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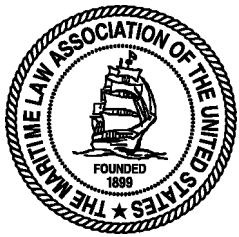

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Spring 2016

THE MARITIME LAW ASSOCIATIOI OF THE UIITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

TABLE OF COITEITS

EDITORIAL COMMEIT

This edition of MLA Report contains newsletters of the Association's Committees that were issued in connection with the Spring Meeting in New York in May 2016, held in conjunction with the 42nd International Conference of the Comite Maritime International.

In accordance with our practice of honoring members who have materially advanced the work of the Association and the development of maritime law, we have included an announcement by the International Maritime Organization ("IMO"), reprinted with its permission, concerning its award of the 2015 International Maritime Prize to Dr. Frank Wiswall of Castine, Maine, for his contributions to the work of the IMO over many years. Frank is the third living American to receive this prize, following RADM Rod Edwards (U.S.C.G.), who was an early and long-time chairman of the IMO Council, and ADM Bill Kime (U.S.C.G.), who was Commandant from 1990-94 and noted for the response of the Coast Guard to the EXXON VALDEZ oil pollution. Lindy Johnson, a lawyer in the Office of General Counsel for International Law of the National Oceanic and Atmospheric Administration ("NOAA") who was a member of the United States delegation to meetings of the IMO Marine Environment Protection Committee until her death in 2010 and was important in the development of designations of particularly sensitive sea areas, was the only woman to have received the prize. The prize is to be presented to Frank on December 5, 2016.

We thank the following member 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;, J. Ben Segarra of Maynard, Cooper, & Gale, PC in Mobile; Stephanie Propson of Fincantieri Bay Shipbuilding in Sturgeon Bay; and Christine M. Walker of Fowler White Burnett PA in Miami. We appreciate their help. However, we remain responsible for any errors or ambiguities that may have escaped their and our view.

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

AWARD OF THE IMO IITERIATIOIAL MARITIME PRIZE TO FRAIK WISWALL

The prestigious International Maritime Prize for 2015 is to be awarded to Dr. Frank Lawrence Wiswall Junior, former Chair of the IMO Legal Committee and Vice-President (Honoris Causa) Comite Maritime International (CMI), for his contribution to the work of IMO over many years.

The IMO Council has decided to award the Prize, noting Dr. Wiswall's personal contribution to the work of IMO, leading IMO's Legal Committee as it developed a number of key international treaties and holding important roles at various international IMO legal and diplomatic conferences.

As a lecturer at the International Maritime Law Institute (IMLI) in Malta and as a Member of its Governing Board from 1992 to the present, Dr. Wiswall has also made a significant contribution to the training of lawyers from around the world.

In nominating his candidature for the International Maritime Prize, the CMI said Dr. Wiswall had contributed greatly to the establishment of the uniformity of maritime law during his long and distinguished career as a practicing maritime lawyer, academic and Vice-President of the CMI.

Biography:

Frank Wiswall was born in Albany, New York and raised in Maine, United States. He obtained a Bachelor of Arts degree at Colby College, a Doctor of Law at Cornell University and a Doctor

of Philosophy at Clare College, Cambridge University. He was admitted to the Bar in the State of Maine in 1965 and the Supreme Court of the United States in 1968.

Dr. Wiswall worked with New York admiralty and law firm Burlingham Underwood (1967-1973) before taking on the role as Admiralty Counsel, Bureau of Maritime Affairs for the Republic of Liberia (1973-1988). He worked as Maritime Counsel at the International Bank in Washington DC and has been in private practice and consultation on admiralty and maritime international law since 1985.

Dr. Wiswall was elected Vice-Chair of the Legal Committee (1974-1979), Chair of the Legal Committee (1980-1984), and served as acting Chair for a number of Legal Committee sessions.

During these periods, the Legal Committee achieved a great deal of work, including the drafting of articles and conventions in relation to wreck removal; limitation of liability for maritime claims; legal aspects of a draft international convention on search and rescue; extension of the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) to oils not covered by that Convention; review of limits in the 1969 CLC and 1971 Fund Convention; the draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; consideration of salvage and the revision of the 1910 Salvage Convention; consideration of work in respect of maritime liens and mortgages.

As well as his work as Chair and Vice-Chair of the Legal Committee, Dr. Wiswall played a proactive role at several international conferences convened by IMO. He was Chair of the Drafting Committee of the International Legal Conference on the Carriage of Passengers and their Luggage on Board Ships, 1974; Chair of the Committee on Final Clauses of the International Conference on Limitation of Liability for Maritime Claims, 1976; and Chair of the Committee of the Whole of the International Conference on Liability and Compensation for Damage in connection with the Carriage of Certain Substances by Sea, 1984.

Shortly after his tenure as Chair of the Legal Committee, Dr. Wiswall was asked by the then IMO Secretary-General to review a draft syllabus for the embryonic International Maritime Law Institute (IMLI) in Malta. Dr. Wiswall instantly became a strong believer in IMLI's purpose as a capacity-building and training institute, and began teaching at IMLI in 1990, visiting once or twice per year. He has lectured on a variety of topics including maritime legal history, maritime legislation drafting, law of maritime safety and the law of marine collisions.

As a Member of IMLI's Governing Board from 1992 to the present, and a Member of the IMLI Academic Committee, Dr. Wiswall has made a significant contribution to the training of lawyers from around the world in the drafting of international conventions, in the international regulation of maritime law through international conventions, including COLREG and SOLAS, as well as in the incorporation of international conventions into national legislation.

IMLI conferred on Dr. Wiswall the Degree of Honorary Professor of International Maritime Law in 1999, in recognition of his long service to the harmonization, progressive development and codification of international maritime law.

Dr. Wiswall was also a visiting professor at the World Maritime University (WMU) in Malmo, Sweden, from 1986-2003.

Dr. Wiswall has made an extensive contribution to the work of the Comite Maritime International (CMI), which has consultative status at IMO. He was made a Titulary member of the CMI (1980); Executive Councillor (1989-1997); Vice President (1997-2005) and Chair of the CMI Constitutional Committee (since 1992).

Dr. Wiswall is a member of various law associations and societies and has published a number of legal books, including The Development of Admiralty Jurisdiction and Practice Since 1800 (1970), and numerous papers and articles.

International Maritime Prize

The International Maritime Prize is awarded annually by IMO to the individual or organization judged to have made the most significant contribution to the work and objectives of the Organization. It consists of a sculpture in the form of a dolphin and includes a financial award, upon submission of an academic paper written on a subject relevant to IMO.

The Prize will be presented to Dr. Wiswall at a special ceremony, on a date to be arranged.

IMO — the International Maritime Organization — is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships.

Web site: www.imo.org

[Editors' note: The preceding information is reprinted from the IMO website with permission from the IMO. The editors offer their congratulations to Frank.]

COMMITTEE COI ARBITRATIOI AID ADR

Chair: Leo G. Kailas
Vice Chair: Peter Skoufalos
Secretary: Chris Nolan
YLC Committee Liaison: Lindsay Sakal

IEWSLETTER

May 2016

Message from the Chair:

It has been another exciting year for the Arbitration and ADR Committee which has been involved in several initiatives with the Society of Maritime Arbitrators in New York ("SMA") to promote arbitration of maritime and maritime related disputes in the United States. Several members of the Committee including Keith Heard, Don Murnane, Robert Shaw, Jay Pare and the Chair have also assisted in drafting amendments to the SMA Rules including the most recent Seventh Edition released in March 2016.

At the Fall meeting in Bermuda, with 25 members in attendance in person and by phone, Committee member George Tsimis of the American Club spoke on the use of anti-suit injunctions to enforce arbitration provisions. The need for such relief arose when P&I Club members were being forced to post security in West Africa relating to often frivolous cargo loss claims filed in violation of arbitration clauses. In many instances the security that had been posted would be tied up in local legal proceedings for many years, lending to coercive settlements. Mr. Tsimis described how he turned to the London courts to issue orders (1) enforcing the London arbitration provisions and (2) enjoining the cargo interests from pursuing actions in the local West African courts. The issuance of these injunctions with associated sanctions has, according to Mr. Tsimis, cut down dramatically on the number of such cargo actions filed in recent years.

Our Committee also held an informative joint session with the CMI on May 5, 2016 with almost 200 lawyers and industry people in attendance. The focus was on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the New York Convention—now nearly 60 years old. With 158 signatory countries, the Convention has built, as Luc Grellet put it in that session, a "transnational arbitral culture through simple principles." Other speakers, representing the U.K. Japan, Brazil and Australia, also provided local perspective on how the Convention is applied in their own jurisdictions with a focus on the "public policy" exception to enforcement and the availability of pre-award security. The Committee Chair closed the meeting by noting that uniformity in the application of the Convention worldwide may be desirable but not always attainable.

In closing, I also wish to share with you news of a fresh initiative announced by Michael Northmore of the SMA

> With an influx of new members with extensive insurance backgrounds, the SMA has formed a committee of insurance experts to help further expand the SMA's arbitration and mediation services beyond traditional blue-water owners' and charterers' disputes and into the fields of brown-water & coastal, offshore & onshore energy and related services, Great Lakes, transit business, shipbuilding & repairing, yachts, fisheries, ports & terminals, reinsurance, etc. As it broadens its activities, the SMA welcomes MLA members' input, suggestions and comments.

For the Committee's benefit, we have been collecting cases of note since last year's newsletter. Intrepid volunteers from the MLA Young Lawyers Committee conducted additional research and prepared the concise summaries below, organized by circuit. If a particular circuit did not have an arbitral case of note, we selected a district court decision. Not all circuits are recognized based on relevancy, time, and space restrictions.

Thank you to Committee Secretary **Chris I°lan** for taking the laboring oar on the project, and our YLC drafters including: **Scott R. Gunst, Jr., Barrett Hails, Simon Levy, Daniela Oliveira, Imran Shaukat,** and **Christie Walker.**

First Circuit

Farnsworth v. Towboat Iantucket Sound, Inc., 790 F.3d 90 (1st Cir. 2015)

In *Farnsworth v. Towboat Iantucket Sound, Inc.,* the First Circuit held that a vessel owner could not challenge the validity of the arbitration clause after the salvor moved to confirm the arbitration panel's award in his favor.

After his vessel went aground on rocks, Farnsworth's radio request for a tow was answered by Towboat Nantucket Sound (TNS). Although there was some discussion as to whether Mr. Farnsworth was coerced, he executed a "no cure, no pay" marine salvage agreement. The agreement contained a standard arbitration provision, in which the parties agreed to resolve any disputes by binding arbitration.

Shortly after the vessel was salvaged, Farnsworth sent a letter to TNS purporting to rescind the salvage agreement. A dispute arose and TNS's counsel demanded arbitration pursuant to the salvage agreement. Despite initially suggesting that the arbitration clause was void, Farnsworth nominated an arbitrator and the parties agreed that the issues regarding the salvage of the vessel must be heard by the arbitrators. In his submission to the panel, Farnsworth alleged that he signed the salvage agreement under duress. Shortly after arbitration proceedings commenced, Farnsworth filed a federal court action seeking a declaratory judgment that the salvage agreement was void. His federal complaint did not specifically challenge the arbitration provision. The district court denied the request for a preliminary injunction, and stayed the case pending the outcome of the arbitration.

Thereafter, the arbitration panel unanimously found in favor of TNS, which then filed a motion in the district court to confirm the panel's award and dismiss Farnsworth's suit. In Farnworth's opposition to the motion to confirm, he argued that he had been coerced to agree to the arbitration clause as opposed to the agreement as a whole. This was the first time that Farnsworth challenged the specific arbitration clause of the salvage agreement. The district court confirmed the arbitration award, and held that the failure specifically to challenge the validity of the arbitration clause was fatal.

On appeal, the First Circuit looked at Supreme Court holdings that differentiated between two types of challenges to arbitration agreements: (1) challenges to an entire contract containing an arbitration clause, and (2) challenges to a specific agreement to resolve a dispute through arbitration. The Supreme Court has held that where a challenge is to the entire contract the arbitrators decide the validity of the agreement, whereas the court should decide challenges to the specific agreement to arbitrate, if such challenges are timely and properly made. The First Circuit affirmed the district court holding that Farnsworth's motion for a preliminary injunction to stay the arbitration proceedings was only a general challenge to the salvage agreement and not a specific challenge to the arbitration clause. Farnsworth's only challenge to the validity of the arbitration clause came after TNS moved to confirm the panel's award which was far too late.

Second Circuit

Zurich American Insurance Co. v. Team Tankers A.S., 811 F.3d 584 (2d Cir. 2016)

In *Zurich American Insurance Co. v. Team Tankers A.S.,* the Second Circuit affirmed the district court's decision denying the shipper's motion to vacate the arbitral award but reversed the district court's order awarding attorney's fees and costs.

The shipper, Vinmar International, Ltd., chartered a vessel from Team Tankers A.S. to transport a large quantity of acrylonitrile

(ACN) from Houston to South Korea. ACN is most valuable when colorless but begins to "yellow" when it comes in contact with other chemicals, thus reducing its value. When the vessel arrived in South Korea the ACN was transferred to onshore tanks. At the time of the offloading the ACN was as specified and had not begun to yellow. Six week after offloading the ACN into the storage tanks, the product had yellowed beyond Vinmar's quality standards. The sample pulled from the tanks in Houston had not yellowed at all.

Consistent with the charter agreement, Vinmar initiated arbitration proceedings. The arbitration panel majority held that Vinmar was not entitled to relief, holding that: (1) Vinmar had not made out *a prima facie* case that the ACN had been damaged while aboard the vessel; (2) Team Tankers showed that it exercised due diligence during transport; (3) Vinmar failed to prove damages. Vinmar petitioned the district court to vacate the award under the FAA arguing that the panel manifestly disregarded COGSA in reaching its decision. The district court confirmed the arbitration award.

On appeal the Second Circuit held that the arbitration panel did not manifestly disregard the law. The panel majority recognized that while COGSA permits a shipper to make *a prima facie* case by establishing that it delivered the goods to the carrier in sound condition and the goods arrived in damaged condition following the carriage, the shipper's evidence was insufficient to satisfy its initial burden under COGSA.

The shipper also argued that the panel chairman's failure to disclose **a terminal illness constituted "corruption" or** "misbehavior," as such disclosure is required by SMA Rules which governed the conduct of the arbitration. The Second Circuit emphasized that an attempt to vacate an arbitral ruling based on a violation of private arbitral rules runs headlong into the principle that parties may not expand by contract the FAA's grounds for vacating an award. The Second Circuit reasoned that without more, holding that a failure to comply with private arbitral rules was tantamount to "corruption" or "misbehavior" would result in an

expansion of the FAA beyond the scope of the statute and would result in varied decisions.

The Second Circuit reversed the district court's award of attorney's fees, holding that the shipper did not breach the charter agreement by seeking to vacate the arbitration award.

Third Circuit:

Energy Marine Servs., Inc. v. DB Mobility Logistics AG, et al., No. CV 15-24-GMS, 2016 WL 284432 (D. Del. Jan. 22, 2016)

In *Energy Marine Servs., Inc. v. DB Mobility Logistics AG,* the United States District Court for the District of Delaware held that a parent corporation could not be held liable for a London maritime arbitration judgment against its distant subsidiary on the grounds of an alter-ego claim, agency claim, or partnership claim. Defendant DB Mobility Logistics AG ("DBMLAG") — a subsidiary of German national train company Deutsche Balm AG and part of its family of companies — is the corporate parent and Schenker Libya for Transport Services Company ("Schenker Libya") and Schenker SA were the relevant subsidiaries. Until December 2010, DBMLAG was an "indirect shareholder," via three other corporate entities, of Schenker Libya. *Id.* at *1.

In June 2010, Energy Marine Services, Inc. ("EMS") and Schenker Libya took part in a London maritime arbitration action regarding a dispute over withheld charter party payments from Schenker Libya's June 2008 chartering of a vessel from EMS. EMS's claims in the London arbitration against Schenker Libya had been stayed since the 2011 outbreak of the Libyan civil war and not recommenced until October 2015.

In January 2015, EMS filed a suit in admiralty against DBMLAG, Schenker Libya, and Schenker SA in the District of Delaware, seeking to hold DBMLAG liable for EMS's claims against Schenker Libya on the grounds that DBMLAG may be liable for the actions of its subsidiary on alter ego, agency, or partnership bases. DBMLAG filed a motion to dismiss under Fed. R. Civ. P.

12(b)(6), contesting liability for the arbitration judgment. The court granted DBMLAG's motion to dismiss, reasoning that "EMS has not averred facts sufficient to support any of its theories asserting that DBMLAG is liable for the arbitration judgment against Schenker Libya." *Id.* at *5. A common thread in the court's reasoning for dismissing EMS's basis for holding DBMLAG liable for Schenker Libya's purported conduct was that EMS, rather than pleading factual assertions, provided conclusory assertions linking DBMLAG to Schenker Libya.

With regard to EMS's alter-ego claim, the court reasoned that "[a]lthough EMS alleges that DBMLAG operated Schenker Libya as an alter-ego, it pled no facts asserting that DBMLAG or its subsidiaries were undercapitalized, did not pay dividends, employed non-functional directors in subsidiaries, siphoned funds, or failed to keep reasonable corporate records." *Id.* at *3. Turning to EMS's agency claim against DBMLAG, the court reasoned that EMS did not provide sufficient facts to connect Schenker Libya to DBMLAG, and therefore "EMS's agency allegations fail for the same reason as its alter-ego claim: The pleadings do not demonstrate a plausible agency relationship between DBMLAG and either Schenker SA or Schenker Libya." Lastly, EMS's argument based on partnership failed because "conclusory statements alleging partnership are insufficient to meet the minimum pleading requirements." *Id.* at *5. Accordingly, the court held that EMS did not aver facts that made it plausible that DBMLAG could be liable for Schenker Libya's purported conduct, and therefore granted DBMLAG's motion to dismiss .[1]

Fourth Circuit:

Flame S.A. v. Freight Bulk Pte. Ltd., 807 F.3d 572 (4th Cir. 2015)

In *Flame S.A. v. Freight Bulk Pte. Ltd.,* the Court of Appeals for the Fourth Circuit affirmed the United States District Court for the Eastern District of Virginia's holding that Freight Bulk Pte. Ltd.

[1] EMS has filed a notice of appeal of the January 22, 2016 decision with the United States Court of Appeals for the Third Circuit.

("Freight Bulk") was the alter ego of Industrial Carriers, Inc. ("ICI"), and therefore Freight Bulk and ICI were jointly and severally liable for defrauding ICI's creditors, including the plaintiffs-appellees Flame S.A. ("Flame") and Glory Wealth Shipping Pte., Ltd. ("Glory Wealth").

In 2008, Flame entered into four Forward Freight Agreements ("FFAs") with ICI. ICI breached the FFAs, and Flame commenced an English High Court of Justice action against ICI, eventually obtaining an English judgment against ICI. Flame had its English judgment recognized in the Southern District of New York, and later registered the judgment in the Eastern District of Virginia for the amount of approximately $19.9 million. *Id.* at 584. Also in 2008, Glory Wealth contracted with ICI for the charter of a vessel. ICI failed to pay the fourth installment of hire, or any other payment due thereafter. Glory Wealth commenced arbitration in London pursuant to the charter, and the London arbitration panel issued Glory Wealth an award. Glory Wealth then sought and obtained recognition of the arbitration award by obtaining a default judgment in the Southern District of New York in the amount of approximately $46.38 million, *see Flame S.A. v. Indus. Carriers, Inc.,* 39 F.Supp.3d 769, 775 (E.D. Va. 2014), but did not register that judgment in the Eastern District of Virginia. Rather, Glory Wealth "filed a complaint in the Eastern District of Virginia alleging that it was an ICI creditor who could maintain a maritime claim against ICI for breach of a charter party, as established by its English arbitration award." *Flame S.A.,* 807 F.3d at 578. Flame and Glory Wealth subsequently sought a writ of maritime attachment under Supplemental Rule B to attach Freight Bulk's vessel, the MN CAPE VIEWER, when it docked in Norfolk, Virginia. Glory Wealth then obtained an attachment order for the M/V CAPE VIEWER pursuant to Supplemental Rule B. *Id.* The trial court ordered the sale of the vessel and the distribution of the sale proceeds to Flame and Glory Wealth. *Id.* at 577.

On appeal, ICI and Freight Bulk argued, *inter alia,* that the district court erred in distributing proceeds of the MN CAPE VIEWER's sale to Glory Wealth because Glory Wealth failed to register its New York default judgment against ICI, stemming from

the English arbitration award, in the U.S. District Court for the Eastern District of Virginia. *Id.* at 579. The Court of Appeals for the Fourth Circuit disagreed with ICI and Freight Bulk's argument, finding that Glory Wealth's claim against ICI "also arose from the breach of an indisputably maritime contract, namely, a charter party." *Id.* at 581, citing *Kossick v. United Fruit Co.,* 365 U.S. 731, 735 (1961). Accordingly, the Court of Appeals for the Fourth Circuit affirmed the trial court and concluded that Flame and Glory Wealth's attachment proceedings were based on a foreign judgment or foreign arbitration award involving maritime claims.

Seventh Circuit

Grooms v. Marquette Transp. Co., LLC, Case. No. 14-cv-603, 2015 WL 681688 (S.D. Ill. Feb. 17, 2015)

In *Grooms v. Marquette Transp. Co., LLC,* a mariner crushed his leg during a voyage on the Mississippi River. His contract of employment contained an arbitration clause, which the mariner argued should not be enforced. *Id.* **at *1.** At the outset, the court noted that the employment contract was exempt by the terms of the Federal Arbitration Act, but was enforceable under the Illinois Uniform Arbitration Act. *Id.* The court then looked to the Jones Act and case precedent interpreting the Jones Act and found that the agreement to arbitrate was enforceable. *Id.* at *2. The court further advised that, from a policy perspective, the mariner need not forego any substantive rights by agreeing to arbitrate his claims. *Id.*

pith Circuit:

Galilea, LLC v. AGCS Marine Ins. Co., 2016 WL 754221 **(D.** Mont. Feb. 24, 2016),

In *Galilea, LLC v. AGCS Marine Ins.,* the United States District Court for the District of Montana granted the motion of defendants AGCS Marine Insurance Company, Liberty Mutual Insurance Company, and Torus Insurance Company's (collectively "Insurers") to dismiss and to compel arbitration and denied plaintiff Galilea, LLC's motion permanently to stay arbitration proceedings.

This action arose from the Insurers' denial of insurance coverage for the sailing yacht GALILEA, which grounded in an accident and was deemed a total loss. The Insurers initiated an arbitration proceeding pursuant to the terms of the policy and plaintiff initiated this action seeking to stay the arbitration proceeding and assert several state causes of actions.

Plaintiff Galilea, LLC, a Nevada limited liability company, was formed by Chris and Taunia Kittler, both Montana citizens, for the purpose of owning the GALILEA. In May 2015, the Kittlers sought insurance coverage for the GALILEA from Pantaenius American Yacht Insurance ("Pantaenius"). A Pantaenius representative provided the Kittlers with a premium quote for insurance coverage which listed a Montana address for Galilea, LLC. Shortly thereafter, the Kittlers emailed an application for insurance to Pantaenius listing Galilea, LLC as the insured and the port of registry as Las Vegas, Nevada. Although the application was drafted by Pantaenius, the application listed the issuing insurance companies as the Insurers named in this action. Pantaenius, in turn, sent the Kittlers an insurance binder and policy which contained a New York arbitration clause and stated that it would be interpreted by federal maritime law, or if that particular area of federal maritime law is not "established and entrenched," New York law would apply.

In challenging the Insurers' arbitration proceeding, plaintiff argued that Montana law should apply to the interpretation of the policy and that under Montana law arbitration clauses in insurance policies are invalid. The court rejected any arguments that the policy's place of performance or place of execution was relevant to the determination of jurisdiction and instead focused on the nature of the contract, which was decidedly a maritime insurance policy. Thus, federal maritime jurisdiction would apply to the dispute.

The court then turned to the question of whether the choice of law provision is enforceable under federal maritime law. Citing the RESTATEMENT (SECOND) OF CONTRACT OF LAWS § 187(2), the court noted that the "law of the state chosen by the parties to govern their contractual rights will be applied ... unless either (a) the chosen

state has no substantial relationship to the parties ... or (b) application of the law of the chosen state would be contrary to fundamental policy of the state which has a materially greater interest than the chosen state in the determination of the particular issue." Following Ninth Circuit precedence, the court concluded that the referenced "state" in the Restatement can be the federal government which historically has a substantial relationship to maritime insurance contracts. Additionally, the court found that Montana did not have a materially greater interest than the federal government in the dispute when the only connection was that Galilea, LLC's members were Montana citizens. Ultimately, although the matter was "not an easy case," the court upheld the longstanding principle of uniformity of federal law in admiralty matters.

Eleventh Circuit:

Iavarette v. Silversea Cruises Ltd., Case No. 14-20593, 2016 WL 12655601, (S.D. Fla. March 7, 2016)

In *Iavarette v. Silversea Cruises Ltd.*, a Filipino citizen was injured during mooring operations. His employment agreement contained standard terms and conditions, including an agreement to arbitrate, as approved by the Philippine Overseas Employment Administration. *Id.* Following the arbitration, the mariner moved to vacate the award. In determining whether to vacate or enforce the award, the court first looked at whether the award offends public policy and, second, whether the mariner was a Jones Act seaman.

