims like petitioner's against vessel owners so long as the vessel owner's right to seek limitation of liability is protected. "Because *Lewis* only involved a single claimant who stipulated that he would not seek to litigate the limitation issues in state court, and because the district court stayed the limitation proceeding while litigation was pending in state court, 'the decision to dissolve the injunction [is] well within the court's discretion.'"

Based on *Lewis*, the federal court stayed the limitation action pending resolution of Alvarado's state-court action. It reasoned that both parties acknowledged that Alvarado is the only claimant and that the precise extent of Brown Water's liability will be determined by the state-court action. Further, the right to limitation will be adequately protected in this case if this court stays the limitation action "so that it [can] act if the state court proceedings jeopardize [] the vessel owner's rights under the Limitation Act. Alvarado must not litigate the limitation issue in state court, but as long as he does not do so, he should be allowed to litigate his injury claims in that forum." *Brown Water Marine Serv., Inc.*, 2012 WL 2994459, at *2.

Stay Can be Lifted When Lone Claimant Makes Required Stipulations

In re Fire Island Ferries, Inc., 11-CV-4327 JS ARL, 2012 WL 3704708 (E.D.N.Y. Aug. 20, 2012)

Fire Islands Ferries, Inc., owner of the FIREFLY VI, initiated a limitation of liability proceeding seeking to exonerate it from liabilities for injuries Emmanuel Marias allegedly suffered aboard the FIREFLY VI, or to limit its liability for the accident. The federal court, in accordance with the Limitation of Liability Act, enjoined all other legal proceedings arising against Fire Island Ferries that arose out of the accident.

Marias moved the court to vacate the injunction so he could file a tort action in state court. In support of his motion, Marias agreed 1) to prioritize his claims against Fire Island Ferries, 2) to have all issues relating to limitation of liability heard by the Eastern District of New York, 3) to not seek a state-court ruling as to Fire Islands Ferries' limitation of liability, 4) to waive any *res judicata* argument based on a state court's determination of limitation of liability, and 5) to not enforce any state-court judgment insofar as it exposes Fire Islands Ferries to damage in excess of the value of FIREFLY VI.

Recognizing the tension between its exclusive jurisdiction under the Limitation of Liability Act, and the savings to suitors clause, which ensures suitors their right to common law remedies, the court held that its exclusive jurisdiction *must* give way when a lone "claimant concedes the admiralty court's exclusive jurisdiction to determine all issues relating to the limitation of liability." *In re Fire Island Ferries, Inc.*, 2012 WL 3704708, at *2. Accordingly, the court vacated its enjoinder of legal proceedings against Fire Island Ferries contingent on Marias filing an executed stipulation with the court.

Claims for Attorneys' Fees or Costs Created Multiple Claimant Situation, Necessitating Stipulation of all Before a Stay Can be Lifted

In re Natures Way Marine, LLC, 2012 AMC 2867,
2012 WL 4103879 (S.D. Ala. Sept. 17, 2012)

Charles Brunson initiated a lawsuit in state court against several parties, including Natures Way Marine, LLC, claiming he was injured due to chemical exposure while working on Natures Way's barge. Natures Way filed a petition in federal district court seeking limitation of its liability under the Limitation of Liability Act. The federal court stayed all other related actions against Natures Way.

Brunson filed a timely claim against Natures Way for his alleged damages. Several of Natures Way's co-defendants from

the state-court action also filed claims for indemnity, contribution, subrogation, and/or attorneys' fees and costs.

Brunson moved to lift the court's stay of all other actions to allow him to proceed in his state-court action. The court recognized the tension between the exclusive jurisdiction vested in admiralty courts to determine the vessel owner's right to limited liability, and the savings to suitors clause, which embodies a presumption in favor of jury trials in the forum of the claimant's choice. It then cited the two circumstances in which vessel owners may limit their liability, claimants can prosecute their injury claims in their preferred forums: 1) where the limitation fund exceed the aggregate amount of all the possible claims; and 2) where there is only one claimant. A multiple-claim-inadequate-funds case, however, can be converted into a single claim case through stipulations that set the priority in which the multiple claims will be paid from the limitation fund.

In this case, Brunson stipulated to subordinate his damage claim to any subrogation claims Natures Way was deemed liable for. He did not, however, stipulate to subordinate his damage claim to any claims for attorneys' fees and costs. His failure to stipulate regarding the attorneys' fees and costs left this a multiple-claims-inadequate funds case. As a result, the court denied his motion to lift the stay absent stipulation from all claimants.

Middle District of Louisiana Holds Claimant May Proceed in State Court Concurrently With a Limitation Action in Federal Court

In re Kirby Inland Marine, L.P., 2013 AMC 754,
2013 WL 147807 (M.D. La. Jan. 14, 2013)

Kirby Island Marine, L.P. brought an action in the federal district court seeking exoneration from or limitation of its liability for damages arising from James Welch's alleged exposure to chemicals or other substances during his employment with Kirby, while assigned to various Kirby vessels. The court, in accordance with the Limitation of Liability Act, stayed all proceedings related to Welch's damages.

Welch's son, on behalf of James Welch and his surviving children, moved the court to modify the stay so that he could bring a Jones Act claim in state court. The court found that Welch's claim fell within an exception to the mandatory stay imposed by the Limitation of Liability Act. Specifically, Welch stipulated that the federal court had exclusive jurisdiction over the limitation action and that he would not seek to enforce a greater damage award until the limitation action was heard.

Kirby, however, argued that the "preferred approach" in the Fifth Circuit was for the court to resolve all limitation and exoneration issues prior to allowing Welch to proceed in state court. While recognizing that other district courts in the Fifth Circuit had articulated the 'preferred approach' championed by Kirby, the court decided that this approach was "misguided" and could not co-exist with the Fifth Circuit decision in *Odeco Oil and Gas Co. v. Bonette*, providing that an admiralty court *must* permit a state action to proceed concurrently with a limitation action when claimants stipulate properly. Based on the foregoing, the court modified the stay to allow Welch to commence an action in state court subject to the stipulations.

Single Claimant Required to Stipulate to Issue Preclusion But Not to the Value of the Limitation Fund or the Priority of Claims

In re Reicon Group, LLC, 11 CIV. 3523 GBD FM, 2013 WL 269046 (S.D.N.Y. Jan. 23, 2013).

Earl Megahan injured himself while working as a diver from the HUGHES 34. After learning of Megahan's accident, Reicon Group, LLC, the owner of the HUGHES 34, commenced a proceeding in federal court to limit its liability. Megahan sought to lift the stay imposed by the Limitation of Liability Act under the "single claimant" exception. The parties, however, disputed whether Megahan was required to stipulate to the value of the limitation fund; waiver of any claim of issue preclusion relevant to the issue of limited liability; and, the priority of claims.

Megahan was willing to stipulate that he would not seek to enforce a judgment against Reicon for any amount that exceeded the value of the limitation fund, but he did not want to identify a specific dollar amount. Reicon argued that the stipulation should set forth the sum of $55,000.00 as the interim value of the HUGH 34. The court agreed with Megahan, stating that stipulating that he would not seek to enforce a judgment greater than the interim value of the fund until the federal court determined the issue of limitation of liability was sufficient for Megahan to use the "single claimant" exception.

In regard to issue preclusion, Reicon explained that to prevail in the limitation action, it would have to prove that the injury to Megahan occurred without its "privity or knowledge." To prevail in his state court negligence suit, however, Megahan would have to show that Reicon had knowledge of a defective condition; thus, opening up the door to an issue preclusion argument in the limitation action. The court agreed with Reicon, stating that the shipowner has the "right to litigate all issues relating to limitation in the federal limitation proceeding." *In re Reicon Group,* LLC, 2013 WL 269046, at *2. Thus, the court required that Megahan stipulate to waive any arguments of issue preclusion before it lifted the stay.

Reicon also sought a stipulation declaring that "any claims of a third party for indemnification or contribution in any state court or other proceeding shall have irrevocable priority over the claim… of Megahan." *Id.* at *3. The court, however, agreed with Megahan that the claimant should not be expected to prioritize claims when no such claims exist. Consequently, Megahan was not required to stipulate to the priority of claims.

D. OTHER CASES.

Single Claimant Entitled to Jury Trial in Limitation Proceeding

In re Moran Towing Corp., 2012 AMC 1382, 2012 WL 1254975 (S.D.N.Y. APR. 13, 2012)

Moran Towing Corporation, the owner and operator of the tug TURECAMO GIRLS, filed a petition for exoneration from or limitation of liability stemming from a December 27, 2009, incident that killed deckhand Ricardo Young. Young's widow, Avril Young, answered claiming damages under the Jones Act, and the General Maritime Law and demanding a trial by jury. Moran Towing moved to strike Ms. Young's demand for a jury trial on any issues pertaining to exoneration or limitation of liability.

Recognizing Ms. Avril's right to a jury trial for her Jones Act and general maritime claims, the court stated that in limitation actions involving claimants who possess common law claims that carry with them the right to a jury trial, courts have nonetheless refused to allow a jury to decide any aspect of the limitation proceedings, including damages. The court reasoned, however, that Ms. Avril, as a single claimant, would qualify for the 'single-claimant exception,' which would allow her to dissolve the current injunction and pursue her claim in a state-court proceeding before a jury. Consequently, in the interest of justice, the court held that all issues would be tried before the court and a jury. The jury would return a special verdict with respect to the Jones Act issues, and the court would determine the facts and conclusions necessary to the Limitation of Liability Act.

Act Does Not Limit Claims of the United States Under OPA, CERCLA or RHA

In re Wilkie, 3:11-CV-00205-HRH, 2012 WL 1918775 (D. Alaska May 24, 2012).

Plaintiff Timothy Wilkie, owner and operator of the F/V COPASETIC, filed a limitation of liability act case in federal district

court. The magistrate judge issued a subsequent order holding that the State of Alaska's claims under the Oil Pollution Act of 1990 ("OPA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") were exempted from the court's amended order issuing injunctions with respect to the prosecution of other actions. The United States followed by asking that the court find that damages under OPA, CERCLA, and the Rivers and Harbors Act ("RHA") were not limited by the Limitation of Liability Act.

