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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

THE MLA REPORT

Editors:

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EDITORIAL COMMENT

This edition of the MLA Report contains newsletters of the Association's Committees that were issued in connection with the Spring Meeting in New York in May 2017 and subsequently.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this issue: Corey R. Greenwald of Clyde & Co. US LLP in New York, J. Ben Segarra of Maynard, Cooper & Gale PC in Mobile, Patrick J.R. Ward of Hand Arendall LLC in Mobile 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 articles, case notes and comments published in the MLA Report are for information purposes only, are not intended to be legal advice and are not necessarily the views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

COMMITTEE ON ARBITRATION AND ADR

Editor: Peter Skoufalos

NEWSLETTER

Fall 2017

EDITOR'S COMMENT:

It is an honor and a privilege to assume the leadership of this Committee, together with my co-chairman, Chris Nolan, and the Committee's Secretary, Lindsay Sakal.

The Committee's last meeting included a robust discussion on (i) the power/authority of arbitrators to raise issues or facts not developed by the parties; (ii) a recent S.M.A. interim award allowing pre-award security in the amount of $63 million; and (iii) the impact of Brexit on London arbitration. Over fifty participants attended and Chris, Lindsay and I look forward to organizing future Committee meetings that will be of broad interest to the arbitration/ADR community

We are also pleased to offer with this newsletter a review of notable arbitration cases that we hope will be of value to Committee members in particular and to the Association's membership in general. While the collected cases do not all involve maritime disputes, we believe they should be of interest to maritime practitioners as they touch on important issues surrounding arbitration. In addition to the efforts of the Committee's leadership, the Committee would also like to thank Daniela Oliveira and Imran Shaukat, the Committee's Young Lawyers Liaisons, for their invaluable contribution to this newsletter.

Peter Skoufalos

UNITED STATES SUPREME COURT

a. FAA Trumps Kentucky Clear-Statement Rule

Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017)

In *Kindred Nursing Centers Ltd. P'ship v. Clark,* the Supreme Court of the United States held that "[t]he Kentucky Supreme Court's clear-statement rule violates the Federal Arbitration Act by singling out arbitration agreements for disfavored treatment." 137 S. Ct. at 1426-29.

This action arose from disputes over the authority of a party acting under a power of attorney which afforded broad authority to manage a family member's affairs, including the power to enter into arbitration agreements on the family member's behalf. Two powers of attorney were in question:

> The Wellner power of attorney:
>
> Gave [family member] authority, "in my name place and stead," to (among other things) "institute legal proceedings" and make "contracts of every nature in relation to both real and personal property."
>
> The Clark power of attorney:
>
> provided [family member] with "'full power . . . to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way,' including the power to 'draw, make, and sign in my name any and all . . . contracts, deeds, or agreements."

Id. at 1425 (internal citations omitted). It was under these grants that a wife and daughter, respectively, signed all the necessary paperwork to move each of their family members into a Kindred

nursing home. "As part of that process, . . . each signed an arbitration agreement with Kindred on behalf of her relative." *Id.* The two contracts, worded identically, provided that

> "[a]ny and all claims or controversies arising out of or in any way relating to ... the Resident's stay at the Facility" would be resolved through "binding arbitration" rather than a lawsuit.

Id. (internal citations omitted). When tragedy struck and both family members died the next year, their estates brought separate suits against Kindred in Kentucky State court alleging that Kindred had provided substandard care, causing their deaths. *Id.* Kindred moved to dismiss the cases, arguing that the arbitration agreements prohibited the parties from bringing their disputes in state court. *Id.* The trial court denied Kindred's motions, the Kentucky Court of Appeals agreed, and the Kentucky Supreme Court, after consolidating the cases, affirmed. All three rulings were made because, under the so called Kentucky clear-statement rule, "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." *Id.* at 1426. (emphasis in original)

The Supreme Court rejected these holdings, drawing upon Section 2 of the FAA, which makes arbitration agreements "valid irrevocable, and enforceable, save upon such grounds as exit at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court reasoned that Section 2 of the FAA established an equal treatment principle, whereby a "court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules 'that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (citation omitted). "The FAA thus preempts any state rule discriminating on its face against arbitration — for example, a law prohibiting outright the arbitration of a particular type of claim' . . . [or] any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration

agreements." [e.g. a contract disallowing an ultimate disposition of a dispute by a jury]. *Id.* (internal citation omitted).

Moreover, the state court attempted to cast the rule in broader terms, suggesting that the clear-statement requirement, "could also apply when an agent endeavored to waive other `fundamental constitutional rights' [here, right to access the courts and to trial by jury] held by a principal." *Id.* at 1427. "The [state] court hypothesized a slim set of both patently objectionable and utterly fanciful contracts that would be subject to its rule: No longer could a representative lacking explicit authorization waive her `principal's right to worship freely' or 'consent to an arranged marriage' or bind [her] principal to personal servitude." *Id.* at 1427-28 (citations omitted). The Supreme Court noted that "[p]lacing arbitration agreements with that class reveals the kind of 'hostility to arbitration' that led congress to enact the FAA . . . . [a]nd doing so only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans." *Id.* at 1428. (internal citations omitted).

Since the Kentucky clear-statement rule was not clearly applicable to any contract, but instead singled out arbitration agreements, the rule was pre-empted by the FAA. Because the state court had held the Clark agreement to be sufficiently broad to cover executing an arbitration agreement, the Court reversed the Kentucky Supreme Court's judgment in favor of the Clark estate. *Id.* at 1429. On the other hand, because the state court held that the Wellner agreement was insufficiently broad to cover executing an arbitration agreement, and it was unclear if the clear statement rule influenced the state courts' interpretation of that agreement, the court vacated the judgment below and remanded the case for further consideration. *Id.*

Justice Thomas dissented, stating that, "I continue to adhere to the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, does not apply to proceedings in state courts." *Id.* at 1429.

FIRST CIRCUIT

a. Court, Not Arbitrator, Decides FAA § 1 Exceptions

Oliveira v. New Prime, Inc., 857 F.3d 7 (1st Cir. 2017)

In *Oliveira v. New Prime, Inc.*, the First Circuit answered two questions of first impression under the Federal Arbitration Act ("FAA"), joining with the Ninth Circuit' in holding that, "when confronted with a motion to compel arbitration under § 4 of the FAA, the district court, and not the arbitrator, must decide whether the § 1 exemption applies," and in the transportation context, further holding that "transportation-worker agreements that establish or purport to establish independent-contractor relationships are `contracts of employment' within the meaning of the §1 exemption." *Id.* at 24.

This action arose from a dispute involving an "Independent Contractor Operating Agreement," which included an arbitration clause with the following language:

> ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH . . . THE FEDERAL ARBITRATION ACT.

Oliveira v. New Prime, Inc., 141 F. Supp. 3d 125 (D. Mass. 2015), *affd in part, dismissed in part,* 857 F.3d 7 (1st Cir. 2017). Prime argued that the applicability of a §1 exemption was a question of arbitrability for the arbitrator to decide where, as here, the parties agreed to delegate such questions to the arbitrator. The First Circuit

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[1] The First Circuit joins the Ninth Circuit in a circuit split with the Eight Circuit, which held that that the question of whether the §1 exemption applies is a question for the arbitrator to decide where, as here, the parties have delegated such questions to the arbitrator. *Green v. SuperShuttle Ina, Inc.*, 653 F.3d 766 (8th Cir. 2011).

rejected Prime's argument stating that, if taken to its logical conclusion, such argument would obligate a district court to compel arbitration under § 4, even if a § 1 exemption indisputably applied to the contract, such that a district court had no authority to act under the FAA in the first place. *New Prime, Inc.*, 857 F.3d at 14. A classic case of putting the cart before the horse. For that reason, such a determination must be made by the district court before ordering arbitration pursuant to § 4.

Looking to the scope of § 1 exemptions, which includes contracts of employment for seamen and other classes of workers engaged in foreign trade, the First Circuit, after an analysis of the meaning of the statutory text, held that "contracts of employment" in § 1 simply mean "agreements to do work," which would include an independent contractor relationship. *Id.* at 20.

b. Arbitrability Under MAA Rule 9

Micoperi, S.r.l. v. CHMMar., S.A.P.I de C.V., 2015 AMC 1274, 2015 WL 997663(D. Mass. 2015)

In *Micoperi, S.r.l. v. CHMMar., S.A.P.I de C. V.,* selected in part for its seldom seen analysis of proceedings before the Maritime Arbitration Association of the United States ("MAA"), the district court held that MAA Rule 9(a) unequivocally delegates to the arbitrator the power to decide the proper scope of arbitration and to rule upon what claims may or may not be arbitrable in that proceeding.

This action arose from disputes between a charterer and a shipowner in which the charterer sought a court order to include claims for tortious conduct related to charter parties with the shipowner, in an ongoing arbitration dispute, despite the arbitrators refusal to allow them. The charter parties between the two parties contained identical arbitration clauses, providing that:

> "[a]ny dispute, claim or controversy arising out of or relating to this charter party, or breach, interpretation or validity thereof,

> shall be settled through good faith negotiation," and if unsuccessful, by arbitration before "a single arbitrator of the maritime Arbitration Association of the United States *in accordance with its Rules. ."*

Id. at 1278, 2015 WL 997663, at *3 (emphasis in original). In turn, Rule 9 of the MAA provides in part:

> Unless the parties otherwise agree, the arbitration tribunal shall have the power to decide all issues arising out of or related to any claim or response, or agreement to arbitrate an existing dispute. *This includes not only the merits of the dispute but any issues with respect to the jurisdiction of the arbitral tribunal* and the existence, scope or validity of the underlying arbitration agreement.

Id. (citing Arbitration Rules of the MAA, Rule 9(a)) (emphasis in original). The court reasoned that such a clause effectively "removed the issue of arbitrability from the jurisdiction of [the] court, and placed it squarely in the hands of the arbitrator." *Id.* Even if such claims arose from allegedly tortious conduct, MAA Rule 9(a) gave the arbitrator full authority to decide his own jurisdiction and the scope of the underlying agreement. *Id.*

SECOND CIRCUIT

a. Subject Matter Jurisdiction to Confirm Award Under FAA

Hermes of Paris, Inc. v. Swain, 867 F.3d 321 (2d Cir. 2017)

It is sometimes overlooked that in an action to confirm an award under the Federal Arbitration Act, a party must have an independent basis for subject matter jurisdiction. In this case, the Second Circuit reminds us that the FAA "bestows no federal

jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute." *Swain*, 867 F.3d at 323 n.1 (citing *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009)). In general, subject matter jurisdiction is based on either federal question or diversity jurisdiction. Here, Swain challenged a petition in federal court by his former employer to compel him to arbitrate a dispute over his termination, arguing that the district court lacked diversity jurisdiction. Swain, a New Jersey resident, urged the court to find that there was not complete diversity because in Swain's earlier-filed state court action he had named as a defendant a co-worker also resident in New Jersey. The Second Circuit held that Swain's argument was foreclosed by its prior decision in *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438 (2d Cir. 1995), where the court held that, in assessing whether there was complete diversity in an action under the FAA, a court is to look only at the parties before it—i.e. the "parties to the petition to compel," as well as any indispensable parties under FRCP 19. Here, Swain's co-worker—a non-signatory to the arbitration agreement—was not an indispensable party because his joinder was not necessary to afford complete relief on the petition to compel and any concerns over piece-meal litigation were outweighed by the FAA's strong policy in favor of arbitration.

b. Competing Arbitration Clauses

Infrassure, Ltd. v. First Mut. Transportation Assurance Co., 842 F.3d 174 (2d Cir. 2016)

Even when parties agree that their dispute is subject to arbitration, on occasion they disagree on which of two competing arbitration clauses prevails—especially when the parties believe they will gain a relative advantage depending on which clause governs their dispute. In this dispute, the reinsurance certificate contained an arbitration clause requiring the arbitrators to be active or former officers of insurance or reinsurance companies. However, the arbitration clause on an endorsement to the certificate did not have that requirement. In addition, the two competing clauses called for different arbitral rules to apply.

To resolve the dispute, the court looked at the title of the endorsement clause which included the language "(UK and Bermuda insurers only)". Since the party opposing the endorsement clause was a Swiss company, it argued that the clause was inapplicable. The court agreed. But what about the so-called Titles Clause of the parties' contracts which cautions that the titles of the paragraphs of the certificate and the endorsement "will not be deemed in any way to limit or affect the provisions to which they relate"? The court rejected the argument that the Titles Clause controlled here, concluding that the clause is not intended to "strip away an express indication" of the content to which it relates. Rather its purpose is to "ensure that the text of a provision is not discounted or altered by the words of its heading." Hence, paragraph headings or titles can play a role in construing a contract, but they cannot be used to alter its words.

c. Challenge to Award Based on Partiality of Arbitrator

Nat'l Indem. Co. v. IRB Brasil Reseguros S.A., 675 F. App'x 89 (2d Cir. 2017)

A party seeking to avoid enforcement of an arbitration award bears a heavy burden when the challenge is based on the perceived partiality of an arbitrator. Here, the underlying reinsurance arbitration spanned a period of seven years and involved three separate awards by a tripartite panel consisting of two party-appointed arbitrators and a neutral. At the close of the hearings, the prevailing party (NIO) sought confirmation of the awards in the district court while the losing party (IRB) cross-petitioned to vacate the awards on grounds that the prevailing party's appointed arbitrator demonstrated "evident partiality or corruption" within the meaning of §10(a)(2) of the FAA. The factual basis for this challenge was that the arbitrator had refused to withdraw from another arbitration involving IRB and an affiliate of NIO after IRB objected to his appointment. In addition, the arbitrator had accepted an appointment for NIO' s affiliate in a separate arbitration while the subject arbitration was still pending.

Noting that judicial review of arbitration is "severely limited", the Court of Appeals affirmed the district court's conclusion that that accepting work as a party arbitrator on behalf of a party's corporate affiliate does not amount to evident partiality under § 10(a)(2). As the court noted, a successful challenge under that section of the FAA requires a showing that a "reasonable person, considering all the circumstances, would *have* to conclude that an arbitrator was partial to one side." *IRB Brasil Reseguros S.A.*, 675 F. App'x at 90 (citation omitted). (emphasis in original) Merely accepting an appointment in a separate arbitration for a party's affiliate, without any familial, business or employment relationship, or financial interest, fails to satisfy the statute. Further, the arbitrator had actually voted against the affiliate in his role as a party-arbitrator in the other proceedings and had accepted appointments against the affiliates of NIO. Considering all the circumstances a reasonable person would not have to conclude that the arbitrator was partial to NIO.

d. Application to Enjoin Arbitration Fails

Integr8 Fuels Inc. v. Daelim Corp., No. 17 CV 2191-LTS, 2017 WL 1483326, 2017 U.S. Dist. LEXIS 62702 (S.D.N.Y. Apr. 25, 2017)

What are a party's remedies when it is served with a demand for arbitration but the party disputes that is bound by a valid arbitration clause? Here, the party seeking to avoid arbitration sought a preliminary injunction and temporary restraining order enjoining the arbitration. Finding that the party resisting arbitration could not satisfy the conditions for a preliminary injunction [(i) likelihood of success on the merits; (ii) irreparable harm; (iii) balance of equities favor movant; and (iv) the injunction is in the public interest], the court denied the application for an injunction and permitted the arbitration to proceed.

In deciding the case, the court applied the familiar two-step process of determining whether a valid agreement exists and whether the particular dispute falls within the scope of the agreement. There was no dispute that a valid agreement existed,

since the party opposing arbitration drafted the arbitration clause. As to scope, the court found that this particular arbitration clause was drafted to include even "incidental" disputes and was intended to cover a "diverse range of parties" that included the party that now demanded arbitration. Accordingly, the party opposing arbitration could not demonstrate a likelihood of success and could not prevail on its request for a preliminary injunction.

e. Arbitration Clause Binds Disponent Owner Only

Iota Shipholding Ltd. v. Starr Indem. & Liab. Co., 2017 AMC 1461, 2017 WL 2374359, 2017 U.S. Dist. LEXIS 83622 (S.D.N.Y. May 31, 2017)

This case concerns the threshold issue underlying any potential arbitration: whether there is a valid arbitration agreement between the parties—here, between certain cargo interests and the vessel owners. The court held that there was no such agreement and granted the vessel owners' summary judgment motion seeking an injunction enjoining the underlying arbitration.

The matter arose out of damage to a cargo of mechanical tubing that was shipped pursuant to various contracts, including a voyage and time charter. The voyage charter contained an arbitration clause providing for arbitration of any disputes between "Owner and Charterer" in "New York/London" pursuant to SMA Rules. It was under this clause that the cargo interests made a demand for arbitration against the vessel, citing the voyage charter arbitration clause and "relevant bills of lading". The vessel owners then filed an action in the district court to enjoin or stay the arbitration, arguing that they were not a signatory to the voyage charter and therefore not bound by its arbitration clause.

The court framed the issues as (i) whether the parties had entered into a valid arbitration agreement and, if so, (ii) whether the parties' dispute fell within the scope of the agreement. While it was undisputed that the vessel owners were not a party to the voyage charter, the cargo interests argued that they were nevertheless bound by bills of lading incorporating the voyage charter. Indeed, non-

signatories can in certain circumstances be bound to arbitrate under principles of agency law and alter ego liability. However, because the court concluded that the arbitration clause at issue was narrow in scope, it did not even decide the incorporation issue. The reference in the arbitration clause to "Owner and Charterer" was "restrictive in scope" and by its own terms did not apply to the vessel owners, as opposed to the disponent owners—a defined term under the voyage charter. Therefore, the cargo interests were limited to demanding arbitration against the disponent owners as "abundant case law in this Circuit makes clear" that scope language should be "carefully if not restrictively construed".

f. Alter Ego Required to Arbitrate

LiquidX Inc. v. Brooklawn Capital, LLC, No. 16CV5528, 2017 WL 2266879, 2017 U.S. Dist. LEXIS 79280 (S.D.N.Y. May 23, 2017)

Principles of alter ego liability may, under certain circumstances, lead a court to compel a non-signatory to respond to claims in arbitration. Here, after a four-day bench trial, Judge Pauley concluded that the plaintiff was indeed the alter ego of a non-party signatory to an arbitration agreement and must therefore also respond to the arbitrable claims.

The underlying dispute involved the 2016 collapse of an electronic exchange for accounts receivable. The defendant in this case demanded arbitration against the exchange pursuant to a binding arbitration agreement and later sought to join the plaintiff on alter ego grounds. The plaintiff then commenced the present action seeking a declaration that joinder was improper. Reserving for the court the question of arbitrability, Judge Pauley entered an order enjoining the arbitrator from deciding the alter ego issue pending a trial on the alter ego issue.

The court applied New York law to determine that the plaintiff was indeed an alter ego of the non-party signatory and was therefore also bound by the arbitration agreement. The court concluded that the two entities were virtually indistinguishable and

that plaintiff's actions were structured to perpetrate a wrong; namely leaving creditors of the non-party with nothing but a shell company against which to pursue their losses. Accordingly, the plaintiff was liable as the non-signatory's alter ego and could be joined in the arbitration.

g. Non-Signatory Must Arbitrate Under Equitable Estoppel Principles

Cooper v. Ruane Cunniff & Goldfarb Inc., No. 16CV1900, 2017 WL 3524682, 2017 U.S. Dist. LEXIS 128851 (S.D.N.Y. Aug. 15, 2017)

Because arbitration is a matter of contract, a party generally cannot be compelled to arbitrate a dispute which the party did not agree to submit to arbitration. However, under certain circumstances where parties have agreed to arbitrate, they may be required to submit to arbitration even with a non-signatory. Here, the district court relied on the doctrine of equitable estoppel to hold that a non-signatory—in this case, the manager of 401(k) profit sharing plan—could compel the plaintiff to arbitrate certain claims arising out of alleged mismanagement of the plan.

A non-signatory may compel arbitration pursuant to principles of equitable estoppel where (1) there is a sufficiently close relationship with the signatory parties and overlap between claims, such that the non-signatory may avail itself of the arbitration agreement and (2) the signatory's claims against the non-signatory are intimately intertwined with the underlying agreement containing the arbitration clause. This condition is satisfied where the signatory's claims against the non-signatory arise from the subject matter of the agreement with the arbitration clause. In applying these factors the district court concluded that the plaintiff who had agreed to arbitrate should be estopped from denying an obligation to arbitrate a similar dispute with an adversary which is not a party to the arbitration agreement.

h. P&I Club Coverage Determination Subject to Deferential Review

TransAtlantic Lines LLC v. Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc., 2017 AMC 1293, 2017 WL 2334995, 2017 U.S. Dist. LEXIS 82211 (S.D.N.Y. May 28, 2017)

The deference given by federal courts to claims resolutions reached by alternative means is not vitiated merely because the dispute resolution process involves a determination by dispute resolution body organized by one of the parties. Under the rules of the American Club, claims processing is handled by the Club's managers, which make coverage decisions in the first instance, subject to a right of appeal by the Members to the Club's board of directors. The appeal, which includes main and reply submissions by the Club's managers and the Member, is then considered by the board at its regular meetings with a written decision required within six months. Under the Club's rules, the decision of the board of directors "is intended to be final and binding," with further review in federal court under an "arbitrary and capricious" standard.