With regards to the first aspect of the court's analysis, the court explained that a violation of public policy occurs when an award is contrary to well-defined and dominant policy that is ascertained by reference to laws and legal precedents. The two competing policies at issue are the public policy favoring arbitration and the public policy protecting mariners as wards of admiralty. In weighing the competing policies, the court emphasized that the approval of the contract terms by the Philippine government reflects the policy of its government to promote and monitor the overseas employment of Filipinos. The second aspect of the court's analysis,

whether the mariner was a Jones Act seaman, was determined under a standard *Lauritzen* eight factor choice-of-law analysis. The court weighed the eight factors and concluded that U.S. law did not apply and hence the mariner was not a Jones Act seaman. The only factors connecting the employer to the United States were its office in Fort Lauderdale, some of its ships hailing and porting in Port Everglades and passenger tickets containing a Southern District of Florida forum selection clause. Ultimately, the court confirmed the tribunal's award by finding that (a) the award did not offend public policy and (2) the tribunal correctly concluded that the mariner was not a Jones Act seaman.

State Court:

Cusimano v Schnurr, 26 N.Y.3d 391 (N.Y. 2015)

In *Cusimano v. Schnurr,* plaintiffs alleged fraud and malpractice against the family's accountants, claiming they aided other family members in fraud and misconduct in 1991 and 2009. Plaintiffs' claims arose from three separate intra-family commercial real estate business agreements. The agreements included ownership of property in New York and Florida, some of which was leased to national and international franchises. Each agreement contained an arbitration provision with reference to the American Arbitration Association ("AAA") rules. Plaintiffs litigated the case for nearly a year, issuing three non-party subpoenas and moving to disqualify defendants' counsel. At oral arguments on the motion to disqualify, the trial court stated having a "nasty feeling" that the litigation was "frivolous." Plaintiffs moved for arbitration and added claims against other family members. The remaining family members intervened and along with defendants, moved permanently to stay arbitration. The trial court determined the Federal Arbitration Act ("FAA") was inapplicable given the intra-family nature of the business agreements. On appeal, the Appellate Division reversed, denying the stay of arbitration. On appeal from the Appellate Division, the Court of Appeals of New York considered the application of the FAA to the intra-family business agreements as well as whether plaintiffs waived the right to arbitrate their claims.

With regard to the application of the FAA, the court noted that the United States Supreme Court applies an extremely broad reach to the FAA and utilizes a "commerce in fact" interpretation as to an activity's impact on interstate commerce. The Court of Appeals rejected the argument that the FAA did not apply to the "passive" agreements in question because the agreements did not evidence transactions that affect commerce. The court was not persuaded that these agreements were "intra-family transactions" between New York residents. The court further held that commercial real estate agreements and leases do have an impact on interstate commerce and that under the facts of the case, "the FAA is applicable to these agreements." Despite the application of the FAA, the "totality of plaintiffs' conduct" established waiver of the right to arbitrate. Plaintiffs litigated the case for nearly a year before moving for arbitration and did not move for arbitration until learning the trial court considered the claims largely time barred and "frivolous." The plaintiffs' behavior was "blatant forum-shopping," which established prejudice to the defendants and intervenors. As such, plaintiffs waived the right to arbitration. The issue of timeliness was to be decided by the court not the arbitrator.

Elite Logistics Corp. v. Wan Hai Lines, 2015 Cal. App. Unpub. LEXIS 3914 (June 4, 2015)

By way of background, plaintiffs were motor carriers in the business of transporting intermodal shipping containers delivered to California seaports. Defendants were international cargo shipping companies operating in California ports. Pursuant to industry practice, shipping companies do not charge motor carriers for their use of intermodal containers for an initial period of "free days." However, if a container is returned after the expiration of this grace period the shipping companies levy a daily rental or "per diem" fee. In 2005, California enacted Bus. & PROF. CODE § 22928, which prohibited shipping companies from assessing per diem fees on weekends and holidays. This matter arose from plaintiffs' allegations that defendants had ignored the enactment § 22928 in a manner constituting unlawful business practices and breach of contract. In response to plaintiffs' allegations, defendants moved to compel arbitration pursuant to the arbitration provisions contained

in the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA") of which both plaintiffs and defendants were signatories.

The trial court granted the defendants' motion and the arbitration panel issued an award in defendants' favor based on plaintiffs' failure to bring their claims within thirty days as required by the terms of the UIIA. On appeal, plaintiff argued that the trial court erred in compelling arbitration because the underlying arbitration agreement was unconscionable. The California Court of Appeal agreed, finding the UIIA's arbitration provision unenforceable because it was contained in a contract of adhesion and it unreasonably shortened the limitations period to just 30 days making it both procedurally and substantively unconscionable. The Court of Appeal further explained that its conclusion was consistent with two recent federal court decisions, which held that the UIIA arbitration agreement was unconscionable as applied to claims such as those asserted by plaintiffs in the present case. *See Elite Logistics Corp. v. Hanjin Shipping Co.,* 589 F. App'x. 817 (9th Cir. 2014); *Unimax Express, Inc. v. Cosco Iorth America Inc.,* 2011 WL 5959881 (C.D. Cal. Nov. 28, 2011). Lastly, the court held that the Federal Arbitration Act ("FAA") as interpreted by *AT&T Mobility v. Concepcion,* 563 U.S. 333 (2011), did not preempt plaintiffs' state law unconscionability claim because nothing in the court's analysis compelled the parties to adopt arbitration procedures to which they had not agreed, a practice prohibited by the FAA. As a result, the court reversed the order granting the motions to compel arbitration and the judgment confirming the arbitration.

COMMITTEE OI CARRIAGE OF GOODS

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CARGO IEWSLETTER IO. 67

Spring 2016

ASBATAIKVOY 23 REQUIRES BREACH....

Zurich Am. Ins. Co. v. Team Tankers A.S., 811 F.3d 584, 2016 AMC 528 (2d Cir. 2016)

A shipment of acrylonitrile (ACN) was transported from Houston, Texas to Ulsan, South Korea. When the vessel arrived at Ulsan, the ACN was transferred to onshore tanks for storage. At that time, the ACN remained "on specification" for color.

Six weeks later, it was again tested and found to have yellowed beyond charterer's quality standards. Charterer also tested a sample that had been carried on the vessel (but was not exposed to the Ulsan shore tanks); it was determined this had yellowed as well. A sample taken from the tanks at Houston that had not been on the vessel had not yellowed at all.

Charterer initiated arbitration and the arbitration panel, in a 2-to-1 decision, held that charterer was not entitled to relief. The panel first held the charterer had not made out a *prima facie* case that the cargo had been damaged while aboard the vessel; second, even if it had made out a *prima facie* case, the respondent vessel owner had shown that it had exercised due diligence in transporting the cargo; and third, the charterer had, in any event, failed to prove its damages.

The panel majority also awarded owner attorneys' fees in the arbitration.

The charterer petitioned the district court to vacate the award, arguing that the panel manifestly disregarded the law in reaching its conclusions. Additionally, the charterer had learned the panel chairman had passed away as a result of a brain tumor which had been diagnosed during the arbitration. The chairman did not inform the parties of this. The charterer amended its petition, arguing that this failure to inform constituted "corruption" or "misbehavior."

The district court held that the panel had not manifestly disregarded the law and likewise held that the panel chairman had not been guilty of "corruption" or "misbehavior."

On the basis of a provision in the charter agreement (Clause 23 of the Asbatankvoy) the district court also awarded the vessel owner fees and costs incurred in connection with the district court proceeding.

On appeal, the charterer argued that the district court had erred in concluding the arbitration panel majority did not manifestly disregard the law; in finding the panel chairman had not been guilty of "corruption" or "misbehavior"; and in awarding attorneys' fees and costs to the vessel owner.

The circuit court initially noted that arbitration awards "are subject to very limited review," and, under the New York Convention (which governed the dispute), a court must confirm an arbitral award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

The circuit court agreed with the district court that the shipper had not established any ground for vacating the arbitral award. The circuit court noted the majority of the panel simply found that the charterer's evidence was insufficient to satisfy its initial burden under COGSA. While it was arguable that the charterer's evidence could have supported a contrary conclusion, such "does not show that the panel majority manifestly disregarded the law." *Team Tankers A.S.*, 811 F.3d at 589, 2016 AMC at 534.

As to "corruption" and "misbehavior," the circuit court emphasized that the charterer's effort to secure vacation of the award based on a violation of private arbitration rules (the SMA Rules applied), ran headlong into the principle that parties may not expand by contract the FAA's grounds for vacating an award:

> ...if an arbitrator's failure to comply with arbitral rules, without more, could properly be considered "corruption" or "misbehavior," the FAA's grounds for vacatur would be precisely as varied and expansive as the rules private parties might choose to adopt. We accordingly reject this argument.

Id. at 589, 2016 AMC at 534-35.

In sum, the circuit court found the charterer had not established any grounds on which to vacate the award, and accordingly found the district court did not err in denying the motion to vacate and in granting the vessel owner's motion to confirm.

In dealing with the district court's award of attorneys' fees and costs, the circuit court found the district court had erred. The circuit court initially noted the American Rule as providing "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Id.* at 590, 2016 AMC at 535. The district court had determined that this "default rule" was displaced by contract (referring to Clause 23 of the charter party) which read:

> BREACH. Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder.

The circuit court found the district court was in error as, by its terms, the provision authorized a fee award *against* a party that breached the charter agreement as part of the non-breaching party's damages. The court noted there was no finding below, nor indeed any suggestion, that the charterer breached the agreement.

The circuit court rejected the vessel owner's argument that the charterer breached the agreement by resisting entry of judgment on the award.

The court noted that in agreeing to arbitrate, the parties also consented to confirmation of the arbitral award in any court of competent jurisdiction. In doing so, they agreed that a federal court would have authority to confirm the award under the standards in the FAA. Thus, the parties effectively incorporated FAA review into their contract. The argument that the charterer breached the contract by making arguments which the FAA permitted was rejected.

Even if the contract obliged the charterer to forbear from resisting confirmation of the award, it would be, to that extent, unenforceable. If the contract were read that way, the contract would authorize a federal court to confirm an arbitration award while effectively preventing that court from insuring that the award complied with the FAA.

The vessel owner further argued that the award could be sustained under 28 U.S.C. §1927 which authorizes a court to assess "costs, expenses, and attorneys' fees" against any attorney who "so multiplies the proceedings in any case unreasonably and vexatiously." However, the court noted an award under that section would be proper only "when there is a finding of conduct constituting or akin to bad faith." *Id.* at 591, 2016 AMC at 537.

The court found a finding of bad faith or improper purpose was not warranted on its review of the record.

The circuit court reversed the district court's award of attorneys' fees and costs.

IEWSLETTER IO.66 REVISITED....

GIC Servs., LLC v. Freightplus (USA), Inc., 2016 AMC 574, 2015 WL 5682605 (E.D. La. Sept. 25, 2015)

The court considered motions to alter or amend its judgment (summarized in Cargo Newsletter No. 66, MLA Doc. 821 at 18863)

wherein it granted judgment to the plaintiff in the amount of $1,860,985 plus prejudgment interest and found that the actual carrier was obligated to indemnify the NVOCC for 30% of its liability to the plaintiff. It also found the NVOCC defendant entitled to 30% of its attorneys' fees spent in defending the claim.

On reconsideration of the matter, the court acknowledged the total sum of plaintiffs damages was miscalculated. On re-calculation, the total damages were reduced from $1,860,985 to $1,811,385 (thus reducing the cost of the deviation involved from $12,300 per mile to $11,973 per mile)

The court further clarified that the actual carrier's liability of 30% applied to both the amended amount and prejudgment interest.

The court had also awarded the NVOCC defendant 30% of its attorneys' fees spent in defense of the claim; however, it reversed this holding, finding the 30% indemnity awarded sounded in comparative fault; therefore it was inappropriate under Fifth Circuit precedent which precluded an award of attorneys' fees as between defendants in any case where defendants shared fault. It vacated the order obligating the actual carrier to pay 30% of the NVOCC's attorneys' fees.

YOU CAM' HAVE IT BOTH WAYS....

Am. Transp. Grp. LLC v. California Cartage Co., LLC, No. 13 C 05650, 2016 WL 890699 (N.D. Ill. Mar. 9, 2016)

A shipment of two loads of copper cathodes went missing from a warehouse in Alsip, Illinois, where they had been stored awaiting shipment as part of a six-load package. The cathodes were valued at $282,333.87 and were picked up - by someone - but never delivered to the intended final recipient. The plaintiff reimbursed its customer for the loss and its customer in turn assigned its legal claims to the plaintiff.

The plaintiff filed a complaint against the warehousing providers for the loss. The complaint did not mention that two

weeks earlier, the plaintiff had sued the intended carrier under the Carmack Amendment for loss or damage to the goods. That complaint did not mention the warehouse interests in any capacity. In that complaint, the plaintiff had alleged that the intended carrier had issued bills of lading for the two truckloads of cathodes and allegedly acknowledged receipt in good order and condition. When the intended carrier failed to respond to the complaint, default judgment was moved for by the plaintiff on the basis of plaintiff s affidavit attesting that the shipments were tendered to the carrier which failed to deliver the shipments.

Unaware that three months earlier the plaintiff had filed a separate complaint alleging that the warehouse interests had failed to deliver the very same loads to the intended carrier, the court entered a default judgment accordingly.

In the instant case, the warehouse interests moved to dismiss any claims against them, principally on the point of collateral estoppel. The plaintiff, having already obtained "complete relief against the intended carrier by default, nevertheless continued to prosecute the case against the warehouse interests.

The court noted that under the doctrine of judicial estoppel, "a party who prevails on one ground in a prior proceeding cannot turn around and deny that ground in a later proceeding." (Citing cases). The court noted the plaintiffs position in this case was clearly contrary to the one it took in its suit against the intended carrier (a fact plaintiff admitted). Plaintiff had affirmatively pursued the default judgment against the intended carrier, representing that the intended carrier had taken possession of the goods.

The court considered that, while pleading in the alternative may be permissible, obtaining judgments against multiple defendants for the very same loss without any joint or derivative liability was plainly inconsistent with the law. "It is a double recovery." *California Cartage Co., LLC,* 2016 WL 890699, at *4.

As the plaintiff continued to pursue both actions, it did not seek to consolidate the two cases nor to join the warehouse interests

in the original case by pleading in the alternative. It did not abandon the instant case when it obtained a judgment against the intended carrier by default: "Pursuing multiple judgments for the same loss based on inconsistent positions is not a 'change' in litigating position; it is a fraud upon the courts and is precisely the sort of impermissible tactic that judicial estoppel exists to thwart." *Id.* at *5.

The court was not receptive to plaintiffs arguments and noted that while plaintiff might be out some $283,000, such was a direct result of its deliberate litigation strategy, of "simultaneously pursuing factually inconsistent claims in two lawsuits and failing to act upon learning the 'real' version of events." *Id.* Plaintiff could not have it both ways.

Additionally, the court ordered plaintiff to show cause why the court should not vacate the default judgment entered against the intended carrier for fraud upon the court and dismiss that *case. Id.* at *6.

Finally, the court ordered plaintiffs counsel to show cause why they should not be sanctioned for the submission of an affidavit in support of the default judgment that was not based upon the affiant's personal knowledge and was otherwise without evidentiary basis. *Id.* (The court also noted it would not impose additional sanctions on the plaintiff itself, as the plaintiff would already bear a financial consequence with the dismissal of both its lawsuits.)

SUPPLIER'S AGEIT GETS STUCK WITH THE BILL....

OOCL (USA) Inc. v. Transco Shipping Corp., No. 13-CV-5418(RJS), 2015 WL 9460565, at *1 (S.D.N.Y. Dec. 23, 2015), *reconsideration denied,* No. 13-CV-5418 (RJS), 2016 WL 4481153 (S.D.N.Y. Aug. 23, 2016)

Four containers of plasterboard were provided to plaintiff s agent in China for transportation from the port of Shenzhen, China to the port of New York. The supplier, at about the same time, entered into an agency agreement with the defendant whereby the

defendant agreed to act as its agent in New York to receive the containers.

Three original sets of non-negotiable bills of lading identified the defendant as the "consignee" and "notify party" on the front and set forth terms and conditions on the back. The term "consignee" was within the definition of "merchant" and noted that all merchants would be held "jointly and severally responsible" for all freight charges due. The bills of lading also included an explanation on the front side that the terms and conditions of each bill of lading were also available at the carrier's website, in its published U.S. tariffs and in pamphlet form.

The front side of each bill of lading was emailed to the defendant and the complete original bills of lading were subsequently sent to it. Upon arrival, the cargo began to incur demurrage charges. The defendant signed and endorsed each bill of lading and presented each to the plaintiff.

In an earlier opinion, the court found defendant became a party to each bill of lading by endorsing and presenting each bill of lading.

After endorsing and presenting each bill of lading, defendant notified the third-party buyer that the cargo had arrived; however, no response was given by the buyer who apparently had gone out of business. Neither defendant nor any other entity took physical possession of the cargo and plaintiff continued to incur demurrage charges for the unclaimed cargo. *Transco Shipping Corp.,* 2015 WL 9460565, at *3.

At a point in time, the plaintiff arranged for the salvage sale of the cargo; however, prior to that sale, it had sustained some $58,490 in demurrage and detention charges. Plaintiff received some $1,017 as a result of the cargo salvage sale. *Id.*

The court found defendant had accepted the bills of lading and had become a party to each of them when it signed, endorsed and presented them to the plaintiff. It had ample notice of the terms

and conditions on the reverse side of each bill of lading, having received the bills of lading, and, when the cargo arrived at New York, signing and endorsing them directly on top of the terms and conditions. *Id.* at ***4.**

The court also noted defendant had in the past endorsed and presented at least 90 bills of lading to plaintiff that had the same terms and conditions as the bills of lading in the present case. *Id.* at *5. ("Evidence of a prior course of dealing may establish a party's awareness of and consent to intended contractual terms." (Citation omitted)).

The court also noted defendant's "publicly available tariff' contained terms and conditions that were remarkably similar to plaintiffs bills of lading and noted the front of each bill of lading gave notice that the terms and conditions were available at the carrier's website. *Id.* at ***4.**

The court found defendant was no stranger to the terms and conditions on the bills of lading and it had ample opportunity to read those terms before it signed and endorsed each bill of lading (Citation omitted). *Id.* at *5.

The court found defendant liable for the demurrage and detention fees claimed, less reduction by "at least $1,017." *Id.* at *6.

The court further dismissed a claim for Account Stated asserted by plaintiff as being duplicative. *Id.*

The court awarded prejudgment interest and also reasonable attorneys' fees and costs. The bills of lading expressly stated that all merchants shall be liable for "any court costs, expenses, and reasonable attorney's fees incurred in collecting any sums due [Plaintiff]." *Id.* at *7.

WE DID IT BEFORE AID WE CAI DO IT

In Complaint of Moran Philadelphia, 2016 AMC 1260, 2016 WL 1274139 (E.D. Pa. Mar. 31, 2016)

A barge crane was damaged in the port of Philadelphia while it was being moved by a tug boat. Its owner and operator moved for limitation of liability. The case was divided into two phases at the request of the parties with the first addressing the applicability of a schedule of rates, terms and conditions, including a limitation of liability provision that was published online by the tug's owner/operator.

[Editor's note: The case involves towage, rather than damage to cargo as such; however, the court's treatment of the applicability of the schedule of rates, terms and conditions includes a detailed consideration of the doctrine of "course of dealing."]

The movement in question was "booked" on a telephone call and no invoice was issued with respect to the movement. At the same time, the court noted that the crane's owner had previously requested tug services by calling or emailing the tug owner. Invoices were sent to the crane owner and each one was paid. Each invoice referenced the tug owner's schedule of rates, terms and conditions.

The crane owner also admitted it was able to fmd the "Schedule of Rates, Terms and Conditions" on the tug owner's web page. *In Complaint of Moran Philadelphia,* 2016 WL 1274139, at *4. In addition, the general manager of the crane owner previously worked for the tug owner and was familiar with the invoicing by the tug owner in the past. *Id.* at *13. He was familiar with the tug owner's schedule, and while he was employed by the tug owner he had seen it. He also testified it was customary for the tug owner, as well as other tug companies in the port, to use schedules of rates, terms and conditions as a baseline, which was subject to negotiation if the customer desired. He was not a "newcomer" to the port and his employer, the crane owner, was a sophisticated entity: "As such, Rhoads was aware, or should have been aware, that the Schedule

published by Moran applied when it provided tug services. Moreover, Rhoads admitted that the notice on the invoices was 'obvious' and that locating the Schedule on Moran's website was easy." *Id.* at *7 (internal citations omitted).

The court engaged in a detailed review of prior decisions dealing with the issue of "course of dealing" which it noted to be " 'a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.' *Id.* (quoting Restatement (Second) OF Contracts § 223(1) (1979))." *Id.* at *8

Basing its review on prior precedent, the court found, while the contract for tug services was made orally and the only term discussed was the rate, the schedule was incorporated into the oral contracts for towage services. *Id.* at *11. The court further noted that other courts have held that prior instances of the use of documents containing a similar term (one as few as four) was sufficient to create a course of dealing (citations omitted).

The court found it reasonable that the tug owner assumed that the crane owner read the notices on its prior invoices and silence may reasonably be interpreted as assent to such terms and conditions. The court rejected other arguments submitted by the crane owner and granted the tug owner's motion for summary judgment:

> In summary, the eleven prior invoices containing reference to the Schedule created a course of dealing. The online Schedule and limitation of liability provision were incorporated by reference into the contract between Rhoads and Moran. The Schedule and limitation of liability section were clearly identified in the invoice. The Schedule was available on Moran's website and was easily located. Rhoads is a sophisticated party and by never objecting to the application of the Schedule, it manifested its assent to the Schedule's future application.

Id. at 15.

AI AIR SHIPMEIT IS AI AIR SHIPMEIT IF THE CARRIER HAS IT....

AIG Prop. & Cas., Co. v. Fed. Express Corp., No. 15-CV-6316 (KBF), 2016 WL 305053 (S.D.N.Y. Jan. 25, 2016)

Plaintiff subrogated underwriter brought suit against defendants for the loss of three bags of luggage while its assureds were traveling in Italy.

Suit was filed in New York Supreme Court against FedEx and a hotel alleging that the assureds entrusted the defendants with luggage and goods worth in excess of $41,628.36 which were lost while in the custody and control of FedEx. (The hotel, also named in the complaint, was not served and did not appear in the action.)

The defendant FedEx removed the action to federal court on the basis that there was federal subject matter jurisdiction under the Montreal Convention because the action involved an air shipment of cargo from Milan, Italy, to New York, New York.

FedEx then moved to dismiss the complaint on the grounds that the claim was barred by Article 35 of the Montreal Convention which contains a two year limitation of actions provision. The court allowed plaintiff subrogated underwriter to amend its complaint, and FedEx again moved to dismiss.

If the Montreal Convention applied, the subrogated underwriter did not dispute that it failed to bring the claim within the two year period.

The court found the claim was clearly covered by the Montreal Convention because it arose from the loss of an international air shipment of cargo from Milan, Italy, to New York, New York. The complaint alleged that FedEx was entrusted with the luggage at the hotel in Italy and that the luggage was lost while FedEx was shipping it back to the hotel because the luggage contained perfumes that could not be shipped from Italy to New

York. It further alleged that the bags were lost, stolen or destroyed "while in the custody of one of the FedEx defendants or another FedEx member company." *AIG Prop. & Cas., Co.,* 2016 WL 305053, at *2. The plaintiff subrogated underwriter attached to the complaint a FedEx "International Air Waybill" for three pieces of cargo to be shipped from the Il Pellicano Hotel to New York. The court found such allegations show that the transaction underlying the dispute was intended to involve an international air shipment of cargo and that the luggage was lost while FedEx was in the performance of its carrier duties.

It noted that Article 18 of the Montreal Convention states that "carriage by air... comprises **the period during which the cargo is in the charge of the carrier."** *Id.* at ***4** (emphasis in original). Because it was alleged the luggage was lost while in the charge of FedEx (and there was no allegation that FedEx had ceased to serve as a carrier), the claim fell within the plain terms of paragraph 3 of Article 18. The court also added that plaintiffs state law claims were preempted as the claim must comply with the Montreal Convention's terms to remain viable. *Id.* at *6.

The court concluded the Montreal Convention governed and the claim was extinguished for failure to comply with the two year limitation of Article 35.

WHEI STRIIGS ARE ATTACHED, COIDITIOIAL SURREIDER PRESERVES MARITIME

In re World Imports Ltd., 820 F.3d 576, 2016 AMC 913 (3d Cir. 2016)

Petitioners were business entities that bought furniture wholesale and sold such to retail distributors. Respondent-claimant provided NVOCC services for approximately five years to the petitioner interests. Petitioner(s) initiated bankruptcy proceedings and the NVOCC asserted maritime liens on goods then in its possession.