The magistrate judge found that the language of the OPA, the CERCLA, and the RHA is clear: the Limitation of Liability Act does not preclude potential claims by the United States with respect to oil pollution. Consequently, it was recommended that the district court grant the United States' motion. United States District Judge Russel Holland accepted the magistrate's recommendation and entered an order to that effect on May 25, 2012.

Matter Granted "Inactive Status" in Order to Preserve Statutory Remedies Under the Act

In re Down South Marine, LLC, CIV.A 11-3086,
2012 WL 2567148 (E.D. La. July 2, 2012)

Claiming to have sustained injuries while aboard the M/V MR. GAGE, David Williams and Terrence Hankton filed state court personal-injury claims against the vessel's charterer, Country Boy Construction and Environmental. Country Boy, in turn, sought indemnity from Down South Marine, LLC; the owner and operator of the M/V MR GAGE.

Down South brought a limitation of liability action in federal court. Hankton, however, moved to dismiss his claims against Down South without prejudice and the court ordered that the pending limitation of liability action would be dismissed on May 9, 2012, if not opposed. Down South opposed the dismissal, arguing that because the statute of limitation on Williams and Hankton's claims had not run, Down South could be barred from the protection of the

Limitation of Liability Act if Williams and Hankton were to later assert claims against it.

The court recognized Down South's concern, and determined that putting the matter on "inactive status," as opposed to dismissal, was appropriate until all statutes of limitation against Down South expired.

Absent an Affirmative Refusal to Cure the Error. Failure to Surrender the Correct Vessel Was Insufficient to Warrant Dismissal in Second Circuit

N.E. Marine, Inc. v. Boody, 09-CV-5600 CBA,
2012 WL 4482794 (E.D.N.Y. July 5, 2012)

North East Marine, Inc. filed a petition pursuant to the Limitation of Liability Act to limits its liability for claims asserted against it by Robert Boody in state court. Boody claimed that he sustained injuries while attempting to cross two barges owned by North East Marine. Importantly, Boody's state court complaint named the OSAGE as the offending tug, although it did not specifically identify the barges. In its petition, North East Marine named three vessels as security: the tug ELENA and two unnamed barges. However, it was undisputed that Boody's incident involved two unnamed barges and the tug OSAGE.

Boody filed a motion for summary judgment arguing that North East Marine's petition was fatally defective for failing to name the correct tug and that any effort to cure the error at the time of this case would fall outside the six-month statute of limitation period for the Limitation of Liability Act.

In making its ruling, the court noted that the Supreme Court has set forth an often criticized standard of determining which vessel must be surrendered in a given limitation proceeding. Where the incident involves a "pure tort" that does not involve a preexisting contractual or consensual relationship between the shipowner and claimant, the shipowner only needs to surrender the "offending

vessel" to the limitation fund. However, where the accident arises out of a contractual or consensual relationship – such as an employer-employee or contractor-subcontractor relationship -- between the shipowner and a claimant, courts in limitation proceedings have held that the shipowner must surrender the entire "flotilla" of ships.

The court recognized that courts in other circuits have held that where a petitioner fails to surrender the entire flotilla in its petition, dismissal is warranted. *See, e.g., Sacramento Nav. Co.,* 273 U.S. 326, 330–31, 1927 AMC 397, 400 (citing *The Columbia,* 73 F. 226, 237 (9th Cir. 1896), for the proposition that an owner is "not entitled to the advantages" of the Limitation of Liability Act unless it surrenders all vessels in the relevant flotilla). Additionally, Supplemental Admiralty Rule F(2) provides that a petition for limitation must set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited.

Nevertheless, as North East Marine correctly noted, the Second Circuit has limited the harsh remedy of dismissal to those situations where a petitioner *refuses* to amend its petition to account for all ships in a flotilla. Accordingly, even though North East Marine did not name the correct flotilla, the court held that where a shipowner timely brings a proceeding, the mere failure to name the correct vessel or vessels is insufficient to warrant dismissal absent an affirmative refusal by the petitioner to cure its error by amending the petition. Consequently, the court granted North East Marine leave to amend its petition to reflect the correct flotilla.

Sole Owner of LLC That is The Titled Owner of a Vessel Constitutes an 'Owner' for Purposes of the Act

In re Aloha Jetski, LLC, 920 F. Supp. 2d 1143,
2013 AMC 53 (D. Haw. 2013)

Aloha Jetski, LLC filed a limitation of liability action seeking exoneration from and limitation of liability relating to an incident in which Kristen Fonseca was killed when her jet ski collided with

another jet ski. Both jet skis were owned by Aloha Jetski and Glenn Cohen, who was the sole member and manager of Aloha Jetski. Aloha Jetski also sought an injunction restraining a state court action filed by Evangaline Canton, on behalf of Fonseca's estate against Aloha Jetski, et al, and the commencement of any claims, action, or legal proceedings of any kind against Aloha Jetski (as the limitation plaintiff), "its affiliates, agents, employees, managers, members, officers, directors, shareholders, vessels, property, underwriters and insurers…"

Claimants objected to the injunction, arguing that the injunction against other proceedings should be limited to Aloha Jetski and its property because Cohen was not the owner of the vessels and he was being sued in state court only for his own negligence. Claimants assert that the injunction must be limited to the limited liability company and should not extend to Cohen, any other agents, employees or insurers.

The court first examined whether Cohen was an "owner" under the Act and looked to the Ninth Circuit decision in *Admiral Towing Co. v. Woolen,* 290 F.2d 641, 645, 1961 AMC 2333, 2337-38 (9th Cir. 1961), wherein an "owner" was described as one whose relationship to the vessel is such as might reasonably afford grounds upon which a claim of liability for damages might be asserted against him, a claim predicated on his status as the person perhaps ultimately responsible for the vessel's maintenance and operation and a claim against which the Limitation Act is designed to furnish protection. Finding that Cohen was the person responsible for the jet skis' maintenance and operation and the only person with authority to act on behalf of Aloha Jet-ski, the court held that Cohen was an owner for purposes of the Limitation of Liability Act such that the stay applied to claims against him.

Next, the court addressed whether the limitation plaintiff was entitled to a stay of claims against the additional groups named in its proposed injunction. The limitation plaintiff argued that the court had discretion to include these parties in the injunction based on Ninth Circuit precedent which allows district courts "discretion to

stay the state action or otherwise to shape the limitation proceedings in a manner that promotes the purposes of the Act." *Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 763, 1987 AMC 104, 113 (9th Cir. 1986). Noting that in this case the limitation plaintiff sought an injunction restraining the state court action and the commencement of any claims against "its affiliates, agents, employees, managers, members, officers, directors, shareholders, vessels, property, underwriters, and insurers with regard to any and all claims and causes of action", the court, in its discretion, found that the purposes of the Act were not served by granting the broad injunction as sought by limitation plaintiff. That is, the court would not extend the stay to encompass the limitation plaintiff's "affiliates, agents, employees, managers, members, officers, directors, shareholders, vessels, property, underwriters, and insurers with regard to any and all claims and causes of action", as requested. Rather, the court ordered that the injunction would be limited to all claims and causes of action which arise from or related directly or indirectly to the causes of action which arise from or relate directly or indirectly, to the August 5, 2012 incident described in the limitation plaintiff's complaint, filed October 9, 2012, including the action *In re Aloha Jetski, LLC*, 920 F. Supp. 2d 1143, 2013 AMC 53 (D. Haw. 2013).

Three-Prong Test to Determine Whether to Permit Claims Weighs in Favor of Late-Filing Claimant

In re FR8 Pride Shipping Corp., 2013 AMC 1073,
2013 WL 690837 (S.D. Tex. Feb. 25, 2013)

Rowans Companies, Inc., along with other plaintiffs, filed a state-court action seeking recovery for damages sustained when the M/V FR8 PRIDE collided with its offshore drilling rig. FR8 Shipping Corp., along with other owners or operators of the M/V FR8 PRIDE, brought a subsequent action in federal court seeking the protections of the Limitation of Liability Act. Notice of the limitation of liability act was posted in two local newspapers for four consecutive weeks, advising claimants to file a statement of interest with the court by August 31, 2012.

Chester Dobson filed a motion for leave to intervene on February 7, 2013. Dobson, an employee on Rowan's drilling rig at the time of the collision, sought to recover damages pursuant to maritime tort law for injuries sustained during the collision.

The court, in analyzing whether it would allow Dobson's late claim, cited to the Fifth Circuit's three-prong analytical frame work for determining whether to permit late claims. Under the three-prong test, a district court should consider: 1) whether the proceeding is pending and undetermined, 2) whether granting the motion will adversely affect the rights of the parties, and 3) the claimant's reasons for filing late.

The court found that all three factors weighed in favor of allowing Dobson leave to intervene. First, the proceedings were still pending and undetermined at the time Dobson brought his motion. Second, if Dobson were not allowed to intervene, he would be unable to proceed in any way against the limitation action petitioners. Further, potential reduction of the limitation fund by the addition of Dobson was not a sufficient showing of prejudice to the other claimants. Third, Dobson explained that he did not receive personal notice of the limitation action, and only learned of it when defendants in a related state-court action filed their answer after the August 31, 2012, deadline. Because all three factors weighed in Dobson's favor, the court allowed him to intervene.

COMMITTEE ON RECREATIONAL BOATING

Chair: Lars Forsberg
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BOATING BRIEFS

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JURISDICTION

"That Certain Unnamed Gray, Two-Story Vessel" Was Not a Vessel After All

Lozman v. City of Riviera Beach, 133 S. Ct. 735, 2013 AMC 1 (2013)

In a 7-2 decision issued in January, the U.S. Supreme Court ruled that a "floating home" is not a vessel as defined by federal law and is therefore not subject to a maritime lien for necessaries.

The floating home—a wood-frame structure constructed atop a rectangular platform—had no means of self-propulsion. Yet it had been towed through navigable waters on several occasions, eventually docking at a marina owned by the City of Riviera Beach, Florida.

The craft's owner, Fane Lozman, became embroiled in numerous disputes with the City, and ultimately the City directed Lozman to take the craft elsewhere. Lozman refused to move it.