This procedure was followed in the context of a claim submitted to the Club by its Member, Transatlantic Lines, arising from a shipping incident in which various shipping containers were lost and damaged at sea. After paying Transatlantic over $500,000 for its sue and labor and certain litigation costs, the Club rejected Transatlantic's remaining claims. Consequently, Transatlantic filed an appeal to the board of directors as provided by the Club's rules. The board ultimately issued a 22-page decision upholding the Club's manager's denial of coverage for Transatlantic's remaining claims and the action in the district court ensued.

In granting summary judgment for the Club, the district court agreed that the standard of review of the board's decision was the deferential standard typically applied to ADR decisions. Citing the Second Circuit's recent NFL "deflategate" ruling, the district court rejected the claim that there was an inherent bias in the Club's ADR structure given that the Member had knowingly and voluntarily agreed to the ADR procedure when it became a Member.

Finding that the board's consideration of the appeal was conscientious and thorough, the court rejected the Member's claim that the absence of oral argument on the appeal to the board indicated a lack of meaningful consideration of the Member's claim. Further, the district court rejected the Member's "fundamental fairness" argument because the Member was aware of the ADR procedure and therefore waived this argument when it failed to lodge a protest with the board concerning its procedures. Finally, the court rejected the argument that it should review the board's decision *de novo* because it violated public policy, noting that "the scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow." Under the deferential standard of review, the district court was required to uphold the award in the absence of proof of fraud, corruption or other misconduct.

i. Panel's Denial of Further Discovery Not Grounds for Vacatur

Al Maya Trading Establishment v. Global Exp. Mktg. Co., 2017 U.S. Dist LEXIS 39192 (S.D.N.Y. Mar. 17, 2017)

Parties that arbitrate commercial disputes may be disappointed that they are not always allowed the breadth of discovery available in state and federal courts. Here, the parties, a New York corporation and an Emirates-based business, entered into a multi-year contract for the distribution of foodstuffs in the UAE. After the parties' relationship deteriorated, the UAE company commenced arbitration in New York under the AAA's Rules for Commercial Arbitration. Because loss of profits was an element of the damages claimed, a request was made to the panel that the UAE company be directed to produce profit and loss statements for a 3-year period. Although the panel ordered the production, it cautioned the parties that they were participating in a commercial arbitration, "not a domestic litigation". Nevertheless, even after the UAE company complied with the discovery request, the New York company sought to compel additional production, with the UAE company this time opposing the request as "untimely, cumulative and unduly burdensome." The panel apparently agreed and denied

the request without explanation and later ruled in favor of the UAE distributee. In subsequent proceedings to confirm and vacate the award, the district court rejected the argument that the panel's denial of the additional discovery amounted to violation of fundamental fairness under § 10(a)(3) of the FAA. The court noted that procedural and evidentiary questions were left to the sound discretion of the arbitrators and should not be second-guessed by the courts. This was particularly the case where, as here, the parties had agreed at the outset to "focused disclosure of documents" consistent with Rule 22 of the AAA's Rules. It should be noted that while the court made short shrift of the arguments in favor of vacatur, it denied the prevailing party's motion for sanctions.

j. Post-judgment Interest Award Subject to Judicial Review

Maersk Line Ltd. v. National Air Cargo Group, Inc., 2017 U.S. Dist LEXIS 165196 (S.D.N.Y. Oct. 4, 2017)

Even where a motion for summary judgment seeking confirmation is unopposed, a district court still has the duty to independently review the motion to determine if it demonstrates the absence of material facts. In this case, the district court granted the petitioner's unopposed motion, but modified the tribunal's calculation of post judgment interest. In the underlying dispute, Maersk had agreed to provide ocean transportation and container storage and management services to the defendant, with all disputes subject to arbitration and New York State law. After Maersk claimed non-payment, it commenced arbitration resulting in a final award in favor of Maersk that included the principal amount claimed, pre-award interest and post-award interest at an annual rate of 9% accruing after 30 days from the date of the award. The defendant did not oppose Maersk's subsequent petition to confirm the award. Noting that the Second Circuit treats unopposed petitions to confirm an arbitration award "as akin to a motion for summary judgment based on the movant's submissions," the court found that the grounds for the principal amount of the award were "readily discernible from the contents of the award" itself. The court also confirmed the pre-award interest calculation as within the

arbitrator's discretion. However, the court concluded that "post-award, pre-judgment interest is a matter left with the district court." Moreover, federal law (28 U.S.C. § 1961), not state law controls post judgment interest. Nevertheless, the district court confirmed the arbitrator's grant of post-award, pre-judgment interest of 9% on any unpaid amounts within 30 days of the award—but only up to the date of the entry of judgment in the case. With respect to post-judgment interest, the court found that 28 U.S.C. § 1961—which is linked to the government's costs for Treasury bills—governs, unless the parties express a clear intent to deviate from the statute. Finding that no such intent was shown here, the court concluded that the federal statute controls the interest applicable to any unpaid amounts after the entry of judgment in favor of Maersk.

k. Manifest Disregard Alive and Well in State Court

Daesang Corp. v. Nutrasweet Co., 2017 N.Y. Misc LEXIS1810, 655019/2016 (Sup. Ct., NY Cty., May 15, 2017)

Justice Charles Ramos of the New York State Supreme Court's Commercial Division, breathed new life to the "manifest disregard of the law" defense to enforcement of arbitral awards in partially vacating a $100 million arbitration award against NutraSweet, a manufacturer of the artificial sweetener aspartame. The court concluded that a US tribunal's failure to consider a counterclaim by NutraSweet against a South Korean food company, Daesang, amounted to an "egregious dereliction of duty".

The dispute between the parties arose out of series of agreements in which Daesang agreed to sell its aspartame business to NutraSweet. Under the terms of the agreements, NutraSweet had the right to rescind the purchase in the event of litigation by an aspartame customer that the agreements violated antitrust laws. In fact, such an action was filed within three years of the parties entering into the agreement by a customer of Daesang, resulting in NutraSweet notifying Daesang that it was rescinding the agreements. Daesang then declared an event of default and demanded arbitration pursuant to one of the governing agreements. NutraSweet, in turn, asserted various counterclaims, including that

it had been fraudulently induced into entering into the agreement based on misrepresentations by Daesang on the operation of its aspartame business. A tribunal of three arbitrators, operating under ICC Rules, eventually found in favor of Daesang dismissing all of NutraSweet's defenses and counterclaims and awarding Daesang damages in excess of $100 million. Daesang then sought confirmation before Justice Ramos and NutraSweet moved to vacate the award.

Justice Ramos began his review of the tribunal's award by acknowledging the limited grounds for vacatur under § 10 of the Federal Arbitration Act. However, citing the Second Circuit's decision in *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444 (2d Cir. 2011), he found that an award "rendered in manifest disregard of the law" constituted a further basis to vacate an award. While affirming part of the panel's decision in favor of Daesang, Justice Ramos concluded that the panel "manifestly disregarded New York law" in dismissing NutraSweet's counterclaim for fraudulent inducement. The court found that the panel disregarded a "well-established principle" that a fraud claim can be based on breach of contractual warranties and that the tribunal "ignored the applicable law" and "mischaracterized" NutraSweet's counterclaims. The tribunal's award thus went "beyond a mere error in law or facts, and amounts to an egregious dereliction of duty on the part of the Tribunal."

Justice Ramos's decision may give parties seeking to confirm international arbitration awards some pause about proceeding in New York state court. Typically, the manifest disregard doctrine receives much stricter scrutiny in federal courts; and some courts have construed the US Supreme Court's decision in *Hall Street Associates v. Mattel* as sounding the death knell for the doctrine. Nevertheless, the Second Circuit's decision in *Duferco Intern. Steel Trading v. T. Klaveness Shipping A/S*, has been viewed as leaving the door at least partly open to invocation of the doctrine, albeit on a narrow basis.

THIRD CIRCUIT

a. Choice of California Law Requires Parties to Arbitrate

Int'l Foodsource, LLC v. Grower Direct Nut Co., No. 16CV3140WHWCLW, 2016 WL 4150748 (D.N.J. Aug. 3, 2016)

In *Int'l Foodsource*, the district court concluded that a mandatory arbitration provision contained in two sales contracts for the sale of a large quantity of walnuts (the "walnut contracts") between Grower Direct Nut Co., Inc. ("GDNC"), a grower and seller of walnuts, and International Foodsource LLC ("IFS"), a wholesaler, was enforceable. *Int'l Foodsource, LLC,* 2016 WL 4150748 , at *11-*13. Accordingly, the court granted GDNC's motion to compel arbitration in California for all disputes arising under the walnut contracts.

IFS, a New Jersey company, filed suit in the District of New Jersey, seeking a declaratory judgment that the arbitration provision in the walnut contracts was unenforceable. IFS also sought a temporary injunction to stay the arbitration proceedings in California. *Id.* at *1. The arbitration clause in the walnut contracts provided that "[a]ny claim relating to this contract shall be settled by arbitration in California by the DFA[2] with its rules..." *Id.* at *2. IFS argued, *inter alia*, that the arbitration clause was unenforceable under New Jersey law because it did not contain "an explicit waiver-of-rights disclaimer." *Id.* at *9. GDNC, a California company and the drafter of the walnut contracts, moved to compel arbitration and dismiss the declaratory judgment action for lack of jurisdiction. *Id.* at *1-2. Specifically, GDNC argued that California law governed the parties' agreement, that a waiver-of-rights disclaimer is not required under California law, and that the arbitration clause in the walnut contracts was therefore enforceable. *Id.*

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[2] The district court noted that "the parties did not discuss 'what DFA was, what DFA arbitration entailed, nor did GDNC provide IFS with a copy of DFA's rules' at the time the Parties entered into the contracts." *Id.* at *5 n.l.

The district court, recognizing that "New Jersey law requires an arbitration provision to contain waiver-of-rights language for parties to reach 'mutual assent' and California law does not," concluded that a conflict-of-laws existed between New Jersey and California law. *Id.* at *10. Therefore, the court undertook an analysis to determine whether New Jersey or California had the "most significant relationship" with the parties and the walnut contracts. *Id.* The court concluded that under New Jersey's multi-factor "most significant relationship" test,[3] California law governed the construction of the arbitration clause. *Id.* at *11. Specifically, the court found that the negotiation of the contract occurred in California, the place of performance of the contract (i.e., delivery of the walnuts) was in California, and the location of the walnuts themselves was California. *Id.* at *10. Accordingly, applying California law, the district court concluded that the arbitration clause was enforceable, and that IFS' various claims relating to the breach of the walnut contracts were subject to mandatory arbitration in California.

FOURTH CIRCUIT

a. Non-Signatory Must Arbitrate Under Broad Arbitration Clause

Developers Sur. & Indem. Co. v. Carothers Constr., Inc., No. CV 9:17-1419-RMG, 2017 WL 3054646 (D.S.C. July 18, 2017)

In *Developers Surety and Indemnity Company v. Carothers Construction, Inc.*, the district court held that a subcontract's binding arbitration clause that was incorporated into performance and payment bonds was sufficient to subject the executor of the bonds to mandatory arbitration even though the executor of the bonds was a non-signatory to the subcontract.

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[3] A federal court sitting in diversity follows the substantive law of the forum state, including that state's choice-of-law rules. *Id.* at *8 (citing *Robeson Industries Corp. v. Hartford Acc. & Indent. Co.*, 178 F.3d 160, 165 (3d Cir. 1999).

The underlying dispute arose when Liberty Enterprises Specialty Contractor ("Liberty") and Carothers Construction, Inc. ("Carothers") entered into a subcontract for work to be performed at Marine Corps Air Station Beaufort (the "Project"). The plaintiff, Developers Surety and Indemnity Company ("DSI"), was not a signatory to the Project subcontract. Rather, DSI executed a performance bond and a payment bond for that subcontract on behalf of Liberty and in favor of Carothers for work on the Project. Carothers alleged that Liberty defaulted and abandoned the Project, and Carothers subsequently claimed $130,000 against the bonds executed on Liberty's behalf. *Developers Sur. & Indem. Co.*, 2017 WL 3054646, at *1.

Carothers filed a demand for arbitration with the American Arbitration Association and alleged that the bonds incorporated by reference the subcontract's mandatory arbitration clause. *Id.* DSI subsequently filed suit seeking a declaratory judgment that it was not subject to the subcontract's mandatory arbitration clause and requested an injunction against compelled arbitration, arguing that "the language of the arbitration clause, which states, 'all claims, disputes, and other matters in controversy between the Contractor and the Subcontractor arising out of or relating to this Subcontract shall be decided by binding arbitration,'" did not cover DSI because DSI was neither the contractor nor the subcontractor. *Id.* at *2. DSI further argued that claims arising from the bonds were not subject to the arbitration clause because such claims were distinct from claims arising from the subcontract.

The district court first concluded that the "broad" arbitration clause applied to any claims, disputes, or other matters "arising out of or relating to" the subcontract. *Id.* The court next concluded that because an agreement to arbitrate may be validly incorporated into a subcontract by reference to an arbitration provision in a general contract under the Federal Arbitration Act, the arbitration clause incorporated into the bonds applied to DSI. Accordingly, the court concluded that DSI was "bound by the subcontract's arbitration clause." *Id.* at *3.

b. Court Designates Venue for Arbitration Where Clause is Silent

Greenway Energy, LLC v. Ardica Techs., Inc., No. CV 1:17-819-RMG, 2017 WL 2210254 (D.S.C. May 17, 2017)

In *Greenway Energy, LLC v. Ardica Techs.*, the district court held that parties who contractually agreed to binding arbitration, but did not specify the arbitral forum or arbitrator, were nevertheless subject to mandatory arbitration in the district in which the petition for an order compelling arbitration was filed.

The underlying dispute arose when Ardica Technologies, Inc. ("Ardica") entered into a contract with Greenway Energy, LLC ("Greenway"), pursuant to which Greenway was to produce and deliver Alane, a type of fuel, to Ardica. The agreement did not specify a price for the Alane, but rather provided that Arcadia would fund Greenway in compliance with "budgets that are mutually agreed to in order to achieve the [contract's stated goals]." *Greenway Energy, LLC,* 2017 WL 2210254, at *1. Subsequent to the contract's execution, the parties purportedly modified the contract to increase the amount of Alane to be produced by Greenway and increased the budget in light of the additional requested Alane production. *Id.*

Greenway alleged that it incurred $1 2 million in additional expenses to satisfy increased production requested by Ardica. Greenway subsequently filed a verified complaint for breach of contract and promissory estoppel against Ardica. Ardica moved to dismiss Greenway's claims and to compel arbitration before the American Arbitration Association in California.

The contract between Greenway and Ardica contained a binding arbitration clause, which provided "that all claims, counterclaims, disputes, and matters in question between the parties arising out of or relating to this Agreement or the breach thereof will be decided by negotiations between the parties" but "any dispute which is not settled to the mutual satisfaction of both parties within thirty (30) days from receipt of written notice of a dispute, will be

settled by arbitration." *Id.* However, the agreement was silent regarding the arbitral forum and the method of selecting an arbitrator. Greenway moved to stay the action and to compel arbitration in South Carolina.

The district court, sitting in diversity and applying the Federal Arbitration Act ("FAA"), concluded that because the parties failed to specify an arbitrator within the agreement, the court, upon the application of either party, would designate the arbitrator. *See* 9 U.S.C. § 5. The court next concluded that because the parties failed to specify the location of the arbitration, under the FAA the arbitration proceeding would take place in the district in which Greenway petitioned for an order compelling arbitration. Accordingly, the court ordered the parties to arbitrate the dispute in South Carolina.

FIFTH CIRCUIT

a. Subject Matter Jurisdiction to Obtain Attachment Under NY Convention

Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar, 870 F.3d 370 (5th Cir. 2017)

This case involves a dispute between two creditors, each of which entered into contracts for the purchase of pig iron from America Metals Trading L.L.P. ("AMT"). AMT failed to perform and the creditors pursued attachment remedies against the same pig iron owed by AMT.

One creditor, Daewoo International ("Daewoo") sued AMT in the Eastern District of Louisiana, to compel arbitration, while also seeking a maritime attachment as well as an attachment under Louisiana's non-resident attachment law. The writ of attachment under Louisiana law was granted. Two weeks later, the second creditor, Thyssenkrupp Mannex ("TKM"), filed suit in Louisiana state court seeking a writ of attachment over the same pig iron. TKM then was allowed to intervene in Daewoo's federal action and successfully challenged Daewoo's attachment on grounds that

Daewoo's attachment should be vacated because (1) maritime jurisdiction was improper and (2) the Louisiana non-resident attachment was inapplicable.

The district court agreed with TKM and vacated Daewoo's attachment. Specifically, the district court found that because Daewoo's underlying suit sought to compel arbitration, it was not an "action for a money judgment" and therefore Daewoo could not receive a non-resident attachment writ. Daewoo appealed.

First, the Fifth Circuit found that it had subject-matter jurisdiction under the New York Convention because all four requirement for coverage under the Convention were met. Daewoo's arbitration agreements with AMT were in writing; they provided for arbitration within the United States (which is a signatory to Convention); they arose out of commercial relationship between purchaser and seller; and, both purchaser and seller were not U.S. citizens.

Second, the Fifth Circuit also found subject-matter jurisdiction under the Convention because Daewoo sought an attachment to facilitate the arbitration provided for in the AMT agreements. The court relied on its decision in *E.A.S. T., Inc. of Stamford v. M/V Alaia,* 876 F.2d 1168 (5th Cir. 1989), which recognized subject matter jurisdiction based on the Convention to issue provisional remedies in aid of arbitration in the context of a maritime attachment. The court in *E.A.S.7'.* noted that the Convention "does not expressly forbid pre-arbitration attachment" and that pre-arbitration attachment "may `serve[ ] ... as a security device in aid of arbitration.' " *Id.*

The court reasoned that *E.A.S.7'.* and cases that followed it, strongly suggested that courts recognize jurisdiction under the Convention to issue state-law provisional remedies in aid of arbitration. Thus, subject matter jurisdiction was not lacking merely because Daewoo sought attachment to bring about a covered arbitration.

The Fifth Circuit also held that Daewoo's attachment over the pig iron cargo in connection with future arbitration against AMT was valid under Louisiana's non-resident attachment statute, even though Daewoo's underlying action seeking to compel arbitration was not an "action for a money judgment" (as required to obtain attachment under the statute). The court reasoned that Daewoo would likely eventually ask the court to confirm a monetary arbitration award (which would be considered an action for a money judgment). Additionally, the court relied on a separate Louisiana law allowed for attachment in aid of yet-to-be-brought actions. Thus, non-resident attachment is also available in aid of arbitration when an eventual confirmation suit is contemplated.

b. Arbitrability is for Arbitrator Under UNCITRAL Rules

Brittania-U Nigeria, Ltd. v. Chevron USA, Inc., No. 16-20690, 2017 WL 3404575 (5th Cir. Aug. 9, 2017)

In *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, the Fifth Circuit held that an agreement that provides for arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules constitutes a clear and unmistakable delegation to the arbitrator to decide arbitrability.

In 2013, Chevron opened a bidding process for the sale of its interests in oil mining leases in Nigeria. Brittania-U participated in the bidding process and signed a confidentiality agreement which Chevron also executed. The agreement contained an arbitration provision that provides for UNCITRAL arbitration. After Brittania-U did not win the leases despite the fact that it bid higher than the winning party, it filed suit against Chevron and Chevron's agent in Texas state court alleging fraud, misrepresentation, and tortious interference with business relations. Chevron removed the case to the United States District Court for the Southern District of Texas. The district court denied Brittania-U's motion to remand and granted the defendants' motions to dismiss. Brittania-U appealed.

The Fifth Circuit affirmed the denial to remand finding that the case met the four jurisdictional prerequisites under the New

York Convention even through there was a dispute as to whether the case involved a non-U.S. party. The court noted that for an arbitration agreement that is "entirely between citizens of the United States" to fall under the Convention Act, it must "involve[ ] property located abroad, envisage[ ] performance or enforcement abroad, or ha[ve] some other reasonable relation with one or more foreign states." Because the disputed transaction involved property located in Nigeria, envisaged performance in Nigeria, and called for arbitration in London, the Fifth Circuit found that the district court properly had federal question jurisdiction under the New York Convention.