A credit agreement had been entered into between the parties which provided for a general lien on property then and thereafter in the custody of the NVOCC which would also survive delivery or release of any specific property. The NVOCC had also published a tariff which provided, in pertinent part, that it had a carrier's lien which would "survive delivery, for all sums due under [the] contract or any other contract or undertaking to which the Merchant was a party...." *In re World Imports Ltd.,* 820 F.3d at 580, 2016 AMC at 917.

Within the bankruptcy proceeding, the NVOCC argued that it was a secured creditor with a possessory maritime lien on the petitioners' goods in its possession and was entitled to refuse to release such goods until and unless certain prepetition claims were satisfied. While petitioners called for an expedited hearing to compel the NVOCC to turn over all of the "Current Goods" in its possession, which would include both landed goods and goods still in transit which were to be delivered in the near future; petitioners expressed willingness to pay for freight charges on those Current Goods but not for any outstanding charges associating with prepetition goods.

After a hearing, the bankruptcy court granted petitioners injunctive relief. The NVOCC did not seek a stay of the bankruptcy court's order but appealed and requested entry of an order requiring petitioners to pay all outstanding amounts due for its services or, alternative, provide it with replacement liens on petitioners' assets in the NVOCC' s possession.

The district court ordered the parties to brief the aspect of whether the contract between the parties created a maritime lien and, subsequently entered an order affirming the order of the bankruptcy court.

Initially, petitioners argued that the appeal should be dismissed because the NVOCC failed to obtain a stay of the bankruptcy court's order. Instead, it released "Current Goods" in exchange for payment for the charges on those goods. However, the NVOCC also asked for relief that would remedy its loss for the

surrender of those goods by requesting enforceable replacement liens on other assets of petitioners. Thus, the circuit court was not precluded from granting effective relief and the appeal was not moot.

The only dispute before it was whether the NVOCC held a valid maritime lien for charges associated with the "Prepetition Goods" which had been delivered.

The circuit court set forth a review of maritime liens, noting that a lien for unpaid freight arises from the right of a ship-owner to retain possession of the goods until freight is paid and, thus, is lost upon *"unconditional* delivery to the consignee."

At the same time, there is a presumption that, absent a clear indication to the contrary, the cargo lien has not been waived upon delivery of that cargo. Courts should consider whether there was an understanding between the parties regarding retention of the lien, either before or at the time the consignee took possession of the cargo, or whether there was a stipulation in the contract of affreightment inconsistent with the exercise of a lien or whether other security was taken when the cargo was discharged.

The court noted both the bankruptcy court and the district court appear to have assumed that the NVOCC did not merely deliver the prepetition goods to petitioners, but did so unconditionally and thus in waiver of its lien on those goods.

The court concluded that the NVOCC did not waive its previous liens but rather agreed with the petitioners in advance that such liens would survive delivery and would be applied to any of petitioners' goods currently in the NVOCC' s possession. On that foundation, the circuit court held that the agreement to extend the liens was enforceable. *Id.* at 586, 2016 AMC at 926.

In considering petitioners' argument that precedent provided that an unconditional delivery discharges the lien, the court noted that precedent also recognized that "parties may depart from the norm by contractual agreement," recognizing that parties "may

frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it...." *Id.* at 587-88, 2016 AMC at 928.

> Given the express agreement that OEC would not waive its liens upon delivery, however, the parties' contractual modification is better regarded as an *ex ante* agreement that OEC would simply retain the position already afforded to it by operation of maritime law....
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> In sum, we do not think the policy concerns roused by World Imports and accepted by the Bankruptcy Court and District Court are sufficient to either outweigh the benefits to commerce of allowing two sophisticated businesses to contract for a mutually agreeable transportation and credit arrangement, or to curtail the broad contractual freedom that *Bird of Paradise* on its face allows.

Id. at 591-92, 2016 AMC at 934-35.

Based on the strong presumption that the NVOCC did not waive its maritime liens on the "Prepetition Goods," the clear documentation that the parties intended such liens to survive delivery, and the principle that a maritime lien may attach to property substituted for the original object of the lien, and the parties' general freedom to modify or extend existing liens by contract, the court concluded the agreement to apply those unwaived liens towards the "Current Goods" is enforceable. It reversed and remanded to the district court so the NVOCC could be granted relief appropriate to its "valid maritime liens." *Id.* at 592, 2016 AMC at 935-36.

BAILEE CAI LIMIT TO $100K, BUT IT CAHOT ZERO OUT....

,N, Specialty Ins. Co. v. Christie's Fine Art Storage Servs., Inc., 137 A.D.3d 563, 27 N.Y.S.3d 528 (N.Y. App. Div. 2016)

The subrogated underwriter brought an action against defendant based upon a storage agreement where plaintiffs assured entered into a one-year managed storage agreement whereby defendant was to provide secure storage for fine art works at its facility in the Red Hook section of Brooklyn. The agreement gave the assured the option either (a) to have the defendant "accept liability for physical loss of, or damage to, the Goods," or (b) to "sign a loss/damage waiver," in which the assured accepted that the defendant would not be liable for any physical loss of, or damage to, the Goods; and further provided that if the assured opted to sign the waiver, it was required to "effect and maintain adequate insurance in respect of the Goods ...."

The agreement further provided for an additional limitation that liability for loss or damage to the goods was not to exceed the lower of $100,000 or the market value.

The assured elected to sign the waiver which also required that the assured notify its insurer of the waiver and to arrange for them to waive any right of subrogation. The agreement and waiver were renewed for a second year during which "Super Storm Sandy" struck the New York metropolitan area.

Prior to Sandy's arrival, the defendant notified the assured that extra precautions were being taken and that all property on the first floor of the building (where the assured's artwork was stored) would be checked to insure all items were raised off the floor or, if necessary, removed to empty rooms on upper floors. In the past, defendant had taken measures to protect such goods during Hurricane Irene; however, this time, the goods were apparently left on the first floor and were damaged. *Christie's Fine Art Storage Servs., Inc.,* 137 A.D.3d 563, 564-65, 27 N.Y.S.3d 528, 529.

Plaintiff insurer paid for the losses and commenced the action as subrogee as the policy between plaintiff and its assured did not waive any right to subrogation. In lieu of an answer, defendant moved to dismiss on the bases (a) that the waiver contained both a waiver of subrogation clause and a limitation of liability; (b) that the agreement limited plaintiffs damages to $100,000; (c) **that** plaintiffs breach of bailment claim must fail because the agreement created a lessor/lessee relationship, not bailment; and (d) that Sandy was an Act of God which, as a matter of law, precluded liability. *Id.* at 565, 27 N.Y.S.3d at 529.

The motion court correctly found that the agreement between the insured and defendant created a bailor/bailee relationship under Article 7 of the UCC and that the agreement's limitation of liability was unenforceable because it purported to exempt defendant from all liability, in contravention of then UCC 7-204(2). (UCC 7-204[b], as amended December 17, 2014.)

Under UCC 7-204(a), a warehouse would be liable for loss or injury caused by its failure to exercise care that a reasonably careful person would exercise under similar circumstances and would be liable for damages that could have been avoided by the exercise of that care.

Section UCC 7-204(b) provides that damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss beyond which the warehouse would not be liable. However, such limitations on liability are limited by UCC 7-202(c) which provides that such terms must "not impair its...duty of care under Section 7-204. Any contrary provision is ineffective."

The court found a question existed concerning whether defendant, in failing to move the goods, was reasonable under the circumstances. *Id.* at 565, 27 N.Y.S.3d at 530. If the trier of fact found that defendant did not act reasonably, then defendant may be liable for damage to the goods. However, the court found the lower court erred in fmding that the waiver of subrogation in the agreement was enforceable and barred the action:

> Provisions purporting to exempt the bailee from liability for damage to stored goods from perils against which the bailor had secured insurance, even when caused by the bailee's negligence have been held to run afoul of the statutory scheme of UCC Article 7.

Id. at 566, 27 N.Y.S.3d at 530 discussing *Kimberly-Clark Corp. v. Lake Erie Warehouse, Div. of Lake Erie Rolling Mill, Inc.,* 49 A.D.2d 492, 375 N.Y.S.2d 918 (1975), *appeal dismissed* 39 N.Y.2d 888, 386 N.Y.S.2d 393 (1976).

The court noted that, while UCC 7-204 permits a warehouse to limit the *amount* of liability, it cannot completely exempt itself from liability as imposed by UCC Article 7.

**COMMITTEE CII CRUISE LIIES
AID PASSEIGER SHIPS**

Chair: Carol L Finklehoff

IEWSLETTER

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IAVIGATIIG THE UIITED STATES LIMITATIOI OF LIABILITY ACT

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EL FARO was a United States-flagged, cargo ship. On September 30, 2015 at 2:00 a.m., EL FARO left Jacksonville, Florida for San Juan, Puerto Rico, carrying a cargo of 391 shipping containers, about 294 trailers and cars, and a crew of 33 people — 28 Americans and 5 Poles.'

At the time of the departure, Hurricane Joaquin was still a tropical storm, but meteorologists at the National Hurricane Center forecast that it would likely become a hurricane by the morning of October 1, on a southwest trajectory toward the Bahamas.[2] Joaquin became a hurricane by 8:00 a.m. on September 30, then rapidly intensified.[3] The storm reached Category 3 intensity by 11:00 p.m., packing maximum sustained winds of 115 mph.[4] EL FARO'S charted course took it within 175 nautical miles of the hurricane. Ten hours after departing Jacksonville, EL FARO was

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[1] *U.S.-Based Cargo Ship With Crew of 33 Sank in Storm.* The New York Times, October 10, 2015. http://www.nytimes.com/ 2015/10/06/us/el-faro-missing-ship-hurricane-joaquin html

[2] Daniel P. Brown (September 30, 2015). Tropical Storm Joaquin Discussion Number 9 (Report). Miami, Florida: National Hurricane Center. Retrieved October 7, 2015.

[3] Jack L. Beven (September 30, 2015). Hurricane Joaquin Public Advisory Number 10-A (Advisory). Miami, Florida: National Hurricane Center. Retrieved October 7, 2015.

[4] Daniel P. Brown and Stacy R. Stewart (September 30, 2015). Hurricane Joaquin Public Advisory Number 13 (Advisory). Miami, Florida: National Hurricane Center. Retrieved October 10, 2015.

steaming at full speed and deviating from its charted course, heading directly into the storm.[5] At around 7:30 a.m. on October 1, less than 30 hours after the ship sailed from Jacksonville, the United States Coast Guard received a satellite notification that the vessel had lost propulsion, taken on water, and had a 15-degree list.[6] The loss of propulsion doomed the ship as it was engulfed by high seas whipped up by Joaquin.? The EL FARO and its 33 crewmembers disappeared on October 1. It was the worst disaster involving a U.S.-flagged vessel since 1983.[8]

On October 30, 2015, Sea Star Line, LLC, d/b/a TOTE Maritime Puerto Rico, owner ***pro hac vice*** of the S.S. EL FARO, filed a verified complaint seeking exoneration from or limitation of liability, under the United States Limitation of Liability Act, 46 U.S.C. §§30505-30511 ("Limitation Act"). In the verified complaint, TOTE declared that the value of EL FARO is zero. This proceeding, referred to as a limitation action, seeks to limit a shipowner's liability to the value of the vessel after a maritime casualty. In the case of EL FARO the limitation action seeks to limit TOTE's liability to zero. To understand whether TOTE will ultimately prevail in the limitation action, requires a close analysis of the origins, applications and exceptions to the Limitation Act.

Admiralty and maritime law includes a host of special rights, duties, rules and procedures. See, ***e.g.,*** 46 U.S.C. App. § 721 ***et*** seq. (wrecks and salvage); § 741 ***et seq.*** (suits in admiralty by or against vessels or cargoes of the United States); 46 U.S.C. § 10101 ***et seq.***(merchant seamen protection and relief). Among these provisions is the Limitation Act, 46 U.S.C. §§ 30505-30511. The Limitation Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or

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[5] *Doomed cargo ship reportedly left normal course, sailed into the track of Hurricane Joaquin.* Fox News (Fox Entertainment Group). Associated Press. October 9, 2015.

[6] Update 2: Coast Guard Searching for Container Ship Caught in Hurricane Joaquin. Miami, Florida: United States Coast Guard. October 3, 2015.

El Faro reported 'hull breach' before sinking in hurricane. Reuters, October 20, 2015. http://www.reuters.com/ article/us-ship-elfaro-idUSKCNOSE2UM20151020

8 id.

knowledge, to the value of the vessel or the owner's interest in the vessel. The central provision of the Act provides at §30505(a)-(b):

> **(a) In general.--Except** as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any **one owner shall not exceed that owner's proportionate interest in the vessel and pending** freight.
>
> **(b) Claims subject to limitation.--Unless otherwise** excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Congress passed the Limitation Act in 1851 "to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Iorwich &I. Transp. Co. v. Wright,* 13 Wall. 104, 121 (1871). **See also** *British Transport Comm'n v. United States,* 354 U.S. 129, 133-135, (1957); *Just v. Chambers,* 312 U.S. 383, 385 (1941). The Act also had the purpose of "putting American shipping upon an equality with that of other maritime nations" that had their own limitation acts. *The Main v. Williams,* 152 U.S. 122, 128 (1894). See also *Iorwich Co., supra,* at 116-119 (discussing history of limitation acts in England, France, and the States that led to the passage of the Limitation Act).

An example of the use of the Limitation Act is the sinking of the RMS TITANIC in 1912. Upon her sinking the owners rushed into the federal court in New York to file a limitation of liability proceeding. After the TITANIC sank, the only portions of the ship

remaining were the 14 lifeboats, which had a collective value of about $3,000. This was added to the "pending freight"—which means the ship's earnings from the trip from both passenger fares and freight charges[9]—to reach a total liability of about $91,000. The cost of a first-class, parlor suite ticket was over $4,350. The owners of the TITANIC were successful in showing that the sinking occurred without their privity and knowledge, and therefore, the families of the deceased passengers, as well as the surviving passengers who lost their personal belongings, were entitled only to split the $91,000. Another example was when Transocean filed in the U.S. District Court for the Southern District of Texas in 2010 to limit its liability to just its interest in the DEEPWATER HORIZON which it valued at $26,764,083. This was in the wake of billions of dollars in liabilities resulting from the DEEPWATER HORIZON oil spill that followed the sinking. 10

The Limitation Act is much criticized. The Supreme Court has observed that it is not a "model of clarity" *Lewis,* 531 U.S. at 447 (quoting to T. Schonbaum, Admiralty and Maritime Law, 299 (4th Ed. 2004)("This 1851 Act, badly drafted even by the standards of the time, continues in effect today"). Having created a right to seek limited liability, Congress did not provide procedures for determining the entitlement. It wasn't until 1872 (20 years after its passing) that the Supreme Court designed procedures for determining the entitlement to limitation. The Eleventh Circuit has described it as "hopelessly anachronistic and long ago due for a general overhaul." *See Lewis Charters Inc. v. Huckins Yacht Corp.,* 871 F. 2d 1045, 1054 (1 1 th Cir. 1989); see also, *In Re: Esta Later Charters, Inc.,* 875 F. 2d 234 (9th Cir. 1989), (the Limitation Act is "a vestige of time gone by").

On several occasions the Eleventh Circuit has criticized the Limitation Act as particularly illogical when applied to pleasure vessels, and has observed that insurance companies are the true

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[9] Frederick B. Goldsmith (November 2011). *The Vessel Owners' Limitation of Liability Act: An Anachronism that Persists, For Tow."* Legal. *Marine Jews.* p. 44. Retrieved 2014-06-12.

[10] Transocean, Ltd. Press Release, May 13, 2010. http://phx.corporate-itnet/phoenix.zhtml?c=113031&p=irol-newsArticle&ID=1426526&highlight=

beneficiaries of the Limitation Act. *See Keys Jet, In Re: Keys Jet Skis, Inc., v. United States,* 893 F. 2d 1225, 1228 (11th Cir. 1990), *citing Lewis Charters Inc. v. Huckins Yacht Corp.,* 871 F. 2d 1045, 1054 (11th Cir. 1989) ("owners of pleasure vessels may limit their liability under the Limitation Act [although] ... there is little reason for such a rule.").

The commentators agree that the statute is outdated and obsolete. *See Esta Later Charters, Inc., v. Ignacio,* 875 F. 2d 234 (9th Cir. 1989):

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in shipping industry which induced the 1851 Congress to pass the Act no longer prevail ... Commentators agree: "[T]he Limitation Act, passed in an era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity Insurance) were available, shows increasing signs of economic obsolescence.'

Procedural Requirements

Rule F. The procedures for a limitation action are found in Supplemental Admiralty and Maritime Claims Rule F. Rule F sets forth the process for filing a complaint seeking exoneration from, or limitation of, liability. The district court secures the value of the vessel or owner's interest, marshals claims, and enjoins the prosecution of other actions with respect to the claims In these proceedings, the court, sitting without a jury, adjudicates the claims. The court determines whether the vessel owner is liable and whether the owner may limit liability. The court then determines the validity of the claims, and if liability is limited, distributes the limited fund among the claimants. *Lewis v. Lewis & Clark Marine, Inc.,* 531 U.S. 438 (2001).

A single forum is provided for determining• (1) whether the vessel and its owner are liable at all; (2) whether the owner may in

fact limit liability to the value of the vessel and pending freight; (3) the amount of just claims; and (4) how the fund should be distributed to the claimants. Limitation extends both *in personam* to the shipowner as well as *in rem."*

The complaint (formerly petition) for exoneration or for limitation of liability must be filed in the federal district court in admiralty jurisdiction.[12] The shipowner may plead for exoneration or limitation in the alternative in a single complaint.[13] Venue is proper in any district where the vessel has been attached or arrested or, if there has been no attachment or arrest, in the district where the owner has been sued.[14] If suit has not yet been commenced against the owner, the limitation complaint may be filed in any district where the vessel is physically present, or, if the vessel is not within any district (because it is lost or in a foreign country), the complaint may be filed in any district Limitation may be invoked either as a defense to an action seeking damages or as an independent complaint in admiralty.[15]

Six-Month Statute of Limitation to File Claims. The complaint must be filed within six months after the owner has received written notice of a claim.[16] The six months' notice requirement is strictly construed, and pleading limitation as a defense in an answer to a claimant's complaint will not extend or toll the time limit If a shipowner files in the wrong venue, and after

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T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, §15-5 (5th ed. 2015), citing *Hartford Accident & Indemnity Co. v. Southern Pacific Co.,* 273 U.S. 207 (1927).

[12] The only court of competent jurisdiction is the district court in admiralty. The state courts accordingly do not have concurrent jurisdiction under the saving to suitors clause, 28 U.S.C. § 1333. This is based upon the fact that the remedy of limitation is not one at common law. T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, §15-5 (5th ed. 2015), citing *jorwich & Jew York Transp. Co. v. Wright,* 80 U.S. (13 Wall.) 104 (1871).

[13] *In re Tetra Applied Technologies LP,* 362 F.3d 338 (5th Cir. 2004).

T. SCHOENBAUM, supra.

[16] T. SCHOENBAUM, supra.

[16] T. SCHOENBAUM, supra. 46 U.S.C. § 30511. *In re Oceanic Fleet, Inc.,* 807 F.Supp. 1261 (E.D. La. 1992). *See also* Rule F(1). Notice of a claim is usually in the form of service of a summons and a complaint, but it may also be asserted by letter. For a discussion of the tests employed by courts to determine whether a writing contains all the information needed to constitute a "written notice of claim" under the Limitation of Liability Act, see *P.G. Charter Boats, Inc. v. Soles,* 437 F.3d 1140, 2006 AMC410 (11th Cir. 2006).

the action is dismissed, files in the correct venue out of time, the court may reject equitable tolling if it finds the shipowner's oversight was not in good faith.

Limitation Fund. A limitation action cannot be maintained unless the shipowner deposits with the court money, or as is usually done, a bond equal to the value of the vessel. *See* Fed. R. Civ. P. Supp. F(2). Posting of this security creates a limitation fund from which successful claimants in the action can be paid pro rata. Fed. R. Civ. P. Supp. F(1)(b).

If the limitation fund is insufficient to pay injury or death claims (e.g. the shipowner posts a bond of $1,000, when claims amount to $20 million), under Fed. R. Civ. P. Supp. Rule F(7) a claimant can file a motion to compel the shipowner to increase the value of the limitation fund. Pursuant to Supplemental Admiralty Rule F(7), "any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and ... the court may similarly order that the deposit or security be increased or reduced."

The claimant can do this in two ways. The claimant can petition the court to require the shipowner to increase the limitation fund to include the value of all the vessels in its flotilla. Under this mechanism, known as the 'flotilla doctrine' and developed by Judge Learned Hand in *Standard Dredging v. Co. v. Kristiansen,* 67 F. 2d 548 (2d Cir. 1933), if the shipowner operates more than one vessel, the court can order the shipowner to post a bond for the value of all of the vessels in its fleet. *See Foret v. Transocean Offshore (USA), Inc.,* 2011 U.S. Dist. LEXIS 96679 (E.D. La. 2011):

> Procedurally, courts have permitted [claimants] to invoke the flotilla doctrine in a variety of ways. Where a limitation fund already exists, Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims permits Plaintiffs to file a Motion to Increase the Limitation Fund, when the amount

> tendered is less than the value of the [combined group of] vessel(s).

Courts determine whether vessels together constitute a flotilla by applying the "single venture test." *Id.* For a group of vessels to be considered a flotilla, the single venture test sets forth three requirements: they must (1) be owned by the same person, (2) be engaged in a common enterprise, and (3) be under single command. *Id.; See also Complaint of Tom Quin Co.,* Inc., 806 F. Supp. 945 (M.D. Fla. 1993), citing *Patton—Tully Transportation Co. v. Ratliff,* 715 F. 2d 219, 222 (5th Cir. 1983)("the limitation fund liability of a defendant ship-owner may be increased to include his interest in the value of all vessels engaged in a common enterprise or venture with the vessel aboard which the loss of or injury was sustained").

Personal injury claimants can also challenge the limitation fund by filing a motion to increase the fund under 46 U.S.C. § 30506(b). To increase the fund under § 30506(b), two requirements must be met: (1) the amount of the fund must be insufficient to pay all claims in full; and (2) the portion of the fund available to pay personal injury and death claims must be less than $420 times the tonnage of the subject vessel. 46 U.S.C. § 30506(b); *Complaint of Caribbean Sea Transport, Ltd.,* 748 F.2d 622 (11th Cir. 1984); *In Re Pan Oceanic Tankers Corp.,* 332 F.Supp. 313 (S.D.N.Y. 1971); *In Re Alva Steamship co.,* 262 F.Supp. 328 (S.D.N.Y. 1966).

Privity or Knowledge

The Limitation Act provides that the owner may limit liability only if it shows that the fault causing the loss occurred without its "privity or knowledge." See 46 U.S.C. §183(a); *Moeller v. Mulvey,* 959 F. Supp. 1102 (D. Minn. 1996); *Carr v. PMS Fishing Corp.,* 191 F. 3d 1 (1st Cir. 1999); *Keller v. Jennette,* 940 F. Supp. 35 (D. Mass. 1996). The privity and knowledge issue is the favored method claimants use **to** deny shipowners the benefits of the Limitation Act. *See* T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, 820 (4th Ed. 2004).

Privity and knowledge under the statute "have been construed to mean that a shipowner knew or should have known that a certain condition existed." *Potomac Transport, Inc., v. Ogden Marine, Inc.,* 909 F. 2d 42, 46 (2d Cir. 1990). The determination of whether a shipowner may limit liability involves a two-step analysis: (1) a determination of what acts of negligence or unseaworthiness caused the casualty and (2) whether the shipowner had knowledge or privity of these acts. The burden of proving negligence or unseaworthiness is on the claimant; then the burden shifts to the shipowner to prove lack of privity or knowledge. *Hercules Carriers, Inc. v. Claimant State of Florida, Dep. of Transp.,* 768 F. 2d 1558 (11th Cir. 1985):

> Under this statute, Hercules is liable beyond the value of the ship if it had privity and knowledge before the start of the voyage of acts of negligence or conditions of unseaworthiness that caused the accident. Moreover, Hercules is not entitled to limitation if the ship was unseaworthy due to an incompetent crew or faulty equipment. Therefore, a determination of whether a shipowner is entitled to limit his liability involves a two-step analysis. As stated in *Farrell Lines, Inc. v. Jones,* 530 F.2d 7 (5th Cir. 1976): "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." 530 F.2d at 10. Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

Lack of actual knowledge by the shipowner is not sufficient to invoke the protections of the Limitation Act. As the Eleventh Circuit explained in *Hercules Carriers,* the shipowner's "burden is not met by simply proving a lack of actual knowledge, for privity and knowledge is established where the means of obtaining

knowledge exist, or where reasonable inspection would have led to the requisite knowledge." *Hercules Carriers, Inc.,* 768 F. 2d 1558, 1564 (11th Cir. 1985). "Thus, knowledge is not only what the shipowner knows but what he is charged with discovering in order to appraise himself of conditions likely to produce or contribute to a loss." *Id.*

IITERIATIOIAL IISOLVEICY AID THE ARREST AID JUDICIAL SALE OF SHIPS II GERMAIY AID OTHER EUROPEAI UII0I MEMBER STATES

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In recent years the maritime industry has become unpleasantly familiar with cross-border insolvencies, the OW Bunker global collapse amongst them. Whereas under normal circumstances, the power to arrest a vessel is an efficient means for a creditor to secure its interests against a debtor, such arrest may conflict with the rights and duties of the insolvency administrator to preserve all assets within the insolvent enterprise for the protection of the body of creditors. The same conflict of interests arises where a creditor wishes to realize this by pursuing a judicial sale.