Claiming a maritime lien for unpaid dockage and for trespass, the City filed an admiralty arrest action captioned *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel*

[1] Contributors to this issue are: Alberto Castañer-Padró, Joseph Kulesa, Ross Rochat, Gregory Singer, and Patrick Ward.

Approximately Fifty-Seven Feet in Length. After the craft was arrested, Lozman argued that the federal court lacked admiralty jurisdiction because the craft was not a vessel. The district court and the Court of Appeals for the Eleventh Circuit sided with the City, ruling that the craft was indeed a vessel for purposes of maritime law since it was capable of movement over water. *See Boating Briefs,* Vol. 20:2 (*MLA Report*, Fall 2011, MLA Doc. No. 804 at 16632). Seven of nine Supreme Court justices disagreed.

The relevant statute defines a vessel as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Writing for the majority, Justice Breyer concluded that the floating home did not have the practical capacity to be used for waterborne transportation. Although the craft had been taken under tow several times, the Court decided that it was not a vessel because "a reasonable observer, looking to the [craft]'s physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water." The craft's lack of self-propulsion, its rectangular bottom, its inability to generate or store electricity, and its construction details (non-watertight doors and windows, for instance) all suggested that the craft was not designed to transport anything other than its furnishings and the owner's personal effects.

Justice Sotomayor (joined by Justice Kennedy) dissented. She characterized the Court's new "reasonable observer" standard as too subjective: "If windows, doors, and other esthetic attributes are what take Lozman's craft out of vessel status, then the majority's test is completely malleable. If it is the craft's lack of self-propulsion, then the majority's test is unfaithful to our longstanding precedents. If it is something else, then that something is not apparent from the majority's opinion." Since the craft's capabilities and its performance while under tow were not developed in the record, Justice Sotomayor would have remanded the case for further fact-finding.

FINANCE

Yacht Mortgage Did Not Entitle Borrower to Notice of Time and Place of Repossession Sale

BARCLAYS BANK PLC V. POYNTER, 2013 AMC 1245,
2013 WL 951229 (1st Cir. March 13, 2013)

With a loan from Barclays Bank, Dr. Thomas Poynter bought a yacht and granted the bank a preferred mortgage. When he stopped making mortgage payments, the bank repossessed the yacht and sent Poynter a "Notice of Plan to Sell," which cited the self-help provisions of Florida's Uniform Commercial Code. The notice did not include a specific date, time, or place of sale but did provide a date (not less than ten days in the future) after which the yacht would be sold.

The bank then sold the yacht in Florida for less than what Poynter owed. The bank informed Poynter of the results of the sale and demanded that he pay the residual balance. Poynter did not do so, and the bank sued him in federal district court to recover the deficiency.

Poynter moved for summary judgment, arguing that the bank was not entitled to the deficiency because it had not provided him with proper notice of the sale. The district court was unconvinced; it denied Poynter's motion and instead granted summary judgment for the bank. *See Boating Briefs,* Vol. 20:2 (*MLA Report*, Fall 2011, MLA Doc. No. 804 at 16636). Poynter appealed, and the First Circuit affirmed.

Poynter relied on a mortgage provision which stated that in the event of a default the bank could repossess the yacht and then sell it "after first giving Owner notice thereof 10 days in advance of the time and place of sale." Poynter read this to mean that he was entitled to 10 days' notice of the time and place of any sale, including a sale conducted under the Florida UCC.

The bank relied on a different mortgage provision which stated that in the event of a default the bank could exercise any "rights, privileges and remedies granted by applicable law"—the applicable law here being Florida's UCC.

The First Circuit faced the question of whether the mortgage imposed an absolute notice requirement for every repossession sale, as Poynter argued, or instead whether the bank could dispense with the mortgage's notice provision and simply proceed in accordance with the UCC.

Applying Massachusetts contract law, the First Circuit found no ambiguity in the mortgage. The mortgage stated that upon default the bank "may, at its option, do any one or more of the following:" This statement was followed by the two clauses in dispute. The court decided that each clause contained an independent, complete thought (each punctuated with a period). This meant that the bank had several distinct options and could elect to employ a single one of those options or a combination thereof. The bank therefore had the option of conducting a sale under the Florida UCC and could dispense with the more detailed form of notice. The trial court's judgment was affirmed.

Sixth Circuit Approves Interlocutory Sale in Forfeiture Case

United States v. Real Prop. & Residence,
699 F.3d 956 (6th Cir 2012)

A husband and wife procured a loan from Bank of America to help purchase a yacht and in turn gave the Bank a mortgage on the yacht. The United States filed a civil forfeiture in rem complaint against several properties, owned and controlled by the borrowers, alleging that they were acquired in part with the proceeds of fraud and money laundering. The yacht was later added to the complaint. Given the pending criminal investigation, the district court stayed the forfeiture proceedings. The wife was eventually acquitted of all criminal charges, but the husband was convicted of fraud and money laundering.

Payments on the yacht mortgage had not been made for years, and the bank was owed a substantial amount. The bank and the Government jointly moved to have the yacht sold at an interlocutory sale. The wife sought to have the yacht released to her. The district court ordered an interlocutory sale and denied release of the yacht. The wife appealed.

Supplemental Rule G(7)(b)(i) allows interlocutory sales during forfeiture actions in rem if "the property is subject to a mortgage or to taxes on which the owner is in default." No one disputed that the yacht was subject to a mortgage and that the mortgage had been in default for almost three years. However, because this was a civil forfeiture proceeding that had been stayed while criminal proceedings continued, the wife argued that an interlocutory sale was appropriate only if it satisfied Rule G(7)(b)(i) and also, in light of 18 U.S.C. § 981(g)(6), was necessary "to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property." The Sixth Circuit agreed in principle, but concluded that § 981(g)(6) did not prohibit a sale on these facts. First, the parties agreed that the yacht was "subject to a mortgage on which the owner is in default," and so Rule (G)(7) was satisfied. Second, the value of the yacht was not at risk from an interlocutory sale because the district court's sale order required that the yacht be sold in a commercially reasonable manner. And, because the yacht was subject to a mortgage in default, the wife had no right of possession. At best, she would have a right to any proceeds remaining after the note was paid, and such a right had no bearing on whether the yacht could be sold.

INSURANCE

Sixth Circuit: Jury Must Decide Whether Fatality Arose Out of Insured's Permissive Use of Another Vessel

N.H. Ins. Co. v. Carleton, 2013 AMC 2102,
2012 WL 4902843 (6th Cir. Oct. 16, 2012)

After a sailing regatta in Michigan, the insured (Carleton) docked his 24-foot sailboat at a local yacht club. But the sailboat was

not tied off directly to the dock. Instead, a smaller rigid-inflatable dinghy, owned by a third person, was tied off directly to the dock. Carleton's sailboat was tied to the offshore side of the dinghy. Thus, in order for Carleton to board his boat from the dock, it was necessary to climb from the dock down into the dinghy and then climb aboard the sailboat. All parties agreed that the vessels were permitted to be moored in this fashion, and that it was customary to allow a boat owner to walk across another vessel to board his own boat when the vessels were rafted in this fashion.

That night, Carleton met a young woman at a post-regatta party, and the two began walking back to his sailboat. As was customary, the couple needed to climb from the dock down to the dinghy and walk over the dinghy in order to reach the sailboat. Upon climbing into the dinghy, however, Carleton and the woman stopped and had sex. In fact, they never boarded Carleton's sailboat. After a passerby appeared on the scene, Carleton and the woman parted ways—the testimony suggested that she asked Carleton to leave and give her time alone. The evening ended with Carleton leaving the dock and the woman opting to stay in the dinghy by herself. The next day she was reported missing. Her body was later recovered in the harbor. The cause of death was listed as drowning. Her blood-alcohol level was quite high.

The woman's estate sued Carleton for negligence. The insurance policy issued by Carleton's marine liability insurer contained the following provision:

> COVERAGE FOR VESSELS YOU DO NOT OWN: We shall pay bodily injury and property damage arising out of your permissive use of a private pleasure vessel which you do not own or rent

The insurer denied coverage and filed a declaratory judgment action, reasoning that while the insured and his companion may have had implicit permission to walk across the dinghy, they did not have permission to use the dinghy for intimate relations. As reported in *Boating Briefs,* Volume 20:1 (MLA Report, Fall 2011 MLA Doc. No. 804 at 16602), the district court agreed with the insurer, holding

that Carleton's implicit permission to walk across the dinghy did not give him the right to "use the dinghy in any way he wished."

On appeal, the Sixth Circuit looked at the substantive law of both Michigan (where the casualty occurred) and Virginia (where the insured lived), and found that both supported the same conclusion: the scope of the implicit permission was a question of fact that needed to be answered by a jury. The court noted that the couple's activities aboard the dinghy were a "red herring" since the decedent's accident did not occur during those activities but rather at some later time, presumably as she was attempting to leave the dinghy to return to the dock (an act that she had permission to do regardless of the intervening activities). The scope of the permitted use, whether it was exceeded, and whether acts outside the scope of the permitted use caused the accident, were all issues for the jury. The Sixth Circuit therefore reversed and remanded for further proceedings.

TORTS

Cruise Line May be Liable for Allowing Inattentive Guest to Operate Jet Ski

In re Royal Caribbean Cruises Ltd., 2013 AMC 708,
2013 WL 425837 (S.D. Fla. Feb. 4, 2013)

While on a Royal Caribbean Cruises jet ski tour, Linda Arnold was injured when Inghram, the operator of another jet ski, collided with the jet ski on which Arnold was a passenger. The cruise line filed an action for limitation of liability, and Arnold filed a claim seeking damages for her injuries.

The jet ski tour was supposed to be led by a tour guide on a jet ski, with the tourists' jet skis following in single file spaced at 100-yard intervals. A second tour guide would decide when each jet ski was allowed to proceed, and he would then follow at the end of the line. Arnold was on jet ski number six, and Inghram was on either eight or nine. The collision occurred less than one hundred

yards from the starting point, and Arnold alleged that the second tour guide was negligent in permitting jet ski seven and Inghram's jet ski to start without sufficient space between them. Arnold also argued that Inghram was not competent to operate the vessel and that the cruise line was negligent in allowing her to do so.