The Fifth Circuit also held that the district court did not err in dismissing the case after concluding that the arbitration provision delegated "gateway issues," such as "the validity and enforcement" of the arbitration provision. The court relied on another Fifth Circuit case that held that the incorporation of the American Arbitration Association's ("AAA") Rules clearly and unmistakably expressed the parties' intent to leave the question of arbitrability to an arbitrator where the AAA Rules stated that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The court noted that three sister circuits had held that language from the UNCITRAL rules also clearly and unmistakably delegates arbitrability to an arbitrator. While the court found that the UNCITRAL Rules did not delegate arbitrability as obviously as the AAA Rules in that they did not mention explicitly the arbitrator's ability to determine the scope or validity of the arbitration agreement, the Fifth Circuit agreed with the other circuits' conclusions.

c. Incorporation of UK Law Delegates Arbitrability to UK Arbitrator

Gemini Ins. Co. v. Certain Underwriters at Lloyd's London, No. CV 1-1-17-1044, 2017 WL 1354149 (S.D. Tex. Apr. 13, 2017)

This decision involved a dispute arising from an underlying personal injury suit. Paul Blasingame was injured in a maritime

accident and sued Galveston Bay Energy LLC in Texas state court. Galveston Bay had several relevant insurance policies, including a policy by the plaintiff Gemini and a policy issued by Lloyd's underwriter defendants via Osprey Underwriting Agency Ltd. The Blasingame litigation was ultimately settled without a contribution from Osprey and thereafter Osprey notified Galveston Bay that it had begun an arbitration proceeding in England seeking a determination that it did not owe any money towards the Blasingame settlement.

Gemini then filed suit in Texas state court, alleging it was subrogated to Galveston Bay's rights and seeking a temporary restraining order and preliminary injunction preventing Osprey from pursuing the English arbitration. The state court granted the TRO and the case was removed to federal court. The district court dissolved the TRO and instructed the defendants to file a motion to dismiss in favor of the London arbitration.

The court noted that although typically the issues of contract formation and the scope of an arbitration provision are "gateway issues" for the court to decide, the parties may also agree to delegate that scope to the arbitrator by using a "delegation clause." The court further clarified that the delegation can be implicit through the incorporation of some body of rules or law that, in turn, provides that the arbitrator is to have power to determine her own jurisdiction or to rule on arbitrability in the first instance. The court ultimately held that the incorporation of English law, which unambiguously provided that arbitrators have the power to decide threshold questions, was an implicit delegation to the arbitrator to make threshold determinations about what claims are arbitrable.

d. Party had Choice to Litigate or Arbitrate Under Dispute Resolution Clause

Hunt Constr. Grp., Inc. v. Cobb Mech. Contractors, Inc., No. A-17-CV-215-LY (W.D. Tex. June 29, 2017)

This decision involves a dispute related to the construction of the Fairmont Hotel in Austin, Texas. Plaintiff Hunt, the general

contractor for the project, contracted with the owner of the Fairmont to construct the hotel ("Prime Contract"). Hunt subcontracted with defendant Cobb to install mechanical systems on the project ("Subcontract"). After Cobb began falling behind on the construction schedule, Hunt sent Cobb formal notice that Cobb needed to get back on schedule and eventually served Cobb with a "Notice of Default of Subcontract Obligations and Notice of Termination." Hunt then replaced Cobb with another subcontractor to correct Cobb's work and to perform the remainder of the mechanical work.

After Cobb was terminated, Cobb filed a demand for arbitration with the American Arbitration Association ("AAA") alleging that Hunt wrongfully terminated Cobb's work. Hunt contested the AAA arbitration on the basis that the subcontract provided that Hunt must have "sole and exclusive right to determine whether any dispute, controversy or claim arising out of or relating to this Subcontractor, or breach thereof, shall be submitted to a court of law or arbitrated under the auspices of the American Arbitration Association in accordance with its Construction Industry Arbitration Rules" and Hunt had elected to litigate. Hunt then filed suit in the U.S. District Court for Western District of Texas against Cobb and the performance bond issuer on the project, seeking not less than $27 million in damages resulting from Cobb's delays and defective work on the Fairmont.

In response to Hunt's motion to stay and dismiss Cobb's AAA proceeding, Cobb argued that Hunt's right to choose to litigate was in conflict with other provisions of the Subcontract and Prime Contract which specifically called for the application of the AAA's Rules. Thus, the parties adopted the AAA rules and had undeniably agreed to have the arbitrator determine arbitrability. The district court rejected Cobb's argument, finding no conflict between the provisions and that, although the parties had agreed to apply the AAA's rules, they had only done so in the event Hunt determined to arbitrate the dispute.

NINTH CIRCUIT

a. Arbitration Not Compelled Where no Agreement to Arbitrate

Norcia v. Samsung Telecommunications Am., LLC, 845 F.3d 1279 (9th Cir. 2017)

The Ninth Circuit affirmed the district court's order denying Samsung's motion to compel arbitration of a class action suit, based on an arbitration provision contained in a warranty brochure included in the Galaxy S4 box.

In May 2013, Plaintiff, Daniel Norcia purchased a Samsung Galaxy S4 phone at a Verizon store in San Francisco. This receipt printed a Customer Agreement which included, among other provisions, an agreement to settlement by arbitration. Norcia signed the Agreement, set up his phone instore, leaving behind the Product Safety & Warranty Brochure ("Brochure"). This 100+ page document included an arbitration clause within the Standard Limited Warranty section as well as an opt-out clause for arbitration where notice is provided to Samsung. Norcia did not opt out.

Norcia filed a class action, for California purchasers, against Samsung alleging misrepresentation as to the phone's storage capacity among other issues, in violation of various California consumer laws. *Norcia,* 845 F.3d at 1283. He made no claims relating to breach of warranty. In lieu of answering, Samsung moved to compel arbitration based on the Brochure. This motion was denied by the district court stating the Brochure did not form an agreement to arbitration non-warranty claims.

On appeal, the court considered Samsung's two theories of contract formation: (i) that the arbitration provision in the Brochure applied to all claims related to the phone and (ii) that the Verizon Customer Agreement incorporated the terms of the Brochure. The court quickly dismissed this second argument as meritless as Samsung was not a signatory to the Agreement or a third-party

beneficiary. *Id.* at 1290-91. The decision focuses on the first argument, evaluated under California law of contract formation.

While a party cannot avoid the terms of a contract by failing to read before signing, a reasonable person must believe the offeree assented to the agreement - silence or inaction does not constitute acceptance. *Id.* at 1284. Exceptions where silence may be deemed consent are where an offeree had a duty to respond to an offer (failing to respond to a single paged document requesting acknowledgement to arbitration or the option to opt out) or retains the benefit offered (retained benefit of insurance policy renewal without paying premium). *Id.* at 1285. Additionally, one "'is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Id.* Relying on these principles, the court found Norcia did not expressly assent to the agreement in the Brochure; did not sign the Brochure; nor did silence and failure to opt out indicate acceptance. *Id.* His inaction, pursuant to California law was insufficient to form a contract and Samsung failed to demonstrate any of the above exceptions to silence. *Id.* at 1286.

In a final push, Samsung argued the Brochure was analogous to a shrink-wrap license, citing *Wall Data Inc. v. Los Angeles Cty. Sheriffs Dep't,* 447 F.3d 769, 782 (9th Cir. 2006), or an "in-the-box contract" per *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997). The court distinguished *Wall,* where by opening a package with user terms on the exterior the user was now obliged to prove it did not accept the terms, as no such notice was provided by Samsung. It also found that Samsung's reliance on California cases citing *Hill* was misplaced. First, Samsung confused limits under warranty law with independent obligations on a buyer under ordinary contracts. *Id.* at 1288. Second, "even if a customer may be bound by an in-the-box contract under certain circumstances, such a contract is ineffective where the customer does not receive adequate notice of its existence." *Id.* at 1289.

In sum, the court concluded that inclusion of the Brochure, and failure by Norcia to opt out, did not make the arbitration clause enforceable.

b. Equitable Tolling Applied to Allow § 10(a)(3) Challenge to Award

Move, Inc. v. Citigroup Glob. Markets, Inc., 840 F.3d 1152 (9th Cir. 2016)

In *Move, Inc. v. Citigroup Global Markets, Inc.,* the Ninth Circuit reversed and remanded the district court's judgment, in part, finding that Move, Inc. ("Move") was prejudiced by fraudulent misrepresentations of the Arbitral Chairperson, who should have been disqualified from the dispute under the rules and regulations of Financial Industry Regulatory Authority (FINRA).

In September 2008, Move initiated arbitration alleging Citigroup mismanaged $131 million of its funds. The parties were required to sign a FINRA uniform submission agreement and FINRA provided a list of proposed arbitrators (along with biographies). FINRA requires arbitrators to maintain accurate and updated bios and failure to do so subjects them to disqualification. Based on information provided by FINRA, particularly the arbitrator's ranking and licenses to practice law, Move selected a certain Chair. The panel returned a unanimous award denying Move's claim. Four years later it was discovered that the Chair had been impersonating a retired attorney and in fact, was not a licensed attorney. Soon thereafter Move filed a complaint to vacate the arbitral award seeking vacatur under the FAA as a result of these misrepresentations. Move's application was denied finding that, while tolling may be available under the FAA (Move did not seek to vacate within 3 months of the award), Move did not show adequate grounds for vacatur as the Chair's misbehavior did not prejudice Move's right to a fair hearing and the panel did not exceed its power in violation of the FAA. *Move, Inc.,* 840 F.3d at 1155.

The Ninth Circuit first agreed that equitable tolling applies to the FAA finding the language of the statute does not preclude it, the statute is not incompatible with the concept and it would not undermine the purpose of the FAA enacted to make "valid and enforceable written provisions or agreements for arbitration of disputes." *Id.* at 1156-57. Though Citigroup argued tolling would

undermine FAA's goal of finality, the court argued finality has to be balanced with due process — tolling enhances both accuracy and fairness of arbitral outcome. *Id.* at 1158.

Looking to § 10(a)(3) of the FAA, "courts may vacate an arbitration award upon finding that "the arbitrators were guilty of ... any ... misbehavior by which the rights of any party have been prejudiced." *Id.* at 1158. The court asked, did the parties receive a fundamentally fair hearing? Acknowledging that neither the Ninth nor other Circuits have addressed whether vacatur is proper "where an arbitrator's purposeful and material deception resulted in his selection as chairperson of a panel," *Id.*, the Ninth Circuit concluded that Move could invoke this provision. Move's selection was premised upon the Chair being an attorney and his claims of expertise in complex securities, striking those candidates that lacked it. Citigroup countered that there was no evidence the Chair influenced other arbitrators or the outcome. However, the court found that there was no way to determine whether this contention was accurate. *Id.* at 1159. Moreover, under FINRA's rules, the Chairs deceit would have permanently disqualified him, if known at the time. The court noted that the hearing was therefore chaired by an imposter, not a panel of three qualified arbitrators. As such, Move was entitled to vacatur and the court reversed and remanded.

c. Enforceability of Arbitration Provisions for Arbitrator to Decide

Mohamed v. Uber Techs., Inc., 848 F.3d 1201 (9th Cir. 2016)

The Ninth Circuit affirmed in part and reversed in part the district court's order denying Uber's motion to compel arbitration of claims brought by Uber drivers, and remanded for further proceedings.

Mohamed and Gillette began working for Uber in 2012 and 2013, respectively. They both signed additional agreements with arbitration clauses which included opt-out provisions which could be exercised in person or by overnight mail and in the later contract, by email notice. Neither opted out.

Both Mohamed and Gillette relied on Uber's smartphone application to do their job. In 2014 both lost access to the application due to negative consumer credit reports, essentially terminating their ability to work for Uber. *Uber Techs., Inc.,* 848 F.3d at 1207. They both separately sued Uber and two other companies alleging violations of the Fair Credit Reporting Act along with state consumer reporting laws. Gillette also argued that Uber misclassified him and other employees as independent contractors in violation of California's Private Attorneys General Act (PAGA). *Ibid.*

Uber moved to compel arbitration. That motion was denied by the district court. On appeal, Uber argued that the district court erroneously considered whether the arbitration provisions were enforceable when that question was clearly delegated to an arbitrator; second, even if the court properly considered arbitrability, it erred in concluding that the arbitration provisions were invalid and in declining to compel arbitration. *Ibid.* The district court had found that the delegation clauses in the drivers' agreements, requiring arbitrability to be arbitrated, were not clear and unmistakable. However, even if they had been, they were unenforceable because they were unconscionable. The Ninth Circuit reversed, finding that all claims, except Gillette's claim, should be arbitrated. *Id.* at 1208.

Looking to the issue of arbitrability, the court relied on Supreme Court precedent that while "there is a presumption that courts will decide which issues are arbitrable," parties can agree to arbitrate arbitrability through a clear and unmistakable agreement. While the district court acknowledged the principle of delegation, it had found that the delegation provision conflicted with a venue provision stating the parties "shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco." *Id.* at 1209. The Ninth Circuit found this was not a conflict as the venue clause would apply when seeking to *enforce* the arbitration award.

Moving to the unconscionability issue, California law provides that an unconscionable contract must "shock the conscience," be specific to the delegation provision, and be both

procedurally and substantively unconscionable. *Id.* at 1210. Although the district court agreed opt-out clauses render the delegation clause procedurally conscionable, it found that, because the 2013 Agreement required the drivers to exercise that option in person or by overnight delivery service, this option was "illusory" and the contract was procedurally unconscionable. The Ninth Circuit, however, disagreed stating "the district court does not have the authority to ignore circuit court precedent, and neither do we." *Id.* at 1211. Unless the arbitration agreement was adhesive, it was not unconscionable; and it was not adhesive if an opt-out was provided. Furthermore, just because the manner of opting-out was burdensome, it did not mean it was illusory. Because the agreements were not procedurally unconscionable, the arbitration clause was enforceable.

The plaintiffs next argued that the drivers' agreements were invalid under California law because they contained unenforceable, non-severable waivers of their claims under PAGA. The court only addressed this with respect to the 2013 agreement as the district court should not have assessed the arbitrability of the 2014 agreement in the first place.

The Ninth Circuit found that, although the PAGA waiver is invalid under California law, this provision was severable from the agreement and therefore the arbitration clause was not invalidated. *Id.* at 1213. Therefore, plaintiffs PAGA claim could be litigated in court and the remainder of the claims would proceed to arbitration.

The decision rules on various other issues including whether a third-party, Hirease, the independent background-check company could join Uber's motion to compel arbitration. *Id.* at 1214. The decision should be consulted for an in-depth review of those issues.

d. Arbitration Award Consented to by Seaman Not Subject to Challenge

Castro v. Tri Marine Fish Co., LLC, No. C17-8RSL, 2017 WL 3262473 (W.D. Wash. July 31, 2017)

Seaman have been described as wards of the admiralty, a phrase that is intended to convey the solicitude or special legal protection that federal maritime law accords them. However, in *Castro,* this favored treatment was not enough to allow a seaman to escape the consequences of an arbitration award he had consented to as part of a negotiated settlement arising out of personal injuries suffered aboard a fishing vessel.

In *Castro,* the plaintiff, a citizen of the Philippines, was injured shortly after beginning service in American Samoa aboard a fishing boat operated by the defendant. His employment contract contained an arbitration clause requiring any dispute arising out of his work to be arbitrated in American Samoa. After his injury, he was transported to the Philippines and paid maintenance and cure. Ultimately, while still in the Philippines, he negotiated a final settlement, which was memorialized before a specialized maritime arbitrator at the Philippines' office of the National Conciliation and Mediation Board. Nevertheless, approximately two years later, the plaintiff commenced an action in Washington state court for negligence, unseaworthiness, maintenance and cure, and statutory wages. His employer removed the matter to federal court and sought to enforce the award concluded in the Philippines. In opposing confirmation, the plaintiff raised multiple defenses under Article V of the New York Convention, including that the award violated public policy.

In rejecting plaintiffs defenses, the court found that the award entered in the Philippines fell under the Convention and that the plaintiff participated knowingly and with full notice of the proceedings. With respect to the public policy grounds for refusing enforcement, the court noted that the defense is construed narrowly "in recognition of a presumption favoring upholding international arbitration awards." While recognizing the special status given to

seaman, this had to be balanced with the strong federal policy favoring international arbitration. The Ninth Circuit had previously "confronted a possible conflict between these two policies and held that the provision of the Federal Arbitration Act that exempts arbitration agreements in seamen's employment contracts, 9 U.S.C. § 1, does *not* exempt arbitration agreements in maritime employment contracts that are otherwise enforceable under the New York Convention." Finally, considerations of international comity favored enforcement of the award. Ultimately, despite plaintiff s status as a ward of admiralty, the arbitral award against plaintiff does not offend the U.S.'s "most basic notions of morality and justice."

ELEVENTH CIRCUIT

a. New York Convention Requires Cruise Ship Employee to Arbitrate Personal Injury Claim

Suazo v. NCL (Bahamas), Ltd., 822 F.3d 543, 2016 AMC 1447 (11th Cir. 2016)

In *Suazo,* the Eleventh Circuit confirmed the district court's order compelling arbitration in a dispute brought by a cruise ship employee who was injured on the job. Suazo, a Nicaraguan citizen, signed an employment contract with NCL to work aboard one of its cruise ships. The employment agreement contained an arbitration agreement governed by the New York Convention and Chapter 2 of the Federal Arbitration Act (FAA). On appeal, Suazo raised a cost-based defense to NCL's motion to compel arbitration arguing that the costs of the arbitration would preclude him from arbitrating his claims. The Eleventh Circuit discussed New York Convention precedent that suggests (but does not hold) that a party may only raise such a public-policy defense in opposition to a motion to enforce an arbitral award and not in opposition to a motion to compel arbitration. However, the Eleventh Circuit did not need to definitively answer this question, because plaintiff failed to establish that the costs of arbitration would preclude him from arbitrating his federal statutory claims.

The Eleventh Circuit, in reviewing the order granting the motion to compel arbitration *de novo,* held that the New York Convention requires that a motion to compel arbitration must be granted "so long as (1) the four jurisdiction prerequisites are met and (2) no available affirmative defense under the New York Convention applies." It was undisputed that the four jurisdictional prerequisites were met in this case; thus, the issue on appeal was whether Suazo's alleged inability to pay the costs of arbitration constituted an available affirmative defense under the New York Convention.

In analyzing the dispute, the court looked to *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279 (11th Cir. 2015), *cert. denied,* 136 S. Ct. 1158, 194 L. Ed. 2d 174 (2016), which had recently considered whether a cost-based effective vindication defense could be asserted at the arbitration enforcement stage under the New York Convention. In *Escobar,* the Eleventh Circuit noted that no court had ever applied the effective vindication doctrine to a New York Convention case but found it unnecessary to decide whether Escobar's cost-based vindication defense could be raised at the arbitration-enforcement stage because Escobar's effective vindication claim failed for three reasons. "First, to the extent Escobar could make [an effective vindication] claim in a New York Convention case," it was "premature for him to do so at the present stage of the case." The court found that a cost-splitting clause in the arbitration agreement required that Escobar's employer pay the initial fee—meaning that "Escobar has access to the forum." Additionally, the cost-splitting clause required the employer to pay for all of the costs of arbitration and then seek reimbursement from Escobar, so Escobar had not "shown that he is likely to incur any costs due prior to the arbitrator's decision." Lastly, the court found that Escobar also failed to submit any evidence of how much arbitration would cost him and, therefore, had failed to carry his burden to prove he would be denied access to the forum.

The Eleventh Circuit held that because Suazo was attempting to defeat a motion to compel arbitration, he could only raise his cost-based effective vindication defense if it falls within the defenses enumerated in Article II of the New York Convention.

Article II prescribes only a limited set of defenses at the *"initial arbitration-enforcement stage"* such as when the agreement is "null and void, inoperative or incapable of being performed." However, the Eleventh Circuit noted that the Supreme Court had never applied the effective vindication doctrine and "no court [] has applied it in the context of the New York Convention case." The Eleventh Circuit noted that it has never determined whether a cost-based effective vindication defense could be raised under the "incapable of being performed" clause of Article II, but ultimately found that it did not need to resolve that question because Suazo had fallen short of establishing that enforcing the arbitration agreement in this case would effectively deny him access to the arbitral forum.

Specifically, Suazo failed to submit any evidence concerning "the amount of fees he is likely to incur" and provided insufficient evidence of his "inability to pay [the arbitration] fees." The court said that the arbitration agreement in *Escobar* was distinguishable from the one in this case and that Suazo "may" be responsible for some costs prior to the arbitrator's decision. Even so, the court found that Suazo failed to carry his burden of proving that it was likely that unaffordable costs would deny him "access to the forum." The Eleventh Circuit also held that Suazo could not prevail on his effective vindication defense for a second and independent reason. Specifically, the employment agreement was silent as to which party would bear the costs of arbitration; however, the agreement was subject to the Collective Bargaining Agreement ("CBA") which, in turn, provided that if the seafarer is represented by the Norwegian Seafarer's Union ("NSU") in arbitration, NCL will bear the "reasonable costs related to the arbitration process from beginning to end." Thus, the court determined that the only reason Suazo would be required to bear any costs in arbitrating his dispute with NCL was because he opted to retain private counsel instead of proceeding to arbitrate with union-appointed counsel. The Eleventh Circuit ultimately concluded that because the arbitration agreement and the CBA gave Suazo the ability to arbitrate for free and thereby "vindicat[e] his [federal statutory] rights in the arbitral forum," his effective vindication defense was unmeritorious.

b. Fraud-Based Defenses are for Arbitrator to Decide

Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corp., 247 F. Supp. 3d 1294, 2017 AMC 720 (S.D. Fla. 2017)

Internaves involved another attempt to invalidate an arbitration clause under one of the New York Convention's affirmative defenses. The dispute arose out of a contract to transport an electrical transformer from Brazil to Mexico. Defendants claimed that a charter party that provided for arbitration in London governed the relationship between the parties. Plaintiff argued that the arbitration clause in the charter party was induced by fraud and therefore invalid.