This article aims to show how a creditor (foreign or domestic) may obtain an order for the arrest of a vessel belonging to an insolvent shipowner and/or pursue the judicial sale of such vessel:

- in Germany in **the** course of German insolvency proceedings,

- in another European Union ("EU") member state in the course of German insolvency proceedings and vice versa in Germany in the course of insolvency proceedings in another EU member state, or

- in Germany in the course of insolvency proceedings initiated in a non-EU member state (e.g. United States of America)

Insolvency Stages

German law distinguishes between two phases of the insolvency proceedings — the preliminary and the regular insolvency proceedings. The former essentially serves as a period of time to determine whether the company is de facto insolvent and if so, whether there are sufficient funds to cover the costs of the proceedings. The Insolvency Court generally appoints a preliminary insolvency administrator to evaluate the fmancial status of the company and supervise, or more rarely, take over the management. When the Insolvency Court thereafter decides to open regular proceedings, the preliminary insolvency administrator will generally be appointed insolvency administrator.

Equal Treatment of Foreign and Domestic Creditors

German law makes no distinction between foreign and domestic creditors so the possibility to pursue an arrest or judicial sale in the course of German insolvency proceedings is governed by the same rules for all creditors.

Ship-Arrest

Regular Insolvency Stage

Once regular insolvency proceedings are opened sec. 89 of the German Insolvency Act prohibits execution into the movable and immovable insolvent estate by individual creditors. This prohibition includes an arrest as a measure supporting the execution of claims. Arrest orders already granted over the insolvency estate will be lifted.

Preliminary Insolvency Stage

During the preliminary insolvency stage, the position is less clear. In theory, a creditor is free to apply for an arrest order. However, under sec. 21 of the Insolvency Act the Insolvency Court may, in its own discretion, put a stop to a creditor's execution measures — including an arrest — by issuing a protective prohibition

order — but only in relation to *movables,* not *immovable property. It* is disputed if, under German law vessels shall be considered *immovable* property for the purpose of this provision and thus, excluded from its scope of application. As will be shown below the issue is of relevance if the vessel of an insolvent owner happens to be abroad in foreign waters.

The prevailing opinion among legal academics is that they are to be considered immoveable because 1) as stated above arrest is considered a measure of execution in German law, and 2) according to sec. 864 the German Code of Civil Procedure *registered ships* are subject to the rules applicable to immovable property for the purpose of measures of execution.

This line was followed by the Hamburg local court in a recent decision in 2015[17]. The court held that any registered ship is subject to the rules of immovable property — regardless of whether the property in question is located abroad. It thereby rejected a much criticized decision by the Bremen regional court made in 2011[18]. In that case involving a vessel located in Australia and belonging to an insolvent owner the Bremen court did indeed concede that, generally, registered vessels are to be treated as immovable property for the purpose of measures of execution (in this case by the financing bank seeking to arrest the ship and to enforce the mortgage). Nevertheless and based on the interpretation of sec. 21 in the light of the preparatory works, the court concluded that registered vessels located *outside of Germany* are to be treated as *movable property*. The court reasoned that the legislator's intention had been to relieve the Insolvency Court from the additional burden of deciding on measures of execution into *immovables* by leaving this area to the competent Enforcement Court (the court where the immovable is located) — which the Bremen court surmised correctly. However, the following assumption by the Bremen court that the legislator in doing so *had overlooked* the fact that when the relevant property is located outside the German jurisdiction there would be no German competent court to prevent measures of execution is not

"AG Hamburg, Decision from 3.3.2015 — 67a IN 400/14.
[18] LG Bremen, Decision from 14.08.2011 — 2 T 435/11.

well founded. Nevertheless, the court decided to close this perceived "lacuna" in sec. 21 by reasoning that the legislator's overriding objective was the protection of the community of creditors which would be compromised if the arrest by an individual creditor against property abroad was excluded from the insolvency court's jurisdiction under sec. 21.

So far there are these two conflicting judgments from the Bremen and the Hamburg court on the issue of ships being a moveable or immoveable object in the context of the preliminary insolvency stage so it seems that a creditor's right to proceed with an arrest depends on whether other courts follow either Hamburg or Bremen.

It is suggested, however, that the decision by the Bremen district court is based on the erroneous premise of a "lacuna" and that questions regarding measures of execution into registered vessels, whether located in German waters or not, are subject to the rules of immovable property. As emphasized by the Hamburg local court, it is obvious that vessels as well as real estate can and often will be located abroad and that the decision by the legislator to exclude property not located in Germany was a conscious one. As a consequence, German law offers no means to prevent the arrest of a registered vessel outside of Germany in the course of the preliminary insolvency proceedings. This may be a blessing or a curse, depending on the interest involved. Also, this does not mean that the insolvency administrator may not be able to hinder an arrest in the foreign jurisdiction where the vessel is located under the applicable foreign regime.

Security Issued

Even a security issued by the insolvent debtor prior to the preliminary proceedings may be revoked under certain conditions. Among other things, since 2014 the Insolvency Act contains a provision *automatically* revoking a security issued within one month prior to the application to open insolvency proceedings. This presumably includes also an arrest lien registered against the vessel within the one month period. The rule, however, does not affect the

validity of a security issued by a third party such as a bank or P&I Club letter of Undertaking. Neither does the rule apply if the creditor has already enforced a security issued by the insolvent debtor by way of judicial sale.

Enforcement

As far as immovable property is concerned, the German Insolvency Act contains an exception to the rule that acts of enforcement against the debtor's property are prohibited once the insolvency proceedings are instituted. As stated above under "Ship-Arrest", for the purpose of measures of execution, registered vessels are subject to the rules applicable to immovable property. In effect, a creditor with an enforceable claim may apply for a judicial sale despite ongoing insolvency proceedings. The application must be made to the court where the *property is located* – the enforcement court — (i.e. not the Insolvency Court). Also foreign vessels that would have had to be registered in Germany, if they would have been German vessels (e.g. commercial ships of a LOA of more than 15 meters), count as registered vessels.

The judicial sale can be stayed by the enforcement court upon application of the insolvency practitioner. Once the regular insolvency proceedings have been opened, the court handling the judicial sale will grant a stay in the following situations: (i) where the first creditor's meeting has not yet taken place, (ii) where the immovable property is necessary for the continuation of the enterprise (also if the continuation is only preliminary and liquidation the ultimate aim), (iii) where the execution would put an already issued insolvency plan at risk, or (iv) where the judicial sale would not generate a reasonable compensation for the insolvency estate. Exception is made for the case however, that, based on the creditor's financial situation, it cannot be reasonably required that the sale is postponed. Already during the preliminary insolvency proceedings, the administrator can apply for a stay although at this stage, a stay will only be granted if the court is convinced that it is necessary to avoid any prejudice to the fmancial status of the estate.

Recognition of Insolvency Proceedings and Judgments Between EU Member States

Germany, as most EU member states, has not adopted the UNCITRAL Model Law on Cross Border Insolvencies. Instead the Regulation EC 1346/2000 on Insolvency Proceedings settles questions of jurisdiction, applicable law recognition and enforcement in relation to other EU member states (with exception for Denmark). The Regulation will be replaced in June 2017 by Regulation (EU) 2015/848, which, however, is essentially based on similar principles as its predecessor.

Under both regulations the law applicable to the main insolvency proceedings is that of the member state where the proceedings have been initiated. Other member states are obliged to recognize any judgment by the initiating state by which the insolvency proceedings are opened and such judgment shall, with no further formalities, produce the same effect in all other member states as in the "opening state". Thus, for example, once regular insolvency proceedings have been opened in Germany, no other EU member state is allowed to arrest property belonging to the insolvent estate because of the above mentioned prohibition in German law for creditors to execute into the insolvency estate after this point of time. The obligation to recognize judgments (the term being used here in a broad sense including orders with a similar effect) also extends to judgments concerning the course and closure of the proceedings and as judgments relating to preservation measures taken after the application to institute insolvency proceedings. Consequently, also a decision by a German court of the kind described above prohibiting measures of execution into the debtor's assets during the preliminary insolvency proceedings must be recognized by all other EU member states.

The picture becomes complicated, however, by a provision in the regulation(s) excluding rights *in rem* from the recognition when the property in which the right is vested is situated *within the territory of another member state* than the "opening state". With regard to ships the exception means that the fact that main insolvency proceedings were opened against a shipowner in member

state "A" does not prevent member state "B" to issue an arrest order upon the application of a creditor with a right *in rem* in the vessel, *regardless* whether the insolvency law of member state "A" prohibits individual creditors to execute into the insolvency estate. The definition of what constitutes a right *in rem* in a vessel, however, is not uniform throughout the member states and the definition provided by the Regulations (in extract: "The rights referred to in paragraph 1 [rights in rem] shall in particular mean: [...] the rights to dispose of assets [...] by virtue of a lien or a mortgage [....]") is neither clear nor exhaustive. Indeed, the question has been answered differently across the member states. The following may serve as examples:

In a French decision[19] a maritime claim for bunker supplies was not considered a right *in rem.* A mortgage on the other hand, was, and the creditor bank obtained an arrest order in France despite ongoing insolvency proceedings against the owner in Italy. Both Belgium[20] and Malta[21], unlike France, have interpreted *"rights in rem"* to also include maritime claims. In an Italian decision[22] the court took a completely different, quite interesting approach: As the regulation provides that *'property and rights of ownership of entitlement to which must be entered in a public register"* shall be considered situated in the member state in which the *register* is kept, so the abovementioned exception in the regulation concerning rights *in rem* did not apply in the first place because under the regulation the location jurisdiction of a registered vessel and the state of where the register is kept are always identical.

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[19] *Puglia di lavigazione Sp.a. v. Cambiaso & Risso Marine Sp.a., H Diritto Marittimo* 2013, 198 and *Droit Maritime Francais* 2012, 131.

[20] MS *Hannes C,* Antwerp Court of Appeal, issued on 4 March 2009.

[21] Av *Louis Cassar Pullicino vs MV Beluga Sydney,* Sworn Application No. 1136/2011, decided by the First Hall, civil court on 30 December 2011.

[22] *Svitzer Salvage BV v. Celia Schiffahrtsgesellschaft MIH & Co Reederei KG, H Diritto Marittimo* 2013, 69. The La Spezia court upheld the precedent set by the Venice court in *AS Dan-Bunkering Ltd v Delphin Kreuzfahrt GmbH, Tribunale Di Venezia* 21-X11-2010 [2011] *1lDiritto Marittimo 276-286.*

Recognition of Insolvency Proceedings and Judgments of Ion-EU Member States

In relation to non-EU member states, German law recognizes *ipso jure* the act of instituting and concluding foreign insolvency proceedings as well as preservation measures ordered prior to the opening of such proceedings subject to two conditions: (1) the recognition must not be manifestly incompatible with fundamental principles of German law, and (2) the courts of the state of the opening of proceedings must have *jurisdiction in accordance with the principles for founding jurisdiction under German law:* the so-called "mirror-image" doctrine. The decisive test in other words is whether the foreign court would have had jurisdiction to institute insolvency proceedings, if, hypothetically, the German Insolvency Statute applied. Exclusive jurisdiction pursuant to the German Insolvency Statute is established where the center of the debtor's business activity is situated. Where the "mirror-image" test fails the ongoing foreign proceedings will not prevent a creditor from arresting a ship or selling it through a judicial sale.

If on the basis of the "mirror-image" test the foreign decision to institute insolvency proceedings is recognized the main rule applies that the effects of an insolvency are governed by the laws of the jurisdiction where the insolvency proceedings were opened. No rule without exemption, however: when it comes to ***ships*** as part of the debtor's insolvent estate the insolvency proceedings are governed by laws of the state where the ship's register is kept *(lex libri siti).* Thus, if for example the relevant ships are registered in Germany the German Insolvency Act applies and the question whether the foreign creditor can actually jump the queue and arrest and sell the vessel is subject to that Act and its interpretation by German courts as referred to above.

information. Readers should take specific advice from a qualified professional when dealing with specific situations.

UPDATE OI THE LAW

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PASSEIGER CLAIMS

Admiralty Jurisdiction

Lipkin v, Jorwegian Cruise Line Ltd., 93 F. Supp. 3d 1311, (S.D. Fla. 2015)

Admiralty jurisdiction applies where passenger was injured in walkway in terminal because the disembarking process is part of unloading passengers, which satisfies the location test. The nexus test is satisfied because the safe unloading of passengers from a cruise ship has obvious potential to disrupt maritime commerce. The court found that the cruise line has a duty to warn of dangers beyond the point of disembarkation where passengers were invited or reasonably expected to visit.

Jewell v. Carnival Cruise Lines, 180 So. 3d 178 (Fla. 3d DCA 2015)

The case was governed by general maritime law where a passenger sued for injuries as a result of a fall in the terminal after disembarking the vessel at the conclusion of her cruise. The two prong admiralty test was satisfied. First, there was a causal connection as the plaintiff alleged the cruise line failed to provide her with a safe walkway. The location test is satisfied because a vessel being unloaded has an impact, which is felt on shore at the time and place not remote from the wrongful act.

COSTA COICORDIA

A Beid-Saba v. Carnival Corp., 184 So.3d 593, 2016 A.M.C. 46041 (Fla. 3d DCA 2016)

The Third District Court of Appeal upheld the dismissal of a lawsuit brought by fifty-seven (57) plaintiffs, including five (5) US citizens based *upon forum non conveniens.* The court ruled that Italy was an adequate forum and the plaintiffs could pursue their claim there without any undue hardship. The public and private interests favored Italy and Carnival would suffer material injustice if the case were litigated in Florida. The court found that a delay of many years was not reason to try the case in Florida when nearly all the evidence was in Italy.

Discovery

Parker v. MSC Crociere S.A., No. 14-62475-CIV-UNGARO/OTAZO-REYES (S.D. Fla. May 18, 2015)

Plaintiffs motion to compel a better response to her interrogatory, seeking details of prior slip and falls on a particular tile floor for the preceding three years, was granted on grounds that the request was relevant or reasonably calculated to lead to the discovery of admissible evidence.

Terman v. ICL (Bahamas) Ltd., No. 14-24727-CV-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 84963, 2015 WL 3892508 (S.D. Fla. June 16, 2015)

A surveillance video is not protected by the work product privilege and is discoverable. Defendant was required to produce CCTV footage of the plaintiffs incident prior to his deposition.

Brown v, ICL (Bahamas) Ltd., No.: 15-cv-21732-JAL, 2015 U.S. Dist. LEXIS 148114 (S.D. Fla. Oct. 30, 2015)

A surveillance video is not protected by the work product privilege and is discoverable. However, under the unique circumstances of the case, the plaintiff giving three different

versions of the incident (her shipboard statement, the complaint, and the interrogatory response), production was ordered after the deposition of the plaintiff.

Forum Selection

Sellers v. Carnival Cruise Line, 49 Misc.3d 1205(A) (N.Y. Civ. Ct. 2015).

The New York state court held that it was not necessary to enforce Carnival's forum selection clause in a small claims matter because it was unreasonable to expect the plaintiff to bring that claim to Florida. Nonetheless, the plaintiffs case was dismissed as the court had no jurisdiction over Carnival's business activities in New York.

Loss of Consortium

Williams v. Carnival Cruise Lines, 2016 U.S. Dist. LEXIS 7144, 2016 WL 245312 (S.D. Fla. Jan. 21, 2016)

Despite the plaintiffs' argument that the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend, 557* U.S. 404 (2009), lifts the prohibition on loss of consortium claims in non-fatal personal injury maritime cases, the district court held that binding Eleventh Circuit precedent bars loss of consortium claims under maritime law. Even though the Eleventh Circuit has not addressed loss of consortium claims for maritime personal injury since *Townsend,* the overwhelming majority of courts within the Eleventh Circuit (and throughout the country) have continued to bar such loss of consortium claims.

Medical Malpractice

Casorio v. Princess Cruise Lines, Ltd., 2015 WL 4594169, 2015 U.S. Dist. LEXIS 100576 (C.D. Cal. July 30, 2015)

In a decision limiting the holding in *Franza v. Royal Caribbean, Ltd.* 772 F. 3d 1225 (11th Cir. 2014), the courts ruled **that** a carrier does not have a legal obligation to provide

transportation to a particular type of hospital to obtain specialized care.

Rojas v. Carnival Corp., 2015 U.S. Dist. LEXIS 160201 (S.D. Fla. Nov. 30, 2015)

While the court recognized a duty timely to secure medical treatment, summary judgment was granted where the plaintiff could not show that the delay caused by the cruise line caused any injury or exacerbation of injury.

Cordani v. JCL (Bah.) Ltd., 2015 WL 7758512,2015 U.S. Dist. LEXIS 160893 (S.D. Fla. Dec. 1, 2015)

The plaintiff properly pled a liability claim for negligence of the ship's medical staff based upon joint venture. The complaint alleged that the cruise ship operator and medical defendants intended to create a joint venture and joined forces to operate the medical facility. As to joint control and interest the complaint alleged that the cruise line had the interest in the money it devoted to setting up the medical facility and the medical defendant had the interest in the time and labor expended in operating the facility. Profits and losses were shared as the cruise line collected the charges and then shared them with the medical defendants. Also, a contractual arrangement laid out the profit-sharing.

Iegligent Infliction of Emotional Distress

Crusan v. Carnival Corporation, No. 13-cv-20592-KMW (S.D. Fla. Feb. 24, 2015)

Applying the zone of danger test to limit recovery to those who sustain physical impact or who are placed in immediate risk of danger.

Pucci v. Carnival Cruise Line, 160 F. Supp. 3d 1329 (S.D. Fla. 2016)

General maritime law does not allow the plaintiffs in a wrongful death action brought on behalf of a nonseafarer to recover

for negligent inflection of emotional distress. However, the plaintiff could seek emotional distress remedies under Virgin Islands' wrongful death statute as it supplements DOHSA applying the principles of *Calhoun v. Yamaha Motor Corp., U.S.A.,* 40 F.3d 622, 642 1995 AMC 1 (3d Cir. 1994).

Tinker v. Yankee Freedom III, LLC, No. 15-10080-civ-JEM, (S.D. Fla. Mar. 23, 2016)

The plaintiff was found to be in sensory perception (sight, sound, touch) when she witnessed the drowning death of her husband, satisfying the zone of danger test.

Martins v. Royal Caribbean Cruises, Ltd., 2016 AMC 873, 2016 U.S. Dist. LEXIS 42516 (S.D. Fla. March 29, 2016)

DOHSA did not preempt a claim for negligent infliction of emotional distress where the claim was not brought for the loss of the decedent, but for the survivor's own experience. A plaintiff who is present at the scene of the decedent's death and suffers directly from the same negligent act is not precluded from recovering for his or her own losses although a non-present plaintiff would be precluded.

Iew **Trial**

Hausman v. Holland America Line-U.S.A. et aL, Case No. CV 13 0937, 2016 U.S. Dist. LEXIS 787 (W.D. Wa. 2016)

The court vacated a twenty-one and a half million dollar ($21.5 M) jury verdict award and ordered a new trial in a case where the plaintiff claimed he suffered from traumatic brain injury after being struck in the head by automatic sliding glass doors. Following trial the plaintiffs personal assistant came forward claiming that the plaintiff deliberately sabotaged the defendant's pre-trial discovery efforts. Plaintiff allegedly failed to produce and/or failed to disclose emails that he knew were relevant to his case, tampered with witness testimony, fabricated and/or exaggerated the extent of his injuries and testified falsely at trial.

The moving party had the burden to demonstrate that the alleged discovery misconduct substantially interfered with the aggrieved party's ability fully and fairly to prepare for and proceed to trial. Substantial interference is shown by establishing that the discovery misconduct precluded inquiry into a plausible theory, denied access that could have been probative on an important issue or closed off a potentially fruitful avenue of direct or cross examination. Substantial interference may also be shown through a presumption of interference. The court looks to the parties' intent, accidental or inadvertent. Thus if there was a knowing and purposeful intent to suppress evidence then there is a presumption of interference.

Iotice

Lipkin v. Jorwegian Cruise Line Ltd., 93 F.Supp.3d 1311, (S.D. Fla. 2015)

Warning signs or warning labels may be evidence that a defendant had actual or constructive notice of a dangerous condition. However the mere implication of actual or constructive notice is insufficient to survive summary judgment. A plaintiff must show specific facts demonstrating, at least, that the purported defect was detectable with sufficient time to allow for corrective action.

Pleading Requirements

Cordani v. JCL (Bah.) Ltd., 2015 U.S. Dist. LEXIS 160893, 2015 WL 7758512 (S.D. Fla. Dec. 1, 2015)

The court will not embark on an analysis of each alleged act or omission to determine whether the ship owner breached a duty. Even though certain of the alleged breaches of the ship owner's duty of reasonable care may not adequately state a negligence claim, the court will not strike the alleged breaches in a line-item fashion.

Punitive Damages

Crusan v. Carnival Corporation, No. 13-cv-20592-KMW (S.D. Fla. Feb. 24, 2015)

In order properly to plead intentional misconduct for the purposes of recovering punitive damages, the plaintiff must allege the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result, and despite that knowledge intentionally pursued the course of conduct resulting in injury or damage.

Fleischer v. Carnival Corp., Case No. 15-cv-24531-KMM, 2016 U.S. Dist. LEXIS 40647, 2016 WL 1156750 (S.D. Fla. Mar. 17, 2016)

Punitive damages are recoverable under general maritime law when the defendant engaged in wanton, willful, or outrageous conduct. The plaintiffs claim for punitive damages would not be dismissed where the plaintiff alleged two prior incidents at the subject location. The defendant was not precluded at a later stage of the litigation from challenging the sufficiency of the facts alleged to support the demand for punitive damages.

Open and Obvious

Lipkin v, lorwegian Cruise Line Ltd., 93 F. Supp. 3d **1311 (S.D. Fla.** 2015) and *Pucci v. Carnival Corp.,* 146 F.Supp.3d 1281 (S.D. Fla. 2015)

A context specific inquiry that necessitates the development of factual records is required before the court can decide whether as a matter of law the dangerous condition was open or obvious. This court stated that this issue is more appropriately addressed at summary judgment phase and not on a motion to dismiss.

Shore Excursion

Richards v. Carnival Corp., 2015 U.S. Dist. LEXIS 52191, 2015 WL 1810622 (S.D. Fla. Apr. 21, 2015)

A motion to dismiss was granted where the plaintiff failed to plead a factual basis as to why the cruise line knew or should have known that the ATV excursion was not safe in order to trigger a duty to warn. Plaintiff did properly plead a cause of action for apparent agency where the allegations could establish the necessary representation which could cause the plaintiff reasonably to believe that the tour company was an agent of cruise line. Plaintiff alleged that the cruise line negotiated a contract, marketed the tour, had a dedicated shore excursion desk, determined the price charged, collected the money onboard, and had the sole discretion to determine refunds.

Pucci v. Carnival Corp., 146 F. Supp.3d 1281 (S.D. Fla. 2015)

A motion to dismiss was denied where the cruise line argued that it had no duty to warn of an open and obvious danger such as snorkeling in an open body of water. The cruise line failed to warn the plaintiff that the activity might not be appropriate for someone in her condition (age, limited swimming ability, and physical disability), or otherwise adequately train or supervise her. While cruise line's knowledge of her limited swimming ability and advanced age does not change the duty of reasonable care, the cruise line may have had to do more for her than for a passenger with no disabilities.

Rojas v. Carnival Corp., 2015 U.S. Dist. LEXIS 160201 (S.D. Fla. Nov. 30, 2015)

Summary judgment was granted where the plaintiff was injured when she crashed a scooter rented while ashore from an outside vendor. The court found that plaintiff failed to state a cause of action because the cruise line had no duty to warn.

Witover v. Celebrity Cruises, Inc., 161 F.Supp.3d 1139 (S.D. Fla. 2016)

Plaintiff sued when injured on a shore excursion in a scooter that the cruise line represented would satisfy her special needs. While there is no breach of contract of carriage against the cruise line absent a provision of safe passage in the ticket contract, the plaintiff could bring a claim for breach of contract of the shore excursion. The court held that the cruise line also had supplemental duties under reasonable care when it knew of passenger disabilities or handicaps. The court added that whether the cruise line knew or should have known of the danger the passenger faced when being unloaded during the shore excursion is more appropriate at the summary judgment phase than at trial. Plaintiff did state a cause of action for negligent hiring and retention. She pled that the tour operator's practices and procedures were unsafe, which satisfied the negligent retention claim that the operator was unfit or incompetent. The length of the cruise line's relationship with the tour operator satisfied the "knew or should have known" requirement. The scope of the relationship between the cruise line and tour operator is not controlled by the labels in their contract but rather it is intensively factual and requires discovery.