In moving for summary judgment, the cruise line argued that: (1) an executed liability waiver barred the injury suit; (2) there was no evidence of negligence on the tour guides' part; and (3) any liability should be limited as the cruise line had no privity or knowledge of any negligence. Arnold countered that (1) the waiver was void; (2) the tour guide was negligent in controlling the spacing at which the jet skis began the tour; and (3) permitting an incompetent person to operate a jet ski constituted negligent entrustment.

In support of her claim, Arnold presented evidence that, during the pre-ride orientation, Inghram was acting silly and unfocused, needed to be told her jet ski number three times, was told by the tour guide that she wasn't paying attention, kept forgetting whether she would be the operator or passenger, and held up the group for ten minutes. Arnold argued that the guides were negligent in permitting an apparently incompetent operator to take control of the jet ski.

The district court determined that the liability waiver, purporting to disclaim liability for negligent acts of the cruise line's employees, was void under 46 U.S.C. § 30509, which provides that cruise operators sailing from U.S. ports may not rely on contractual provisions to limit "the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents."

Arnold's next argument—that the second tour guide was negligent—was unsupported by the record, as there was no evidence that allowing jet skis to operate less than one hundred yards apart was inherently unsafe, or that the tour guide's control over the initial spacing was a substantial factor in bringing about the collision.

The cruise line argued that it was entitled to limit any liability because it had no privity or knowledge of any negligence. But the court held that where a vessel is unseaworthy due to an incompetent operator, and where this condition existed before the start of the voyage, the vessel owner may not limit its liability. The cruise line therefore would not be able to limit its liability to the extent a factfinder determined that it negligently allowed an incompetent person to operate the jet ski and that this negligence caused Arnold's injuries.

Virgin Islands Court Enforces Exculpatory Clause in Jet Ski Rental Agreement

Jerome v. Water Sports Adventure Rentals & Equip. Inc., 2013 AMC 1331, 2013 WL 692471 (D.V.I. Feb. 26, 2013)

The plaintiff was injured during a jet ski and snorkeling tour in St. Croix and brought claims of negligence and gross negligence against the rental company.

Before the tour, the plaintiff read and signed a release purporting to exculpate the rental company from "any and all claims based upon negligence, active or passive, with exception of intentional, wanton, or willful misconduct."

During the snorkeling part of the tour, the plaintiff was swimming in the water when another jet ski, under the control of a guide employed by the rental company, struck her in the head. The company contended that the guide's jet ski was off or idling and that it hit the plaintiff due to the action of a wave. Conversely, the plaintiff asserted that the jet ski was under power and was being operated in a grossly negligent fashion.

The court first decided that the case was subject to admiralty jurisdiction because: (1) the accident occurred in the navigable waters off St. Croix; (2) an injury caused by a maritime tour provider has the potential to disrupt maritime commerce; and (3) a recreational maritime tour bears a substantial relationship to traditional maritime activity.

Citing the release, the company sought summary judgment on the plaintiff's negligence claim. The plaintiff responded that the release was ambiguous and unenforceable. The court decided that the release was clear and unequivocal and that the relationship between the rental company and the plaintiff did not involve an inherent risk of overreaching. The exculpatory clause was therefore enforceable, and the negligence claim was dismissed.

As for the claim of gross negligence, the court held that there were disputes of material fact as to whether the rental company's guide was grossly negligent. The case would therefore be allowed to proceed, but the plaintiff could recover only if she proved gross negligence.

Florida Court Rejects Claim by Marina Worker Whose Hand Was Crushed During Docking

Arcure v. McCabe, No. 2:11-cv-266-FtM-DNF,
2013 WL 140220 (M.D. Fla. Jan. 11, 2013)

This was a suit by a marina employee, Arcure, whose hand was crushed as he assisted in tying up a 40-foot Rinker named the LANDSHARK. The defendants were McCabe (owner of the LANDSHARK) and TowBoatUS.

During an outing in the Gulf of Mexico, the LANDSHARK ran out of fuel and had to be towed back to shore by TowBoatUS. In order to get the LANDSHARK to the dock, the TowBoatUS vessel towed the LANDSHARK in the direction that it wanted it to follow, and then at the last moment, turned away and released its towline, allowing the LANDSHARK to coast to the dock. Meanwhile, Arcure was standing on the dock to assist in the mooring operation. As the LANDSHARK approached the dock, it was traveling at idle speed and McCabe, apart from using the bow thruster, had no way to steer the vessel. Arcure testified that the vessel was approaching "really slowly and calmly, and then the next thing I know I was looking down and I lost track of the towline. I had seen a towline and I didn't know where it went. And then the next thing I know, without any warning and unexpectedly the bow of the LANDSHARK came

straight at me, at my head and face." Arcure instinctively reached up with his hand, which was then crushed between the boat and a pylon. Although Arcure testified that this movement of the vessel happened abruptly, no one on the LANDSHARK felt any impact or jolt or lost their balance.

The expert testimony offered by Arcure was that McCabe, as the captain of the vessel, had the responsibility to moor the vessel safely and to avoid injuring people on the dock. The expert opined that McCabe should have had someone throw a bow line to Arcure as the LANDSHARK was approaching, which would have allowed Arcure to grab it and would have prevented Arcure's hand from being near the pylon.

McCabe's expert, on the other hand, testified that "it's common sense that you don't get between a boat and a stationary object" and that Arcure was the only one who could have prevented his hand from being placed between the boat and the pylon. He also testified that even if the bow thruster had been engaged, it was not capable of causing the LANDSHARK to make such a sudden movement toward the dock.

After a bench trial, the court found that McCabe and TowBoatUS acted reasonably and breached no duty to Arcure. The court further noted that Arcure's expert's opinion—that Arcure would not have been injured had McCabe thrown a tow line—was purely speculative and that in fact Arcure was negligent by placing his hand between the LANDSHARK and the pylon. Judgment was therefore entered for the defendants.

PRODUCTS LIABILITY

Court Dismisses Tort Claims Following Fatal Boating Accident, But Allows Some Contract Claims to Stand

Alongi v. Bombardier Recreational Prods., Inc.,
2013 AMC 1603, 2013 WL 718755
(E.D. Mich. Feb. 27, 2013)

This case arose from a fatal accident involving a fifteen-foot Bombardier Speedster Jet Boat. The plaintiffs sued both the manufacturer of the Jet Boat and the dealer who sold it. The court granted summary judgment to both defendants on the tort claims. It also granted summary judgment to the manufacturer on all contract claims. But the court allowed some contract claims to stand against the dealer.

After just five hours of using their new Jet Boat, the plaintiffs allegedly began experiencing an intermittent problem consisting of a high-temperature alarm and a drop in engine speed.

The accident itself occurred two weeks after the plaintiffs' purchase. The plaintiffs' seventeen-year-old son took five friends for a ride in the Jet Boat after drinking. As he approached a canal at high speed, the temperature alarm sounded, and the Jet Boat's controls allegedly stopped responding, at which point the son cut the throttle and lost steering capability. The Jet Boat struck a seawall, killing a passenger.

Nearly four years later, the plaintiffs sued on a variety of tort and contract claims, and the defendants moved for summary judgment.

The court dismissed the plaintiffs' claims under the Michigan Consumer Protection Act because that statute by its terms did not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Here, the sale of the Jet Boat was specifically authorized by law inasmuch

as the Federal Boat Safety Act (FBSA) regulated the Jet Boat as a "recreational vessel."

The claims under the FBSA likewise failed: they were based on a regulation that did not apply. The defendants had allegedly failed to provide notification that the Jet Boat did not comply with SAE J2608, the recommended practice for assessing off-throttle steering in personal watercraft. First, the court noted that the Sixth Circuit does not recognize a private right of action for violating a notification requirement. Second, the Jet Boat was not a "personal watercraft," which is defined by SAE J2608 to be a vessel less than thirteen feet long and "designed to be operated by a person . . . sitting, standing or kneeling on the craft rather than in the confines of the hull." The Jet Boat was fifteen feet long and was meant to be operated by a person in the hull.

The court summarily dismissed various other claims. First, the negligence and strict-liability claims were barred by Michigan's three-year statute of limitations (the plaintiffs had filed suit nearly four years after the accident). The plaintiffs' implied-warranty claims were barred because the Jet Boat's warranty contained explicit and conspicuous language, written in all capital letters, disclaiming all implied warranties.

The court also dismissed the plaintiff's revocation-of-acceptance claims. As to the manufacturer, the plaintiffs were not in privity of contract, so there was nothing to revoke. And, as to the dealer, the plaintiffs tried to revoke acceptance nearly four years after their purchase, which was not "within a reasonable time after" they discovered or should have discovered the ground for revocation.

The plaintiffs had mixed results on the remaining theories. As to express warranties, the court found that the manufacturer could not have breached, because, as noted above, the manufacturer was not in privity of contract with the plaintiffs. Without a valid underlying contractual claim, the Magnuson-Moss Warranty Act claim also failed.

But the claim for breach of express warranty against the dealer did not fail for lack of privity. And, an issue of fact precluded summary judgment on the dealer's statute-of-limitations defense. The statute began running when the breach was or should have been discovered, but here there was no indication as to precisely when the plaintiffs first experienced the alleged overheating problem. Instead of making a definitive ruling, however, the court asked the parties to brief two issues: whether the Jet Boat actually malfunctioned (i.e. whether there was a breach) and whether any such malfunction was the proximate cause of the accident.

As a result, the court also withheld ruling on the Magnuson-Moss claim against the dealer because, as noted earlier, a Magnuson-Moss claim requires an underlying warranty action. The court did, however, grant summary judgment to the dealer on the Magnuson-Moss implied-warranty claim because the underlying claim had already been defeated.

Products-Liability Plaintiff May Obtain Full Damages From any Maritime Tortfeasor

Sands v. Kawasaki Motors Corp., No. 12-14667,
513 F. App'x 847 (11th Cir. Mar. 20, 2013)

A passenger who fell off the back of a Kawasaki Jet Ski was seriously and permanently injured when the force of the water from the nozzle tore through her bodily cavities. She brought a products-liability action under maritime law, alleging defective design and failure to warn. The case was tried to a jury in the Southern District of Georgia, Savannah Division. The jury found for the plaintiff on the design-defect claim and for Kawasaki on the failure-to-warn claim.