The court noted that while fraud is an available defense, the "severability doctrine" insists that a federal court's treatment of fraud claims be bifurcated. "[I]f the claim is fraud in the inducement of the arbitration clause itself –an issue which goes to the 'making' of the agreement to arbitrate –the federal court may proceed to adjudicate it. But the [FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally." In analyzing the dispute, the court noted that the only allegation of fraud in the complaint dealt with alleged misrepresentations regarding the ship's availability which dealt with the contract *as a whole* and touched on services that the defendants offered and supposedly failed to provide, not the design of the arbitration clause. The court reasoned that since Internaves challenged the entirety of the agreement, an arbitrator must be the one to decide the fraud allegation.

The court also held that the charter party contained contradictory provisions on the arbitration forum and was therefore ambiguous. The court relied on a Ninth Circuit case for the proposition that the FAA permits a district court to compel arbitration outside of its territorial jurisdiction only when the arbitration agreement "provided for" a place, which the agreement in question—through its ambiguity –did not. Thus, the court lacked jurisdiction to compel arbitration in either of the conflicting forums. The court held that the parties had an opportunity to select a forum

and panel by mutual agreement but if the parties could not settle on an arbitrator, then the court would order arbitration to be held within its territory. *[Editor's note: This case is on appeal to the Eleventh Circuit and we will follow and update in future newsletters]* .

c. Appointment of Arbitrator By ICC Not Grounds for Refusing Enforcement

Hipasat, S.A. v. Bantel Telecom, LLC, 17-cv-20534 (S.D. Fla. 2017)

In this action to confirm an award under the New York Convention, the parties were unable to agree on a single arbitrator to hear their multi-million dollar dispute arising out of an agreement to provide satellite capacity for transmissions to the U.S. and South American markets. The parties' agreement provided for arbitration under the rules of the International Chamber of Commerce (ICC) with a single, bilingual arbitrator (English and Spanish) sitting in Madrid and with the proceedings to be conducted in Spanish. Although the parties initially attempted to agree on a single arbitrator, their efforts failed, triggering an ICC rule whereby the ICC appointed the arbitrator after considering certain factors. Ultimately, the ICC appointed a German national, resident in Madrid, over the respondent's objections, with the respondent arguing that the appointment violated the ICC's own rules and the parties' agreement to work together to choose an arbitrator. After, the respondent failed to have the ICC-appointed arbitrator recused, the respondent withdrew from the arbitration proceedings alleging bias and discrimination on the part of the arbitrator. Nevertheless, a final hearing was held without the respondent and an award of almost $3 million entered against the respondent.

In challenging the award in the district court, the respondent invoked Article V of the New York Convention, which sets out seven defenses to enforcement, including that the composition of the tribunal was not in accordance with the parties' agreement [Art. V(1)(d)] and that the respondent was not given proper notice of the appointment of the arbitrator or of the proceedings, or was otherwise unable to present its case [Art. V(1)(b)]. The district court rejected

both challenges finding that the arbitrator appointed by the ICC satisfied all of the criteria of the parties' agreement and the ICC's own rules for appointment of an arbitrator. Moreover, the record did not establish that the arbitration was in violation of the U.S.'s standards of due process, particularly where the respondent initially participated in the proceedings and interposed a counterclaim. Ultimately, the respondent made its own affirmative decision to sit out of the arbitration, undermining its position in the district court that the respondent had, in effect, been railroaded.

COMMITTEE ON CARRIAGE OF GOODS

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CARGO NEWSLETTER NO. 69

Spring 2017

CONTRACT FOR LAND USE OF CHASSIS NOT SALTY ENOUGH...

Interpool, Inc. v. Four Horsemen, Inc., 2017 AMC 862, 2017 WL 522161 (D.N.J. Feb. 8, 2017)

Plaintiff brought suit alleging that the defendants breached a maritime contract by utilizing the plaintiff's equipment (chassis) to move maritime cargo without compensating the plaintiff.

On defendants' failure to timely respond, the plaintiff moved for entry of default and entry of judgment by default. The court exercised its obligation to satisfy itself that it had subject matter jurisdiction over the action and ordered the plaintiff to show cause why the action should not be dismissed for lack of subject matter jurisdiction.

It also invited the plaintiff to assert an alternative basis for jurisdiction to prevent the action from being dismissed if the court were to find admiralty jurisdiction lacking. The plaintiff responded, arguing that the court had both admiralty jurisdiction and diversity jurisdiction.

The court noted the plaintiff was in the business of leasing maritime equipment, namely chassis, for the movement of cargo. The defendants took the chassis from chassis pools in certain marine ports for delivery of marine cargo to consignees to and from ports of the United States, including, *inter alia,* the Port of Chicago, and have refused to compensate the plaintiff.

The plaintiff asserted that the containers transported by defendants were carried pursuant to bills of lading, which provided for the landing of the ocean import cargo and continuous on-carriage by train to the railhead and then on plaintiff's chassis to the ultimate consignee (i.e., the defendants took the chassis so that they could transport ocean import cargo pursuant to the final land portion of a "through" bill of lading).

The court noted initially that it had an obligation to satisfy itself that it had subject matter jurisdiction over a case and then addressed the issue *sua sponte.* The burden of establishing subject matter jurisdiction is on the plaintiff. As to admiralty jurisdiction, the court initially referred to the Supreme court decision of *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004) and the criteria set forth in that case designated as a conceptual approach:

> To ascertain whether a contract is a maritime one... [t]he answer depends upon the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions. The contract involved in this case was not a bill of lading that included both land and sea components. Rather, it is a contract to use chassis for the movement of cargo that takes place exclusively on land (i.e., from railhead to consignee). Its primary objective is to provide equipment so that a carrier can accomplish land based transportation. The fact that the Defendants were transporting international cargo pursuant to a "through" bill of lading does not change the nature and character of the separate and distinct contract they had with Plaintiff.

The court also referred to *Mediterranean Shipping Co. (USA) v. Rose,* 2008 AMC 2484, 2008 WL 4694758 (S.D.N.Y. 2008). In that case, the court ultimately found that the agreement involved was "essentially a leasing arrangement allowing the

defendants to lease transportation equipment, including containers, in order to carry out land-based deliveries pursuant to other contracts for the carriage of goods." Thus, the court did not have admiralty jurisdiction "[b]ecause the primary objective of the contract is leasing equipment for land transportation, and not maritime commerce."

The court distinguished cases offered by the plaintiff and found, based on the plaintiffs' pleadings and submissions, that the equipment at issue was used exclusively for land transportation. The contract between the parties was not a maritime contract and therefore, the court did not have Admiralty jurisdiction over the matter.

As to a Rule B attachment, which the plaintiff sought, the court found a party may only seek Rule B attachment if the underlying claim satisfies Admiralty jurisdiction., explaining that "[b]ecause the contract underlying Plaintiffs' breach of contract claim is not a maritime contract, there is no jurisdictional basis for" the court's . . . orders granting the plaintiffs motion for writ of garnishment."

Dealing with the issue of diversity jurisdiction, the court was satisfied that it had subject matter jurisdiction by virtue of diversity jurisdiction because the plaintiff and the defendants were citizens of different states and there was an amount in controversy exceeding $75,000. After reviewing the complaint and other submissions from the plaintiff and finding no allegations as to the defendants' contacts or activities with the State of New Jersey, however, the court issued a "show cause" order to the plaintiff as to why the court should not deny plaintiffs motion for entry of judgment by default for lack of personal jurisdiction.

PURSUIT IN PERU OVERRIDDEN BY EXCLUSIVE FORUM CLAUSE...

Maxima International, S.A. v. Interocean Lines Inc. No. 16-21233, 2017 AMC 582 (S.D. Fla. Jan. 24, 2017)

The defendant received a cargo of computer equipment for transportation from Miami, Florida to Callao, Peru. The plaintiff was the consignee on the bill of lading. The ocean carrier, pursuant to the plaintiff's instructions, delivered the cargo to a terminal at the Port of Callao where it was then lost or stolen, purportedly by a third party, before receipt by the consignee.

The consignee filed an action in the Southern District of Florida pursuant to a forum-selection clause in the carrier's bill of lading which provided for suit in that District:

> ...to the exclusion of the jurisdiction of any other courts or tribunals in the United States or any other country. The laws of the United States of America shall govern any such pleading.

Defendant moved to dismiss the action on the basis *of forum non conveniens,* arguing that Peru is a more convenient forum for the litigation.

The court initially considered that a *forum non conveniens* motion is usually evaluated by considering whether (1) an adequate alternative forum is available; (2) private interest factors favor the alternative forum with a strong presumption in favor plaintiff's initial choice of forum; (3) public interest factors favor the alternate forum; and (4) plaintiff can reinstate their suit in the alternative forum without undue inconvenience or prejudice. Where there is a valid forum-selection clause, the court no longer considers the private interest factors. It may consider arguments about public-interest factors only. "Because the public interest factors will 'rarely defeat' a *forum non conveniens* motion, 'the practical result is that forum-selection clauses should control except in unusual cases.'

The court noted that forum-selection clauses are presumptively valid and enforceable unless the plaintiff makes a "strong showing" that enforcement would be unfair or unreasonable under the circumstances (citing cases).

> It will be invalidated when (1) its formation was induced by fraud or overreaching; (2) the plaintiff would be deprived of its day in court because of inconvenience or fairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy.

The court found defendant's argument that the bill of lading contained conflicting forum-selection clauses, one mandating the Southern District of Florida and one permitting arbitration in New York, to be without merit, noting the bill of lading specifically acknowledged that any claim under the bill of lading must be brought exclusively in Florida.

The court went on to find the alternative forum adequate and available, noting that a forum is considered adequate if it can provide relief to the plaintiff and the substantive law of the foreign forum does not need to be as favorable to the plaintiff as the law of the plaintiffs chosen forum. Rather, the plaintiff need only have an opportunity to obtain some relief.

As to public interest factors, while noting public interest factors "rarely defeat" a *forum non conveniens* motion, the court considered public interest factors which it found to weight in favor of litigating in Peru. There was little connection between the alleged loss of the cargo and Florida aside from both parties doing business there. On the other hand, Peru would likely have an interest in having the controversy involving its own ports and port employees decided in its own courts. While there would potentially be a parallel action in Peru against third parties for the loss, however, the possibility of parallel action "is not in itself sufficient to *merit forum non conveniens* dismissal (citation omitted)."

Despite the public interest factors "weighing in favor of Peru," the court did not find that the facts were so unusual "... that the forum-selection clause should not be enforced."

> The clause is clear, the parties agreed to litigate this action in the Southern District of Florida and United States law applies. Accordingly, the court does not find good cause to dismiss this action.

DOES HAGUE-VISBY PROVIDE *IN REM* JURISDICTION?

Thyssenkrupp Materials NA, Inc. v. M/V Kacey, 2017 AMC 342, 2017 WL 666114 2017 (S.D.N.Y. Feb. 16, 2017)

A shipment of steel pipe was carried from Subric, Philippines to Houston, Texas. Two bills were issued for the cargo which contained a forum selection clause providing that any dispute should be decided in a country "where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."

The plaintiff filed an *in rem* action against the vessel and *in personam* actions against its owner and manager for loss and damage to the steel pipes.

The defendants filed a motion to dismiss for *forum non conveniens* pursuant to Rule 12(c).

The court, in deciding a 12(c) motion, may consider "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case" (citation omitted). It may also "consider documents incorporated into the complaint by reference or integral to the complaint, provided there is no dispute regarding their authenticity, accuracy, or relevance" (citation omitted).

The court stated:

> In the Second Circuit, a forum selection clause is presumptively valid if it was reasonably communicated to the party resisting enforcement, is mandatory and not merely permissive, and covers the claims and parties involved in the suit.(Citation omitted)

To overcome this presumption of enforceability, the plaintiff has the burden to make a "sufficiently strong showing that `enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching. '" The court also noted, where COGSA applied, a forum selection clause would be unenforceable if "the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees."

The plaintiff did not dispute the clause was reasonably communicated, mandatory, and the claims involved were subject to the clause. However, the plaintiff argued that the court should deny the motion because Greek law does not recognize an *in rem* action against a vessel or the *in personam* action against the manager. The plaintiff also requested the court to stay the instant action and retain jurisdiction to ensure that the Greek litigation complied with applicable U.S. law.

The court found that the plaintiff failed to show it would lose its *in rem* action because Greek law does not recognize *in rem* actions. The court held that the weight of authority in the Southern District of New York is that the inability to proceed *in rem* in the chosen forum was not sufficient by itself to defeat the presumed enforceability of a forum selection clause (citations omitted).

The majority view is that in rem actions are generally "duplicative of the *in personam* claims against the carrier(s)" and "do not confer any further benefit other than providing an additional mechanism for enforcement" (citation omitted). The court found that the plaintiff had not demonstrated an *in rem* action against the vessel would confer on the vessel any substantive benefits in addition to those in its *in personam* action against the owner.

Secondly, as to the argument that Greek domestic law did not recognize *in rem* actions, such failed to account for the application of the Hague-Visby Rules. The court referred to the Hague-Visby Rules as containing a provision similar to Section 3(8) of COGSA, "which appears to keep *in rem* actions intact by stating, ' [a]ny clause...in a contract of carriage relieving the carrier *or the ship* from liability...or lessening such liability...shall be null and void.'

The court found the Rule would serve to ensure that the plaintiff would not be deprived of its *in rem* cause of action because it was being made to litigate in a foreign forum. The bills of lading required application of the Hague-Visby Rules. The court noted that Greece had ratified the Hague-Visby Rules, and the plaintiff's own Greek law expert conceded that international conventions are "rules of superior legal power" that would prevail over domestic Greek legislation.

The court also referred to *Reed & Barton Corp. v. M V. Tokio Express,* 1999 AMC 1088, 1999 WL 92608, (S.D.N.Y. Feb. 22, 1999) where the court found that because German law applied the Hague-Visby Rules, the "fraternal equivalent" of COGSA, the carrier's obligations would not be reduced below that which COGSA guarantees. In light of this, the court found that the plaintiff had failed to meet its burden to show that its substantive rights would be reduced if the matter was litigated in Greece.

As to the plaintiff's argument that it would lose its *in personam* action against the vessel's manager, the court found that the bills of lading already prevented plaintiff from bringing an action against the manager. Specifically, the bills of lading contained a clause that channeled all liability to the owner, stating that the contract was between the Merchant and the carrier of the vessel and that *"said ship owner only shall be liable* for any damage or loss." The clause thus prevented the instant action from being brought against anyone except the ship owner. The court found the manager was not a ship owner or a carrier under the bills of lading.

The court noted that the Second Circuit has held such "so-called exoneration clauses" in bills of lading that channel claims to one entity are enforceable

> The Second Circuit noted that the exoneration clause was simply an ordering mechanism that regulates who will be responsible to whom rather than lessening any substantive rights. The plaintiff may bring an action against the common carrier for damage to the cargo, and the common carrier may then sue the underlying carriers

As to the plaintiffs argument that such clause would violate the Harter Act, the court noted that the Harter Act, while voiding provisions *absolving* liability, does not void provisions *limiting* a carrier's liability. The court found that the plaintiff did not meet its burden of establishing that enforcement of the forum selection clause would be unreasonable or unjust, nor did it point to any public interest factors that would have counseled against the court's enforcement of the clause in the case:

> Plaintiff may assert its *in rem* action in Greece, and while it may not assert its *in personam* action against Technomar there, neither could it do so in this court. Accordingly, this court finds that the forum selection clause is valid and enforceable.

As to retaining jurisdiction, the court rejected this request because the facts involved in the *Sky Reefer* decision did not exist in the case before it. In *Sky Reefer,* the Supreme Court enforced the choice of forum and choice of law clauses because it was too early to know what set of law the arbitrators would apply, and also because the district court had retained jurisdiction to review at the award enforcement stage. The Supreme Court noted that it would not have enforced the clause if there were no subsequent opportunity for review by the district court. This decision was driven largely by uncertainty regarding which law the arbitrators would apply. "There

is no such uncertainty here as the court is persuaded that the Hague-Visby Rules would be required to apply. Thus, plaintiff's substantive rights will not be impaired or diminished. Accordingly, this court will not retain jurisdiction."

SHIPPER STUCK BY FAILURE TO SPEAK UP...

Mediterranean Shipping Co., v. Best Tire Recycling, Inc., 848 F.3d 50, 2017 AMC 801 (1st Cir. 2017)

Forty containers of scrap tires were shipped from San Juan, Puerto Rico to Vietnam. When the cargo arrived at its destination in Vietnam, the consignee refused to accept delivery, apparently because the shipments arrived late. As a result, the carrier stored them. The stored cargo incurred demurrage charges totaling $353,083.50, port-storage charges totaling $36,780, and an administrative fee totaling $300. Moreover, the carrier asserted that $69,889.54 of the cost to ship the freight remained unpaid.

The appellant was named as shipper in all bills of lading involved; and the bills of lading provided that every person defined as a "Merchant" was jointly and severally liable for all of the various undertakings, responsibilities, and liability of the Merchant. "Merchant" was defined as including the shipper, and "Freight" was defined to include the freight and all charges, costs and expenses in accordance with the applicable tariff and the bill of lading, including storage, per diem and demurrage.

The ocean carrier filed suit against the shipper, and the district court granted summary judgment in favor of the carrier, holding that the defendant/appellant was a party to the contract and as such was liable to the carrier for unpaid ocean freight charges, shipping container demurrage, port storage and related administrative fees.

On appeal, the circuit court noted that it was uncontested that the defendant/appellant was designated as the "shipper" on all of the bills of lading. The "shipper" did not argue that the presumption this creates was overcome by a statute or a contractual provision,

but rather argued that the parties' course of conduct overcomes the pattern and presumption that the defendant/appellant should be liable. The circuit court found that it does not.

The circuit court found that the defendant/appellant was jointly and severally liable as the shipper of the cargo. It noted the defendant/appellant was given notice that it was named as a shipper, having received two email messages notifying that it would be the shipper. It admitted that it "could have refused being named as a shipper by replying to those messages." The court also noted that the six bills of lading were received by the defendant/appellant and defendant/appellant was designated as the shipper on all these bills of lading received between April 24, 2012 and June 28, 2012. However, while it was designated as a shipper on all the bills of lading, the defendant/appellant made no objection until over a year later, when it received invoices for demurrage and other charges.

The circuit court also addressed two additional issues raised in the appellant's brief; however, the circuit court noted these issues were being raised for the first time on appeal and never clearly raised or argued before the district court. Both of the arguments were therefore waived. The decision of the district court was affirmed.

CALIFORNIA KICKS CARGO SUIT TO CHOSEN FORUM...

Goal Zero, LLC. v. Cargo Freight Services, Ltd., 2017 AMC 157, 2016 WL 7406796 (N.D. Cal. Dec. 22, 2016)

A shipment of solar energy equipment was shipped from Hong Kong to Rotterdam under contracts of carriage and a bill of lading. The cargo was not delivered at Rotterdam.

Suit was brought in the federal court in California by the plaintiff and its underwriter for a total loss of the shipment valued at $95,183.55.

The defendant maintained that venue was improper and the bill of lading contained a forum selection clause requiring all

disputes to be litigated in the United States District Court in the State of Georgia to the exclusion of any other courts. The defendant moved to dismiss or, alternatively, transfer the matter to a Georgia District Court.

The court dealt with the bill of lading initially on the basis that the contract of carriage between shipper and carrier should have familiar principles of contract interpretation govern its instruction and that contract terms are to be given their ordinary meaning, and, whenever possible, the plain language of the contract should be considered first (citing cases).

Considering an argument that the bill of lading was ambiguous because a provision on the front said any proceedings against the Carrier "must be brought in the courts of the United States of America and no other court" and a provision on the back provided that all disputes should be determined by the District Court in the State of Georgia, the court found no ambiguity.

The front provision incorporated the reverse where it says that "...the goods would be transported in accordance with all of the items printed, written or stamped in or on the front and back pages of this bill of lading." The specific language on page two gave meaning to and carried more weight than the broad language on page one. The court found "by the plain language of the agreement," the parties agreed to litigate their disputes in a Georgia District Court.

The court next considered whether venue was improper. The only defendant was a Georgia corporation and the plaintiffs offered no indication that it resided in the district for the purposes of venue. None of the events relating to the dispute occurred in the district, nor was it alleged that the defendant was subject to personal jurisdiction. The court found venue improper in the Northern District of California.