Flaherty v. Royal Caribbean Cruises, Ltd., 2016 U.S. Dist. LEXIS 39827, 2015 WL 8227674 (S.D. Fla. Mar. 23, 2016)

A cruise line had a duty to warn a passenger that a tour operator had a dangerous practice of having guests hold hands while hiking The plaintiff does not have to allege what caused the passenger he was holding hands with to fall. Holding hands while hiking is also not an open and obvious danger to ordinary passengers without experience and knowledge of safe hiking practices.

Thompson v. Carnival Corp. 2016 U.S. Dist. LEXIS 41933, 2016 WL 1242280 (S.D. Fla. Mar. 30, 2016)

The court lacked general jurisdiction over the tour operator. Applying the recent Supreme Court holding in *Daimler AG v. Bauman,* 134 S.Ct. 746 (2014), the foreign corporation's operations

in the forum must be so substantial and of such a nature as to render the corporation at home in forum only in exceptional circumstances.

Kadylak v. Royal Caribbean Cruise, LTD., 2016 WL 908469, 2016 U.S. Dist. LEXIS 32320 (S.D. Fla. Mar. 1, 2016)

The plaintiff brought suit against the excursion provider and cruise line after the ship's staff captain, who was participating in an onshore motorcycle tour, crashed his bike into her and crushed her leg. The court deemed the waiver, which was governed by Tennessee law, unenforceable because general hold harmless provisions do not bar claims of negligence. The excursion provider's motion for summary judgment was denied because there were issues of fact as to whether the provider failed to follow its own policy when it allowed the inexperienced staff captain to ride, and whether the staff captain was actually part of the tour. The cruise line's motion for summary judgment was granted for the plaintiffs negligence count because there were no facts to establish notice of a dangerous condition, nor for plaintiffs vicarious liability count. There were no facts to establish that the staff captain was acting within the scope of his employment.

Standard of Care

Cox v. Princess Cruise Lines, Ltd., 2015 U.S. Dist. LEXIS 112666, 2015 WL 5031900 (C.D. Cal. Aug. 25, 2015)

The court acknowledged the reasonable care under the circumstances standard but noted that it is case specific. The greater the foreseeable risk, the greater the care and precaution required for finding reasonable care.

Pucci v. Carnival Corp., 146 F.Supp.3d 1281 (S.D. Fla. 2015)

A carrier with knowledge of a passenger's abnormal physical disability may have to do more under the reasonable care standard toward that passenger than it would toward a passenger with no physical disability.

Summary Judgment

Smith v. Royal Caribbean Cruises, Ltd., 620 F. App'x 727 (11th Cir. 2015)

The plaintiff was injured while swimming underwater in the onboard pool when his head hit the wall, which he could not see because the water was murky. The cruise line had no duty to warn the plaintiff because the murkiness of the water was an open and obvious condition.

Pettit v. Carnival Corp., 2015 U.S. Dist. LEXIS 104490, 2015 WL 4755182 (S.D. Fla. Aug. 10, 2015)

Summary judgment granted after an injured cruise line passenger missed the statute of limitations. She filed her complaint in state court just twelve (12) days before the ticket contract's one year statute of limitations ran, served the defendant two months later, and filed a new complaint in the district court only after the defendant sought dismissal in the state court. The court held that equitable tolling was not available because the plaintiff failed to bring suit in a timely fashion despite knowing the limitations period was running.

Cox v. Princess Cruise Lines, Ltd., 2015 U.S. Dist. LEXIS 112666, 2015 WL 5031900 (C.D. Cal. Aug. 25, 2015)

A disabled passenger was injured when a ramp to a balcony in her cabin came apart and caused her scooter to tip over. There was a genuine issue of fact as to whether the cruise line's act of supplying the unconnected ramp created a dangerous condition, or an unreasonable risk, which the cruise line failed to take appropriate measures to mitigate. Even if the defendant lacked actual notice of a structural defect, the cruise line could still be liable if the jury concluded that it should have known of the defect. Strict liability was not applicable because the cruise line is not a person engaged in the business of selling ramps for use or consumption and summary judgment was granted as to that cause of action.

McQuillan v. JCL (Bah.) Ltd., 2015 U.S. Dist. LEXIS 156655, 2015 WL 7294828 (S.D. Fla. Nov. 19, 2015)

Summary judgment was denied where a passenger fell off a step or drop-down. A difference in flooring level does not by itself constitute an inherently dangerous condition because the condition is open and obvious. However, a step may not be open or obvious where the character, location or surrounding conditions of the step down are not such that a reasonable person would expect it. Even though there was no evidence of knowledge of any prior injury causing incidents, notice was not required where the ship owner created the condition. It was a question of fact for the jury to determine if the defendant created a dangerous condition by failing to differentiate the flooring color, arranging luggage in a manner that concealed the drop-down and not posting warning or caution signs.

Lugo v. Carnival Corp., 154 F. Supp. 3d 1341 (S.D. Fla. 2015)

Defendant's motion for summary judgment was granted because the bunkbed ladder that did not reach the floor was an open and obvious condition. The plaintiff and his family had been in the same cabin for four days and his children had used the ladder without incident.

Jaber v. JCL (Bahamas) Ltd., Case No. 1:14-cv-20158-KING, 2016 U.S. Dist. LEXIS 25873, 2016 WL 853018 (S.D. Fla. Mar. 2, 2016)

The plaintiff was injured in her stateroom when a bunk bed fell on her. The plaintiffs motion for partial summary judgment was granted as to liability because the defendant's merely denied the plaintiffs evidence of duty, causation, and notice, and offered no evidence of its own.

Teddivairma v. Carnival Corp., 2016 U.S. Dist. LEXIS 30160, 2016 WL 1031308 (S.D. Fla. Mar. 9, 2016)

Defendant's motion for summary judgment on plaintiffs claim for punitive damages following her slip and fall was granted

because the plaintiff could not show that the deck was actually wet. Further, defendant, which knew that the subject deck had an insufficient level of slip resistance but took extensive steps to remedy the problem, did not display willful, wanton, or outrageous conduct.

Taiariol v. MSC Crociere, S.A., 2016 U.S. Dist. LEXIS 48966, 2016 WL 1428942 (S.D. Fla. Apr. 12, 2016)

Plaintiff was injured when she slipped on the illuminated metal stair nosing in the ship's theater. The court granted defendant's motion for summary judgment, holding that the stair nosing was an open and obvious condition because it was illuminated and plaintiff stated that she had noticed it before her fall. Plaintiffs argument that the slipperiness of the stair nosing was not open and obvious was rejected. Alternatively, the court found that defendant's notice was not established by a "watch your step" sticker that was placed on the subject step by a third-party shipbuilder.

Lombardie v. JCL (Bahamas) Ltd., 2016 U.S. Dist. LEXIS 48967 (S.D. Fla. Apr. 12, 2016)

Summary judgment was granted in a case where the plaintiff tripped over the threshold to the bathroom in her cabin. The court found that the bathroom step was not a dangerous condition and it was open and obvious through the ordinary use of plaintiffs senses. The condition was not so unique to ships as to so as have altered the standard of care.

CREW CLAIMS

Arbitration

Sierra v. Cruise Ships Catering & Servs. Ina, I V., 631 F. App'x. 714 (11th Cir. 2015)

The Eleventh Circuit held that an arbitration agreement was "in writing within the meaning of [The Convention on the Recognition and Enforcement of Foreign Arbitral Awards]" when

an arbitral clause—found in the collective bargaining agreement—was incorporated by reference into the plaintiffs signed employment contract. The district court need not have an actual arbitration agreement if an arbitral clause appears in a contract.

Hodgson v. ICL (Bah.), Ltd., 151 F. Supp. 3d 1315 (S.D. Fla. 2015)

It is well-established that a case will be dismissed when all the issues raised in the district court must be submitted to arbitration. The court refused to make an exception to the "frivolous" requests of a plaintiff asking for a stay in the action, rather than a dismissal, so the plaintiff could avoid filing fees and use the district court to obtain discovery for arbitration, among other things.

Bendlis v. JCL (Bahamas), Ltd.
112 F. Supp. 3d 1339 (S.D. Fla. 2015)

The plaintiff argued that his written arbitration agreement was inapplicable because his employment contract with a cruise line had expired prior to the litigated incident. The court held the arbitration clause survived expiration because of the broad language used — "any and all claims ... of any kind whatsoever relating to or in any way connected with the Seaman's shipboard employment ... shall be referred to and resolved exclusively by binding arbitration."

Ringewald v. Holland Am. Line - USA, Inc., 2015 U.S. Dist. LEXIS 89758, 2015 WL 4199808 (S.D. Fla. July 10, 2015)

A cruise ship employee's claims were compelled to arbitration after the court concluded that all of the jurisdictional requirements of the New York Convention were met. The plaintiffs performance of duties aboard the ship at sea constituted "abroad" within the meaning of the Convention. The plaintiffs claims against defendants who were not signatories to her employment agreement were also compelled to arbitration because her claims against the non-signatory defendants were based on the same facts and were inherently inseparable from those against the signatory defendant.

Sierra v. Cruise Ship Catering and Srvcs. Ina, I V., Costa Crociere S.P.A., 631 F. App'x. 714 (11th Cir. Nov. 10, 2015)

A copy of the employment agreement and incorporated Collective Bargaining Agreement is sufficient to satisfy valid written arbitration on agreement. The court disagreed with the plaintiffs second argument because the Supreme Court has never applied the effective vindication doctrine to invalidate any provisions in an arbitration agreement.

Smith v. ICL (Bahamas) Ltd., 2015 U.S. Dist. LEXIS 115456, 2015 WL 5097121 (S.D. Fla. Aug. 31, 2015)

Mere delay is insufficient to support a claim that a defendant has waived its agreement to arbitrate. The court held that the cruise line did not waive arbitration when, rather than paying the three thousand dollar ($3,000) filing fee for arbitration, it paid the plaintiff the entirety of the one thousand four hundred forty dollar ($1,440) he sought in his statement of claim.

Iavarette v. Silversea Cruises, Ltd., 620 F. App'x. 793 (11th Cir. 2015)

The court held that there was a valid enforceable written agreement to arbitrate when the plaintiff separately signed "Standard Terms", which contained an arbitration provision. A second employment contract signed by the plaintiff that did not contain an arbitration clause did not constitute a novation of the original employment contract because the plaintiff could not show any intent by the parties to extinguish the original contract.

Choice of law

Sierra v. Cruise Ships Catering & Servs. Ina, I. V., 631 Fed. Appx. 714 (11th Cir. 2015)

The court held that the Supreme Court's holdings regarding the effective vindication doctrine did nothing to disturb its holding in *Lindo v. ICL (Bahamas) Ltd.,* 652 F.3d 1257, 1275 (11th Cir. 2011)—"that an arbitration provision in a seaman's employment

contract containing a choice-of-law provision is enforceable"—because those holdings did not apply the doctrine to invalidate "any provisions in an arbitration agreement, much less to invalidate [a] choice-of-law provision .. ."

Class Action

Celebrity Cruises, Inc. v. Rankin, 175 So. 3d 359 (Fla. 3d DCA 2015)

The cruise line had all of its doctors sign an identical contract stating that it would pay them a commission on "total medical revenues." The doctors filed suit alleging that the cruise line had breached the contract by refusing to pay them for the sale of medications. The court affirmed an order certifying the doctors as a class because all the doctors' claims posed the same basic legal question arising from identical written provisions, and the calculation of each doctor's damages could be calculated using the same formula.

COMMITTEE OI MARIIE IISURAICE
AID **GEIERAL AVERAGE**

Chair: Andrew C. Wilson
Editor: Julia M. Moore

IEWSLETTER
Spring 2016

Editorial Iote:

It is not often that there is "breaking news" on a 300-year - old marine insurance clause, but the Committee is pleased to report on a very recent case interpreting the standard hull policy perils clause familiar to most marine insurance professionals. The decision holds that the perils clause extends cover for a vessel arrest only when done by governmental act. Commercial arrests are not covered. Joseph G. Grasso, Esq. and Michael B. McCauley, Esq. handled the matter for hull underwriters. A discussion of this case closes this edition of the Newsletter.

Next, we present a timely article by Michelle T. Castle, Esq. titled "Marine Insurance: Free of Capture & Seizure," which picks up on that discussion and provides an expanded review of how the FC&S clause is viewed by the courts. Following that is our summary

of recent cases, and some notes on previously reported cases that went up on appeal, including the Supreme Court's denial of the petition for *certiorari* in *St. Paul Fire & Marine Insurance Co. v. Abbe & Svoboda, Inc.,* and the Eleventh Circuit's reversal of a district court decision on construction of an all-risk policy.

MARIIE IISURAICE FREE OF CAPTURE & SEIZURE

Michelle T. Castle
Mendes & Mount, LLP

A recent decision from the United States District Court for the Southern District of New York addresses the age-old issue concerning the meaning of the phrase "Arrests, Restraints and Detainments" in a marine insurance policy. *Swift Spindrift, Ltd. v. Alvada Ins., Inc.,* 2016 AMC 1012, 2016 WL 1271061, 2016 U.S. Dist. LEXIS 41895 (S.D.N.Y. March 29, 2016). The case addresses the complexities of coverage found in marine hull and war risk policies. The hull clauses contained a perils clause, which purported to cover a certain set of risks, but the hull clauses also contained a war exclusions clause, which excluded many of those same risks from coverage. The war risks and strikes clauses, however, restored coverage to most of the excluded risks. The decision of the court eventually focused on the grant of coverage provided in the perils clause of the marine hull policy. The clause provided:

> Touching the Adventures and perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by

provisions elsewhere in the Policy or by endorsement thereon.

Swift owned and operated the cargo vessel SWIFT SPINDRIFT. The vessel transported cargo from Argentina to Tripoli, Libya, and was arrested by the importer of cargo carried on board the vessel at the destination port. The Libyan importer had filed a multi-million dollar lawsuit and arrested the vessel in Tripoli as a means of securing its claim. A Libyan court issued a writ of arrest (or, writ of attachment) requiring posting \ security in order to release the vessel. Difficulties with the posting of proper security resulted in the vessel being arrested for a period of several months. Swift filed a claim against its hull insurers for a constructive total loss of the vessel and sue & labor expenses.

The court held that the initial grant of coverage in the perils clause of the hull policy only provided insurance for government arrests, not for commercial seizures. The court explained that the marine hull policy did not "cover 'commercial' arrests, i.e., arrests that are the result of legal proceedings brought by private commercial parties." The court also decided that the events in Libya were not covered because the arrest of the SWIFT SPINDRIFT was not an exercise of sovereign authority and was merely a standard commercial arrest.

The *Swift* case addressed "named perils" coverage often found in marine hull policies. The type of coverage frequently found in marine cargo policies, however, is not limited to "named perils" coverage, and is generally written on an "all risks" basis. Consequently, the focus shifts to the exclusions from coverage found in the clause referred to as "The Free of Capture and Seizure Clause."

The insuring terms and conditions in a standard marine cargo insurance policy provide "all risks" coverage, but do not provide coverage with respect to any loss, damage or expense arising out of capture, seizure, arrest, restraint or detainment, according to the following clause:

FC&S Warranty (April 3, 1980)

NOTWITHSTANDING ANYTHING HEREIN CONTAINED TO THE CONTRARY THIS INSURANCE IS WARRANTED FREE FROM:

capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise;

A standard cargo policy also expressly provides that the "FC&S Warranty":

> shall be paramount and shall not be modified or superseded by any other provision included herein or stamped or endorsed hereon unless such other provision refers to the risks excluded by these Warranty(ies) and expressly assumes the said risks.

The free of capture and seizure clause was developed during the Napoleonic Wars, as a "precaution against Baltic ports becoming hostile to the insured vessel after she sailed." KENNETH J. GOODACRE, MARINE INSURANCE CLAIMS 788 (2d ed. 1981). An early distinction between "seizure" and "capture" is found in *Cory v. Burr, [1882-'83]* 8 App. C as . 393 (H.L.). "'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture' and goes beyond it, and may reasonably be interpreted to embrace every act of forcible possession either by a lawful authority or by overpowering force." *Id.* at 405.

The FC&S warranty is not a true warranty and must be construed as an exclusion from coverage. Pursuant to the FC&S Clause, the assured "warrants" that the goods shall be free from capture or seizure. This "warranty" is actually an exclusion from coverage for losses arising out of such an event, and the phrasing of the clause as a "warranty" does not require the insured to ensure that

the cargo will not be captured. *Resin Coatings Corp. v. Fidelity and Casualty Co. of York,* 489 F. Supp. 73, 74 (S.D. Fla. 1980); *Intermondale Trading Co. v. Torth River Ins. Co. ofkw York,* 100 F. Supp 128, 132, 1951 AMC 936, 939, (S.D.N.Y. 1951).

The FC&S clause is prefaced by the phrase: "Notwithstanding any average terms contained herein . . . ." The plain meaning of the phrase indicates that this exclusion overrides any and all other coverage provisions in the policy. *See Caribbean Lumber Co. v. Phoenix Assurance Co.,* 227 Ga. App. 236; 488 S.E.2d 718 (Ga. App. 1997); *Kimta v. Royal Ins.,* 2001 AMC 708 (Wash. Ct. App. 2000). The FC&S clause remains in full force and effect during terms of coverage provided by the warehouse to warehouse and marine extension clauses, and supersedes those clauses. For example, a detention of cargo is not covered as an interruption of transit beyond the control of the insured because it is excluded from coverage under the FC&S clause which, by its own terms, takes precedence over the marine extension clauses. *Torthern Feather International, Inc. v. Those Certain London Underwriters Subscribing to Policy To. JWP108 through Wigham Poland, Ltd.,* 714 F. Supp. 1352, 1989 AMC 1805 (D.N.J. 1989).

Although the acts of pirates were probably the types of acts originally contemplated by the drafters of the clause, the FC&S clause has been construed broadly, including within its purview all types of seizures and detentions. Virtually any governmental seizure will be found an excluded risk under the "warranty." *Pan American World Air, Inc. v. Aetna Cas. & Sur. Co.,* 505 F.2d 989, 1009 (2d Cir. 1974) (governments, de facto governments, military and usurped powers).

In *International Multifoods Corporation v. Commercial Union Insurance Company,* 2002 AMC 2939 (2d Cir. 2002), the insured cargo owner suffered a fortuitous loss when its cargo was seized by the Russian government, for a matter not involving the owner of the cargo. The owner could not regain control of the goods, despite efforts to do so. The court ruled that the assured sustained a loss due to the fact that the owner had lost control of the goods; it did not matter that the ultimate disposition of the cargo was

unknown. The FC&S clause was held to exclude coverage by the mere fact of the seizure, without proof of the ultimate disposition of the cargo.

The court explained that the marine cargo policy contained a standard FC&S clause which provided that: "Notwithstanding anything herein contained to the contrary, this insurance is warranted free from . . . seizure . . . and the consequences thereof . . . *whether in time of peace or war* and whether lawful or otherwise." *Id.* at 2941 (emphasis added). The court held that the FC&S clause trumped any other provisions of the cargo policy and that the clause unambiguously applied to peace time seizures.

Numerous detentions under peaceful circumstances have been held excluded from coverage:

> *Blaine Richards & Company, Inc. v. Marine Ind. Ins. Co. of Am.,* 635 F.2d 1051, 1981 AMC 1 (2d Cir. 1980) (detention of cargo by the Food & Drug Administration); *Iorthern Feather Intl v. Underwriters, supra* (detention by Customs for improper visa entry classification); *Resin Coatings Corp. v. Fidelity & Casualty Co., supra* (Customs detention for suspected improper declaration of value); *Intermondale Trading Co. v. forth River Insurance Co, supra* (detention of a vessel for suspected illegal transportation to Palestine resulting in the sale of the vessel and cargo).

"Detainment" includes any detainment by a government official, such as United States Customs, including any "hold" on the goods exercised by Customs while awaiting the submission of proper paperwork by cargo interests needed for Customs clearance. *Blaine Richards, supra.; see Iorthern Feather Ina, supra; Resin Coatings Corp. v. Fidelity and Casualty Co. of I.* Y, 489 F. Supp. 73 (S.D. Fla. 1980); *Pantcho Iakasheff v. Continental Ins. Co.,* 1954 AMC 986 (S.D.N.Y. 1953). In *Iorthern Feathers,* the goods were being held in a bonded warehouse awaiting clearance by customs, when a fire destroyed the goods. The court held that the

cargo insurance policy did not provide coverage due to the exclusion from coverage contained in the FC&S warranty.

In *Blaine Richards,* the court noted, however, that the act of detention by the Customs officials must have caused the resultant cargo damage. In *Blaine,* the goods had previously been damaged by fumigation of beans for the sea voyage; and because of said fumigation, the goods were then detained by U.S. Customs. The court held that any damages caused by the Customs detention, such as loss of market value or extra expenses to transport the goods, were not covered by the policy due to the FC&S exclusion; but that damages to the beans caused by fumigation for the sea voyage were covered.

This commonly litigated issue is whether the seizure or detention was the force which actually or legally caused the loss. Proximate cause in marine cases is defined as "that cause which is most nearly and essentially connected with the loss as its effectual cause." *Standard Oil Co. v. United States,* 340 U.S. 54, 588, 1951 AMC 1, 4 (1950); *see Pan American World Air., Inc., v. Aetna Cas. & Sur. Co.,* 505 F.2d 989, 1008 (2d Cir. 1974) (subsequent damage after loss of control due to a "taking" of property). The cause nearest in time to the event is not necessarily the proximate cause. *Lanasa Fruit Steamship & Importing Co. v. Universal Ins. Co.,* 302 U.S. 556, 562-63, 1938 AMC 1, 5-7 (1938).

When ascertaining the legal cause of loss for insurance purposes, a court must look to the "real efficient cause" of the occurrence rather than the single cause nearest in time to the loss. *Blaine Richards, supra* at 1054. Determination of proximate cause is a matter of applying common sense and reasonable judgment as to the source of the losses alleged. *Id.* Where a loss results from a combination of causes, one of which is excluded from coverage, courts generally isolate a single peril as the dominant or efficient one. 1 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 413 (1987).

In *Kimta v. Royal Insurance,* 2001 AMC 708 (Wash. Ct. App. 2000), the WV BIKIN was transporting a cargo of fish and

crab from Russia to Korea. Russian authorities arrested the vessel for failure of the captain to comply with orders of Russian authorities to return to port, as well as the fact that the ship was not carrying a required permit. Russian authorities confiscated the cargo and sold it at auction. It was undisputed that the seizure would not have occurred without the negligence of the master.

The cargo policy contained "all risk" coverage and an "INCHMAREE" clause providing coverage for loss caused by negligence of the master. The policy also contained a "paramount" free of capture and seizure warranty. The court analyzed existing precedent as follows:

> Federal courts have consistently interpreted this warranty as providing that a loss is due to seizure even if the seizure resulted from an insured peril such as the negligence of the master, so long as the insured peril did not endanger the cargo independently of the seizure. *See Blaine Richards & Co., Inc. v. Marine Indem. Ins. Co. of America,* 1981 AMC 1, 7, 635 F.2d 1051, 1055 (2d Cir. 1980). ("In cases involving detention, courts have generally not followed losses **back to prior events...the common sense** understanding [is] that the temporary physical loss of the beans was caused by detention."); *Commodities Reserve,* 879 F.2d at 644 ("The dominant cause of the potential loss from infestation was the detention in Crete. Commodities Reserve forwarded the cargo only because it was detained. No danger from infestation existed apart from the detention").

The court in *Kimta* held that the FC&S warranty excluded coverage. The judge noted that there was no allegation that the negligence of the vessel's master or the charter company caused any independent and distinct damage to the cargo, apart from the fact that their conduct resulted in confiscation. The judge stated that there was no evidence that the cargo would have been lost or damaged in any way if the seizure had not occurred. The misconduct of the master may have caused the seizure, but was too

remote to be considered a proximate cause of the loss of the cargo. Under federal maritime law the efficient proximate cause of the loss is the seizure. *Id.* at 715.

Of course, federal maritime law applies if the insurance policy is a marine contract and there is established federal maritime precedent with respect to the disputed issue. The principal purpose of the insurance is determinative as to whether the insurance contract in issue constitutes a maritime contract. *Folksamerica Reinsurance Co. v. Clean Water oflew York, Inc.,* 413 F.3d 307 (2d Cir. 2005). If the insurance contract is a maritime contract, the court will then examine whether there is established federal maritime precedent with respect to the particular legal issue. If no established federal precedent exists, the construction of an insurance policy is a matter of state law. *Commercial Union Ins. Co. v. Flagship Marine Services, Inc.,* 190 F.3d 26 (2d Cir. 1999). Fortunately, courts have recognized that there is established federal maritime law with respect to the FC&S clause and the issue of proximate causation.