Shortly before trial, Kawasaki sought to add to the verdict slip the person who was operating the jet ski at the time of the accident. But this person was not a party to the lawsuit and had not entered into any sort of settlement. The court decided that allowing the jury to assign a percentage of fault to the operator would be

improper because the operator had not been sued and Kawasaki had not raised the issue until after the close of discovery.

At trial, Sands presented an expert who offered an alternative design based on his patented rotatable seat back; Kawasaki sought to exclude his testimony, arguing his opinion was unreliable because he had not sufficiently tested his design. The court evaluated his qualifications and determined that he had performed sufficient testing to offer a reliable opinion. Kawasaki countered with its own expert, who testified that the rotatable seat back was not a safer design.

Sands was awarded $3 million for past and future medical expenses, but nothing for pain and suffering. The award was reduced by fifty percent based on her negligence in failing to hold on to the vessel or its operator.

Both Sands and Kawasaki moved for a new trial. Sands argued that the jury verdict was inadequate as a matter of law due to the absence of any award for pain and suffering. Kawasaki offered ten different arguments for a new trial, including its previous contention that Sands' expert was unreliable, its contention that the operator's name should have been on the verdict slip, and various other challenges to the trial judge's evidentiary rulings. The motions were denied, and both parties appealed.

In its appellate brief, Kawasaki argued that the trial judge misapplied maritime law by not including the operator on the verdict slip. Without the operator listed, Kawasaki argued that the jury was unable to assess everyone's percentage of fault. The appellate court noted that under general maritime law a plaintiff may sue any defendant for the full amount of damages, so long as that defendant's negligence was a substantial factor in causing the injury. A plaintiff may proceed in this fashion even if the negligence of some other person also contributed to the incident. Thus, the district court did not err by omitting the operator from the verdict slip.

Regarding Kawasaki's many other arguments, the court found that the trial court had not committed any reversible error in its evidentiary rulings or jury instructions.

Finally, the court ruled that Sands' challenge to the lack of an award for pain and suffering was barred by *Coralluzzo v. Education Management Corp.*, 86 F.3d 185 (11th Cir. 1996), as Sands failed to object to the verdict before the jury was discharged. Thus, despite the "overwhelming evidence" of pain and suffering, the verdict could not be revisited on appeal.

CRIMINAL LAW

Man Sentenced to Seven Years in Prison for Causing False Distress Call to U.S. Coast Guard

United States v. Deffenbaugh, 2013 AMC 1295,
2013 WL 729118 (4th Cir. Feb. 28, 2013)

Larry Deffenbaugh, a licensed captain, hatched a scheme to fake his own death so that he could avoid an upcoming hearing about an alleged probation violation. His plan was to get his unsuspecting (and legally blind) brother to rent a boat to go fishing in the Chesapeake Bay and, while the brother was distracted, jump out of the boat and swim to shore. He would then meet his girlfriend and flee the state. Deffenbaugh thought that his brother would alert the authorities, who would respond and conduct a search. When his body was not found, Deffenbaugh figured that he would be declared dead.

The brother called 911 as expected, and the dispatcher contacted the U.S. Coast Guard, which mounted a fruitless search costing over $220,000. But Deffenbaugh was not declared dead. Instead, he was arrested out of state and, after one mistrial, eventually convicted of causing a false distress call to be communicated to the U.S. Coast Guard and of conspiring with his girlfriend to commit the same offense.

Deffenbaugh appealed on the basis that the Government couldn't prove conspiracy because his girlfriend didn't share in the objective of the conspiracy. He also argued that his sentence was excessive. The Fourth Circuit affirmed.

Essentially, Deffenbaugh argued that there could be no conspiracy under federal law unless the girlfriend knew that the recipient of the distress call would be the U.S. Coast Guard (as opposed to the state police or another agency). The court disagreed. The court reasoned that proving a conspiracy does not require proving intent to violate federal law unless the underlying offense requires it. Because the language of the applicable statute (14 U.S.C. § 88(c)) makes it a federal crime to "knowingly and willfully communicate[] a false distress message to the Coast Guard or cause[] the Coast Guard to attempt to save lives and property when no help is needed," the court reasoned that the perpetrator need only have the intent to communicate a false distress message; the U.S. Coast Guard need not be the intended recipient. The conspiracy conviction was therefore upheld.

In affirming Deffenbaugh's seven-year sentence, the court stated that it was not plainly unreasonable for the district court to treat sending a false distress call as analogous the crimes like fraud or theft, which can justify a longer sentence under federal sentencing guidelines. Nor was the sentence unreasonably long, given that the defendant had been convicted of both the principal offence and the conspiracy, that he used his maritime experience when planning the crime, and that he had endangered his disabled brother by abandoning him on the boat.

LEGISLATIVE DEVELOPMENTS

[Editors' note: Thanks to Gregory Singer and Todd Lochner of the Lochner Law Firm P.C. (boatinglaw.com) for providing the following updates.]

Uniform Certificate of Title for Vessels Act (UCOTVA)

The Uniform Law Commission has recommended a model vessel-titling act. The Act does four things:

1. Allows undocumented state-titled vessels to secure preferred mortgages.

2. Brands the titles of vessels that have suffered hull damage.

3. Unifies procedures and titling laws among states.

4. Brings state titling laws in line with U.C.C. Articles 2 and 9.

Virginia just became the first state to adopt the Act.

In general, the Act is about codifying best practices for titling vessels and making sure the requirements for all states are consistent. Only thirty-four states have titling laws in the first place, and those that do vary greatly, which allows gaps and duplicities to exist and opens opportunities for fraud. For example, at present a seventeen-foot dinghy might be a vessel requiring title in one state, but another state may refuse to title boats of that length; this creates friction in the sales transaction and opens opportunities for fraud and theft. The process of titling under the Act remains virtually unchanged, and shouldn't create any new burdens on the states or boat owners. Normal exemptions for state titling apply—for example, dinghies and stationary floating structures.

The big win in the Act is for vessel lenders, and hopefully borrowers as well. Currently only federally documented vessels are eligible for preferred mortgages (only one percent of U.S. vessels

are documented). But under 46 U.S.C. § 31322(d)(1), state-titled undocumented vessels may be eligible for preferred mortgages if the state's titling law satisfies applicable federal requirements and is approved by the Coast Guard. This was done to encourage states to participate in the Coast Guard's Vessel Identification System (VIS). A number of states participate in VIS, but no state so far has attempted to clean up its titling law to gain Coast Guard approval. The purpose of the Act is to provide a ready-made law that the Coast Guard will approve. The Coast Guard hasn't formally approved the Act yet, but the drafters are under the understanding that this will happen, as the Act complies with all requirements. Theoretically, states that adopt the act will have a competitive advantage because their marine lenders will be able to secure preferred mortgages, while other states will not. It's easy to see why various marine-financing associations are supporting the Act.

Boat buyers and sellers should also benefit from the uniformity and record-keeping aspects of the Act. Transaction costs on interstate transfers should go down because of the uniformity of procedures, documentation, etc. Better record-keeping in the VIS database theoretically means it should be easier to verify a vessel's title history and harder to sell a stolen boat. Additionally, the drafters are hopeful that once the titling process is standardized, the VIS database for state-titled vessels will be opened to the public.

The title-branding requirement is probably the most contentious part of the Act. It means that the owner of a vessel that has suffered hull damage—even running aground could count if the hull's integrity is compromised—must disclose the hull damage when transferring title to the vessel or when applying for a new title. The model Act's forms show a simple checkbox to indicate that the vessel has suffered hull damage; no opportunity is given to explain the nature or extent of the damage. The brand remains on the title forever, even if title goes to another state or the damage is repaired. The owner of record is responsible for compliance with this provision, and the fine for noncompliance is $1000.

Dealers and brokers will generally be exempt from the branding requirement because they typically are not owners of record for the vessels they sell. Some are worried that vessels with the "scarlet letter" brand on their title will be difficult or impossible to sell, but more disclosure should be a good thing for boat buyers, especially in the case of boats damaged by hurricane, fire, sinking, etc. This portion of the Act may be the sticking point in state legislatures, though if the Coast Guard will approve (for preferred-mortgage purposes) a state's law with the branding provision removed, it shouldn't be an issue.

Finally, the Act will update antiquated state-titling acts to reflect U.C.C. Articles 2 and 9, which all but one state have adopted. Most state title acts were written pre-U.C.C. and this creates discord between those acts and state laws on sales and security interests. The Act specifically references the U.C.C. and brings state titling in line with it. As with most Uniform Acts, helpful interpretational comments are also provided.

State-by-State Legislative Update

Georgia just enacted a law lowering the Boating Under the Influence (BUI) legal limit from .10% to .08% BAC. The new law also requires boating-safety courses for all operators born after January 1, 1998, and requires PFDs to be worn by all children under age thirteen. (Ga. Code 52-7-12).

Hawaii now requires all resident boat operators to complete a boating-safety course. Additionally, children under age sixteen may not operate a vessel unless accompanied by an adult over 21. (Haw. Code R. § 13-244-15.5).

Illinois now requires boat owners to clean their vessel's bottom before trailering from one body of water to another, in order to curtail invasive species. (IL ST CH 625 § 45/5-23).

Indiana now imposes harsher penalties for BUI offenses if the operator is involved in an accident—up to one year in jail and a fine of up to $5000. (Ind. Code § 7.1-1-3-13.5).

Iowa lowered its BUI legal limit from .10% to .08% BAC. (Iowa Code § 321J.2).

Kansas passed a constitutional amendment to allow the state legislature to tax boats differently from other personal property; the amendment was needed to empower the legislature to impose lower tax rates on boats. (HCR 5017 (2012)).

Maryland enacted a vessel excise-tax cap of $15,000. The state also closed a "drunken sailor" loophole which exempted non-motorized sailboats from state BUI laws. (Md. Code, Nat. Res. § 8-716).

New York enacted legislation requiring those convicted of BUI to get a boating-safety certificate before operating a vessel again. Suffolk County now requires any boat operators in Suffolk waters to take a boating-safety course. New York is currently considering a law that would tie DUI and BUI violations together, such that any boater convicted of BUI would have his driver's license suspended, and vice versa. (N.Y. Nav. Law § 49-a).