As to transfer or dismissal, the court found that the plaintiffs could have filed the case in the federal Georgia District Court. As to dismissal, the defendant argued that courts have consistently dismissed, rather than transferred, maritime cargo claims which

were brought by "sophisticated, represented plaintiffs in improper fora." The court noted that the citations offered by the defendant pointed to foreign forums, and federal courts cannot transfer a case to a foreign tribunal. The court considered the case involved did not present the same obstacle. On the basis of judicial economy, the court ordered a transfer of the case rather than a dismissal.

UPSTREAM PARTY BOUND BY DOWNSTREAM AGREEMENT...

Celtic International, LLC v. BNSF Railway Company, 2017 AMC 744, 2017 WL 714379 (E.D. Cal. Feb. 23, 2017)

Shipments of wine were to be transported by rail from Napa, California to Little Rock, Arkansas and Memphis, Tennessee. While the defendant's train was transiting Texas, it derailed and the shipments of wine were destroyed.

The plaintiff somehow became involved with the arrangements for the shipment; however, another party, who apparently had a custom rate arrangement with the railroad, was tasked with submitting bill of lading shipping orders. These triggered computer-generated waybills for the respective shipments. The plaintiff, after a series of assignments of rights, asserted three claims against the railroad under the Carmack Amendment. The railroad moved for summary judgment.

The court noted the Carmack Amendment is an absolute-liability regime designed to compensate shippers for goods that are damaged or lost during interstate shipping. The railroad asserted that the plaintiff could not sue it because the plaintiff was not a party entitled to recover under the Carmack Amendment.

The waybills contained a "Direct Suit Prohibition" clause which provided that only the shipper may initiate and maintain a claim for cargo loss and damage in a suit against the railroad. In the parlance of the shipping industry, the plaintiff was located "upstream" from the waybills, and the issue was whether the

plaintiff is bound by a Direct Suit Prohibition clause located in a downstream agreement.

The court found that the Direct Suit Prohibition was an alternative term authorized by Section 10502(e) of Carmack and that the plaintiff was bound by the liability limitations negotiated by the intermediary with the downstream carrier. The court, referring to the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 2004 AMC. 2705 (2004), held the limited agency rule allowed the railroad to enforce the Direct Suit Prohibition against the plaintiff. The court went on to deny a motion by the plaintiff to amend the complaint to name the intermediary as a defendant. The plaintiff did not comply with Federal Rule of Civil Procedure 16, which the plaintiff never addressed. Not having made a showing under Rule 16, the plaintiffs motion was denied.

COURT FINDS 50 CENTS PER POUND IS ENOUGH...

Eastern Air Express, Inc. v. FedEx Freight, Inc., No. 16-60367, 2017 WL 1311720 (S.D. Fla. Feb. 28, 2017)

A reconditioned aircraft engine was shipped from Terre Haute, Indiana, to Ft. Lauderdale, Florida, using FedEx as the carrier. When the engine was delivered, no damage or exceptions were noted on the delivery receipt; however, after the FedEx driver left, the plaintiff noticed damage to the engine's shipping container and to the engine itself.

The plaintiffs made a claim to FedEx and recovered $245 for damages to the engine at $0.50 per pound (the engine weighing 490 lbs.) and $305.43 in refunded freight charges. The plaintiffs instituted suit to recover for additional damages based upon the Carmack Amendment. The defendant moved for summary judgment and also raised the issue of its entitlement to limited liability.

[The court found that the defendant was not entitled to summary judgment because there was a triable issue of fact concerning the engine's condition at the time defendant picked up the package for transport.]

As to the issue of limitation of liability, the court noted the Eleventh Circuit used a four-prong test to determine such:

> The Carrier must: (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) obtain the shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment.

The court found the issue of the tariff had been largely eliminated due to statutory changes and began its analysis as to prong 2. The court found that the plaintiffs were bound by the terms of the Carrier Contract Agreement entered into which contained the provision with respect to limited liability.

The plaintiffs also argued the tariff of 50 cents per pound was not "reasonable"; however, the court found this argument unpersuasive. The court found that the plaintiffs were bound to the contract their agent prepared. As the plaintiffs had already been paid based upon the limited liability provision, the court ordered judgment to be entered in favor of the defendant, with the plaintiffs recovering nothing.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

Chair: Carol L Finklehoffe

NEWSLETTER

Volume 12, Number 1, May, 2017

PASSENGER CLAIMS

Collateral Source

Sampson v. Carnival Corp., 15-24339-civ-JLK (S.D. Fla. Dec. 12, 2016)

Defendant wants to preclude the amounts that were billed but not actually paid to a third party for healthcare. Court held that consistent with prior rulings, plaintiff is precluded from admitting into evidence the amount billed by healthcare providers, rather than the amount actually paid.

Westermeyer v. Sea Leveler, Inc., et. a/.,13-024111 (8th Cir. Jan. 15, 2017)

"The difference between the amount billed and the amount paid is not considered a discharge of a debt, or payment from a 'collateral source'." Defendants may not introduce into evidence at the trial in this case that the plaintiff had the benefit of health insurance and/or Medicare to pay and cover his medical expenses.

Daubert/Motion in Limine

Barruw v. NCL (Bahamas) Ltd., 15-civ-23182-KMW, 2017 WL 253559, 2017 U.S. Dist. LEXIS 9317 (S.D. Fla. Jan. 18, 2017)

The court granted the plaintiffs request to exclude references to when she hired a lawyer. Court also granted plaintiff s request to exclude medical bills because the bills, their amounts, and

their payment or non-payment are irrelevant as she is not claiming past or future medical bills. Introduction of the medical bills would also unfairly prejudice plaintiff because jurors might use those amounts to determine any verdict for pain, suffering, disability, and loss of enjoyment of life. The court denied the plaintiff's request to exclude testimony of "the physical conditions or recoveries from injury of the general population or average person" as this type of testimony may be part of information reviewed and considered by an expert.

Brown v. NCL (Bahamas) Ltd., 15-civ-21732-JAL, 2016 WL3251931, 2016 U.S. Dist. LEXIS 82084 (S.D. Fla. June 10, 2016)

Plaintiff's expert witness' use of information contained in medical records, literature, and research and a lengthy discussion with plaintiff is a reliable methodology even though the expert never physically examined the plaintiff. The fact that the expert witness failed to review plaintiff's pre-incident medical records would go to the weight the jury should give to the expert's opinion, not to the reliability, and the defendant could explore these issues on cross examination.

Brown v. NCL (Bahamas) Ltd., 15-civ-21732-JAL (S.D. Fla. Oct. 13, 2016)

Since the court granted the defendant's motion to exclude any reference to the plaintiff's incident being referred to as a "criminal act" or the scene of the incident being referred to as a "crime scene," the defendant could not present any evidence that the assailant was not arrested, charged or prosecuted as a result of the incident. The court also excluded social media posts not made by the plaintiff. However, plaintiff's posts, which refer to nail polish that allows for women to test if date rape drugs have been placed in a drink, as the evidence "is not clearly admissible on all potential grounds" and should be deferred until trial so that questions of admissibility, foundation and relevance could be resolved in their proper context. The court also excluded reference to plaintiff's child custody battle, rejecting the defendant's

arguments that it was an alternative or additional cause of plaintiffs claimed injuries and damages.

Evidence regarding prior occurrences of sexual assaults on defendant's vessels would be irrelevant, and any relevance it might have would be substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury.

Flaherty v. Royal Caribbean Cruise, Ltd., 15-civ-22295-JAL (S.D. Fla. Jan. 17, 2017)

A DUI that occurred about twenty-three (23) years before deposition was too remote in time and should be excluded. Fact that the plaintiff was discharged under less than fully honorable conditions is not relevant and excluded. Defendant is prohibited from attempting to limit liability of the plaintiff and any evidence of any ticket bought in connection with the shore excursion as it would be irrelevant and unfairly prejudicial. Defendant cannot introduce evidence of lack of other incidents if it objected to discovery about other incidents.

Flaherty v. Royal Caribbean Cruise, Ltd., 15-civ-22295-JAL (S.D. Fla. March 15, 2017)

Although the plaintiff's expert was qualified, his testimony is limited. Even though he has years of outdoor recreational experience he can provide no scholarly citations that handholding while scaling waterfall is a dangerous practice nor has he ever guided individuals up a waterfall or been to Dunn's River. Expert is also prohibited from testifying that the center route is more dangerous as the trier of fact can easily understand that without specialized expertise.

Gehres v. Cruise Operator, Inc., 2016 WL 6995590, 2016 U.S. Dist. LEXIS 165188 (S.D. Fla. Nov. 30, 2016)

At trial, plaintiff intended to offer expert opinion that X-ray machine should have been onboard cruise ship. The expert opinion was based on recommended industry guidelines. Defendant sought to exclude evidence concerning industry guidelines and court denied motion. In rejecting defendant's motion for reconsideration, the court noted that even though guidelines had not been disclosed during expert's deposition, defendant did not inquire as to basis of that opinion at deposition, and that the existence of industry guidelines had been timely disclosed.

Owens v. Norwegian Cruise Line, Case 1:15-civ-23319-AOR (Consent Case) (S.D. Fla. Feb. 28, 2017)

Passenger plaintiff brought claim against cruise line for injury to finger sustained while using fitness equipment, alleging that the knob on the weight machine was different from that designed by the manufacturer. Defendant moved to exclude testimony regarding the knob, arguing that it was irrelevant, as well as misleading and confusing. Motion was denied.

Sampson v. Carnival Corp., 15-civ-24339-JLK (S.D. Fla. Dec. 12, 2016)

Plaintiff was injured while walking on an outdoor deck in the early morning on defendant's vessel. Defendant moved to exclude two treating physicians because they failed to conduct a mandatory differential diagnosis analysis to survive a *Daubert* challenge. Defendant relied on authority involving toxic tort cases. The court stated that defendant's authority contained distinguishable facts than those presented in the instant case. Specifically, although a temporal relationship alone is insufficient to prove causation, neither of plaintiff's experts here relied solely on this criteria. The plaintiffs experts each had separate medical reasons for their medical opinions and because they performed a thorough review of the plaintiffs medical history, observed her in a

clinical setting, considered the cause of her pain, and arrived at their respective opinions. Accordingly, the plaintiff's experts analysis exceed that which constitutes a temporal relationship.

Discovery

Flaherty v. Royal Caribbean Cruises Ltd., 15-civ-22295-JAL (S.D. Fla. Jan. 18, 2017)

Plaintiff's motion to conduct two (2) depositions after the close of discovery is granted where the defendant disclosed those witnesses in a separate matter pending in the same district. Good cause exists for permitting plaintiff to depose those two witnesses. Fourteen (14) days given to conduct additional discovery.

Fleischer v. Carnival Corp., 15-civ-24531-KMM (S.D. Fla. June 15, 2016)

Defendant is required to produce for a three year period, for both Carnival and Holland America, any and all communications by or between the cruise line, its employee's or cruise ships which have called on Half Moon Cay. The information is to include safety, repair or maintenance of any of the staircases at Half Moon Cay which lead passengers to and from Half Moon Cay's beach or the landings of the staircases. It also applied to accidents or injuries occurring on the staircases which lead passengers to and from Half Moon Cay's beach.

Fleischer v. Carnival Corp., 15-civ-24531-KMM (S.D. Fla. July 28, 2016)

Plaintiff failed to show that documents sent or received after the incident are relevant to whether a joint venture existed at the time of plaintiff's accident. Requested discovery has not been shown by the plaintiff to be proportional to the needs of this case.

Emotional Distress

Blair v. NCL (Bahamas) Ltd., 212 F. Supp. 3d 1264 (S.D. Fla. 2016)

Plaintiff mother and one (1) minor child witnessed two (2) other children being pulled from a pool; one (1) child drowned and the other did not sustain physical injuries. Summary judgment granted in part and denied in part. Court held that plaintiff s emotional distress claims were not barred by the Death on the High Seas Act ("DOHSA"), but plaintiff failed to allege the existence of extreme or outrageous conduct. With regard to the claim of negligent infliction of emotional distress, court held that plaintiff failed to allege that she and minor children were within the "zone of danger." However, the other child who was pulled from the pool could state a claim for negligence infliction of emotional distress.

Elbaz v. Royal Caribbean Cruises, LTD., 16-24568-civ-CMA, 2017 U.S. Dist. LEXIS 5417 (S.D. Fla. Jan. 12, 2017)

DOHSA was the exclusive remedy and the plaintiff could not supplement his claim with Bahamian law. Plaintiff properly stated a cause of action for intentional infliction of emotional distress where he and his husband were subjected to anti-gay slurs and discrimination and the cruise line dropped his husband into the ocean when he was hanging from lifeboat and then failed to immediately deploy rescue efforts. Plaintiff however did not state a cause of action for negligent infliction of emotional because plaintiff does not allege he sustained any physical impact as a result of defendant's conduct or was threatened with imminent physical impact.

Equitable Tolling and Statute of Limitations

Chang v. Carnival Corp., 839 F.3d 993 (11th Cir. 2016)

Plaintiff filed suit in state court within one-year time limitation, but subsequently filed in federal court more than a year

after the incident. Plaintiff acknowledged cruise ticket provided for one-year limitation to file suit and forum-selection clause, but claimed that limitation period should be extended based on doctrine of equitable tolling since she first filed in state court. Eleventh Circuit upheld district court's ruling granting defendant's motion for summary judgment, stating that plaintiff failed to demonstrate she was entitled to believe her state filing was sufficient, particularly because defendant twice informed plaintiff that she must adhere to the forum-selection clause requiring filing in Southern District of Florida rather than state court.

Forum Selection Clauses

Young v. Holland America Line, N.V., 2016 WL 7451563, 2016 U.S. Dist. LEXIS 179370 (N.D. Cal. Dec. 28, 2016)

Plaintiffs purchased tickets for a cruise operated by Holland America but did so using Costco Travel. Plaintiffs were injured on the subject cruise and filed suit in California. The court denied Holland America's motion to transfer venue to the Western District of Washington pursuant to the terms of the forum selection clause in the ticket finding that it was not reasonably communicated. Plaintiffs did not buy their ticket through Holland America and were not notified of the forum selection clause until after they booked their cruise tickets. Even then, the clause was buried near the back of an eleven (11) page document. The court stated it was "skeptical that a term disclosed only after a purchase is made and at a time when cancellation would cost up to 75% of the tickets price can satisfy the reasonable communicativeness test." The seventy-five percent (75%) cancellation fee was much closer to a forfeiture of the entire fare. Plaintiff was never able to complete the online check-in process and Holland America representatives did not communicate to plaintiff the forum-selection clause in multiple telephone conversations during the check-in process.

Independent Contractors

Martins v. Royal Caribbean Cruises, Ltd., 216 F. Supp. 3d 1347 (S.D. Fla. 2016)

Woman died after allegedly eating bacteria-ridden food on cruise ship. Family filed wrongful death action under DOHSA and also for emotional distress. Court denied summary judgment on issue of independent contractors and apparent agency issues, stating that genuine issues of material fact existed based on the level of control the cruise line exerted over doctors, and whether the cruise line completely surrendered its control of the nurses to the doctors. Court also held that factual dispute over time of bacterial ingestion was issue of fact for jury. With respect to DOHSA claims, court held that material facts existed regarding whether mother of deceased was an eligible party under DOHSA, but held that there was no evidence that sister, half-sister, or step-father of deceased were financially dependent on passenger to support DOHSA claim as dependent relative, and no evidence that deceased's half-sister sustained any pecuniary loss to support DOHSA claim.

Jurisdiction

Brown v. Carnival Corp., 202 F. Supp. 3d 1332 (S.D. Fla. 2016)

Court granted excursion company's motion to dismiss for lack of personal jurisdiction because plaintiff failed to show nexus between the alleged tort and company's connections in Florida, thus failing to satisfy Florida long-arm statute. Court held plaintiff failed to allege excursion company had "continuous and systematic" contacts within the state of Florida, thus failing to demonstrate general jurisdiction over company.

Phan v. Grand Bahama Cruise Line, LLC, 2016 WL 5407919, 2016 U.S. Dist. LEXIS 133774 (N.D. Cal. Sept. 28, 2016)

Motion to dismiss denied where the plaintiff has established there is a "colorable basis" for jurisdiction based on one of the three

methods establishing agency. Plaintiff did so by highlighting the similarities in the webpages, documents, and phone numbers of the defendants. The plaintiff is entitled to conduct limited jurisdictional discovery.

Notice

Kulakowski v. Royal Caribbean Cruises, Ltd., 2017 WL 237642, 2017 U.S. Dist. LEXIS 6800 (S.D. Fla. Jan. 18, 2017)

Plaintiff brought negligence claim for injuries sustained after she slipped and fell while ice-skating on docked cruise ship that suddenly moved away from pier. The court ruled that the risk of falling due to ship movement is an open and obvious condition and there is no duty to warn. Motion to dismiss granted.

Pleading Requirements

Jane Doe v. NCL (Bahamas) LTD., 2016 WL 6330587, 2016 U.S. Dist. LEXIS 150817 (S.D. Fla. Oct. 27, 2016)

Plaintiff was served an unknown number of alcoholic beverages by a bartender, became disorientated and intoxicated and was sexually assaulted by the bartender in a storage room. The court found that the plaintiff failed to state a claim for negligent hiring, retention, training or supervision because she used boilerplate allegations. The plaintiff must plausibly allege each element of a claim for negligent hiring and retention, negligent training, and negligent supervision. The court further noted that that the complaint indirectly alleged that the bartender was incompetent or unfit to perform the work but alleged no facts to create a plausible inference that defendant knew or should have known of any particular incompetence or unfitness. Further it was not alleged that the incompetence that defendant knew or should have known caused the injury. Motion to dismiss was granted with leave to amend.

Proximate Cause/Foreseeability

H.S. v. Carnival Corp., 2016 WL 6583693, 2016 U.S. Dist. LEXIS 73373 (S.D. Fla. Nov. 4, 2016)

Cruise line vessel offered teen nightclub, and made representations via its registration guidelines that club's activities would be supervised and age appropriate. Club had no sign-in or sign-out requirement and "unruly behavior" was prohibited. Plaintiffs mother registered 14-year-old plaintiff for club event. At event, plaintiff engaged in sexual contact with two other minors in the absence of adult supervisors. Later, plaintiff accompanied two minors to a stateroom, consumed alcohol, became highly intoxicated, and was sexually assaulted. Court rejected plaintiff's negligence claim, stating that she failed to show the breach of duty was the proximate cause of her injuries. The failure to supervise minors at a teen club was not the proximate cause of the subsequent sexual assault in a private area of the ship. Furthermore, Carnival was under no duty to prevent plaintiff from visiting another person's stateroom and Carnival did not observe anything that reasonably put it on notice of impending danger to plaintiff.

Shore Excursions

Brown v. Carnival Corp., 202 F. Supp. 3d 1332 (S.D. Fla. 2016)

Plaintiff slipped and fell while on a shore excursion boat in Aruba. Court granted cruise line summary judgment motion because plaintiff failed to sufficiently plead the appropriate standard of care, failed to demonstrate knowledge of a dangerous condition or even identify what constituted the dangerous condition, and failed to demonstrate negligent hiring because the plaintiff did not assert that cruise line knew or should have known that excursion company was incompetent or unfit to perform the work. Plaintiff also provided no factual allegations to support a joint venture theory of negligence.

Ceithaml v. Celebrity Cruises, Inc., 207 F. Supp. 3d 1345 (S.D. Fla. 2016)

Plaintiff passenger brought negligence action against cruise line for injuries sustained during zip-line excursion while on shore. Summary judgment granted. Court rejected plaintiff's argument that cruise line owed heightened duty of care, instead holding that plaintiff provided no facts showing cruise line had actual or constructive notice of zip-line ride dangers. Plaintiff failed to state when the negligent misrepresentations regarding the zip-line's safety were made, thus failing to satisfy FRCP 9(b). Court rejected joint venture negligence claim because cruise line had explicitly stated in its Tour Operator Agreement that zip-line company was independent contractor. Court rejected apparent agency negligence claim because the zip-line ticket language, brochure, and passenger ticket release cruise line from liability. Finally, court found no evidence to support actual agency relationship, particularly since cruise line never intended or acknowledged zip-line company would act as its agent, as spelled out in the Tour Operator Agreement.

Kadylak v. Royal Caribbean Cruises, Ltd., 679 F. App'x 768 (11th Cir. 2017)

Plaintiff brought negligence action against excursion provider, cruise line, and off duty staff captain who was participating in the excursion. Summary judgment upheld. Cruise line was not strictly liable because no willful and wanton misconduct had been committed by staff captain against plaintiff. The court also rejected the argument that the cruise line was vicariously liable for the staff captain being present. The court found that the staff captain was acting in a private, off-duty capacity and cruise line exercised no control over him. Finally, the court held cruise line not negligent because plaintiff did not introduce any known dangers related to motorcycle excursion.