Unfortunately, the *Swift* court recognized that the syntactical structure of the "Perils Clause" in a standard marine hull policy is difficult to decipher and may be construed as ambiguous. The court found, however, that the clause must be considered in light of marine usage and legal precedent. Marine policy wording must be construed from "the perspective of 'a reasonably intelligent person . . . who is cognizant of the customs, practices, usages and terminology as generally understood in' the marine insurance industry." The *Swift* judge commented as follows:

> For about as long as the language of the Perils Clause has been in use, courts and commentators have recognized that its phrasing makes deciphering the risks covered a difficult proposition. See 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 19-10 (5th ed. 2011) (quoting a 1791 case that "described the [Lloyd's] S.G. Policy as an 'absurd and incoherent instrument"); see also William D. Winter, Marine [*32] Insurance: Its Principles and Practice 140 (1919) ("Read without reference to the

> wealth of legal lore referring to this particular part of the policy [i.e., the 'Perils' clause], the document is vague, misleading and perhaps unintelligible."). Fortunately, however, "practically every word in the paragraph has been weighed in the judicial balance and its own meaning and its meaning in relation to the context has been determined." Winter, supra, at 140.

As illustrated above, the modern marine practitioner must keep abreast of recent developments in the law, but must not forget the historical context.

RECEIT CASES OF IITEREST

Other Insurance

In re Deepwater Horizon Cameron International Corp. v. Liberty Insurance Underwriters, 807 F.3d 689 (5th Cir. 2015)

The latest decision generated by the DEEPWATER HORIZON disaster arose out of the coverage dispute between the manufacturer of the blowout preventer, Cameron International Corp. ("Cameron") and one of its insurers, Liberty Insurance Underwriters ("Liberty"). As with the dispute between BP and Transocean, this branch of the litigation also involved a complicated arrangement of indemnification agreements and insurance "towers." In this case, Cameron had $500 million insurance tower in place in which Liberty underwrote a $50 million layer and an indemnification agreement with Transocean.

After the spill and the ensuing deluge of lawsuits, Cameron entered into a settlement with BP, the well owner. Under the terms of that agreement, BP would indemnify Cameron in exchange for $250M, but only if Cameron's insurers agreed to waive their subrogation rights and if Cameron agreed to waive its indemnification rights against Transocean so that BP could avoid being "back doored" into litigation on an indemnity claim. Alone among Cameron's insurers, Liberty objected to the settlement and

declined to pay its layer. Liberty contended that its liability under the policy had not been triggered by virtue of the Other Insurance clause which read: "[i]f other insurance applies to a "loss" that is also covered by this policy, this policy will apply excess of such other insurance." Cameron executed the settlement, contributing $50M of its own to fill the gap left by Liberty's denial of coverage, and litigation followed. On cross motions for summary judgment, the district court granted summary judgment in favor of Cameron on its breach of contract claim and its claim for damages under the Texas Insurance Code. The court denied Cameron's request for attorney's fees.

Cameron and Liberty cross appealed to the Fifth Circuit Court of Appeals. Four issues were before the appeals court. First, the chief issue was whether the "other insurance" clause applied and rendered Cameron's claim premature since Cameron was "not yet entitled to coverage because Cameron had not exhausted that indemnification [under the Transocean contract] or obtained a judicial determination that it is not entitled to indemnification." In essence, Liberty argued that the court should read the word "potentially" into the other insurance clause to support its position that it did not have to indemnify Cameron until there was a final adjudication that Transocean was not legally obligated to indemnify Cameron. Cameron countered that the clause was properly interpreted by the district court to mean that Liberty's policy is excess of other insurance (Transocean) but only if the other insurance actually and presently applies. Thus, because Transocean refused to indemnify Cameron, Liberty's policy was triggered. The Fifth Circuit agreed with Cameron and affirmed the district court's finding. The Fifth Circuit found that Liberty's position required the court to rewrite the policy contract to include language the parties could have, but did not, include. The court also found that adopting Liberty's interpretation would transform the other insurance clause from a protection against double insurance into a clause that made Liberty's policy a "policy of last resort."

Second, the court also found that Cameron did not vitiate its coverage rights by waiving subrogation when it settled with BP. The court determined that because Liberty was already in breach of

the policy before Cameron settled with BP by "constructively denying" Cameron's claim and failing to comply with the clause requiring it to "promptly pay" claims, Liberty could not assert this ground as a defense. "[E]ven if Cameron violated [the subrogation clause] in its settlement with BP — a question that we do not reach - Liberty breached first."

Third, the Fifth Circuit certified to the Supreme Court of Texas the question of whether a cause of action under the Texas Insurance Code existed where the insurer wrongfully denied coverage but caused no damages other than those denied benefits. Finally, the court also reversed the district court's ruling that Cameron waived its right to attorney's fees and it remanded the action for a determination of the proper amount.

Utmost Good Faith

St. Paul Fire & Marine Insurance Co. v. Abbe & Svoboda, Inc., 2015 AMC 2416 (8th Cir. Aug. 20, 2015) *amending* 798 F.3d 715, 2015 AMC 2113, *cert. denied* 136 S.Ct. 1486 (2016)

On March 28, 2016, the U. S. Supreme Court denied St. Paul's petition for *certiorari* seeking to overturn the Eighth Circuit Court of Appeals decision that the doctrine of *uberrimae fidei strictissimi* not only obligates an insurer to prove that the insured misrepresented material information when obtaining the policy, but it also requires the insurer to prove that the individual underwriter actually relied upon the misrepresented information when issuing the policy. A summary of the Eighth Circuit's decision was reported in the Spring 2015 edition of this Newsletter. *(see* MLA Report, Doc. No. 821 at 18908)

Gomez v. Ace American Insurance Company, 2016 WL 97490, 2016 U.S. App. LEXIS 206 (11th Cir. Fla. Jan. 8, 2016).

This case was originally reported in the Fall, 2014 edition of this Newsletter. *(see* MLA Report, Doc. No. 816 at 18489) In January 2016, the Eleventh Circuit heard plaintiffs appeal of the lower court's decision after trial denying Plaintiff Gamez's motion

for judgment as a matter of law and the alternative motion for a new trial. The case arose out of the mysterious disappearance of a new 32' Glasstream fishing yacht that Gamez said he loaned to a recent acquaintance for a fishing trip. Neither the yacht nor acquaintance were heard from again. Insurer Ace American Insurance Company ("Ace") denied coverage for the loss. The case was tried to a jury which determined that while Gamez had proved his claim, he was barred from recovery because Ace proved that Gamez had misrepresented material facts in the application for the policy related to the vessel's location, its ownership, the identity of the primary operator and the ownership of prior vessels. Gamez moved to set the verdict aside and for judgment as a matter of law under F.R.C.P. 50(b) or alternatively for a new trial under F.R.C.P. 59(a). The trial court denied those motions and Gamez appealed.

On appeal, the Eleventh Circuit rejected the plaintiff s strained construction of Florida statutory law governing (1) misrepresentations in an application for insurance and (2) breach of warranty. Gamez urged the court to adopt a construction of the statute that conflated the terms of two separate provisions, an interpretation that the appeals court noted was "simply contrary to the structure and clear wording of the statute." The judgment of the district court was affirmed.

Mysterious Disappearance

St. Paul Fire & Marine Insurance Co. v. Britt, 2016 Ala. LEXIS 10 (Ala. Jan. 29, 2016).

This coverage action arose out of the mysterious disappearance of a sailboat and its owner, Michael Britt, in September of 2011 on a voyage from West Palm Beach to Jacksonville. Despite search efforts by the U.S.C.G. and his family, neither Britt nor the sailboat were ever found. The subsequent investigation revealed that the U.S.C.G. had boarded the vessel for a "cold hit" inspection when Britt was approximately one (1) mile off the coast of Cape Canaveral and found the vessel seaworthy. That same day, Britt telephoned his family to advise his ETA in Jacksonville. The U.S.C.G. investigation also revealed that Britt's

last phone call was made to a debt collection agency holding a lien on the vessel. The location of the call indicated that Britt was traveling south, away from Jacksonville at the time.

Britt's father, as conservator of his estate, made claim on the all-risk policy issued by the St. Paul for payment of the $85,000 policy limit, which St. Paul denied on the basis of the policy's "mysterious disappearance" clause. Britt filed suit seeking coverage and damages for bad faith. The trial court entered summary judgment in favor of Britt on the breach of contract claim. This appeal ensued.

On appeal, the St. Paul argued (1) that Britt failed to carry his burden of proof that the claim fell within the coverage provided by the policy and (2) that the loss fell within the mysterious disappearance exclusion. The Alabama Supreme Court dispatched the first argument by holding that the all-risk policy covered the loss unless it was excluded or resulted from the insured's fraudulent conduct and stating that it assumed, without deciding, that Britt carried his burden of proof that the loss was covered unless excluded. The court then held that the loss was excluded by the mysterious disappearance clause.

Noting that the Alabama courts had not previously defined "mysterious disappearance" in the context of an insurance policy, the court adopted the definition of the Supreme Court of North Carolina, which first defined "mysterious disappearance" as "any disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity or speculation, or circumstances which are difficult to understand or explain." *Davis v. St. Paul Mercury & Indem. Co.,* 227 N.C. 80, 83, 40 S.E.2d 609, 611 (1946). The Alabama court then explained that a disappearance was "mysterious" if a person of ordinary intelligence would find the loss to be unknown, puzzling, baffling or inexplicable. On the other hand, a loss was not mysterious when evidence existed to support a logical inference as to what happened to the insured property, even if the evidence was inconclusive. Applying this test to Britt's missing sailboat, the appeals court found that the St. Paul had carried its burden of proof that the loss was excluded.

The court rejected Britt's argument that the clause was ambiguous and conflicted with the "30 Day Provision" which provided that "if the boat is totally destroyed or lost for more than thirty (30) days, we will pay the amount of Boat and Boating Equipment Coverage shown on the Declarations Page." The court found support for its position in an unfortunately worded sentence in Britt's brief in which Britt argued that "[i]f a boat has been lost for more than [30] days, it must have disappeared. But not all disappearances are mysterious disappearances." The court found that this sentence summed up the reason why the two clauses were not contradictory. The decision of the trial court was reversed.

Duty to Defend/Breach of Maritime Warranty

Markel American Insurance Co. v. Vantage Yacht Club, LLC, 158 F. Supp. 3d 699 (N.D. Ill. 2016)

Markel American Insurance Co. ("Markel") issued a policy to Vantage Yacht Club ("Vantage"), a boat rental company in the business of taking passengers for hire on pleasure cruises. In this case, a Vantage employee, who was not a licensed captain, took a group of patrons for a tour on a Markel insured vessel. No fee was charged and no rental agreement was signed. After the vessel returned to the dock, one of the passengers fell into the water and drowned, leading to a wrongful death action filed against Vantage in state court. Vantage sought a defense from Markel, which filed an action in federal court seeking an order that it was under no duty to defend Vantage in the underlying state court case.

The district court held that Markel was under no duty to defend Vantage because the policy only covered liabilities arising out of the "ownership, maintenance, or use of..." the vessel and the complaint in the underlying suit alleged that Vantage, and its employee, caused the death because they failed to take certain precautions with respect to the "boat dock" and/or the dock "premises." Vantage argued that the term "premises" as pleaded in the complaint included the insured vessel. The court disagreed and noted that the complaint did not assert that the vessel itself was a cause of the death. Absent such allegations, the incident was not

within the scope of coverage of the policy. Vantage also contended that the district court could not decide whether the term "premises" included the vessel as doing so placed the district court in the position of deciding an issue of ultimate fact that could bind the parties in the underlying case. This position was deemed to be "unreasonable" in light of the fact that the complaint repeatedly used the term to refer only to the dock and not to the vessel. Thus, coverage was absent.

Markel also asserted that Vantage vitiated any coverage that might have existed when it breached certain policy warranties requiring that the insured vessel must be used pursuant to a signed rental agreement, that the vessel be seaworthy and assigned a suitable captain and crew, and that the captain be properly licensed. As noted, there was no signed rental agreement nor was the captain of the vessel licensed which would seem to support Markel's position that coverage was absent for failure strictly to comply with a marine warranty. Vantage argued that the court could not rely on these facts as they were not contained within the "four corners" of the complaint. The district court clarified that, in certain circumstances, a court may look beyond the "four corners" of the underlying complaint in order to determine whether a duty to defend exists. Citing precedent from the Supreme Court of Illinois, the appeals court held that the only time such evidence is not permitted is when it "tends to determine an issue crucial to the determination of the underlying lawsuit."

Markel also argued that Vantage's breach of its warranties voided coverage and, therefore, relieved it of a duty to defend because maritime law requires strict compliance with a warranty. The district court took note that the prevailing view under federal and state maritime insurance law was that a breach of a warranty excuses the marine insurer from payment without regard to whether a causal connection to the loss exists, but then held that: "[t]he problem with Markel's argument is that this admiralty doctrine of strict compliance — also known by the Latin phrase *uberrimae fidei,* or 'utmost good faith' — also requires that the warranty at issue concern 'facts *material* to an insurance risk.' Markel has filed an appeal.

Duty to Defend

Continental Insurance Co. v. George J. Beemsterboer, Inc., **148 F.** Supp. 3d 770 (N.D. Ind. 2015).

This coverage action was filed by Continental Insurance Co. ("Continental") against its insured George J. Beemsterboer, Inc. ("GJB") seeking a declaration that it was under no duty to defend or indemnify GJB in connection with two underlying suits, (1) a consolidated class action alleging that GJB failed to prevent petroleum coke and coal dust from contaminating nearby communities, and (2) an action filed in state court by the State of Illinois and the City of Chicago alleging GJB's storage operations and handling of petroleum coke caused damage to surrounding properties. Continental issued two (2) hull policies of insurance to GJB with limits of $1M each. GJB counterclaimed for breach of contract and breach of the duty of good faith.

The court began the complicated analysis by confirming that, under Indiana law, an insurer's duty to defend is based on the allegations in the complaint and "those facts known or ascertainable by the insurer after reasonable investigation" and that it would be appropriate to consider extrinsic evidence in assessing the duty to defend. The court then examined both the policy of insurance, the class action complaint and the state court complaint to determine if the duty to defend was triggered. GJB argued that Continental was obligated to defend as the policy provided coverage for losses to property of others resulting from loading or unloading operations performed by or for the insured and also for losses to property of others "if arising out of only those operations covered above." In response, Continental argued that the policies did not cover the property damage alleged in the underlying two complaints and that the policies were marine hull policies that only covered GJB's liability for damage to bailed property, i.e. the vessels and their cargo and property damage to others' vessels approaching and departing from GJB's dock if arising out of docking operations. At issue were the policy clauses covering "landing dock bailee liability" and damage to "property of others." On review, the court concluded that the underlying complaints did allege damage to the

property of others arising, at least in part, from GJB's loading and unloading operations. However, the court then considered whether Continental could rely upon two exclusions to coverage as grounds for its position that coverage was barred and, therefore, it did not owe GJB a defense.

The first exclusion was a pollution exclusion which barred coverage for emission, spill, leakage of "petroleum products" into the seas, on land or into the air. The court found that the phrase "petroleum products" was ambiguous as to whether it included the petroleum coke at issue, therefore, it could not be a basis on which to deny coverage. The second exclusion was a respirable dust exclusion which provided that the policy did not cover bodily injury or property damage arising in whole or part from actual, alleged or threatened presence of respirable dust. As a review of the underlying complaints revealed that the claims for which GJB claimed coverage were based on petroleum coke dust, the court held that this exclusion applied and barred coverage. Because coverage was absent, the court then ruled that Continental had no duty to defend GJB in either suit. The decision has been appealed.

Continental Insurance Co. v. L&L Marine Transportation, Inc., 2016 AMC 864, 2016 WL 301681 (E.D. La Jan. 25, 2016).

L&L Marine Transportation, Inc. ("L&L") was the owner of the MAT ANGELA RAE, the lead tug in a four-vessel flotilla which included the tug MAT MISS DOROTHY. When the flotilla approached the Sunshine Bridge in St. James Parish, the M/V MISS DOROTHY allided against the bridge and sank. The insurers of the MAT MISS DOROTHY filed suit against L&L. In response, L&L sought coverage and a defense from Atlantic Specialty ("Atlantic") under a hull policy, which was denied on two grounds: (1) that the hull policy was an "indemnity" policy which created no obligation contemporaneously to fund L&L for a defense; and (2) even if the policy did create a duty to defend, coverage was absent as the MAT MISS DOROTHY was not "in the tow." Both L&L and Atlantic relied on the "Collision and Tower's Liability" clause in support of their contradictory positions.

In resolving the dispute, the court reiterated that **P&I** policies do not ordinarily create a duty to defend and are indemnity policies, not liability policies. The court noted that liability policies typically have two components, defense and indemnity, and that while the indemnity obligation is capped by the policy limits, the defense obligation is not. In contrast, a **P&I** policy creates only a duty to pay covered claims, which may include defense costs, up to the policy limits Therefore, in this case, L&L's arguments in favor of a duty to defend were rejected. As there was no duty to defend under the policy, the court then declined to consider Atlantic's second defense to coverage.

Duty to Indemnify

laquin v. Elevating Boats, LLC, 744 F.3d 927 (5th Cir. 2016).

This coverage decision arose out of a personal injury suit by Larry Naquin against Elevating Boats, LLC ("EBL"). At the time of his injuries, Naquin was using a land-based crane that toppled over. Naquin sued EBL under the Jones Act and a jury concluded that Naquin was a Jones Act seaman and that EBL's negligence caused his injuries. Those determinations were affirmed on appeal. EBL then filed an action against its insurers, which denied coverage for the Naquin suit. The insurers moved for summary judgment contending that the policies did not extend coverage to Naquin's land-based incident. The district court agreed and granted the motion. On appeal the Fifth Circuit affirmed.

The appeals court held that the "Indemnity" provision of the policy covered EBL for sums that it paid "as owner of the Vessel..." and did not provide coverage for the land-based incident caused by EBL's negligence. Relying upon Fifth Circuit precedent, the court explained that there must be at least some causal operational relation between the vessel and the resulting injury. In this case, because it was EBL's actions as a crane operator that caused the harm, and not its liability as a ship owner, there was no coverage for EBL's liability to Naquin.

Arbitration Clauses in Insurance Policies are Enforceable

Galilea, LLC v. AGCS Marine Insurance Co., 2016 A.M.C. 808, 2016 WL 754221 (D. Montana 2016),.

Plaintiff Galilea, LLC ("Galilea") is a limited liability company formed by Chris and Taunia Kittler, Montana citizens, for the sole purpose of owning the yacht GALILEA. In May of 2015 while sailing in the Caribbean, the Kittlers submitted an application for insurance to Pantaenius American Yacht Insurance ("Pantaenius") for new coverage. The coverage was bound, premium paid and a policy issued which included a jurisdiction and choice of law clause calling for the application of federal maritime law, and in the absence of maritime law, New York law. The clause also contained an agreement to arbitrate "any and all disputes arising under this policy....binding arbitration to take place within New York County, in the State of New York..." A month after the coverage was bound, the yacht grounded off the coast of Panama and the insurers denied coverage as the accident occurred outside of the policy's geographical limits Galilea filed suit in the Kittlers' home state of Montana. The insurers sought dismissal of the action and enforcement of the arbitration and forum selection clause.

As a preliminary matter, the court had to determine which law applied — federal maritime, New York, or Montana. The court found that the insurance policy was a maritime contract, that federal maritime law applied, and that the choice of law provision was enforceable. With regard to the arbitration clause, Galilea argued that it did not agree to arbitrate, that the clause was unconscionable, that it unreasonably favored the insurers, that it deprived Galilea of the protections of Montana law and that the costs of arbitration were "exorbitant." The court rejected each of these arguments, finding instead that the Federal Arbitration Act ("FAA") and federal law favoring arbitration left the court with no discretion to invalidate the clause on the grounds posited by Galilea. **The court then** distinguished that "the enforceability of the arbitration clause is a separate question from the scope of the arbitration clause" and requested further briefing from the parties on whether Galilea's claims were outside the scope of the arbitration clause.

Hill v. Assuranceforeningen Skuld et al., No. CV 15-00025, 2016 WL 1328099 **(D.** Guam April 4, 2016).

This coverage action arose out of the death of a seaman when a fishing vessel owned by Majestic Blue Fisheries, LLC sank. The decedent's wife, Amy Hill ("Hill") filed suit and obtained a $3.2M judgment against the vessel owner, Majestic Blue. When the judgment remained unpaid, Hill filed suit against Majestic Blue's insurer, Skuld, seeking satisfaction of the judgment. Skuld countered that plaintiff was obligated to arbitrate her claim in Oslo, Norway pursuant to the terms of the policy's arbitration clause and the New York Convention ("Convention").

To resolve the issue, the court examined the four (4) factors generally considered in deciding whether to enforce an arbitration agreement under the Convention: (1) whether there was an agreement in writing within the meaning of the Convention; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is commercial in nature; and (4) whether a party to that agreement is not an American citizen, or that the commercial relationship has some reasonable relationship with one or more foreign states. In this case, the court found that all four factors weighed in favor of arbitration.

While the court did note that Hill was not a signatory to the insurance policy, it found that the arbitration clause was binding on her as her complaint asserted that she was a beneficiary of the insurance. Stating that "equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes" the court held that the plaintiff was obligated to arbitrate in Norway.

All Risk Coverage

Great Lakes Reinsurance (UK) PLC v. Kan-Do Research & Products, Inc., 639 F. App'x 599 (11th Cir. 2016).

This case was originally reported in the Spring, 2015 Newsletter. *(see* MLA Report, Doc. No. 821 at 18902) The KAN-DO was a 51' motor yacht covered by an all risk marine insurance policy issued by Plaintiff Great Lakes. The policy covered accidental damage to the "hull machinery and equipment" of the vessel under Coverage "A." When the KAN-DO flooded and sank at the dock due the failure of the bilge pump system caused by a blown fuse, Great Lakes filed suit against the vessel owner contending that the policy did not cover the loss. Great Lakes claimed that the loss, caused by the failure of the bilge pump system, was not covered because damage to "engines, mechanical and electrical parts" was excluded under clause "r" unless the damage was caused by "an accidental external event such as a collision, impact with a fixed object, lightning strike or fire." The insured contended that this exclusion was ambiguous and the loss was covered. The district court agreed, finding that exclusion "r" was inconsistent with other language in the policy providing all risk coverage, specifically Coverage "A." The court determined that without an agreed definition of the key terms, many of the same parts of the KAN-DO fell within both Coverage "A" and exclusion "r" making the policy ambiguous. As a result, the court construed the ambiguity against Great Lakes and held that the loss was covered.

On appeal, the circuit court reversed finding that there was no ambiguity in exclusion "r" just because the same terms appeared in both Coverage A and exclusion "r." The court noted that "simply because one provision gives a general grant of coverage and another provision limits this coverage does not mean there is an ambiguity or inconsistency between the two. This is the very nature of an insurance contract; exclusions in coverage are expressly intended to modify coverage clauses and to limit their scope." The circuit court then determined the policy provided coverage for "accidental physical damage" to engines and mechanical components and

electrical parts *only if* the damage was caused by an "accidental external event," making the coverage for engines and mechanical components narrower than the general all-risk coverage because an external cause of loss was required. Appellee Kan-Do argued that the clause "accidental external event" was ambiguous because it was undefined by the policy. In response, the circuit court noted that while it had the ability to resolve a question of contract ambiguity in the first instance, it would remand the case to the district court for further proceedings.

Sue and Labor

Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5797793 (E.D. La Oct. 2, 2015).

This case was originally reported in the Fall, 2015 Newsletter. *(see* MLA Report, Doc. No. 821 at 18920) As noted, the suit arose out of a fatal allision of a crane barge against the Florida Avenue Bridge spanning the Inner Harbor Navigational Canal in Louisiana. The allision occurred when the tug MAT CORY MICHAEL, towing a crane barge and crane (collectively the "crane barge"), and the mast of the crane barge allided against the bridge causing the crane boom to fall on the pilot house, killing the pilot and injuring several other crew members. At the time of the incident, the owner of the tug, ABC Marine ("ABC"), had a Master Service Agreement ("MSA") with the owner of the crane barge, Boh Bro.'s ("Boh"). The MSC obligated Boh to maintain several insurance policies, including a hull and machinery ("H&M") policy, and to name Boh as an additional insured. ABC purchased H&M coverage from Underwriters at Lloyd's, London ("hull underwriters"). Boh claimed sue and labor expenses from ABCs hull underwriters for damage to its crane barge, which was not a scheduled vessel on the H&M policy. The parties entered into a settlement agreement, under which hull underwriters paid Boh $680,000, while specifically reserving Boh's claim for sue and labor. Boh claimed that this payment was made pursuant to the collision and tower's liability, pilotage and towage, and contractual liability provisions of the hull policy. Hull underwriters contended that they participated in the settlement as the primary collision and tower's liability insurer of

ABC and not in their alleged status as hull underwriters of Boh, and that the settlement payment to Boh was for ABCs potential liability to Boh in tort and not by virtue of any first party coverage owed to Boh. Cross motions were filed to resolve the issue and the court held that Boh was not covered for the claimed for sue and labor expenses under ABC's hull policy.

The court noted that sue and labor clauses date back to the seventeenth century and are founded on the premise that an insured has a legal duty to prevent a loss and must use due diligence to save and preserve damaged property. The purpose of reimbursing the insured for the cost incurred is twofold: it functions as a device to encourage prevention of a loss and/or mitigation of damages if a loss occurs. That said, the expenses must have been incurred for the purpose of avoiding or minimizing a loss for which the insurer would have been liable. If an insured acts to prevent a loss that is not covered by the policy, there is no duty or benefit to the insurer. The obligation only exists when the action taken is to prevent a loss for which the insurer would be liable. Therefore, if there is no coverage under the hull policy, the insurer is under no contractual obligation to repay the sue and labor expenses.