Oklahoma lowered its BUI legal limit from .10% to .08% BAC. (Okla. Stat. tit. 63, § 4210.8).

Pennsylvania now requires all passengers on vessels under sixteen feet to wear life jackets during cold weather months (November 1 through April 30). (58 Pa. Code § 97.1).

Texas now requires all boat operators born after September 1, 1993, to obtain a boating-safety certificate and to carry it with them when operating a vessel. (Tex. Parks & Wild. Code § 31.109).

Virginia just became the first state to pass the Uniform Certificate of Titles for Vessels Act (UCOTVA). The Act was written and promulgated by the Uniform Law Commission in 2011. Besides improving and homogenizing current state title laws, the Act requires "title branding" of vessels that have suffered hull damage—marking the damage directly on the title. Additionally, if the Coast Guard approves the UCOTVA titling procedures (as it is expected to), vessels titled in UCOTVA states will be able to secure preferred mortgages without having to federally document their vessels.

COMMITTEE ON SALVAGE

Chair: William T. Storz
Vice-Chair: Jason R. Harris

Newsletter - Spring 2013

RECENT DEVELOPMENTS IN SALVAGE LAW

In re Oil Spill by the Oil Rig "DEEPWATER HORIZON" in the Gulf of Mexico, 2013 AMC 1641, 2012 WL 5960192 (E.D. La. Nov. 28, 2012).
(*Immunity for responders*.[1])

Plaintiffs asserted general maritime law and state law claims against defendants on behalf of individuals allegedly injured by exposure to oil and chemical dispersant as a result of the clean-up efforts following the DEEPWATER HORIZON oil spill. Defendants moved for summary judgment, arguing they were entitled to derivative governmental immunity and/or preemption of plaintiffs' claims under the Clean Water Act and the National Contingency Plan. The court granted defendants' motion for summary judgment and dismissed the claims against the responders, holding that the claims are preempted by the Clean Water Act and the National Contingency Plan. The court's decision indicates that a responder who acts in accordance with the National Contingency Plan and under the direction of a Federal On-Scene Coordinator is entitled to immunity for any harm allegedly incurred as a result of such actions.

Hoefling v. City of Miami, 876 F. Supp. 2d 1321 (S.D. Fla. 2012).
(*Qualified immunity to municipality and officers for removing (and destroying) derelict sailboat from state waters*.[2])

In this action brought pursuant to 42 U.S.C. 1983, the issue before the court was whether or not municipal law enforcement

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[1] Prepared by Ellen Shults, attorney with Welch and Harris, L.L.P., Jacksonville, NC. Email: egshults@welchharris.com.

[2] Prepared by Adam Jay Jaffe, attorney with the Law Office of Adam Jay Jaffe, San Diego, CA. Email: adam@adamjayjaffe.com.

officers have qualified immunity for removing a vessel from state waters and destroying her in furtherance of their mandate.

Plaintiff owned a derelict sailboat that had no motor, sails, helm or rudder for propulsion or steering and had been advised that she needed to be removed or brought into compliance with state law. As a result of his failure to do so, plaintiff was issued three citations. Eventually state law enforcement caused the sailboat to be removed from state waters and destroyed.

Plaintiff sued for intentional destruction, negligent destruction, and violations of the U.S. Constitution. Defendants filed a motion to dismiss based, in part, on qualified immunity. The court determined that the officers were acting within their discretionary functions, particularly where plaintiff received several notices prior to his vessel and belongings being destroyed.

The court afforded the municipality and its officers qualified immunity; the officers did not owe a duty of care to the vessel owner where the officers acted within the confines of mandates, were enforcing laws, and notice was given to the vessel owner.

DonJon Marine Co. Inc. v. Water Quality Ins. Syndicate, 523 F. App'x 738 (2d Cir. 2013). (*Salvor completed work but not clear whether debtor guaranteed payment under salvage agreement*.)

WQIS's motion to stay a portion of the federal litigation (concerning whether Donjon failed to complete a portion of the work required of it under a salvage contract) pending arbitration was denied because it could not be shown that the proposed arbitration would conclude within a reasonable time.

WQIS disputed whether Donjon completed the work contemplated by the salvage agreement. WQIS offered no admissible evidence that Donjon failed to recover equipment in the general footprint of the sunken vessel, while Donjon supplied affirmative evidence that it had, in fact, done so.

The court found that WQIS was the guarantor of a debt for the salvage, it deemed it "far from clear that the pollution prevention services agreement was a guarantee under the same terms as the guarantee related to the Salvage Agreement" and vacated and remanded that limited portion of the lower court's ruling concerning the pollution prevention services agreement. *Don Jon*, 523 F. App'x At 743.

Columbus-America Discovery Group, Inc. v. the Unidentified, Wrecked and Abandoned Sailing Vessel, 795 F. Supp. 2d 395, 2012 AMC 1370 (E.D. Va. 2011). (*Court unseals inventory of treasure from wrecked vessel*.[3])

The court exercised its continuing jurisdiction over a protective order originally entered in 1990 in connection with a dispute over gold coins, bars, nuggets and dust recovered from the wreck of the *S.S.* CENTRAL AMERICA. In 1998, a detailed inventory of all items recovered from the vessel was filed under seal with the court. In a related case pending in the Southern District of Ohio, certain parties sought to have the author of the inventory produce the document at his deposition. Those parties moved the court for a modification of the protective order to unseal the inventory.

The court had previously ordered the inventory unsealed in 1998, with a thirty-day delay to allow for immediate appeal, but was reversed by the Fourth Circuit which held that the premature release of the inventory could damage the value of the inventory and reversed the lower court ruling. However, the Fourth Circuit noted that the inventory would eventually be made public and that future motions should receive due consideration in the district court.

The court granted the motion to unseal. As all of the gold had been sold and the plaintiff in the original case had fully divested itself of its physical interest in the treasure, the concern over damaging the market for the inventory was deemed irrelevant.

[3] Prepared by David Cole, attorney with Reitler Kailas & Rosenblatt LLC, New York, NY. Email: dcole@reitlerlaw.com.

Additionally, no interested party objected to the release of the inventory. Thus, the court determined that "[t]he time has come for the public to 'judge the product of the courts' in this case by giving them access to the inventory of historic materials recovered from the S.S. CENTRAL AMERICA wreck" and ordered the release of the inventory. *Columbus-America*, 795 F. Supp. 2d at 396.

Fathom Exploration, L.L.C. v. Unidentified Shipwrecked Vessel or Vessels, 857 F. Supp. 2d 1269, 2012 AMC 2875 (S.D. Ala. 2012). (*Shipwreck not DIXEY, provisionally AMSTEL, not yet determined whether abandoned*.[4])

In 2004, Fathom brought action against the *in rem* defendant consisting of what is believed to be multiple shipwreck sites near Mobile Bay. The action was stayed to afford a reasonable opportunity to identify the vessel(s) at issue. In 2011, the court lifted the stay as to the singular site identified as SHIPWRECK #1 believed by some litigants (including Fathom) to be the AMSTEL and others to be the ROBERT H. DIXEY. The court was left to decide from the known facts the identity of SHIPWRECK #1.

DIXEY met its demise after being pushed 12 nm by a hurricane all the while breaking apart and losing cargo. In contrast, SHIPWRECK #1's cargo was found in a single tight grouping, organized and stacked on the sea floor. Such inconsistencies led the court to conclude that SHIPWRECK #1 is not DIXEY.

The facts about SHIPWRECK #1 are consistent with what was known about AMSTEL, but apparently there were too many uncertainties for the court to so hold. Instead the court concluded, "SHIPWRECK #1 may be provisionally identified as the AMSTEL." *Fathom*, 857 F. Supp. 2d at 1279. Thus, Fathom was left to continue researching and to notify the court of findings that shed light on the vessel's identity.

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[4] Prepared by Rick Beaumont, law student at Tulane University Law School, New Orleans, LA. Email: rbeaumon@tulane.edu.

Even if the vessel is further identified as the AMSTEL, Fathom's right to salvage may turn on whether AMSTEL had been abandoned under the Abandoned Shipwreck Act of 1987, 43 U.S.C. 2101, *et seq*. The parties were ordered to file a joint status report proposing a procedure to litigate and resolve the abandonment issue.

Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, Its-Apparel, Tackle, Appurtenances & Cargo Located Within Center Point, No. 8:06-cv-1685-T-23MAP, 2012 WL 3541988 (M.D. Fla. Aug. 15, 2012). (*Claims as to purported MERCHANT ROYAL denied*.[5])

Plaintiff/Intervenor Keith Bray brought two claims pertaining to salvage rights for what it believed was the MERCHANT ROYAL, a British ship that foundered while transporting cargo worth $500 million.

The first claim sought rescission of a written contract entered into with plaintiff Odyssey. Bray sought to have a written agreement between himself and Odyssey rescinded on grounds of fraudulent inducement and mutual mistake. The court explained that rescission is not a cause of action but rather a remedy. However, Florida courts had sufficiently muddled the distinction between cause of action and remedy that rescission had become a well-recognized basis for a claim. Still, Bray failed to allege certain requisite elements to its claims. The claims for rescission, mutual mistake, and fraudulent inducement were dismissed.

Bray's second claim sought declaratory judgment for contractual rights to 7.5% of the prospective discovery of the vessel MERCHANT ROYAL. The court *sua sponte* inquired whether there was a case in controversy and standing in order to bring this claim within its jurisdiction. The court held that because the MERCHANT ROYAL remains undiscovered, and Bray will not incur any real or immediate injury before the vessel is recovered, to rule on this claim would amount to an advisory opinion and the action was dismissed.