McShane v. NCL (Bahamas) Ltd., and Dolphin Encounters Ltd., 16-civ-20991-JLK (S.D. Fla. Dec. 1, 2016)

Motion to dismiss granted where court found that the plaintiff failed to allege facts sufficient to demonstrate entitlement to relief. Complaint did not state how plaintiff was injured and did not show that NCL was aware of the dangerous condition on the excursion. Additionally, the shore excursion ticket expressly informed the plaintiff that NCL did not "own or control the shore excursion operator", and tour operator was an independent contractor based on express language contained in Excursion Agreement and because of this, the plaintiff could not allege a necessary element of a joint-venture claim.

Reming v. Holland America Line, Inc., 2016 WL 5956740 (W.D. Wash. Oct. 14, 2016)

Plaintiff purchased tickets for shore excursion and was injured from fall due to collapsing pavement. Court upheld decision granting defendant's motion for summary judgment, finding that cruise line exercised reasonable care with respect to plaintiff. Cruise line had no duty to warn because walking on pavement was not unique to maritime travel.

Thompson v. Carnival Corp., 174 F. Supp. 3d 1327 (S.D. Fla. 2016)

Plaintiff injured on all-terrain vehicle (ATV) during shore excursion and brought negligence action against cruise line and foreign excursion companies. Court granted excursion companies' motion to dismiss for lack of personal jurisdiction finding that excursion companies' Florida contacts were not "continuous and systematic" to render them "at home" within the forum state. Plaintiff's allegations of jurisdiction, specifically the excursion companies' contracts with cruise line, Florida bank accounts, relationship with a Floridian cruise association, and companies' alleged consent to litigation in Florida, were not "so substantial" such that it would make it an "exceptional" case to support a finding of personal jurisdiction. Nor did the court find jurisdiction under

FRCP 4(k)(2), stating that the companies' contacts were too attenuated to warrant finding of jurisdiction. Court granted cruise line's motion to dismiss, holding that plaintiff failed to plead supporting facts showing that the cruise line knew or should have known of dangerous conditions that would give rise to a duty to warn.

Wolf v. Celebrity Cruises, Inc., 683 F. App'x 786 (11th Cir. 2017)

Plaintiff bought zip-line excursion ticket while onboard cruise ship and sustained injuries after slamming into a zip-line platform in Costa Rica. Plaintiff asserted negligence, claiming cruise line failed to warn him of the dangerous condition and that cruise line was liable for zip-line company's negligence under actual and apparent agency, and joint venture. Court upheld dismissal of zip-line company from suit for lack of personal jurisdiction, and upheld summary judgment in favor of cruise line for all remaining claims. Court held that zip-line company did not have sufficient Florida connections to establish personal jurisdiction. Company had no place of business or branch office, and although it used a mail-forwarding service via a PO Box in Miami, no mail was ever received there. Court found cruise line owed no duty of care to warn plaintiff as the record contained no evidence of injuries or passenger concerns over the years to create such a duty. Court rejected actual agency theory because cruise line exerted no control over zip-line company's operations and rejected apparent agency theory because plaintiff was provided two disclaimers stating that zip-line company was independent contractor and not agent of representatives of cruise line. Finally, court rejected joint venture theory due to lack of evidence that companies had a joint proprietary interest or shared profits/losses .

Summary Judgments

Aponte v. Royal Caribbean Cruises, Ltd., 683 F. App'x 786 (S.D. Fla. 2016)

Plaintiff injured after slipping and falling in puddle of liquid soap on floor of cruise ship bathroom. Summary judgment granted because the plaintiff could not establish cruise line had notice of soap puddle. Court noted that plaintiff could not establish how long it was there or how it got there, or that the puddle was there at the same time an employee was in the bathroom emptying a bucket into the sink. Court also held that liquid soap on floor was "open and obvious" condition. Court also denied plaintiffs motion of partial summary judgment on liability because the passage of time between bathroom inspections is not enough to establish notice when no evidence was submitted demonstrating how long puddle was on the floor. Court also found that plaintiff did not draw connection between employee emptying bucket into sink and soap puddle on floor.

Brown v. NCL (Bahamas) LTD., 15-civ-21732JAL (S.D. Fla. Oct. 16, 2016)

Summary judgment denied. Plaintiff alleged that defendant was negligent for "failing to exercise reasonable care for the safety of its passengers, and by creating this dangerous condition by refusing to intervene to assist the plaintiff when any reasonable prudent crew member would have taken action to deal with an obviously drunk passenger[.]" The court found that a genuine issue of material fact existed as to whether defendant breached its duty of ordinary reasonable care under the circumstances by failing to help plaintiff.

Demain v. NCL (Bahamas) Ltd, 15-cv-23297-DPG (S.D. Fla. Nov. 4, 2016)

Plaintiff was injured when he struck his hand on a sharp diamond shaped piece of metal protruding from a hanging picture frame/marquee. The court found genuine issues of material fact

which precluded entry of summary judgment. Determinations of how the protruding metal came about and whether the defendant was aware of the condition must be resolved, in part, by weighing the credibility of the crewmember who was responsible for cleaning the frame/marquee.

Flaherty v. Royal Caribbean Cruise, Ltd., 15-civ-22295-JAL (S.D. Fla. March 15, 2017)

While scaling a waterfall is an open and obvious danger, the court cannot say that the rule requiring "handholding" posed an open and obvious danger. It is for the trier of fact to determine if this practice is actually dangerous and if so, open and obvious.

Geyer v. NCL (Bahamas), Ltd., 204 F. Supp. 3d 1354 (S.D. Fla. Aug. 31, 2016)

Plaintiff injured after child slid into him in cruise ship's water park. Court denied cruise line's motion for summary judgment, holding that genuine issues of material fact existed as to whether cruise line created a dangerous condition by having unsupervised children in water park, whether the cruise line's safety sign stating "no running" and "children must be accompanied" constituted constructive notice of danger, and whether children running and sliding on slide was an "open and obvious" danger such that it would obviate cruise line's duty to warn.

Lavora v. NCL (Bahamas) Ltd., 2016 WL 7325592, 2016 U.S. Dist. LEXIS 174207 (S.D. Fla. Dec. 15, 2016)

Plaintiff alleged she was injured falling down stairs leading to a hot tub. Surveillance footage showed that plaintiff did not slip and fall on water as the complaint alleged, but instead missed a step and fell on her own accord. Plaintiff could not prove that the fall was a result of a dangerous condition. Summary judgment was granted.

Miller v. Norwegian Cruise Line, 679 F. App'x 981 (11th Cir. 2017)

Court upheld grant of summary judgment in favor of cruise line. Plaintiff brought negligence claim for injuries sustained after vessel movement caused her to lose her footing and fall while dancing. Court held cruise line owed her no heightened duty of care, and that dangers of dancing on vessel are "open and obvious." The fact that the passenger sustained injuries after falling out of chair three hours beforehand was not "substantially similar" to plaintiff's injury and did not establish notice. The court also found that Captain's fact-based testimony of weather could not be inferred as providing notice of a risk-creating condition

Noble v. Carnival Corp., 2016 WL 7373797, 2016 U.S. Dist. LEXIS 175005 (S.D. Fla. Dec. 19, 2016)

Plaintiff alleged cruise line was negligent by allowing passengers to carry beverages outside the restaurant in uncovered containers without an employee stationed at the exit of the restaurant to monitor for spills or installing a rubber mat over the floor. In granting the summary judgment the court found there is no genuine dispute as to whether defendant had actual or constructive notice of the liquid outside the restaurant.

Sampson v. Carnival Corp., 15-civ-24339-JLK (S.D. Fla. Dec. 12, 2016)

Plaintiff slipped and fell in the early morning on a walk on an outside deck. Plaintiff had done this exact walk at a similar time previously in the trip and had no incidents. Plaintiff observed crewmembers doing something on the deck forty (40) feet away but did not observe the floor she was walking on being wet causing her to slip and fall. "Plaintiff purportedly looked at the deck floor before walking on it but could not identify any water given the lack of light — despite noticing the cruise ship's personnel. There is a noticeable difference between observing condensation on an outdoor deck as opposed to nearby crewmembers." It was determined that in this case there was no indication that the

condensation on the outdoor deck was open and obvious. The record evidence is in dispute and as a result the court decided that there is a genuine issue of material fact that is best reserved for a trial. Defendant's motion denied.

Taiariol v. MSC Crociere, S.A., 677 F. App'x 599 (11th Cir. 2017)

Plaintiff tripped on step, which had a protective cover, fell, and broke her ankle. She brought a one-count complaint alleging company negligently failed to warn her of step's unsafe condition. Court affirmed summary judgment in favor of company, finding that plaintiff failed to present evidence that company had notice of risk-creating condition or was aware that step's protective cover was defective or any different from other steps. Also, plaintiff did not provide evidence of company's awareness of falls "substantially similar" to hers. Court also rejected argument that "Watch Your Step" sticker indicates company's awareness of step's alleged slippery condition.

Villa v. Carnival Corp., 207 F. Supp. 3d 1311 (S.D. Fla. 2016)

Plaintiff sustained injuries after he fell in cruise ship's men's bathroom, claiming the floor was wet. He also claimed there was a cruise line employee in the bathroom at the time he fell. Court denied cruise line's motion for summary judgment, stating that genuine issue of material fact existed as to whether the alleged wet floor created a dangerous condition. Court rejected cruise line's argument that summary judgment was warranted because plaintiff did not know what he slipped on, how it got there, or how long it was there. Court also found genuine issue of material fact existed as to whether cruise line created the dangerous condition by employee mopping the bathroom deck.

Webb v. Carnival Corp., 15-civ-2423-(COO), 2017 U.S. Dist. LEXIS 5424 (S.D. Fla. Jan. 13, 2017)

Order denying motion for summary judgment. Highly intoxicated passenger on a cruise went back to cabin and fell overboard. Defendant argued that its duty of reasonable care was discharged once decedent returned to his cabin. The court found that "even accepting Carnival could have discharged its duty in this situation, it is unclear whether it did so. In fact, it is possible Carnival violated its policies for handling highly intoxicated individuals when it did not monitor Decedent after his last drink and when he exited to his cabin alone." These issues are best determined by a jury.

CREWMEMBER CLAIMS

Arbitrations

Cvoro v. Carnival Cruise Lines, 2017 WL 216020 (S.D. Fla. Jan. 13, 2017)

Serbian national plaintiff, employed on cruise line vessel homeported in Florida, sustained personal injuries from medical malpractice by shoreside physician selected by cruise line to treat injuries arising from her service aboard ship. Under seafarer agreement, arbitration occurred in Monaco, which applied Panamanian law. Arbitral award dismissed her claims, rejecting the vicarious liability and Jones Act claims. Plaintiff brought action to vacate/refuse enforcement under Convention of Enforcement of Foreign Arbitral Awards, implemented through Federal Arbitration Act, on grounds it violated public policy under the prospective waiver doctrine. Magistrate denied cruise line motion to dismiss, finding it had subject matter jurisdiction under Convention to determine whether to enforce or refuse to recognize a foreign arbitral award, and held that plaintiff should be permitted to pursue her prospective-waiver argument regarding Jones Act claims. Magistrate also found that *res judicata* doctrine did not bar plaintiff's claim because the arbitrator did not decide whether

plaintiffs inability to present Jones Act claims under Panamanian law violated US public policy.

Choice of Law

Loncar v. NCL (Bahamas) Ltd., ICDR No. 01-16-0004-3640 (Arb. at Miami Feb. 14, 2017)

Respondent's motion to dismiss the "Jones Act Negligence" claim was denied. The parties' employment contract specifically requires such claims to be referred to and resolved by binding arbitration. The claim respecting punitive damages was also denied as Bahamian law permits the recovery of the same.

Soanka v. Norwegian Cruise Lines, ICDR No. 01-16-0004-0022 (Arb. at Miami April 5, 2017)

Claimant, a US citizen and employee of NCL, was injured while working as aerial gymnast on Bahamian-flagged cruise ship. Arbitrator rejected claimant's request to disregard choice of law in his employment contract, which required Bahamian law to control his employment. Arbitrator distinguished this case from *Hellenic Lines, Ltd. V. Rhoditis*, 398 U.S. 306 (1970), in which Supreme Court overrode choice of law provision in employment contract because of the location of the injury and the extensive U.S. connections of the company/owner. Here, the injury occurred on the high seas, the vessel was Bahamian-flagged, the allegiance of the owner was Bahamian, and the choice of law was the Bahamas.

Suazo v. NCL (Bahamas) Ltd., ICDR No. 01-16-0002-5409 (Arb. at Miami April 11, 2017)

Bahamian law does not recognize, or limits U.S. statutory claims for Jones Act, unseaworthiness and maintenance and cure and the application of Bahamian law would deprive or limit the claimant's claims under these theories which are unambiguously preserved in the CBA and employment contract. The CBA and employment contract are therefore ambiguous as they guarantee

these claims and waive the same ones. U.S. law applies because resolving such an ambiguity in favor of waiver of such critical seaman's rights would be contrary to basic contract law.

Forum Selection Clauses

Durkovic v. Park West Galleries, Inc., 217 So. 3d 159 (Fla. 3d DCA 2017)

Court upheld dismissal of case due to mandatory forum selection clause which required legal proceedings to be brought in Turks and Caicos. Court rejected appellant's argument that Jones Act prohibits seaman who is a foreign national residing outside the United States from being bound by a contract provision mandating a specific foreign forum for disputes under the contract. Court held that forum selection clause was valid and enforceable unless forum is unjust and unreasonable such that it constitutes no forum at all. As Turks and Caicos lie within the courts of the UK, court held that clause valid.

Jones Act

Ghaleb v. American Steamship Co., 2017 WL 1201017 (6th Cir. 2017)

Plaintiff sued company for negligence and negligence per *se* under Jones Act for injuries sustained after cable knocked him to the ground during vessel winter storage operation. Jury found for company on all counts, but district court overruled jury on negligence per *se* claim. Since several workers involved in transfer, including plaintiff, worked hours in excess of statutory limit, district court held that only a reasonable jury would conclude that fatigue was reason for injury and held that plaintiff was entitled to judgment as a matter of law. Circuit court reversed and remanded, holding that evidence of plaintiff's actions during storage operation could lead reasonable jury to conclude that fatigue did not contribute to accident. Court held negligence by itself does not require a finding on causation, and plaintiffs actions lacked any defining characteristic requiring inference of casual connection to fatigue.

Martinez v. City ofNew York, 684 F. App'x 90 (2d Cir. 2017)

Plaintiff, an oiler aboard the Staten Island Ferry, slipped and fell when climbing a ladder from steering compartment to main deck. Plaintiff brought claim for vessel unseaworthiness, and also negligence under Jones Act, based on alleged greasy steering compartment floor and lack of handgrabs near top of ladder. Summary judgment upheld because there was no history of ladder injuries and evidence revealed company believed ladder to be safe due to recently passed inspections. Circuit court, however, vacated judgment on negligence and unseaworthiness claims regarding the condition of the steering compartment floor because plaintiff claimed it was greasy and covered with oil during a deposition. Court held that a jury could find plaintiff's affidavit and testimony credible, and thus it cannot be said that City is entitled to judgment as a matter of law, even if affidavits are "self-serving."

Personal Jurisdiction

O'Berry v. Ensco Int'l, LLC, 2017 WL 1048029, 2017 U.S. Dist. LEXIS 39260 (E.D. La. March 20, 2017)

Plaintiff sued foreign corporation for injuries sustained while engaged in a shore-based water survival training course conducted by alleged agent of defendant in Saudi Arabia. Court held that it did not have general jurisdiction over defendant. Citing *Daimler,* the court found that the defendant did not have "substantial, continuous, and systematic contacts with the forum state. The court failed to find specific jurisdiction under the three-factor analysis established by the 5th Circuit in *Nuova Pignone, SpA v. Sortman Asia M/V,* 310 F.3d 415 (5th Cir. 2002), stating that plaintiff did not demonstrate plaintiffs "purposeful availment of the benefits and protection of and minimum contacts with the forum state." The court did find jurisdiction under FRCP 4(k)(2) because several of its executives maintained offices in Texas. Finally, the court rejected defendant's motion to dismiss based on *forum non conveniens,* stating that it failed to demonstrate any of the public or private factors recognized in *Gonzalez v. Naviera Neptuno AA,* 832 F.2d 876 (5th Cir. 1987). Court recognized that a plaintiff's choice

of forum should not be disturbed, and that an American citizen's selection of his home forum deserves more deference than foreign plaintiff's selection of American forum.

Punitive Damages

Tabingo v. Am. Triumph, LLC, 391 P.3d 434 (Wash. March 9, 2017)

Deckhand plaintiff's fingers were amputated aboard fishing trawler and he brought action against owner and operator, asserting claims for negligence and unseaworthiness of the vessel and requesting compensatory and punitive damages. Lower court dismissed punitive damages claim. Plaintiff filed direct interlocutory petition for review with the Washington Supreme Court, which was granted. Court reasoned that punitive damages are available in general maritime claims and there is no indication that unseaworthiness claims have been excluded from this general rule

COMMITTEE ON FISHERIES

Chair: Terence G. Kenneally

FISHERIES CASE BRIEFS*

Spring 2017

Marilley v. Bonham, 844 F.3d 841 (9th Cir. 2016) (cert. docketed)

California requires commercial fisherman who engage in fishing activities within state waters to register their vessels within the state as well as purchase state licenses and permits regardless of whether the fisherman is a resident of the state. The fees for commercial fishing vessel registrations, licenses, and permits are statutorily mandated and are more for nonresidents. In 2010-2011 California took in roughly $5 8 million in fees from the commercial fishing industry and nonresidents paid approximately $435,000 more than residents. Despite these fees, California managed its commercial fishing industry at a substantial loss spending approximately $20 million in 2010-2011. Plaintiffs are a class of nonresident commercial fisherman who challenged the nonresident fee differences under the Privileges and Immunities Clause, the Dormant Commerce Clause, and the Equal Protection Clause. The district court found in favor of the plaintiffs on their privileges and immunities claim but did not reach their equal protection claim and entered judgment in their favor.

The Ninth Circuit looked at the two step inquiry of the Privileges and Immunities Clause established by the Supreme Court. The plaintiff bears the burden of showing that the challenged law falls within the purview of the Privileges and Immunities Clause; if

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successful, the burden then shifts to the state to show that the challenged law is "closely related to the advancement of a substantial state interest." The court looked at other instances where states have charged nonresidents higher rates for fishing permits and have concluded that the challenged fee differences "are within the purview of the Privileges and Immunities Clause."

The court then sought to determine whether the fee differences are closely related to the advancement of a substantial state interest. The court noted that the different fees for nonresidents have not reduced the percentage of nonresidents obtaining fishing permits. The court looked at two Supreme Court cases where different fees were charged to nonresident commercial fisherman. In both cases the Supreme Court struck down the fee differences as a violation of the Privileges and Immunities Clause because the difference in price was so great between residents and nonresidents that the "practical effect is virtually exclusionary." The Supreme Court did note however that the Clause allows states to charge nonresidents a differential which would compensate the state for any added enforcement burden they may impose or for conservation expenditures that residents pay through their taxes.

The court reasoned that California has a substantial reason for charging nonresidents the additional costs. Both resident and nonresident commercial fishermen enjoy the benefits provided to them through California's conservation efforts which totaled roughly $20 million in 2010-2011. California's residents contribute to these conservation efforts through their taxes while nonresidents pay the additional fees to make up for their lack of tax contributions. In addition, California expends more in fees for conservation than it takes in through licensing permits; therefore the court found that the price differences between resident and nonresidents were justified.

The dissent argued that the majority opinion was flawed in that it does not take into account that nonresident fishermen do pay multiple California taxes and, because of the price difference, begin the fishing season each year thousands of dollars in debt compared to resident fishermen.

Coastal Conservation Ass 'n v. United States Dept. of Comm., 846 F.3d 99 (5th Cir. 2017)

Plaintiffs are a group of private anglers as well as the Coastal Conservation Association "CCA," which represents private anglers who are appealing the district court's summary judgment dismissal of their suit challenging Amendment 40 to the Reef Fish Fishery Management Plan (FMP). Red snapper are managed under the Reef Fish FMP since 1984. The National Marine Fisheries Service ("NMFS") had issues regulating the recreational catches of red snapper, specifically the recreational fishing sector routinely exceeded the annual catch quotas allocated to them. In response to these issues the Gulf Council and NMFS proposed separate components of the recreational quotas for red snapper. The Final Rule issued in 2014 established two separate components, federal charterers and private anglers. The rule allocates the red snapper recreational quota between these two components and establishes separate red snapper season closures for the two groups. These quotas are only effective for 2015, 2016, and 2017 unless further action is taken. CCA filed an action in district court challenging the new rule and the district court granted the defendants' Motion to Dismiss. On appeal CCA argues that the Magnuson-Steven Act ("MSA") prohibits separate quotas regulating charter fishing from recreational fishing, that the defendants failed to adequately analyze and assess the social effects, and the data ranges used to calculate the quota allocations were arbitrary and capricious.