Beginning with that premise, the court then determined that Boh was not covered for its sue and labor expenses because the crane barge was not a scheduled vessel on the hull policy. Boh argued that the hull underwriters' participation in the settlement, the text of the sue and labor clause itself and the inclusion of collision and tower's liability created coverage for the crane barge even though it was not listed as a scheduled vessel. The court rejected these arguments noting that the policy, when read as a whole, was not ambiguous, that the language of the collision and tower's liability provision supported hull underwriters' position that the settlement was made in connection with tort liabilities, not third party coverage, and that because the hull policy did not provide first party coverage to Boh, it could not rely on that policy to recover sue and labor expenses for an unscheduled (uninsured) vessel. "To read the Policy as providing first-party hull and machinery coverage for not just scheduled vessels, but for any vessel or barge that it may from time to time be engaged to tow would be unreasonable as it

would ignore the plain reading of the entire rest of the Policy." The court granted hull underwriters' motion for summary judgment and denied Boh's cross motion.

Loss of Earnings Endorsement

Lakeshore Sail Charters, LLC v. Acadia Insurance Company, --- F. Supp. 3d , 2016 U.S. Dist. LEXIS 30257, 2016 WL 861218 (N.D. Ill. March 7, 2016).

Lakeshore Sail Charters, LLC ("Lakeshore") was the owner of a 79' schooner "tall ship" which was insured by Acadia Insurance Company ("Acadia"). Lakeshore sailed the vessel to various tall ship festivals where it sold tickets for excursions. In 2013, while en route to a festival in the Great Lakes, the vessel encountered bad weather and sustained significant damage to its bowsprit. At the time, the vessel was operating under a certificate of inspection ("COI") issued in New York. The vessel could not continue the voyage until repairs were completed and, as a result, the vessel missed most of the tall ship festivals it was scheduled to attend, causing a substantial financial loss.

The policy issued by Acadia included a loss of earnings endorsement and Lakeshore submitted a claim for lost profits that exceeded the limit of the coverage. Acadia denied the claim contending that the loss of earnings endorsement was not in effect at the time of the accident because the policy had a requirement that the vessel obtain a new COI from the USCG on its arrival in the Great Lakes. Suit was filed and both parties moved for summary judgment.

The district court determined that the plain, unambiguous language of the clause required payment of Lakeshore's lost profits claim. The court rejected Acadia's construction of the clause because it would have required the court to re-write the clause to include language that was not present. The court noted, "[h]ad Acadia wanted to include such a limitation on the loss of earnings endorsement, it easily could have done so, but the absence of such a provision speaks volumes." The court also rejected Acadia's

argument that coverage was not in effect because the endorsement specified that there was no coverage when the business interruption was caused by a governmental suspension or termination of the insured's ability to operate. Acadia contended that because Lakeshore did not obtain a new COI in the Great Lakes, the loss of earnings endorsement was not in effect. Again, relying on the plain, unambiguous language of the policy, the court disagreed with Acadia's construction. The court also pointed out that Acadia conceded that the vessel had a COI for the voyage to the Great Lakes festival which undercut its argument. The court awarded Lakeshore $250,000 representing the limits of the endorsement.

Acadia was more successful in dismissing Lakeshore's claims for consequential and statutory damages on the basis that Lakeshore failed to present legally sufficient evidence of its losses and further failed to show that any consequential damages in the form of attorney's fees were the result of "vexatious and unreasonable" conduct on Acadia's part.

Occurrence Based Cover and Calculation of Deductible

Seahawk Liquidating Trust v. Certain Underwriters at Lloyds London, 810 F.3d 986 (5th Cir. 2016).

This decision concerns an interpretation of a policy of insurance covering a jack-up drilling rig owned by Seahawk Drilling, Inc. ("Seahawk"), which was in operation in the Gulf of Mexico. In February of 2010, the rig encountered severe weather and sustained damage to its legs, which were knocked out of alignment. As a result, the rig was not able to perform under a contract and a replacement rig was required. The rig then underwent repairs in dry dock, but the misalignment of the legs was not corrected due to the cost. In July of 2010, the rig again encountered severe weather and sustained further damage. After that storm, the rig was in drydock for repairs until December, 2010. The legs were not repaired. Seahawk presented a claim to its insurers in the amount of nearly $17M for physical damage and cost of repairs. Underwriters denied the claim contending that the loss was not covered since (1) the loss failed to exceed the $10M per occurrence

deductible, (2) the loss was caused by wear and tear excluded by the policy and (3) the loss of contract provision was not triggered. The district court held that because the damage was sustained as a result of two separate occurrences (i.e. the February and July storms), the claim did not exceed the deductible of $10M per occurrence, or $20M in total.

In this context, the court of appeals had to determine how to interpret the term "arising from" when used to determine the number of occurrences under a policy. Noting that the Supreme Court of Texas stated that the term requires a simple causal connection and not a proximate cause connection, the Fifth Circuit examined whether that state court would adopt the proximate cause analysis used by the district court in its ruling that there were two occurrences. The Fifth Circuit then held that "[w]hen an occurrence is technically defined to include a series of losses arising from the same event, it includes only those losses *proximately caused* by that event. The Policy defines an occurrence as a series of losses "arising from" the same occurrence and thereby incorporates the proximate cause analysis. Thus, the district court applied the correct legal standard in determining the number of occurrences by analyzing whether the February storm was the *proximate* cause — not just a contributing or but-for cause — of the sequence of losses between February and December 2010."

The court next addressed the issue of whether the district court correctly found that Seahawk had no recovery under the concurrent-cause doctrine, which applies when covered and non-covered perils combine to create a loss, and which limits a recovery to that portion resulting from a covered peril. Noting that under Texas law, "no amount of damages is even *recoverable* – let alone payable — until the insured complies with the concurrent cause doctrine," the court then affirmed the finding below that Seahawk had not met its burden of proof under the doctrine because it presented no evidence to apportion damages between covered and excluded perils.

Perils Clause Excludes Cover for Commercial Arrest

Swift Spindrift Ltd. v. Alvada Insurance Inc. 2016 AMC 1012, 2016 U.S. Dist. LEXIS 41895, 2016 WL 1271061 (S.D.N.Y. March 29, 2016).

The principal holding of this case concludes that the traditional "perils" clause of the American Institute Hull Clauses, dated June 2, 1977 does not cover a commercial arrest, but only provides coverage for an arrest by a government entity. The memorandum and order are an interesting read on the history of the perils clause itself and its interplay with the War Exclusions clause and war risk insurance.

In this case, Plaintiff Swift Spindrift filed suit against the two insurers providing cover for its vessel MAT SWIFT SPINDRIFT. The vessel had been arrested in Libya in connection with a cargo dispute. Legal proceedings in Libya ensued and the vessel spent more than eighteen (18) months under arrest in Tripoli. Swift Spindrift then filed a claim against the insurers seeking payment of the vessel's agreed value of over $9M under a provision found in both policies that the vessel would be considered a constructive total loss if the vessel were subject to a covered arrest which lasted more than six (6) months. The insurers denied the claim on the basis that the perils clause only covered arrests by a government, i.e. a non-commercial arrest.

In arriving at the decision, the court traced the history of the perils clause, noting along the way that the language was "dated and opaque" and the interplay of the clauses created a "messy patchwork of coverage and exclusions. Despite that, the court found that the terms had developed a particular meaning for marine insurers over the centuries and that the court could not ignore the context in which the perils clause existed. The court noted that in another context, the clause might be considered ambiguous. However, the court was obliged to adopt the perspective of "a reasonably intelligent person *... who is cognizant of the customs, practices, usages and terminology* as generally understood in the marine insurance industry." The court also notes that knowledgeable parties should

be presumed to have intended that the policy's terms would be interpreted in accord with that understanding, absent an indication of contrary intent. Therefore, the perils clause did not cover commercial arrests.

Swift Spindrift attempted to convince the court that coverage for the arrest existed by virtue of the war risks and strikes clauses contained in each policy, the 1984 Addendum which modifies the war risks and strikes clauses and the blocking and trapping clause. These arguments were also rejected by the court as contrary to the plain, unambiguous language of the policy and the meaning ascribed to the clauses when viewed in the context of industry customs and practices.

Finally, the court rejected Swift Spindrift's argument that the arrest was, in fact, carried out pursuant to an exercise of sovereign authority. Plaintiff argued that the party initiating the arrest was an instrumentality of the state. In rejecting this claim, the court noted that Swift Spindrift had put forward no evidence from which a reasonable juror could conclude that the arrest in this particular case was an exercise of sovereign power. Summary judgment in favor of both insurers was granted.

[Editor's note: Cover artwork was provided by Anna Wilson, an Art Director for an ad agency in St. Petersburg, FL who also does freelance illustration, graphic design and web design. Anna received a BFA in illustration from the Savannah College of Art and Design (SCAD) in 2012. Her website is: http ://www. annawil sonillustration. coin]

COMMITTEE OI RECREATIOIAL BOATIIG

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BOATIIG BRIEFS

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Iinth Circuit Allows Tort Claims for Damage to Owner-Furnished Equipment

CHMM, LLC v. Freeman Marine Equipment, Inc., 791 F.3d 1059 (9th Cir. 2015)

The Ninth Circuit Court of Appeals has held that a yacht owner may proceed with tort claims against a component-part manufacturer hired by the builder if the component damages equipment that the owner—whether during the original build or afterward—added to the yacht.

The owner in this case contracted with a German yard to build a luxury yacht. Under the contract, the yard was to construct the "bare ship," while the owner was to provide the yacht's "Interior Outfit." During construction, the yard contracted with Freeman Marine Equipment to design and manufacture a weather-tight door to be installed on the yacht.

The owner, for its part, contracted with various third parties to supply and install the yacht's interior outfitting, such as woodwork, furniture, carpeting, wiring, and electronics.

Several years after the yard delivered the completed yacht, the Freeman door allegedly malfunctioned. Seawater entered the yacht and caused some $18 million in damage to the interior outfitting that had been furnished by the owner or by the third parties with whom the owner contracted during the build process.

The owner sued Freeman under various tort theories. Freeman moved to dismiss on the basis that the economic-loss rule,

as articulated in *East River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858 (1986), barred the tort claims because the damaged interior outfitting was integrated into the completed yacht and was therefore part of the "product itself as to which, under *East River,* no tort remedy was available. The district court agreed with Freeman and dismissed the tort claims.

On appeal, the Ninth Circuit reversed and held that the economic-loss rule did not bar the tort claims. This was because the interior outfitting was not part of the "product itself as supplied by the yard but rather was furnished by the owner pursuant to its contracts with other third parties.

The Ninth Circuit recited the economic-loss rule as follows: "If a plaintiff is in a contractual relationship with the manufacturer of a product, the plaintiff can sue in contract for the normal panoply of contract damages ... [but] can sue the manufacturer in tort only for damages resulting from physical injury to persons or to property *other than the product itself."*

Freeman argued that since the interior outfitting was done before the yard delivered the finished yacht, the outfitting—though furnished by the owner and its contractors—was part of the "product itself." But the Ninth Circuit held that the question whether the damaged property constitutes the "product itself does "not turn on the *timing* of the addition to the product. What matters for purposes of tort recovery is that the items were added by the user."

The fact that the interior outfitting was installed while the yacht was still in the yard's possession was therefore held to be immaterial. The yard's obligation under the construction contract was to build the bare vessel, not to provide the interior outfitting. As a result, the Ninth Circuit held that "[t]he economic loss doctrine does not bar [the owner] from suing in tort for damage to the Interior Outfit caused by the allegedly defective Freeman door."

PRODUCT LIABILITY

Injury Claims Preempted by Coast Guard's Decision to Exempt Personal Watercraft From Ventilation Requirement

Rollins v. Bombardier Recreational Products, Inc., 366 P.3d 33 (Wash. App. 2015)

As she attempted to start a Sea-Doo personal watercraft manufactured by Bombardier, the plaintiff was seriously injured when an electrical arc ignited gasoline vapors in the engine compartment. The Sea-Doo did not have a powered ventilation system, which might have prevented the explosion by eliminating the accumulated vapors.

The plaintiff sued Bombardier in Washington state court, alleging violations of Washington's Product Liability Act and Consumer Protection Act. All of her claims were based on Bombardier's failure to equip the Sea-Doo with a powered ventilation system. The trial court granted summary judgment to Bombardier, holding that the claims were preempted by Coast Guard regulations promulgated under the Federal Boating Safety Act (FBSA). Although the regulations mandated powered ventilation systems for most boats, the Coast Guard had issued an exemption to Bombardier and other personal watercraft manufacturers based on the unique characteristics of their fuel systems.

On appeal, the Washington Court of Appeals affirmed the grant of summary judgment for Bombardier. The Court of Appeals began by reviewing the basic principles of federal preemption. Deriving from the supremacy clause in Article VI of the United States Constitution, federal preemption can be either express or implied. Express preemption occurs when Congress "explicitly defines the extent to which it intends to supersede state law." Implied preemption can occur in one of two ways: "field preemption," where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and "conflict preemption," where "compliance with both federal and state regulations is a physical impossibility" or

where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The Court of Appeals held that conflict preemption applied here. In the FBSA, Congress explicitly provided that federal regulation of personal watercraft would preempt conflicting state laws. See 46 U.S.C. § 4306. The FBSA also gives the Secretary of Transportation (and his delegee the U.S. Coast Guard) discretion to exempt certain vessels from otherwise applicable regulations, just as the Coast Guard did in 1988 when it granted Bombardier an official exemption from the requirement that engine compartments have a powered ventilation system.

The plaintiff challenged Bombardier's preemption argument on two grounds. First, she argued that because the Coast Guard's exemption was granted to Bombardier in a letter and was not published in the Federal Register, the exemption did not constitute a "regulation" sufficient to warrant preemption. The Court of Appeals rejected this argument, noting that there were no authorities holding that only "published regulations have preemptive force." Rather, federal courts have recognized that "federal agency action taken pursuant to statutorily granted authority short of formal notice and comment rulemaking may also have preemptive effect over state law."

The plaintiff alternatively argued that the savings clause in the FBSA, 46 U.S.C. § 4311, saved her state-law claims from preemption. The FBSA's savings clause provides that compliance with the FBSA and its regulations "does not relieve a person from liability at common law or under State law." But the Court of Appeals held that the savings clause merely prevented manufacturers from using "compliance with federal regulations as a broad defense to tort claims." Where, as here, the Coast Guard had conveyed an "authoritative message" about an equipment requirement, that authoritative message would preempt state-law claims premised on a contradictory requirement.

TORTS

Professional Sailor Awarded $1.4 Million for Career-Ending Arm Injury

Ievor v. Moneypenny Holdings, LLC, No. 13-407-M-LDA, 2016 WL 183906, 2016 U.S. Dist. LEXIS 5580 (D.R.I. Jan. 14, 2016)

A federal judge in Rhode Island has held the owner of a racing sailboat liable for more than $1 4 million in damages to a sailor who tore his bicep tendon as he boarded a tender off the U.S. Virgin Islands.

The plaintiff, age 35 at the time of the incident, had a distinguished racing career and was a member of the defendant's sailing team for about four years. He had recently joined the crew of the VESPER, the defendant's 52-foot state-of-the-art racing sailboat.

On the day of the incident, the ODD JOB—the VESPER's 35-foot rigid-inflatable tender—was sent to bring the crew of the VESPER to clear customs in St. Thomas. The transfer occurred in the open waters of Sir Francis Drake Channel, east of St. John. Both vessels were making way and oscillating in choppy seas. Winds were 8-12 knots, and both vessels had less than a full crew.

The ODD JOB came alongside the VESPER for the transfer. The vessels were not tied together, and essentially the crew had to jump from the VESPER to the ODD JOB.

As the plaintiff attempted to make the transfer, the vessels separated. The plaintiff slipped on the ODD JOB's inflatable tube and clung to the VESPER's lifeline with his right arm. The ODD JOB then pitched back toward the VESPER, and the plaintiff—his arm hung up on the lifeline—fell to the ODD JOB's deck. His right bicep tendon was severed.

The plaintiff underwent surgery to repair the tendon, wore a brace for ten weeks, and performed physical therapy for six months. He was left with a permanently tightened tendon, was unable to

straighten his arm, and could not return to professional racing at the elite level.

Following a four-day bench trial, the court found that the sailboat owner was negligent by performing a risky at-sea transfer with an insufficient crew complement. According to the court, the vessels should have moved to protected waters before undertaking the transfer and should have run a line between them to minimize the movement relative to each other. While recognizing that professional sailors are assumed to know how to board a tender at sea, the court nevertheless found that the sailboat owner failed properly to train the crew and implement safety procedures for underway transfers. The court also held that the ODD JOB was unseaworthy because it did not have a non-skid product applied to its hypalon tube, on which sailors would ordinarily place their feet during a transfer. The plaintiff was found to be free of any comparative negligence.

Given the plaintiffs work-life expectancy of 30.3 years, the court awarded him $710,458 for lost earnings and lost earning capacity, plus $750,000 for pain and suffering, for a total of $1,460,458. The sailboat owner has appealed.

Boat Owner Had 10 Duty to Warn Guests About Crowded and Wet Swim Platform

Schade v. Clausius, 2016 WL 233237 (Ill. App. 1st Dist. Jan. 15, 2016)

Four boats were rafted together on Lake Michigan for a Fourth of July outing. One of the boats was a 52-foot Sea Ray, whose owner was using his tender to give rides to guests visiting from the other boats. The Sea Ray's swim platform was lowered, almost to the water, and was being used by guests to jump into the water and to transfer to or from the tender.

The plaintiff, who was visiting from one of the other boats, claimed that the swim platform was overcrowded with guests waiting for a ride on the tender. She testified that, due to the

numerous guests standing on the platform, she could not see whether the platform was wet. As she was attempting to walk among the passengers on the platform (for what purpose is not clear), she slipped and fell on her right hand. She remained aboard the Sea Ray and watched the fireworks.

A couple of days later she was diagnosed with a torn rotator cuff. She underwent surgery but suffered complications and had chronic pain. She brought suit against the Sea Ray owner, claiming that he was negligent in failing to keep the swim platform dry, in allowing too many guests to congregate on the platform, and in failing to warn her that the platform was wet.

The Sea Ray owner testified he had over 40 years of boating experience in which none of his passengers ever sustained injury. His boat was inspected annually and was designed with a skid-resistant swim platform with cuts to allow water to drain. He claimed that on the day in question the platform was in constant use by guests. He also testified that he did not even learn of the plaintiffs injury until about a year and a half after it occurred. He moved for summary judgment, arguing that the condition of the swim platform was open and obvious and therefore required no warning. The trial court agreed with him, and the plaintiff appealed.

The appellate court held that "both the number of guests on the swim platform and the potential for the swim platform to be wet were open and obvious conditions." As such, federal maritime law imposed no duty to warn of these conditions. The plaintiff knew that the swim platform was close to the water, and the fact that it might be wet "was discernible through common sense." While vessel owners must warn passengers of dangers that are known to the owner but neither apparent nor obvious to passengers, owners have no duty to warn passengers of open and obvious dangers.

The plaintiff raised a novel argument based on the "distraction exception," a concept applied in Illinois cases involving landowners. The court noted the absence of any caselaw applying this concept to maritime matters but nonetheless addressed the argument on the merits.

The exception applies where a possessor of land has reason to expect that an invitee's attention may be distracted in such a way "that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Here, the plaintiff was aware of the crowd of people on the platform when she decided to walk on the platform herself. And because the crowd of people was one of the very hazards she was complaining about, the distraction exception simply did not apply. "Moreover, nothing in the record indicates plaintiff was forgetful of the fact that she was on a boat anchored offshore when she decided to join the group of people waiting on the swim platform for a ride on the tender." Summary judgment for the Sea Ray owner was therefore affirmed.

IISURAICE

Does My "All Risk" Policy Cover "All Damages"?

Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc., 2016 WL 285464 (11th Cir. Jan. 25, 2016)

A recent decision by the Eleventh Circuit Court of Appeals serves as a reminder that "all risk" insurance does not necessarily cover "all damages." The case was filed after a 51-foot Bluewater Motor Yacht sank at its slip in Florida. The culprit was a bilge-pump system that had failed due to a blown fuse. The reason why the fuse blew was unknown.

The policy covered "accidental physical loss of, or accidental damage to" the yacht but did not define "accidental physical loss." After concluding that no "accidental" or "fortuitous" loss had occurred, the insurer denied coverage. The insurer also relied on an exclusion that purported to exclude coverage for "[d]amage to the engines, mechanical and electrical parts, unless caused by an accidental external event such as collision, impact with a fixed or floating object, grounding, stranding, ingestion of foreign object, lightning strike or fire."

In finding for the insured, the district court ruled that a blown fuse was a fortuitous event and that the resulting loss was covered. The district court also held that the insurer could not rely on the

exclusion because the exclusion was inconsistent with the grant of coverage and therefore created an ambiguity that had to be construed in the insured's favor.

On appeal, the Eleventh Circuit explained that all risk insurance covers "fortuitous" losses unless otherwise expressly excluded by the policy; that a fortuitous event is one that is dependent on chance; and that an insured may prove fortuity under an all risk policy even if the precise causes of a loss are unknown. The Eleventh Circuit held that the blown fuse in this case was an unexplained event that, as far as the parties were aware, was dependent on chance. The insured therefore met its burden of showing that the loss was fortuitous.

The lower court had ruled that the exclusion created an ambiguity and that the insured was therefore entitled to a full recovery. The perceived ambiguity arose from the fact that the coverage grant and the exclusion used overlapping terminology. The policy extended coverage to the hull, machinery, electrical equipment, etc., while the exclusion precluded coverage for damage to "engines, mechanical and electrical parts" unless caused by an "accidental external event."

But the Eleventh Circuit held that this overlapping terminology created no ambiguity. The fact that one provision in the policy granted coverage and another provision limited the coverage did not mean that the policy was ambiguous. The interplay between the coverage and the exclusion meant that the policy would cover "accidental physical damage" to engines and mechanical and electric parts, but only if the damage was caused by an "accidental external event." Because the district court had not determined whether the damage to the engines and mechanical and electrical parts was caused by an accidental external event, the appellate court remanded the case to the district court for further proceedings.

On remand, the district court would have to consider whether the phrase "accidental external event" was itself ambiguous, and particularly whether ingress of water could qualify as such an event.

If so, the engine, mechanical, and electrical damage would be covered despite the exclusion.

Court Applies "Mysterious Disappearance" Exclusion After Sailboat Goes Missing at Sea

St. Paul Fire & Marine Ins. Co. v. Britt, 2016 WL 360654 (Ala. Jan. 29, 2016)

A man lived aboard his sailboat for several years in Florida and insured it with St. Paul. The policy provided $85,000 in coverage for "accidental direct physical loss of or damage to [the sailboat]" but excluded coverage "for any loss or damage caused by or resulting from . . . mysterious disappearance."

One day the man telephoned his father and said that he had accepted a new job and needed to travel to Oklahoma City for training. He told his father that he would sail the boat from West Palm Beach to Jacksonville, where he would store the boat and then rent a car to drive to Oklahoma City.

Four days later the Coast Guard encountered the vessel and inspected it off Cape Canaveral, fmding it to be seaworthy. Although there was no evidence of any severe weather in the area around that time, no one ever saw the man or his sailboat again.

The father contacted St. Paul to report the sailboat as lost and was thereafter appointed conservator of his son's estate. The father later filed a claim with St. Paul for the loss of the sailboat. Citing the "mysterious disappearance" exclusion, St. Paul denied the claim.

In the ensuing litigation, an Alabama trial court held that the loss was covered under a policy provision that afforded coverage "if your boat is totally destroyed or lost for more than 30 days." According to the trial court, this provision applied despite the "mysterious disappearance" exclusion. St. Paul appealed.

The appellate court noted that the policy did not define "mysterious disappearance" and that the phrase should therefore bear the common everyday meaning that a reasonable person of

ordinary intelligence would give to it. The court relied on authority from other jurisdictions that had read a "mysterious disappearance" to mean: "[a]ny disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain." The appellate court applied that definition and held that the sailboat's disappearance was indeed "mysterious."

The court then addressed the "30 day" provision and held that, when read in conjunction with the "mysterious disappearance" exclusion, the exclusion was effective and that summary judgment should have been entered for St. Paul.

LEGISLATIVE DEVELOPMEITS

Arkansas has made the offense of boating while intoxicated the equivalent of driving a vehicle while intoxicated, meaning that a BWI will be now included in the driving record and may be considered for sentencing in future offenses. See ARK. CODE ANN. § 5-4-104(e)(1)(A)(iv).

California now requires that boaters pass a sanctioned boating-education course and obtain a Vessel Operator Card in order to operate a "motorized" vessel. Furthermore, Section 307 of the Harbors and Navigation Code was amended to change the status of the following violations from infractions to misdemeanor offenses: (1) mooring a boat to a beacon or buoy that is not designated for mooring; (2) exceeding the 5-mph speed limit within 200 feet of a marina; (3) and towing a water skier without a spotter. See Chapter 5 Art. 1.4 of Division 3 of the CAL. HARB. & NAV. CODE; CAL. HARB. & NAV. CODE § 307.