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[5] *Id.*

Smith v. Texas, No. H-12-469, 2012 WL 5868657 (S.D. Tex. Oct. 26, 2012). (*Plaintiff collaterally estopped from claims grounded in the theory that plaintiff had ownership interest in the alleged shipwreck*.[6])

Plaintiff asserted various causes of action against defendants arising from an injunction issued in a 2010 lawsuit barring plaintiff from attempting to excavate the treasure and contents of a historic vessel allegedly found by plaintiff. The crux of plaintiff's claims centered on an alleged conspiracy by defendants intended to deprive plaintiff of said vessel and its contents -- the underlying premise of all such claims being that the alleged shipwreck existed and that plaintiff had an ownership interest in the vessel as well as the right to excavate. Unfortunately for plaintiff, the issue of whether plaintiff had any claim to the alleged vessel or its contents had been litigated in 2007 and again in 2010. Because the issue of plaintiff's ownership interest in the alleged shipwreck had been adjudicated in two separate lawsuits, the court construed the plaintiff's claims as collateral attacks on the final judgments of the 2007 and 2010 actions, which would require the court to improperly review the prior final judgments. Consequently, the court held that plaintiff's claims grounded in the theory that plaintiff had an ownership interest in the alleged shipwreck were precluded as a matter of law under the doctrine of collateral estoppel.

Aqua Log, Inc. v. Lost and Abandoned Precut Logs and Rafts of Logs, 709 F.3d 1055, 2013 AMC 556 (11th Cir. 2012). (*Georgia's Flint River is Navigable*.[7])

The Eleventh Circuit had to determine whether a timber company, Aqua Log, Inc., could assert a maritime salvage claim against the State of Georgia over Aqua Log's recovery of certain abandoned logs in the rural and inland Flint River and its tributary, Spring Creek.

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[6] Prepared by Ellen Shults, attorney with Welch and Harris, L.L.P., Jacksonville, NC. Email: egshults@welchharris.com.

[7] Prepared by Ryan Gilsenan, attorney with Womble Carlyle Sandridge & Rice, LLP, Charleston, SC. Email: rgilsenan@wcsr.com.

As predicate to claiming salvage over the logs, Aqua Log had to show that its claims lay within the U.S. District Court's original admiralty jurisdiction. To that end, Aqua Log had to show the claim arose from a navigable waterway of the United States – the Flint River.[8] In brief, "navigable" is defined as crossing state lines. Georgia moved to dismiss the claim, arguing the Flint River was not "used" for navigation, even though it technically flowed into a lake in Florida and thereby crossed a state line. Accordingly, Georgia asserted the district court, absent its admiralty jurisdiction, lacked subject matter jurisdiction over the claim and the lawsuit must be dismissed. The district court considered the activities on the Flint River, agreed with Georgia, and dismissed the lawsuit.

Aqua Log appealed, correctly arguing the test was not whether a waterway was being used for navigation, but whether it was *capable* of being so used. The Eleventh Circuit agreed with Aqua Log, finding the Flint River was indeed a navigable waterway and holding that admiralty jurisdiction therefore existed, and the case was remanded for trial.

Esoteric, LLC v. M/V STAR ONE, 478 F. App'x 639, 2012 AMC 2698 (11th Cir. 2012). (*Salvage need not be total to be compensable; salvage award affirmed where vessel contributed to success of salvage; award of attorneys' fees based on bad faith conduct of defendant reversed*.[9])

The plaintiff's yacht, M/V ESOTERIC, responded to an

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[8] As Ryan Gilsenen recalls:

> Bowen Jones, U.S. Merchant Marine Academy class of 1997 and native of Griffin, Georgia, grew up with a cabin on the banks of the Flint River. Bowen was the most southern person this New Jersey native had ever met. Naturally, we were roommates. And of course we visited the cabin and canoed the Flint River several times with Mr. Jones and his family. In approximately 1995, a particularly curmudgeonly professor of navigation at Kings Point, the aptly named Capt. Douglas Hard, posed a series of questions on a final exam about navigation on, of all places, the Flint River. Although an engineering midshipman at the time, even I knew the questions were ludicrous: the river is barely knee deep. Bowen Jones, a deck major, was apoplectic. "Everyone knows you *cain't* navigate the Flint River." He said, "Capt. Hard is ridiculous." Fast forward nearly twenty years and the Eleventh Circuit Court of Appeals closes the loop for all of us! Capt. Hard was right after all.

[9] Prepared by Ryan Gilsenan and David Cole. Ryan Gilsenan is an attorney with Womble Carlyle Sandridge & Rice, LLP, Charleston, SC. Email: rgilsenan@wcsr.com. David Cole is an attorney with Reitler Kailas & Rosenblatt LLC, New York, NY. Email: dcole@reitlerlaw.com.

emergency call in the Bahamas from the defendant's yacht, *M/V STAR ONE*, which was capsized and flooding in 1,000 fathoms of water in a busy sea lane and was at risk of sustaining further damage by drifting onto a nearby reef.

The ESOTERIC towed the *STAR ONE* to a safe anchorage, as directed by Bahamian authorities. Several days later, another salvor towed the *STAR ONE* to Miami for repairs. The plaintiff, owner of the ESOTERIC, sued the defendant *STAR ONE* and her owners, for salvage. Following a 2-day bench trial, the district court awarded the plaintiff $67,800.00 for salvage and $72,755.00 in attorneys' fees. The Eleventh Circuit Court of Appeals affirmed the salvage award and reversed on the award of attorneys' fees.

On appeal, the defendants contested that the plaintiff was successful in the salvage. However, the court observed that "to be successful, a party need not be responsible by itself from saving the property at issue; it is sufficient if his efforts contributed in some way to the ultimate success." *Id.* at * 641. (internal quotes and citations omitted). Applying this rule, the court found that absent the plaintiff's efforts, the *STAR ONE* likely would have sunk in 6,000 feet of water, or, in the alternative, fetched up on the reef and sustained further damage. The ESOTERIC's efforts saved the *STAR ONE* to fight another day, allowing professional salvors to pump the vessel dry and tow for repairs in Miami. Accordingly, the court upheld the salvage award.

Finally, the court addressed the lower court's award of attorneys' fees based on its finding that defendant had acted in bad faith. The district court had determined that defendant had no basis for disputing ESOTERIC's salvage claim and had no cognizable defense in law. After noting that attorneys' fees are not generally recoverable in admiralty cases, the court found that a challenge to the success element for salvage based on testimony that the vessel's condition had remained unchanged (capsized and mostly submerged) after the ESOTERIC's efforts did not constitute an abuse of the legal system, especially considering the fact-intensive nature of a salvage effort, and reversed the award of fees.

Reliable Salvage and Towing, Inc. v. Bivona, 476 F. App'x 852, 2013 A.M.C. 591 (11th Cir. 2012). (*Court allows attorneys' fees for bad faith defense where vessel owner concedes salvor's right to compensation*.[10])

The issue before the court was whether to allow attorneys' fees where a contractual salvage claim was denied and pure salvage was allowed. The attorneys' fees at issue were 2.5 times the salvage award ($35,592.50 and $14,000.00, respectively).

After confirming that attorneys' fees are generally not permitted, the court affirmed the award of attorneys' fees because the vessel owner's defense (that the vessel was not in peril) was made in bad faith. The vessel owner was successful on the contractual salvage claim (contract terms were substantially insufficient), and contended that a pure salvage award can only be determined after consideration of many factors with a burden on the plaintiff. Unfortunately, his defense of lack of peril was deemed not well founded. Further, the vessel owner did not dispute that the claimant had a right to be compensated for salvage and admitted it should only have taken him 6-8 weeks after his insurer denied coverage to meet with the claimant to negotiate some type of arrangement for payment. The vessel owner did not argue that the salvage award was excessive. Accordingly, the defense to the pure salvage claim was deemed to be made in bad faith. Essentially, although the contractual salvage claim was denied, since pure salvage was awarded and the owner conceded that the salvor had a right to compensation, the defendant was stuck with the plaintiff's attorneys' fees.

Cayere v. Malta Mediterranean Shipping Co, 2012 AMC 1462, 2012 WL 3112330 (D.P.R. 2012). (*Salvor must post security for vessel owner's counterclaim*.[11])

Seeking marine salvage damages, plaintiffs filed suit *in rem* against the luxury yacht M/Y TROTTER and her owner, Malta

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[10] Prepared by Adam Jay Jaffe, attorney with the Law Office of Adam Jay Jaffe, San Diego, CA. Email: adam@adamjayjaffe.com.

[11] Prepared by Guillermo Cancio, Claims Adjuster with Allianz Global Corporate & Specialty, New York, NY. Email: Guillermo.cancio@agcs.allianz.com.

Mediterranean Shipping Co. Plaintiffs rendered assistance when the TROTTER became grounded on the rocks near Culebrita Bay. Shortly after the rescue, plaintiffs filed suit against the TROTTER and the vessel's owners. During the preliminary hearing, the Salvors requested an award of $150,000.00. Furthermore, the defendants filed a counterclaim for $294,774.12 in damages.

At the hearing, the court found there were "reasonable grounds" for the vessel's arrest because the plaintiffs were entitled to a maritime lien, enforceable by an *in rem* action against the vessel. Consequently, the court granted the plaintiffs' bond request at $250,000.00.[12] However, the court also granted the defendants' request for security for their counterclaim using the same formula prescribed to set the security for the affirmative claim. The court based its order on Supplemental Rule E(7)(a) which "requires counter-security and staying the original claim until it is given".[13] The plaintiffs were then barred from pursuing their claim until they posted the counter-security.

The court elected not to decline counter-security despite the last clause of Rule E(7)(a) which other courts have apparently interpreted to allow them broad discretion in whether or not to order countersecurity.[14] However, the court's ruling also clearly reminded the parties they are free to negotiate and stipulate to appropriate amounts of security, or stipulate that no security is necessary at all.[15]

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[12] The Rules require that a special bond for the vessel's release be in an amount sufficient to satisfy the amount of the plaintiff's claim plus accrued interest, but the principal of the bond may not be greater than the lesser of twice the plaintiff's claim or the value of the property on due appraisement. *See* Supp. R. Admiralty & Maritime E(5)(a).

[13] Supp. R. Admiralty & Maritime E(7)(a): "When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise."

[14] *See e.g., DSND Subsea AS v. Oceanografia, S.A. de C.V.*, 569 F. Supp. 2d 339 (S.D.N.Y. 2008).

[15] *See* Supp. R. Admiralty & Maritime E(5)(a) & (c).