In determining whether the MSA allows for separate regulations between charter fishermen and private anglers, the Fifth Circuit applied the two-step framework established by the Supreme Court in *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984), first determining whether Congress has directly spoken to the question at issue, and if not, then looking at whether the agency's action is based on a permissible construction of the statute. In looking at the language of Amendment 40, the court concluded that the Amendment creates a sub-quota for charter fishing within the recreational sector, not a separate quota. The court concluded that there is no language within the MSA which prohibits the subdivision of recreational or commercial fishing

quotas. Applying the *Chevron* analysis and looking at the language and legislative history of the MSA the court concluded that the MSA does not prohibit the subdivision of quotas.

CCA also challenged Amendment 40 under National Standard 8 and National Standard 2, which require use of the best available economic and social data, the minimizing of adverse economic impacts of Amendment 40 and the inclusion of findings in Fishery Impact Statements "FIS." After reviewing the record the court determined that the Secretary's interpretation of the data available to her at the time of the implementation of Amendment 40 was reasonable. The National Standards do not require the analysis of unpredictable and unavailable data. The court concluded that the Council and Secretary "used the best available data to reasonably assess, specify, and analyze the likely economic and social effects of Amendment 40," therefore the court affirmed the decision of the district court.

Goethel v. United States Dept. of Comm., 854 F. 3d 106, (1st Cir. 2017) (cert. docketed)

In 2007 the Magnuson-Stevens Act was amended to include a requirement that the Fishery Management Plans include measures to ensure accountability with catch limits In order to comply with this requirement, the New England Fishery Management Council amended the Northeast Multispecies FMP to include a requirement that commercial fishermen within the purview of the Northeast Multispecies FMP occasionally have at-sea monitors ("ASM") aboard their vessels to collect data related to that particular fishing trip and the vessel's catch. The fishermen are to bear the cost of the ASM. On March 9, 2015 NMFS published the proposed rule and indicated that it expects that the ASM program to be paid by the fishermen before the end of the 2015 fishing year. On May 1, 2017 NMFS published the final rule reiterating the same language from the proposed rule expecting that NMFS expects sector vessels to pay for the ASM before the end of the 2015 season. On November 10, 2015 NOAA announced that federal funds in the ASM will be extended by December 31, 2015 and the cost to the industry for the ASM will transition effective January 1, 2016. The November 10th

announcement was sent to the relevant sectors via email but not published in the Federal Register. Despite the November 10th email, the Federal Government was able to continue to pay for the ASM through mid-February 2016. Plaintiff is a commercial fisherman subject to various provision of the Northeast Multispecies FMP including the industry funding requirement of the ASM. Plaintiff brought his suit on December 9, 2015, within 30 days of the November 10th email. The district court dismissed plaintiffs case, thereby rejecting plaintiffs argument that the November 10th email was a separately reviewable action.

On appeal the First Circuit looked at the language of the MSA which states that "judicial review is only available if the complaint is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register." The court looked at prior cases and concluded that plaintiff's case could proceed only if the action was filed within 30 days of the "action" in question as required by the statute. The court again looked at the language of the MSA and concluded that the November 10th email was not agency "action" within the meaning of the MSA but instead one of several updates sent to regulated parties throughout 2015 in an effort to keep interested parties informed of developments in the final rule which was published in May of 2015. Therefore, the court dismissed plaintiffs action as being untimely because it was not filed within the MSA's thirty-day statute of limitations.

Bank of the Pac. v. F/V ZOEA, 2017 AMC 1132, 2017 WL 823298, (W.D. Wash. March 2, 2017)

Defendants Brian Nelson and Michael Minor formed N&M Fisheries, LLC for commercial crabbing. N&M purchased the vessel FN ZOEA for $170,000 and included in the sale of the vessel was the crab permit. N&M obtained a ship mortgage from Bank of the Pacific for $130,000. The ship mortgage was recorded with the United States Coast Guard and listed the vessel, commercial fishing licenses, and fishing gear as collateral. The vessel was registered to N&M and the crab permit was registered in Nelson's name only. The following year Nelson used the permit as collateral to secure a

loan from D&M Live Crab, Inc. In order to avoid a Washington state law preventing commercial fishing permits to be used as collateral, the permit was "sold" to D&M for $100,000, with the understanding that D&M would transfer the permit back to Nelson when the loan was repaid. D&M registered the permit with the State in their name. N&M defaulted on its ship mortgage and Pacific sued to enforce its security in the vessel and permit, now possessed by D&M.

In order to determine whether Pacific's security interest reached the permit now in D&M's name, the district court looked at the language and the history of the Ship Mortgage Act and looked at whether the Act preempts Washington's law prohibiting security interests or liens on commercial fishing licenses. Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements." The district court looked at the Supreme Court's decision in *Am. Dredging Co. v. Miller,* 510 U.S. 443, 447 (1994), which held that state law may supplement maritime law, but must yield when it interferes with uniformity or defeats reasonably settled maritime expectations. After looking at several maritime cases the district court determined that it is a reasonably settled expectation that maritime liens can attach to fishing permits. Because Washington law disrupts the harmony and uniformity of maritime law by preventing maritime liens on fishing permits, the Ship Mortgage Act preempts Washington's law.

In determining whether the ship mortgage encumbered the fishing permit, the district court applied Washington law and looked to the intent of the parties and the facts and circumstances surrounding the sale of the permit. The mortgage N&M obtained from Pacific for the vessel specifically listed "fishing rights" and "commercial fishing licenses" as collateral. The mortgage was used by N&M to purchase both the vessel and the fishing permit. The district court determined that if it was not for the fishing permit included as collateral, N&M would not have been able to obtain the full amount of the loan needed to purchase the vessel and the permit; therefore, the permit attached to the ship mortgage the moment N&M purchased the vessel and D&M purchased an encumbered permit.

Initially, the district court dismissed the D&M claims; however, following the court's decision, D&M asked the court for reconsideration to allow it to continue the claim against the permit or its proceeds subject to Pacific's interest. Pacific did not oppose this request and the district court allowed D&M to continue their claims respecting the Permit, subject to the Pacific's interest.

Robinson v. F/V LILLI ANN, LLC, 2017 AMC 1478, 2017 WL 698785, 2017 U.S. Dist. LEXIS 24878, (W.D. Wash. Feb. 22, 2017)

Plaintiff was a crewmember of the F/V LILLI ANN. In early 2012 the captain of the F/V LILLI ANN advised the plaintiff to see a doctor about his snoring and on several occasions suggested that plaintiff wear a CPAP machine. Plaintiff saw an ear, nose, and throat ("ENT") specialist in early May who informed plaintiff that should he have sleep apnea, he would recommend plaintiff have a tonsillectomy and surgery to repair a deviated septum. Two self-administered home sleep studies suggested that the plaintiff had severe sleep apnea. Plaintiffs ENT attempted to contact plaintiff shortly after he completed his second self-administered home sleep study however plaintiff did not receive these communications and did not contact the doctor's office. Shortly after the completion of the home sleep studies plaintiff completed his start-of-season health questionnaire and indicated that he needed surgery on his tonsils and palate. Plaintiff testified that he told the F/V LILLI ANN' s Captain that he needed to take off for two weeks. The Captain informed him that he needed him on the next two fishing trips as he could not get a replacement for him. Roughly three weeks into the fishing trip aboard the F/V LILLI ANN plaintiff suffered a stroke and brought suit for maintenance and cure.

The district court looked at the history of maritime law and the duty imposed on vessel owners to provide vessel crew members with maintenance and cure and determined that vessel owners have a duty to ensure that a seaman receives proper treatment and care even where the employer is not the cause of the sickness or injury. The district court denied defendant's motion for summary judgment and determined that there was a genuine issue of fact as to whether

the Captain of the FN LILLI ANN told plaintiff to postpone his surgery because he was needed on the two fishing trips.

Primozich v. Oczkewicz, 2017 WL 77518, 2017 U.S. Dist. LEXIS 2930 (W.D. Wash. Jan. 9, 2017)

Plaintiff was a commercial fisherman who worked in various capacities both aboard fishing vessels as well as on land. Defendant Vincent Stone and the plaintiff reached an oral agreement whereby plaintiff would be a crewmember aboard the vessel JIMMY 0 of which Stone's company VMS Fisheries LLC, was the bareboat charterer. Plaintiff assisted in preparing the vessel prior to launch which included purchasing groceries, and loading the vessel with fishing gear. After providing these services plaintiff relocated to Alaska to work for La Conner Maritime; his duties included some painting and construction as well as some work aboard the JIMMY 0. Upon conclusion of his work with La Conner, plaintiff began work as an independent contractor, repairing nets and keeping his own hours. While the vessel was out of the water in Alaska, plaintiff assisted in the loading of the vessel for the upcoming season. Stone denies that plaintiff had did any work aboard the vessel to ready the boat to go fishing. One or two days prior to being launched plaintiff was assisting Stone move nets from the storage locker to another storage area. The bags were slippery and had no handles to hold onto. While loading the bags into Stone's truck one of the bags slipped and fell to the ground. Plaintiff testified that he informed Stone that he thought he hurt his arm yet continued to load the remaining bags and took no medication and did not mention the injury until later when he sought medical attention. Upon the launching of the JIMMY 0, plaintiff acted as a crewmember on the vessel for one shakedown fishing trip. Plaintiff then found other employment in Alaska and eventually returned to Seattle and filed suit against the defendants including negligence under the Jones Act, unseaworthiness, and maintenance and cure.

The district court first looked to establish whether plaintiff was a seaman at the time of his injury and looked at the Supreme Court decision in *Desper v. Starved Rock Ferry Co.* 342 U.S. 187 (1952) which held that, while engaged in seasonal repair work, the

plaintiff was not a seaman within the meaning of the Jones Act. The district court distinguished this case from *Desper* on the ground that at the time of his injury the vessel was not undergoing seasonal repair work; instead the vessel was being prepared for launch and plaintiff was performing work typically completed by crewmembers. The district court found that summary judgment was not appropriate under the circumstances and found that as a matter of law plaintiff was a seaman employed in the service of the vessel at the time of the injury.

The district court determined that a duty of care exists in the situation of moving heavy, slippery fishing nets and that plaintiff's injury was foreseeable under the circumstances and found that it is a question of fact as to whether Stone exercised the appropriate level of care under the circumstances.

With regards to plaintiff's claim of unseaworthiness, the district court agreed with the defendants that a single incident which resulted in plaintiffs injury does not satisfy the definition of unseaworthiness. The district court found that there was no evidence in the record that Stone was untrained or careless in the handling of the fishing nets which caused plaintiff's injury.

Fairweather Fish, Inc. v. Pritzker, 2017 WL 6778781, 2017 U.S. Dist. LEXIS 158839, (W.D. Wash. Nov. 16, 2016).

Plaintiffs filed a complaint against the defendants challenging a rule promulgated by the defendants which provides additional regulations for fixed-gear commercial halibut and sablefish fisheries pursuant to the Magnuson-Stevens Act and the Northern Pacific Halibut Act of 1982. In 1993 NMFS adopted the quota share system which allowed a "qualified person" to harvest a portion of allowable catch for sablefish or halibut. The allocated share was based on a "qualified person's" adjusted harvest of fish during the late 1980s. A qualified person is defined as a citizen of the United States or a non-individual entity such as a corporation. The holder of the shares must generally remain aboard the vessel at all times including when landing fish. In 2010 NMFS was concerned that quota share transfer restrictions were inadequate and quota

shares were beginning to be consolidated among a small number of fisherman; and discouraging the formation of an "owner-operator" fleet, so NMFS limited the total number of quota shares held by one person and the annual harvest from any one vessel. To further prevent a consolidation of quota shares a second amendment was proposed which eliminated the "hired master" exception, allowing an initial recipient of a quota share to use a hired master to harvest fish so long as the shareholder retained a twenty percent interest in the harvesting vessel. NMFS claims that this encourages the shareholder to acquire and retain the shares rather than allow the shares to pass to a new fisherman. On December 1, 2014 NMFS barred hired masters from harvesting quota shares acquired after February 12, 2010 unless those shares were consolidated with shares acquired before the control date.

Plaintiffs' brought suit claiming that the new regulations were an impermissible retroactive application of law as well as a violation of their Fifth Amendment right to due process. Plaintiffs' due process claim was based on the allegations that they had no reasonable notice of the new rule. The district court dismissed these claims finding that the plaintiffs' had sufficient notice and opportunity to be heard regarding the February 12, 2010, control date which was included in the proposed rule published in the Federal Register and therefore had sufficient notice and an opportunity to comment on the proposed dates.

With regards to plaintiffs' claim that the rule has a retroactive effect, the district court applied the Ninth Circuit's two-part framework. First the district court must consider whether the statute or regulation clearly expressed the law to be applied retroactively; if not the district court must then consider whether the application of the regulation had a retroactive effect "by attaching new legal consequences to events completed before its enactment." Applying the two-part framework, the district court determined first that the rule only restricted future harvests of fish, specifically those fish harvested after December 1, 2014. The district court then applied step two of the framework. A regulation is retroactive when it takes away or impairs vested rights acquired under existing laws or creates a new obligation, or imposes a new duty. The district

court concluded that the plaintiffs' sablefish quota share rights were never vested as they were aware that any shares that they purchased were subject to revocation at any time. This precluded the plaintiffs from asserting that they had property rights in the quota shares and that those rights were improperly taken away or impaired by the final rule.

With regards to the halibut quota shares the district court concluded that the defendant did not give sufficient notice of the February 2010 control date and therefore the Final Rule was impermissibly retroactive for the halibut quota shares. To remedy the situation, the district court partially vacated the regulation with regards to any transfer before July 28, 2014 and remanded it back to NMFS for further consideration consistent with the court's findings.

COMMITTEE ON INLAND WATERS AND TOWING

Chair: C. Kent Roberts
Editor: Marissa Henderson

NEWSLETTER

Spring 2017

RECENT DEVELOPMENTS IN MAINTENANCE AND CURE AND PUNITIVE DAMAGES

Aaron B. Greenbaum, Esq.[1]

Introduction

This article addresses noteworthy maintenance and cure and punitive damages decisions rendered between January 1, 2016, and May 1, 2017. The selection of cases included in this article reflects trends in the law, including continued application of the *McCorpen* defense, recovery of paid maintenance and cure benefits by the employer, the awarding of future cure, and the awarding of punitive damages *post-Townsend* for maintenance and cure, as well as unseaworthiness.

Medical Conditions Unrelated to the Service of the Vessel

In *Robinson v. F/V Lilli Ann, LLC, et al.,* the U.S. Western District of Washington addressed an employer's duty to investigate a seaman's medical condition, even for those conditions that are unrelated to service on the vessel.[2] Following a stroke, the seaman alleged that his employer and the (separate) owner of the fishing vessel on which he worked breached their maritime duty(ies) to provide maintenance and cure by failing to take all reasonable steps

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[1] Aaron B. Greenbaum is a member of Pusateri, Johnston, Guillot & Greenbaum, LLC, in New Orleans, Louisiana.

[2] 2017 AMC 1478, 2017 U.S. Dist. LEXIS 24878, at *1 (W.D. Wash. Feb. 22, 2017)

to ensure that plaintiff received proper care and treatment for his severe sleep apnea.[3] Well before the incident, the captain of the vessel advised plaintiff to see a doctor about his serious snoring problem and even recommended a CPAP, which plaintiff had tried but did not believe worked.[4] The plaintiff self-administered two sleep studies. If the diagnoses were sleep apnea, his doctor would recommend a tonsillectomy and surgery to repair his deviated septum.[5] Following the sleep studies, the plaintiff did not receive any communications or discuss the results with his physician.[6]

The plaintiff noted on his start-of-season health questionnaire that he needed surgery on his tonsils and palate. He also testified that he told the captain that he would need to take off the next two fishing trips in order to have the tonsillectomy and palate surgery. The captain allegedly told him that he was needed on the next two fishing trips because no other crew member was available to attend training on new technology that the vessel had recently installed, and that plaintiff would have to postpone his surgery. The captain denied telling the plaintiff to postpone his surgery.[7] The vessel left Seattle for Alaska and several days later the plaintiff began to feel unwell.[8] He began to vomit, had trouble walking, and complained of a tingling sensation on the right side of his face.[9] When the vessel arrived in Dutch Harbor, crew members brought the plaintiff to a health clinic, where the right side of his face began to droop. He was transported via air ambulance to a hospital in Anchorage, where he was diagnosed with a stroke.[10]

The defendants moved for summary judgment, arguing that their maintenance and cure obligations did not extend to requiring plaintiff to get medical care for a medical condition unrelated to his

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[3] *Id.* at 1479.
[4] /d..
[5] *Id.* at 1479.
[6] *Id.* at 1479-80.
[7] *Id.* at 1480.
[8] *Id.*
[9] *Id.*
[10] *Id.*

employment—and that even if it did, they did not breach that duty." The court held that the standard of care entailed by the duty to provide maintenance and cure requires vessel owners to take measures that are reasonable under the circumstances to furnish medical care for sick or injured employees, even when the seaman's employment is not the cause of his sickness or injury. However, the court disagreed with the plaintiff's argument that that the duty of maintenance and cure *necessarily* demanded that defendants investigate the plaintiffs illness.[12] "On the facts of a given case, failure to inquire into a seaman's health may constitute a breach of the duty to ensure proper care, but the court declines to impose an affirmative duty to investigate in all cases."[13]

Entitlement to Maintenance and Cure Accruing Post-Termination

In *Cepeda v. Orion Marine Construction, Inc.,* the Texas Court of Appeals addressed whether a seamen was entitled to maintenance and cure benefits when he was injured aboard a skiff taking him back to shore after he was fired.[14] The employer argued that Cepeda was not a seaman at the time of the accident because it had terminated his employment on the dredge, before Cepeda boarded the skiff, and thus no employer-employee relationship existed at the time that Cepeda claimed to be injured.[15] Relying on the U.S. Fourth Circuit's decision in *The Michael Tracy,*[16] as well as the U.S. Supreme Court's decision *in Aguilar v. Standard Oil Co. of New Jersey,*[17] the court rejected the employer's argument, holding

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[11] *Id.* at 1481.
[12] /d. at 1483 (emphasis added).
[13] *Id.*
[14] 2016 Tex. App. LEXIS 7527, at *1-2 (Tex. App. 1st — Houston Div. July 14, 2016).
[15] */d.* at *3.
[16] 295 F. 680 (4th Cir. 1924).
[17] 318 U.S. 724 (1943).

that a "seaman's remedies persist after discharge during the interval in which he disembarks the ship and safely returns to dry land."[18]

Award of Future Maintenance and Cure

Many are aware of the previous U.S. Fifth Circuit *en bane* decision in *McBride v. Estis Well Service L.L.*C., which held that a seaman or his estate could not recover punitive damages for unseaworthiness.[19] Following remand, the U.S. Western District of Louisiana held a bench trial in this matter involving an overturned truck-mounted drilling rig on a barge.[2°] The district court found that while attempting to rescue his co-worker, plaintiff Touchet suffered an injury to his lumbar spine, for which his treating physician recommended a decompression and interbody fusion. The plaintiff also suffered from PTSD. The court ordered the defendant to pay future cure until Touchet reached maximum medical improvement and awarded $55,185 in future medical expenses beyond Touchet's maximum medical improvement.[21] The defendant argued that this was a double award of cure and that the court's award essentially left the cure period open indefinitely.[22] The U.S. Fifth Circuit disagreed, holding that "when supported by a physician's testimony, it is appropriate for a district court to award future maintenance and cure until the plaintiff reaches maximum medical improvement."[23] Moreover, the court held that a plaintiff can be awarded both cure and tort damages for future medical expenses, so long as no duplication will occur, because the cure obligation is independent of tort law.[24] Because the district court made clear that the cure payments would cease once the plaintiff reached maximum medical improvement, and medical treatments thereafter would be

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[18] *Cepeda v. Orion Marine Constr., Inc.*, 2016 Tex. App. LEXIS 7527, at *5 (Tex. App. 1st — Houston Div. July 14, 2016).
[19] 768 F.3d 382 (5th Cir. 2014).
[20] 2017 AMC 945, 2017 U.S. App. LEXIS 6159 (5th Cir. 2017).
[21] *Id.* at 951. (plaintiff's treating physician testified that his expected MMI date following the lumbar fusion was 12-18 months)
[22] *Id.*
[23] *Id.* at 951-52 (citing *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968, 969-70 (5th Cir. 1978)).
[24] *Id.* at 952.

compensated from the $55,185 award for future medical expenses,[25] the court affirmed.