In **Connecticut,** no one under the age of 16 may operate a vessel engaged in water skiing, and anyone age 16 or older operating a vessel engaged in water skiing must have a valid license with a "water skiing endorsement." Furthermore, anyone operating a vessel must have a valid vessel operator license (with an additional restriction that no one under 16 may obtain such a license unless he or she will be under the direct onboard supervision of a licensed

operator who is at least 18 years of age and who has held an operator's license for at least two years). See CONN. GEN. STAT. § 15-140e.

Beginning July 1, 2016 through June 30, 2017, **Florida** will lower registration fees for vessels equipped with an emergency position-indicating radio beacon or a personal locator beacon, thus limiting the application to one vessel per owner. Furthermore, the state excise/use tax section was updated to cap the tax on repair of vessels to $60,000. FLA. STAT. § 212.05(5). Finally, Florida will ban anchoring in many popular sections of the Intracoastal Waterway in south Florida, particularly a large section of the Middle River, Sunset Lake, and sections of Biscayne Bay. The legislation was strongly opposed by recreational boaters who regularly cruise and anchor in these areas.

In **Georgia,** vessels held in "inventory" by licensed boat dealers are now classified separately for ad valorem taxation purposes. Starting January 1, 2016 through December 31, 2019, those vessels that are held for sale or resale are not subject to the classification for ad valorem taxation. See GA. CODE ANN. §48-5-10-7.

Illinois can now seize a watercraft used with the knowledge and consent of the owner in the commission of specified offenses, including operation of a watercraft while under the influence of alcohol, drugs, or intoxicating compounds if the operator has a documented history of similar misconduct. See Ill. Criminal Code of 2012 §§ 36-1, 36-1a, 36-2, 36-3, and 36-4. Also, the operator of any watercraft that is towing a person must display a bright orange flag measuring at least 12 inches per side. The flag must be visible from all directions See Ill. Boating Act § 5-14.

Finally, no person born on or after January 1, 1998, may operate a motorboat with over 10 horsepower unless that person has a valid Boating Safety Certificate issued by the Department of Natural Resources or an entity or organization recognized and approved by the Department. Exceptions include: those with USCG licenses, commercial fishermen, non-residents, and those operating

vessels on private property. See Ill. Boating Safety and Registration § 5-18.

In **Minnesota,** water skiing is now forbidden between a half hour after sunset and sunrise of the following day. MINN. STAT. § 86B.315.

Iebraska has created an invasive species program requiring owners not registered in Nebraska to purchase an aquatic invasive species stamp. The price of the stamp is between $5 and $10. See LB142 (2015).

Ievada has defined "under the influence" as impaired to a degree that renders a person incapable of safely operating or exercising actual physical control of a vessel. NEV REV. STAT. § 202.257.

If **you double paid for vessel registration in Iew Hampshire,** you can now get your refund.

Iew Jersey has set a new vessel tax rate at 3.5%, not to exceed $20,000. See P.L.1966, c. 30 (C.54:32B-1 et seq.). Pontoon boat rental businesses must post a sign at their entrance, stating: "All unlicensed pontoon boat operators shall complete a pre-rental instruction course in accordance with New Jersey State Law". The center portion of the sign is to display an image depicting the outline of a person near a propeller surrounded by a red circle with a red backslash bisecting the image. The bottom portion of the sign is to state: "Warning: Rotating propellers can cause serious injury or death." Finally, the exemption for operators without a license now applies to non-tidal waters. See P.L.1987, c.453 (C.12:7-61).

South Dakota has updated state title requirements for vessels titled in the state, requiring owners of large boats that must be titled under state law to register with the state within 45 days of acquisition. Furthermore, no large vessel can be transferred without an assignment of the title given within 45 days to the transferee.

In Texas, if you are licensed to carry, you can now open-carry a holstered weapon on board a watercraft.

Utah now requires that all vessels have wearable flotation devices for each person on board. This does not apply to sailboard or crew shells. Vessels over 16 feet must have a throwable personal flotation device as well.

Virginia now only requires reasonable suspicion before law enforcement may board and inspect a vessel. Meanwhile, conservation officers are allowed to stop and inspect hunting and fishing licenses for catch limits VA. CODE ANN. § 19.2-10.3.

[Editor's note: *Thanks to Eugene Samarin of Annapolis for submitting the foregoing state-law summary, which was prepared with the assistance ofMathew Hubbard, a law student at the William and Mary School of Law.]*

COMMITTEE OI SALVAGE

Chair: Jason R. Harris
Editors: J. Ben Segarra
Aaron Greenbaum

IEWSLETTER

Spring 2016*

RECEIT DEVELOPMEITS II SALVAGE LAW

Farnsworth v. Towboat Iantucket Sound, Inc., 790 F.3d 90, 2015 AMC 1586 (1st Cir. 2015)

Plaintiff Farnsworth entered into a salvage contract with defendant TNS after his recreational craft ran aground near the Weepecket Islands in Buzzards Bay, Massachusetts. After initiating the arbitration process called for by the terms of the contract, the plaintiff brought an action in federal district court to enjoin the arbitration on the grounds that the entire contract was signed under duress.

The district court denied the motion for injunctive relief, but stayed the case pending the resolution of the arbitration. The arbitration panel determined a liability against Farnsworth of $60,306.85, and the federal court affirmed this award over the plaintiffs objection.

Deciding that the plaintiff "did not challenge the validity of the arbitration clause specifically in his complaint (or indeed at any time before the conclusion of the arbitration proceedings)," the duress claim was in **all** aspects "for the arbitrator to resolve," *Farnsworth*, 790 F.3d at 92-93, 2015 AMC at 1587, the First Circuit

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Please direct comments/questions to the Salvage Committee's Secretary, J. Ben Segarra, at bsegarra@maynardcooper.com, Mr. Segarra is the Senior Maritime Associate at Maynard Cooper & Gale, P.C., 11 North Water Street, Mobile, AL 36602, telephone (251) 421-2667. Mr. Greenbaum is a partner with Pusateri Baniosadtili Greenbaum in New Orleans, LA. The views and opinions expressed herein are not necessarily those of the Maritime Law Association of the United States, the Salvage Committee, the editor, or anyone other than the author of the case summary.

affirmed the trial court's approval of the arbitral liability determination.

St. Clair Marine Salvage, Inc. v. Bulgarelli, 796 F.3d 569, 2015 AMC 2399 (6th Cir. 2015)

Here, the owner of a pleasure craft appeared as a defendant after the craft ran aground in Lake St. Clair, in Michigan. Here, however, the court found that the salving company was fraudulent in its contractual dealing with the owner of the craft, in that the company's representative verbally agreed to one price with the defendant, and then later made a written notation on the contract itself with a much higher price. In doing so, the court employed a series of factors from *Black Gold Marine, Inc. v. Jackson Marine Co.,* 759 F.2d 466, 470, 1986 AMC 137, 142-43 (5th Cir. 1985), as part of a determination of whether the contract as presented was, indeed, fraudulently formed.

St. Michael Press Pub. Co. v. One Unknown Wreck Believed to be the Archangel Michael, 610 F. App'x 940 (11th Cir. 2015)

With perhaps the best case style in the past several years, this *per curiam* decision from the Eleventh Circuit consisted of that court's affirmance of a grant of summary judgment against the alleged discoverer of an ancient Spanish wreck, on the grounds that the would-be salvor presented insufficient evidence of his discovery. The plaintiff filed a sworn affidavit attesting to the discovery; the court viewed his position dimly, and so affirmed summary judgment in favor of the Kingdom of Spain, the nominal owner of the wrecked vessel.

Recovery Ltd. P 'ship v. Wrecked & Abandoned Vessel S.S. Cent. Am., 790 F.3d 522, 2015 AMC 1845 (4th Cir. 2015)

A hurricane claimed the S/S CENTRAL AMERICA off the South Carolina coast in 1857, not to be discovered until the 1980's due to the efforts of the Columbus-America Discovery Group. From the 1980's until the third quarter of 2013, the salvage group hired an attorney to establish its salvage rights to the S/S CENTRAL

AMERICA. During the pendency of these efforts, the company's founder absconded with some 500 gold coins from the wreck in around 2011. The attorney withdrew as counsel for the company, then (not having been paid over $2M worth of legal fees) filed an *in rem* action to obtain a salvage award for himself, claiming that his voluntary assistance to the Receiver in turning over files and documents related to the salvage operation constituted continuing salvage of the S/S CENTRAL AMERICA.

The district court dismissed the attorney's claim, concluding that he was *obligated* to return the files and documents under both agency law and professional responsibility principles. Therefore, no voluntary act took place by which he could obtain a salvage award. The Fourth Circuit Court of Appeals agreed and affirmed.

Biscayne Towing & Salvage, Inc. v. M/Y Backstage, 615 F. App'x 608, 2015 AMC 1961 (11th Cir. 2015)

As the yacht BACKSTAGE lay in harbor one fateful morning, the yacht docked nearby caught fire, igniting a domino reaction of immolated vessels that threatened to engulf her too. The owner of Biscayne Towing arrived on scene with a towboat at this point, and created a firebreak by moving the most recently afire vessel out of its slip. The owner and assistant pilot of the BACKSTAGE then arrived, and attempted to shift her, but the local fire department blocked this maneuver. By the time the fire was eventually put out, the BACKSTAGE had suffered extensive fire damage to her starboard hull.

Reasoning that its movement of the antecedent vessel saved the BACKSTAGE from the conflagration, the towing company claimed salvage thereof, but the district court found that the BACKSTAGE faced no "maritime peril," a necessary requirement of any salvage claim. Holding that a genuine issue of material fact remained as to the existence of the maritime peril, the Eleventh Circuit reversed the trial court's grant of summary judgment in favor of the BACKSTAGE, and remanded the case for further proceedings.

Sea Hunters, LP v. S.S. Port Iicholson, No. 2:08-CV-272-GZS, 2015 WL 1505688, (D. Me. Apr. 1, 2015); 2015 U.S. Dist. LEXIS 158950 (D. Me. Nov. 24, 2015)

This salvage litigation dates to 2008 and concerns the submerged wreck of, and cargo on, the S.S. PORT NICHOLSON, a British merchant vessel torpedoed and sunk during World War II. The salvor-in-possession, Sea Hunters, sought dismissal of its complaint without prejudice. The court found that there was no good cause for dismissal without prejudice, based on Sea Hunters' filing of falsified documents into the record and its inability to salvage any items of substantial value. Thus, Sea Hunters was dismissed and forfeited any right to a salvage award or any ability to reassert salvage rights at the wreck location in the future. Mission Recovery then sought to be substituted as salvor-in-possession. However, the court denied such relief, holding that a new stand alone *in rem* action was the best method for Mission Recovery to seek such protection.

Later, the Secretary of State for Transport of the United Kingdom, which had entered a restricted appearance to defend the claims against the S.S. PORT NICHOLSON, moved for an award to recoup its attorney fees, totaling $902,179.70. Although Sea Hunters had filed falsified documents into the court's docket, altered from the originals to show the existence of valuable cargo, and failed to salvage any items of substantial value since filing the case in August 2008, the court denied the Secretary of State's motion, finding that it had fallen short of carrying "the heavy burden of demonstrating that an award of attorney fees predicated on the bad faith exception: to the American Rule.

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 2016 AMC 969, 2016 WL 915257 (E.D. La. Mar. 10, 2016)

The issue addressed in this decision was whether a "responsible party" is liable under the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702(a), (b)(2)(E), for a claimant's economic loss that resulted from the moratorium on offshore drilling imposed by the federal government in the aftermath of the DEEPWATER

HORIZON/Macondo Well blowout and oil spill. Bisso Marine, LLC, one of the claimants, alleged that the blowout and "consequent explosion, fire, vessel sinking and massive oil spill prohibited [it] from engaging in its marine salvage and commercial diving operations." *Deepwater Horizon,* 2016 AMC at 974, 2016 WL 915257 at *3. The court dismissed Bisso's claims, as well as those of other class members claiming economic losses under OPA. The court reasoned that the "Moratorium addressed the risk of possible *future blowouts and oil spills from wells other than Macondo* . . . [Nut the perceived threats of discharge from other wells are different OPA "incidents" (if these are 'OPA incidents at all') than the Horizon/Macondo incident for which BP is a responsible party. In OPA terms, then— and putting aside the question of whether Plaintiffs' claims are due to the injury, destruction, or loss of property or natural resources—the OPA Test Case Plaintiffs' losses did not result from the discharge or substantial threat of discharge of oil from the Macondo Well; [but rather] from the perceived threat of discharge from other wells." *Id.* at 981, 2016 WL 915257 at *6 (emphasis in original).

Recovery Ltd. P'ship v. Wrecked & Abandoned Vessel, S.S. CEITRAL AMERICA, 120 F. Supp. 3d 500 (E.D. Va. 2015)

This is an important decision addressing the law of salvage versus the law of fmds. Rather than seek a salvage award, the salvor-in-possession of a sunken treasure ship, the S.S. CENTRAL AMERICA, sought to use the common law, law of finds, to obtain immediate title to some recovered artifacts. The court held that salvage law applies to historic wrecks under Fourth Circuit precedent, and the salvor-in-possession was required to seek a salvage award. Citing to the *Titanic* cases, "under salvage law, the *salvor* receives a *lien* in the property, *not title* to the property, and as long as the case remains a salvage case, the lienholder cannot assert a right to title even though he may end up with title following execution or foreclosure of the lien." *Recovery Ltd. P'Ship.,* 120 F. Supp. 3d at 506 citing *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel,* 286 F.3d 194, 204-05, 2002 AMC 1136, 1149 (4th Cir. 2002) (emphasis in original). Thus, the court found that the salvor could not be a salvor-in-possession and also apply the law of finds

to recovered artifacts from this historic wreck. "Whereas salvage law is based on the principle of mutual aid, 'a free finders-keepers policy is but a short step from active piracy and pillaging.' Thus, the law of finds should be 'applied sparingly — only when no private or public interest would be adversely affected by its application.'" *Recovery Ltd. P 'Ship.,* 120 F. Supp. 3d at 505 citing *R.M.S. Titanic, Inc.,* 286 F.3d at 533, 2002 AMC at 319.

Thuan Vo Tran v. Abdon Callais Offshore, LLC, 120 F. Supp. 3d 554 (E.D. La. 2015)

Following a collision between two vessels near the mouth of the Mississippi River and Gulf of Mexico, one of the plaintiffs, Tom's Marine & Salvage, LLC, sought to recover the amount of a salvage contract entered into with the owner of the F/V STAR OCEAN, which sank after the collision. The contract set forth, in pertinent part, that:

> 4. SALVOR'S ONLY OBLIGATION UNDER THIS CONTRACT SHALL BE TO USE ITS BEST EFFORTS TO REMOVE THE SAID VESSEL . . . .
>
> 5. AN INITIAL DEPOSIT OF 20,000.00 DOLLARS U.S. IS DUE AT THE SIGNING OF THIS CONTRACT PRIOR TO THE START OF SALVAGE WORK. THE REMAINING BALANCE OF 120,000.00 DOLLARS U.S. IS DUE AT THE SETTLEMENT OF THE LAWSUIT.

Despite good faith efforts, the F/V STAR OCEAN was eventually unsalvageable. Following a bench trial, the court found that the phrase "due at the settlement of the lawsuit" was both ambiguous and would lead to absurd consequences. *Abdon Callais Offshore, LLC,* 120 F. Supp. 3d at 565. The court found that the parties intended "due at the settlement of the lawsuit" to indicate that the amount would become due once the lawsuit had concluded. *Id.* The court further noted that while there are "no cure / no pay" salvage arrangements, the advent of salvage contracts was largely to protect salvors from just such a scenario when unintended.

Therefore, the failure to state in the contract, either expressly or impliedly, that this was a "no cure / no pay" arrangement evidenced that the parties' intent was in fact the opposite. *Id.* The vessel owner owed the salvor $120,000 on the contract.

COMMITTEE OI YOUIG LAWYERS

Chair: Blythe Daly
Vice Chair: Jennifer Porter
Secretary: Imran 0. Shaukat

IEWSLETTER

Vol. 2016-1 April 2016

"THEORETICALLY QUARTERLY"

Message from the Chair

The Maritime Law Association is pleased to welcome the 42nd International Conference of the Comite Maritime International in New York. The historic joint conference offers exceptional opportunities for young lawyers to network with international practitioners and attend dynamic presentations on a variety of substantive international issues.

The conference has been convened by the CMI mainly to reach consensus on proposed revisions to the York-Antwerp Rules relating to General Average, but other highlights include the Opening Address on the salvage of the *Costa Concordia*, a detailed examination of Cybersecurity in Shipping, and the Polar Shipping and Arctic Development Symposium. Of course, the highlight of the week's substantive program will be the CLE Program on Friday afternoon hosted by the MLA YLC and the Young CMI. Two panel presentations will focus on the OW Bankruptcy and the taking of evidence in the United States and other jurisdictions. Please plan to attend the CLE Program to support our colleagues.

I would like to extend a special thanks to all YLC members who have volunteered for committee work since our last meeting and who have volunteered to assist with the meeting in New York. The contributions of our members are vital to the work of the Association and are recognized by the MLA President, Board, and Committee Chairs. Thank you.

See you in New York!

- Blythe Daly

YLC in TYC

This year's joint meeting with the CMI offers great chances for networking and learning, but the strength of the MLA relies upon the collaboration of its members — including the YLC. We decided to hold a separate MLA YLC committee meeting to address any issues specific to our members. In addition to reports from the YLC liaisons, MLA Past President Liz Burrell will join us to offer her perspectives on advancement within the Association, the officer and board election process, and how young lawyers may become more involved and visible.

Thursday, May 5, 2016
1:30 — 3:00 p.m.
Holland & Knight LLP
31 W. 52nd St., 12th Floor

If you plan to attend the meeting, please email blythe.daly@hklaw.com and arrive early to check in with building security.

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The MLA YLC is looking forward to hosting young CMI attendees at our annual Social Event on Thursday evening.

Thursday, May 5, 2016
Cocktails 7:00 — 8:30 p.m.
Dinner 8:30 p.m. Sharp!
Favela Cubana
543 Laguardia Place
(located near the Healy Lecture)

Cocktails are open to all and a portion of the cocktail hour will be sponsored by S-E-A, Ltd. If you plan to stay for dinner, please **register and pay on the CMI website:** http ://www. cmi20 1 6newyork.org.

A special thanks to **Pamela Shultz** for her superb coordination of this event.

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The YLC has the privilege of hosting and headlining the Friday afternoon CLE program in conjunction with the Young CMI. Our YLC colleagues have put a lot of time and effort into making the program informative and interesting. Please plan to support your fellow YLC members.

Friday, May 6, 2016
1:30 p.m. — 5:00 p.m.
Hilton Hotel — Sutton South & Regent

The program is as follows:

- **Perspectives on the OW Bankruptcy**

  Moderator: David Boyaj ian

  Panelists: Darren Azman
  Justin Heilig
  Marie Larsen
  Jason Lattanzio (CAN)
  Brian Maloney
  Evangeline Quek (HK)
  Luis Raven (PAN)
  Harald Sondergaard (DK)

- **The Procedural Differences in Obtaining Evidence in the United States, the United Kingdom, and the Ietherlands**

Moderator• Imran Shaukat

Panelists: Dharshini Bandara (UK)
Marissa Henderson
Robert Hoeppel (NL)
Kasee Sparks Heisterhagen

- **The Aegean Sea Dispute over the Continental Shelf and Joint Development Agreements as an Avenue Towards Effective Cooperation**
  Presenter: Harts Kazantzis (GR)

SPRIIG MEETIIG HIGHLIGHTS

While the YLC CLE presentation and our business meeting will be "don't miss" events, the following presentations may be of particular interest:

- **Opening Address and Discussion on *Costa Concordia,* Wednesday, May 4, 2016, 9:00 - 1:00, featuring:**
  - Capt. Nick Sloane, Salvage Master
  - Katharine F. Newman, Senior Counsel ConocoPhillips
  - R. Michael Underhill, D.O.J.
  - John A. Witte, President, International Salvage Union
  - Pietro Palandri: Italian attorney for Costa Crociere S.p.A
  - Lisa Reeves: Partner, Reeves McEwing LLP
  - Nick Platt: Vice President, Gard

- Judge Thomas A. Dickerson, Associate Justice Appellate Division, 2nd Dep't, New York

- **Cybersecurity in Shipping, Thursday, May 5, 2016, 9:00 - Ioon, featuring:**

  - Peter Singer, Senior Strategist, New America Foundation & author of "Cybersecurity and Cyberwar"

  - Michael Riley, Bloomberg News addressing Port of Antwerp 2012 security breach by drug traffickers

  - Joe Ruddy, Chief Innovation Officer, Port of Virginia

  - Randy Parsons, Director of Security, Port of Long Beach

  - Lars Robert Pederson, Deputy Secretary General, BIMCO

- Joint Meeting with CMI Acts of Piracy and Maritime Violence IWG, Thursday May 5, 2016 at Noon, featuring YLC member **Rebecca Hamra** of Charles Taylor P&I Management (Americas), Inc.

COMMITTEE LIAISOI PROGRAM

The Committee Liaison Program assigns one YLC member to each of the MLA's standing committees to serve as a liaison. The goal of the program is to increase communication between the committees and the YLC. The hope is that increased communication will lead to more opportunities for our members in those committees as well as increased utilization of the YLC for committee projects. Liaisons provide brief status reports at each YLC meeting pertaining to the work and projects of each standing committee.

A chart identifying the appointed liaisons is posted under the documents section of the YLC page on the MLA website. Let this serve as a reminder to our liaisons that the YLC is ready to work. If you are currently a YLC liaison and have a project that needs help, please e-mail both the YLC Secretary, Imran Shaukat, at ishaukat@semmes corn, and the YLC Chair, Blythe Daly, at blythe.daly@hklaw.com.

We are seeking volunteers for the CLE Committee, the Cruise Lines and Passenger Ships Committee, and the International Organizations, Conventions, and Standards (IOCS) Committee. If you are interested in volunteering to serve as a YLC liaison for any of these committees or in general, please email Imran at ishaukat@semmes com.

RECEIT PROJECTS

At the request of Chet Hooper and David Nourse, the following YLC members assisted in proof-reading and cite checking the latest edition of the MLA Report: Corey **R. Greenwald, J. Ben Segarra, Stephanie Propsom,** and **Christine M. Walker.**

Several YLC members assisted in the preparation of the ADR/Arbitration Committee newsletter, including **Scott Gunst, Jr., Barrett Hails, Simon Levy, Daniela Oliveira, Imran Shaukat,** and **Christine Walker.**

YLC member **Patrick Ward** is also thanked for his contribution to "Boating Briefs," the Recreational Boating Committee's annual newsletter.

OIGOIIG PROJECTS

The Recreational Boating Committee publishes a newsletter entitled "Boating Briefs," which reports on cases involving recreational boats as well as legislative and regulatory developments specific to recreational boating. The Committee requests YLC members keep a lookout for these types of developments and cases and report them to the Committee. In addition, if a YLC member has

been involved in an interesting case involving recreational boating, there may be an opportunity for that member to make a presentation about the case at a Committee meeting. If you have anything to report, please contact the chair of the Recreational Boating Committee, Mark Buhler, at mark.buhler@earthlink net, or the YLC liaison, Bo Williams, at bo.williams@phelps.com.

Peter Black, the YLC liaison to the Website and Technology Committee, advises us that the committee is in the process of establishing a Linkedln page for the MLA. Watch for the page to go live and for opportunities to contribute to the same.

Jessica Martyn, the YLC liaison to the International Organizations, Conventions, and Standards Committee ("IOCS"), reports that the IOCS is in the planning stages of setting up a newsletter, which will be run by editors Stephanie Penninger and Lindsay Sakal who are both YLC members. If additional YLC members are interested in assisting, please contact Jessica at jmartyn@pbh.com.

FALL MLA MEETIIG: THE BIG EASY!

The MLA Fall Meeting will be held in conjunction with the Tulane Admiralty Law Institute in New Orleans October 26 — 28, 2016. This will be a unique fall meeting with many opportunities for CLE credit and various joint social events. Planning is ongoing and we have reminded the planning committee that the YLC is a great resource. Please mark your calendars!

CALL FOR PROJECTS

To the Standing Committees: Please let the YLC 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.

PUBLICATIOI OPPORTUIITIES

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@shergamer.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 a Proctor or Non-Lawyer member. Proctor applications may be obtained and submitted on the MLA website.

YLC MEMBERSHIP LIST COI WEBSITE

If you are not already signed up as a member of the YLC, please make sure you do so. In addition, please review your email and notification settings on the website. We use the membership list on the website as a vehicle for communicating with our members. We have reason to believe that some of our young lawyers are not registered as YLC members or may have restrictive notification settings and thus do not receive our communications. If you know anyone that might fall into either category, please pass this message along and encourage them to formally join the committee and to check their settings. Conversely, if you are no longer a YLC member and are tired of our shenanigans, feel free to unsubscribe.

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