Lay v. Hixson, 905 F. Supp. 2d 1256 (S.D. Ala. 2012). (*Claimant denied salvage award due to failure to establish existence of maritime peril when vessel towed from secure location*.[16])

This action arose when the plaintiff brought a cause of action to obtain a salvage award under general maritime law after he voluntarily towed a barge miles from its original position, where it had been securely moored for over three years. The court found that to establish a claim for a salvage award, the potential salvor must demonstrate three standard elements: (1) existence of maritime peril from which property could not have been saved without the salvor's assistance; (2) voluntary act on part of salvor; and (3) salvor's success in saving property.

After review of the first principle, the court determined it was improbable that the barge would have been damaged, destroyed, or was at any reasonable risk to injury had the plaintiff not taken it into his own possession. The barge was securely attached to another barge, which was moored to the creek bed by spuds embedded into the mud below to a depth of approximately five to eight feet and was regularly monitored by its owners. Thus, due to the plaintiff's failure to demonstrate that the barge was in maritime peril, the court ruled that the plaintiff was not entitled to a salvage award under general maritime law.

R.C. Fischer and Co. v. Cartwright, 2012 AMC 30, 2011 WL 7628682 (N.D. Cal. 2011). (*Evidence sufficient that vessel was in peril to justify a salvage award*.[17])

Plaintiff brought this action for indemnity against defendant arising from a collision between two sailing vessels, QUARK SPEED and INKATU, in the San Francisco Bay on June 24, 2007. Plaintiff insurer paid for a portion of the repairs to the QUARK SPEED on behalf of her owners. The parties disputed whether plaintiff was entitled to payment of the salvage claim of $5,500.00 relating to the

[16] Prepared by Kelly Haas, attorney with Royston Rayzor in Galveston, TX. Email: Kelly.Haas@roystonlaw.com.

[17] Prepared by E. Adriana Kostencki, attorney with Fowler White Burnett, P.A., Miami, FL. Email: ekostencki@fowler-white.com.

tow of QUARK SPEED from the collision site. Plaintiff provided evidence that QUARK SPEED was in peril. The testimony revealed that the only experienced sailor on QUARK SPEED had been thrown overboard in the collision and that the crew members left aboard had no sailing experience and were unable to bring down the mainsail on their own.

Defendant pointed to testimony regarding the location of QUARK SPEED on the bay to demonstrate it was not in peril when it was towed. However, the court ruled that even though the evidence may have shown that QUARK SPEED was not in imminent peril of colliding with Alcatraz, it did indicate that she was adrift and moving fast away from the accident site with inexperienced sailors aboard. Therefore, the court concluded that the QUARK SPEED was in peril to justify a salvage award.

The court then addressed the salvage damages claimed by the plaintiff and held that although there was no evidence that the tow vessel expended a particularly high level of labor, incurred a particularly high degree of risk, or that the tow vessel was exposed to a particularly high level of danger, there was evidence that the tow vessel was promptly on the scene and was able to get a line on QUARK SPEED even though the evidence demonstrated that she was sailing in circles near Alcatraz. Therefore, the court concluded that the relatively modest sum of $5,500.00 for the salvage claim was reasonable.

Klenner v. M/Y EL PRESIDENTE, No. 11-60642-CIV, 2012 WL 3150050 (S.D. Fla. Aug. 1, 2012). (*Lien for necessaries allowed where implied bailee's salvage claim fails*.[18])

After several unregistered title transfers, the ownership of a vessel was disputed following the suicide of occupant Larry Abromovich. The individual who took possession of the vessel, Robert Klenner, filed an action for determination of ownership or, in the alternative, a salvage award. An alleged owner, Michael Waldo,

[18] Prepared by Anne Kulesa, attorney with the Law Office of Anne L. Kulesa, Stroudsburg, PA. Email: anne.kulesa@gmail.com.

intervened. The court ultimately held that Waldo was the owner of the vessel, the occupant's death did not amount to abandonment of the vessel, and Klenner was entitled to a lien for the provision of necessaries up until the expiration of his role as bailee.

Klenner rendered certain services to the vessel such as towing, repairs, and incurred docking fees. Klenner failed to prove that he was entitled to salvage. He offered no proof that the *EL PRESIDENTE* was in peril or that peril was reasonably apprehended. The court found that it is not reasonable to apprehend peril for a safely docked ship that is not rapidly taking on water, absent any other extreme circumstances.

Based on the value of necessaries provided by Klenner prior to the date he was to vacate the vessel, the court found that Klenner was entitled to a maritime lien for necessaries in the amount of $8,080.00. However, the court did not allow a lien for necessaries afforded after the expiration of the bailment.

Am. Steamship Co. v. Hallettt Dock Co., 862 F. Supp. 2d 919 (D. Minn. 2012). (*Defendants' claim for salvage and allegation of plaintiffs' contributory negligence prevent summary judgment for plaintiff.*[19])

This case involved claims by the owners of the WALTER J. McCARTHY, JR., a freight ship which was damaged when it struck debris as it attempted to berth at a Superior, Wisconsin dock. The accident opened a large gash in the McCARTHY's hull and was alleged to have caused more than four million dollars in damage. Plaintiffs sought summary judgment alleging they established over $4 million in "undisputed expenses" as a direct result of the holing and flooding of the McCARTHY. However, the defendants argued that summary judgment was inappropriate because they intended to assert contributory negligence and salvage claims.

The court concluded that it did not need to address defendants' arguments about plaintiffs' contributory negligence and defendants'

[19] Prepared by E. Adriana Kostencki, attorney with Fowler White Burnett, P.A., Miami, FL. Email: ekostencki@fowler-white.com.

salvage claims because, depending on the facts presented at trial, those claims may allow defendants to reduce or offset liability for the damage caused to the McCARTHY.

COMMITTEE ON YOUNG LAWYERS

Chair: Carolyn Elizabeth Bundy

NEWSLETTER

Vol. 2013-1, April 2013

"THEORETICALLY QUARTERLY"

Message from the Chair

Despite the persistence of chilly weather in NYC, the Spring MLA meeting is upon us. I am very much looking forward to the meeting and seeing everyone after the long break due to the unfortunate cancellation of last Fall's meeting. I also look forward to the fresh location for the MLA dinner at Cipriani's Wall Street, which promises to be elegant and festive.

We have a lot of great plans for the YLC next week, including our usual meeting with a great panel of presenters consisting of former YLC Chairs, the Healy Lecture, and, of course, our time-honored social event.

This year's meeting is somewhat bittersweet for me as it will be my last as Chair of the YLC. I have truly loved working with this committee and my time as Chair. I could not have anticipated how much positive impact my involvement in the YLC would have had on my career in the maritime field and I am grateful to have had the opportunity. I hope to stay close to this group in the years to come.

It is my honor to introduce the new leadership of the YLC:

Chair, Norman Stockman
Vice Chair, Blythe Daly
Secretary, Jennifer Porter

I know that you will be in great hands with this new leadership and look forward to seeing the quality work that I'm sure will continue from this committee.

In the meantime, I look forward to catching up with everyone next week and will be doing the "sunshine" dance in hopes of bringing us some lovely weather.

Betsy Bundy

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program is entering its third full year and continues to be a work in progress. 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 as well as allowing 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 the YLC page of the MLA website for everyone's reference. Let this serve as a reminder to our Liaisons that the YLC is ready to work. Spread the word to your respective committees and please call on us when we can be of service.

If you would be interested in volunteering to serves as a YLC Liaison, please e-mail incoming Secretary of the YLC, Jennifer Porter at Jennifer.Porter@kyl.com. If you are currently a YLC Liaison and have a project that needs help, please e-mail incoming Chair, Norman Stockman at nstockman@handarendall.com.

ONGOING PROJECTS

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 nearing completion by the Spring 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

At the request of Katharine Newman, Chair of The Marine Ecology and Maritime Criminal Law Committee, the YLC was asked to assist in preparing summaries to include in their Fall newsletter: *Bilge & Barratry*. I am pleased to report that we had 19 volunteers for this project, many more than Katharine needed! Many thanks to the following individuals who assisted in preparing the latest addition of the newsletter: Matthew Koch, Limor BenMaier, Mark Zlomek, Justin Mitchell, Guillermo Cancio, Charlie Marts, Jude Smith, Ryan Gilsenan, Brian McEwing, David Cole, Lauren Burk, and Becky Hamra.

For the second year in a row, at the request of Jason Harris, Vice Chair, of the Salvage Committee, the YLC has assisted in preparing the Salvage Committee's latest edition of the newsletter "Recent Developments in Salvage Law." The following YLC members contributed to this project: Rick Beaumont, Guillermo Cancio, David Cole, Ryan Gilsenan, Kelly Haas, Adam Jay Jaffe, E. Adriana Kostencki, Anne Kulesa, and Ellen Shults. Jason offers his sincere thanks to this crew for their diligent efforts.

David Farrell, MLA Secretary, recently asked for our help in finding a volunteer to assist with logistics at the General Meeting next week. Two gracious volunteers, Marissa Henderson and Asher Chancey, have stepped up to assist with the sign in table and a video presentation. This is a perfect opportunity for our members to lend a hand and get involved.

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.

PUBLICATION OPPORTUNITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to Benedict's Quarterly Maritime Bulletin. You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair or director unless s/he is Proctor or Non-Lawyer member. Proctor applications may be obtained from the MLA Membership Secretary or may be downloaded from the MLA website (www.mlaus.org) in the "Membership Forms" section.

YLC MEMBERSHIP LIST ON WEBSITE

If you are not already signed up as a member of the YLC on the MLA website, please make sure you do so. We use the membership list on the website as a vehicle for communicating with our members. In this regard, we have reason to believe that some of our young lawyers are not registered as YLC members and thus do not receive our communications. If you know anyone that might fall into this category, please pass this along and encourage them to formally join via the website so they can stay in the loop. Conversely, if you are no longer a YLC member and are tired of our shenanigans, feel free to unsubscribe.

JOB POSTINGS

We recently added a folder to our YLC document library on the MLA website entitled "Job Postings." Our hope is to start using this as a place to post recent marine related job openings appropriate for younger lawyers in the maritime community. We have just added a recent job listing for a U.S.C.G. Attorney Advisor position in Washington, DC, at the suggestion of Pamela Schultz. If anyone comes across a job opportunity that they wish to share with the YLC, please feel free to post it in this folder or send it to Norman Stockman at nstockman@handarendall.com.

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