Medicaid, and Maintenance and Cure

In *Terrebonne v. Bea Martin, Inc.*, the U.S. Eastern District of Louisiana addressed the relationship between Medicaid benefits and maintenance and cure.[26] The seaman was working aboard the vessel when he began to experience chest pain.[27] He claimed that, despite advising his employer of this pain for weeks, he was not permitted to leave the vessel to seek medical attention and that he eventually suffered a cardiac event.[28] He was advised that he need a small procedure for his heart, but alleged that the defendant refused to pay for the procedure, ultimately resulting in the seaman waiting five months to undergo a more extensive open heart surgery at a charity hospital in New Orleans.[29] The defendant moved for summary judgment on its cure obligation, arguing that the seaman's Medicaid eligibility satisfied the cure obligation.[30] The court agreed, reasoning that many courts have found Medicaid to be the functional equivalent of the previously- available free treatment at Public Health Service Hospitals.[31] Accordingly, "a shipowner may avoid liability for cure payments to the extent that a plaintiff's medical bills are paid by Medicaid, as this medical care is provided at no cost to the injured seaman."[32] The court granted summary judgment in favor of the defendants to the extent that Medicaid had provided payment for the plaintiff's medical expenses.[33]

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[26] *Id.* at 953.
[26] 2017 U.S. Dist. LEXIS 40058 (E.D. La. Mar. 21, 2017).
[27] /d. at *1.
[28] *Id.*
[29] *Id.* at *1-2.
[30] *Id.* at *3.
[31] *Id.* at *4 (citing *Lovell v. Master Braxton, LLC,* 2016 U.S. Dist. LEXIS 159884 (E.D. La. Nov. 18, 2016)).
[32] *Id.*
[33] *Id.* at *5.

Proper Defendants for a Maintenance and Cure Claim

The issue in *Daughtry v. Jenny G. LLC, et al,* was whether the seaman brought his maintenance and cure claim against the correct defendant.[34] The seaman alleged that he slipped and fell aboard the subject vessel, resulting in a broken leg.[35] He brought suit against the corporate owner of the vessel, as well as that entity's individual owners.[36] One of the individual owners brought a motion for summary judgment, arguing that, in his individual capacity, he was not the owner of the vessel or the plaintiff's employer. Thus, the seaman's claim for maintenance and cure against him, individually, failed as a matter of law.[37] The U.S. Southern District of Florida agreed, granting the motion for summary judgment, and holding that the seaman's claims for failure to provide maintenance and cure could be maintained only against his employer, the owner of the vessel *in personam,* or the vessel itself *in rem.*[38]

Restitution for Overpayment of Maintenance and Cure

The issue in *Block Island Fishing, Inc. v. Rogers* was whether the employer could recover overpayment of maintenance to a seaman based on an alleged misrepresentation in living expenses by the seaman.[39] As addressed by the U.S. District of Massachusetts, the "sticking point" was the seaman's claimed expenditures for rent.[40] The employer paid the seaman a daily maintenance rate calculated using the monthly expenditure information provided by the seaman. In particular, the seaman claimed a monthly rental expense of $1,600, when in actuality the seaman's rent was half of that amount, or $800 per month.[41] The employer sought "restitution" from the plaintiff for overpayment of maintenance. Relying on the U.S. Fifth Circuit's decision in *Boudreaux v.*

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[34] 2016 U.S. Dist. LEXIS 119157 (S.D. Fla. Sept. 1, 2016).
[35] *Id.* at *2.
[36] *Id.*
[37] *Id.* at *34.
[38] *Id.* at *4.
[39] 149 F. Supp. 3d 214 (D. Mass. Mar. 3, 2016).
[40] *Id.* at 217.
[41] *Id.*

Transocean Deepwater, Inc., the court held that the employer could not recover restitution: "[O]nce a shipowner pays maintenance and cure to the injured seaman, the payments can be recovered only by offset against the seaman's damages award — not by an independent suit seeking affirmative recovery."[42]

Reimbursement for Maintenance and Cure

In *Williams v. Cent. Contr. & Marine, Inc.*, the U.S. Southern District of Illinois addressed an employer's ability to obtain reimbursement of allegedly wrongfully paid maintenance and cure.[43] The seaman brought Jones Act, unseaworthiness, and maintenance and cure claims arising out of an accident involving a fall." The employer counterclaimed, alleging that although it did not require the plaintiff to undergo a pre-employment physical, had he disclosed his previous injuries, he would not have been hired. Based on the *McCorpen* defense, the employer sought reimbursement for the maintenance and cure it had already paid to the plaintiff.[45] The plaintiff moved to dismiss under Rule 12(b)(6) of the *Federal Rules of Civil Procedure.* The court granted the plaintiffs motion, reasoning that employers "have the opportunity and right to investigate maintenance and cure claims such as this before payments are tendered and they can do so without subjecting themselves to liability for compensatory or punitive damages."[46] In addition, the court held that the employer's inability to seek reimbursement would not result in a windfall for the seaman, because, even absent fraud, the employer would be entitled to a setoff against any Jones Act damages.[47]

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[42] *Id. at* 218 (quoting *Boudreaux v. Transocean Deepwater, Inc.*, 721 F.3d 723, 728 (5th Cir. 2013)).
[43] 2017 U.S. Dist. LEXIS 2793 (S.D. Ill. Jan. 9, 2017).
[44] *Id. at* *1-2.
[45] *Id.* at *2.
[46] 1d. at *5.
[47] *Id.*

Intervention to Recover Maintenance and Cure Payments

Can insurance underwriters intervene in a seaman's suit to recover for past payments of maintenance and cure, airing that the alleged seaman is actually a longshore worker? In *Loveall v. Nordic Underwater Services, Inc., et al,* the U.S. Eastern District of Louisiana held that such intervention was improper.[48] The court reasoned that the underwriters had no valid claim for a lien in the seaman's Jones Act suit because any recovery on the purported lien would be premised on the plaintiff being a seaman—meaning that the underwriters had been properly paying maintenance and cure benefits.[49] Furthermore, the underwriters had no right to litigate seaman status in the plaintiff's case beyond what the insured represented by the same attorney—was already doing.[5°] Most importantly, the underwriters claim would only arise when and if the plaintiff was determined not to be a seaman.[51] Therefore, the underwriters could not intervene in the case "to prosecute a claim that has not even accrued and may never accrue."[52] The court dismissed the underwriters' intervention finding them to be an "interloper."[53]

Dismissal of Punitive Damages Claim When Seaman Status is Reasonably Contested

Facing what it described as an issue of first impression, the U.S. Western District of Washington, in *Ward v. EHW Constructors,* dismissed a plaintiffs claim for punitive damages for alleged failure to pay maintenance and cure benefits when the employer had a reasonable basis for contesting seaman status.[54] The employer contended that the plaintiff was part of a construction crew, rather than a seaman, and relied on information from its pile driving foreman in contesting that the plaintiff was a longshore

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[48] 2016 U.S. Dist. LEXIS 110656, at *2 (E.D. La. Aug. 19, 2016).
[49] *Id.* at *6.
[5°] *Id.* at *8.
[51] */d.*
[52] /d.
[53] *Id.*
[54] 2016 U.S. Dist. LEXIS 177640, at *11 (W.D. Wash. Dec. 22, 2016).

worker.[55] Importantly, the court had previously denied the plaintiff's motion for summary judgment, in which he sought a determination that he was a Jones Act seaman as a matter of law, finding that genuine issues of material fact existed.[56] Accordingly, the court dismissed the plaintiff's punitive damages claim on summary judgment: "Because reasonable minds could differ on whether plaintiffs duties rendered him a seaman, no rational juror could find that defendants' opposition to maintenance and cure was in bad faith."[57]

Choice of Law in Employment Contract and Punitive Damages

In another interesting punitive damages decision issued by the U.S. Western District of Washington, *Fox v. Holland America Line, Inc.*, the court addressed whether a claim for punitive damages for failure to pay maintenance and cure was available to a seaman where the employment contract called for application of the law of the British Virgin Islands.[58] The court held that the choice-of-law clause in the employment contract would force the seaman to forego her Jones Act claims, "similarly allowing Defendants to evade liability," and, thus, was void under Section Five of the Federal Employer's Liability Act (FELA).[59] Because the choice-of-law clause did not control, the court turned to the factors set forth by the U.S. Supreme Court in *Lauritzen v. Larsen,* to determine the applicable law: (1) the place of the wrongful act; (2) the vessel's flag; (3) the injured party's allegiance or domicile; (4) the shipowner's allegiance; (5) the place of contract; (6) accessibility of a foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations.[60] In sum, the court found that the matter involved an American plaintiff who was hired in California by a company

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[55] */d.* at *5.
[56] /d. at *15.
[57] *Id.*
[58] 2016 U.S. Dist. LEXIS 44145, at *2 (W.D. Wash. Mar. 31, 2016) (the defendant also argued that if the laws of the British Virgin Island were inapplicable, then the laws of the Netherlands would apply).
[59] *Id.* at *34.
[60] *Id.* at *4-5 (citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970)).

registered in Washington and conducting business in the United States.[61] Furthermore, application of U.S. law would allow the plaintiff to invoke her "important rights under the Jones Act, which would otherwise be precluded."[62] Thus, the United States' interests were "sufficiently implicated to warrant the application of United States law," United States' law applied, and the seaman could seek to recover punitive damages under the U.S. Supreme Court's decision in *Atlantic Sounding Co., Inc. v. Townsend.*[63]

Punitive Damages Claim Denied

The seaman in *In re GIS Marine, LLC,* sought punitive damages for an alleged delay in approving his cure, as well as an alleged refusal by the employer to approve a nerve conduction treatment.[64] The court held that the employer's **4** day delay in approving the seaman's epidural steroid injections was not unreasonable under the circumstances and did not amount to willful refusal.[65] In regards to the nerve conduction treatment, the employer presented evidence that, when the seaman first requested approval for the treatment, it asked for a copy of his primary care physician's report and referral for the nerve conduction treatment in order to investigate the medical necessity of the treatment through an independent medical examination.[66] Because this information was never provided to the employer, the court held that the employer did not act willfully, and that the plaintiff and his counsel had refused to follow through with the employer's "reasonable requests" for medical records.[67]

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[61] *Id. at* *9.
[62] *Id.*
[63] *Id. at* *940 (citing *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 414 (2009)).
[64] 2016 U.S. Dist. LEXIS 69241 (E.D. La. May 26, 2016).
[65] /d. at *7-8.
[66] *Id.* at *8.
[67] /d. *8.

Punitive Damages Claim Available for Maintenance and Cure

In *Hottmann v. Hatch,* the U.S. District of Oregon addressed whether the defendants' assertion that an injury or illness did not occur in the service of the ship was a legal defense to the plaintiff's claim for punitive damages.' The seaman alleged that he injured his back while working aboard the vessel. The defendant disagreed, contending that his injury occurred after his time on the vesse1.[69] The defendants moved for partial summary judgment, arguing that the plaintiffs punitive damages claim should be dismissed because he could not establish the requisite willful and wanton standard.[7°] The court held that "[a] ship owner's mere assertion that an injury or illness did not occur in the service of the ship is not a conclusive `reasonable basis' or 'colorable legal defense' that shields them from a punitive damages or attorney's fees award."[71] Because a question existed regarding whether the "defendants' justification for denying plaintiffs maintenance and cure claim is rooted in pretext or a good faith belief," the claim for punitive damages was allowed to proceed to the jury.[72]

In *Bland v. Omega Protein, Inc.,* the seaman argued that his employer failed to adequately investigate his renewed claim for maintenance and cure and refused to pay maintenance and cure benefits without consulting a medical professional as to those renewed claims, which the seaman argued amounted to a willful and wanton refusal to pay benefits and warranted the imposition of punitive damages.[73] The seaman's original treating physician reported that he reached maximum medical improvement on May 30, 2013. Thereafter, another physician retained by the seaman opined that he had suffered a traumatic brain injury due to the

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[68] 2017 U.S. Dist. LEXIS 20608 (D. Or. Feb 14, 2017)
[69] *Id. at *1-2.*
" Id. at *2.
[71] *Id. at* *4 (citing *Vaughan v. Atkinson,* 369 U.S. 527 (1962); *Deisler v. McCormack Aggregates, Co.,* 54 F.3d 1074 (3d Cir. 1995); *Stermer v. Archer-Daniels-Midland Co.,* 140 So. 3d 879 (La. Ct. App. 3d Cir. 2014)).
[72] /d. A jury trial is scheduled for September 2017.
[73] 2016 U.S. Dist. LEXIS 7887 (W.D. La. Jan. 21, 2016).

subject accident.[74] The employer's retained physician opined that there was no evidence of brain injury relating to the subject accident and the plaintiffs cognitive defects were to be expected given his borderline IQ and history of cognitive deficits.[75] Based on the conflicting medical opinions, the U.S. Western District of Louisiana denied the employer's motion summary judgment, holding that genuine issues of material fact existed as to whether its denial was arbitrary and capricious.[76]

In *Satterfield v. Harvey Gulf Int'l Marine*, the seaman sought punitive damages as a result of an alleged delay by his employer in providing cure.[77] The seaman alleged that while working as a relief captain aboard the defendant's vessel, he began to experience flu-like symptoms that were in fact manifestations of congestive heart failure.[78] He further alleged that his symptoms were reported to his superior on the vessel and to defendant's onshore personnel, who refused to relieve him of his duties, provide any medical assistance while aboard the vessel, or provide any medical personnel upon the vessel's arrival at its port.[79] The U.S. Eastern District of Louisiana discussed maintenance and cure as "the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship."[80] This duty encompasses the duty to provide medical care to a seaman while aboard the vessel, and a breach of this a duty gives rise to an action for breach of the maritime duty of maintenance and cure." Thus, the court denied the employer's motion for summary judgment as to punitive damages.[82]

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[74] *Id. at* *11.
[75] *Id.*
[76] *id.*
[77] 2016 U.S. Dist. LEXIS 138272 (E.D. La. Oct. 5, 2016).
[78] *Id. at *1.*
[79] *Id. at *1-2.*
[80] *Id. at *7* (citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001)).
[81] *Id.*
[82] *Id. at *7 -8.*

Punitive Damages Awarded

In *Weeks Marine, Inc. v. Watson,* the U.S. Eastern District of Louisiana, following a bench trial, awarded punitive damages and attorney's fees to a seaman as a result of the employer's arbitrary and capricious failure to pay maintenance and cure, despite the employer obtaining an independent medical examination report refuting the treating physician.[83] The court found that the employer arbitrarily terminated the seaman's maintenance and cure benefits, even though his treating orthopedic surgeon reported that the seamen needed further diagnostic and clinical work up, including a left knee MRI.[84] Rather than authorize the tests, the employer obtained a second opinion and relied solely on the IME to unilaterally terminate benefits.[85] The employer refused to authorize the treating physician to continue treating the seaman and the treating physician was never able to render a final diagnosis or prognosis. As a result, the treating physician never determined that the seaman reached MMI.[86] The court found the actions of the employer to be arbitrary and capricious and awarded the seaman $100,000 in punitive damages and $50,000 in attorney's fees.[87]

Availability of Punitive Damages for Unseaworthiness

The Washington State Supreme Court recently addressed whether a seaman may recover punitive damages arising out of a general maritime law unseaworthiness claim.[88] In *Tabingo v. American Triumph LLC,* a lever used to operate a hatch in the fishing trawler's deck broke when an operator tried to stop the hatch from closing, resulting in the hatch closing on the seaman's hand and the eventual amputation of two fingers.[89] Allegedly, the vessel owner knew of the broken lever for two years prior to the incident.[90]

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[83] 2016 U.S. Dist. LEXIS 69912, 2016 AMC 1651 (E.D. La. May 27, 2016).
[84] *1d.* at *16.
[85] *Id.*
[86] *Id. at* *16-17.
[87] /d. at *19-20.
[88] *Tabingo v. Am. Triumph LLC,* 2017 Wash. LEXIS 328 (Wash. Mar. 9, 2017).
[89] *Id.* at *2.
[90] *Id. at* *4.

Relying upon the Supreme Court of the United States' holding in *Atlantic Sounding Co. v. Townsend,* which allowed for the recovery of punitive damages in maintenance and cure claims,[91] the *Tabingo* court reasoned that "at common law punitive damages were available and common law remedies extended to general maritime law, and there is no reason to believe unseaworthiness has been excluded from this general maritime rule."[92] The court distinguished the Supreme Court of the United States' decision in *Miles v. Apex Marine Corp.* (holding that non-pecuniary damages, including punitive damages, were unavailable) as non-controlling due to it being limited "solely to wrongful death claims."[93] The Washington State Supreme Court further rejected the U.S. Fifth Circuit's *en bane* decision in *McBride v. Estis Well Serv., LLC,* as a "plurality opinion" that misinterpreted the relationship between *Miles* and *Townsend.*[94] Applying *Townsend's* rationale, the *Tabingo* court found that punitive damages are available for unseaworthiness claims.[95]

Unavailability of Punitive Damages Against a Non-Employer Third Party

Most recently, in *Rinehart v. National Oilwell Varco L.P.,* the U.S. Eastern District of Louisiana addressed the availability of punitive damages for a seaman against a non-employer third party.[96] The plaintiff was a Jones Act seaman who was injured when a pallet fork slipped from NOV' s crane hook onto the back of his head while loading pallets onto the vessel's deck.[97] The plaintiff suffered severe head injuries, including the inability to swallow normal food, resulting in him eating through a feeding tube implanted into his stomach.[98] He brought claims under the Jones Act and the general

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[91] 557 U.S. 404 (2009).
[92] *Tabingo,* 2017 Wash. LEXIS 328, at *12.
[93] *Id.* (citing *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990)).
[94] *Id. at *14-15* (citing *McBride v. Estis Well Serv., LLC,* 768 F.3d 382 (5th Cir. 2014)).
[96] *Id.* at *15.
96 2017 U.S. Dist. LEXIS 60270 (E.D. La. Apr. 20, 2017).
[97] 1d. at *2.
[98] *Id.* at *2-3.

maritime law, including a claim for punitive damages, which the non-employer third party (National Oilwell) moved to dismiss as a matter of law.[99] The court reasoned that although there was a longstanding tradition of availability of punitive damages under common law and general maritime law, the Supreme Court held in *Miles v. Apex* that a seaman cannot recover non-pecuniary damages from his Jones Act employer under either a Jones Act negligence[100] claim or a under a general maritime law unseaworthiness claim. In *Miles,* the Supreme Court explained that "it would be inconsistent with this court's place in the constitutional scheme to sanction more expansive remedies for the judicially created unseaworthiness cause of action, in which liability is without fault, than Congress has allowed in cases of death resulting from negligence."[101]

The court noted that following the Supreme Court's *Townsend* decision, there was brief uncertainty as to the availability of punitive damages under the general maritime law for non-maintenance and cure claims.' However, the U.S. Fifth Circuit, sitting *en bane,* clarified in *McBride v. Estis Well Serv., LLC,* that neither a seaman nor his survivor can recover punitive damages for personal injury or wrongful death claims based on either the Jones Act or general maritime law.[103] The *McBride* court held that the reasoning in *Miles* remained sound regarding seaman personal injury and wrongful death claims, thus limiting *Townsend* only to maintenance and cure claims.' In *Scarborough v. Clemco Industries,* the Fifth Circuit held that a seaman may not recover punitive damages against either his employer or against a non-employer third party.[105] Based on the Fifth Circuit's holdings in *McBride* and *Scarborough,* the court dismissed the plaintiff's punitive damages claim as a matter of law.[106]

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[99] *Id.* at *34.
[100] *Id.* at *7-8 (citing *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990)).
[101] *Id.* at *8 (citing *Miles,* 498 U.S. at 20).
[102] *Id.* at *8-9.
[103] *Id.* *9 (citing *McBride v. Estis Well Serv., LLC,* 768 F.3d 382, 391 (5th Cir. 2014), *cert. denied,* 135 S. Ct. 2310 (2015)).
[104] *Id*
[105] *Id.* at *9-10 (citing 391 F.3d 660, 668 (5th Cir. 2004).
[106] /d. at *10.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

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

NEWSLETTER

Spring 2017

In This Issue:

Editorial Note:

This edition of the Newsletter leads with a timely and concise article by Jonathan Spencer on the recent substantive changes to the York Antwerp Rules 2016 and the CMI Guidelines. Many thanks to Jonathan for sharing his expertise with our Committee. Next is an article submitted by Jason Minkin and Jonathan Cipriani on examinations under oath which coverage practitioners will find useful. Finally, the case summaries contain a number of interesting decisions which highlight variations in judicial analyses among the state and federal courts hearing marine insurance cases.

YORK-ANTWERP RULES 2016 AND GUIDELINES

By Jonathan S. Spencer'

On May 6th 2016 in New York City, at the General Assembly of the Comite Maritime International (CMI)[2], the **York-Antwerp Rules 2016** were approved by 42 countries in attendance, with none opposed and none abstaining.

Background

The Rules are the culmination of some three years' work by a CMI International Working Group (IWG) comprised of the following people-

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' Jonathan Spencer is a New York-based average adjuster. Although 90% of his caseload involves particular average on hull and cargo, and marine liability claims, he enjoys grappling with general average issues and is the only average adjuster to have attended the CMI Conferences in which YAR 1994, 2004 and 2016 were adopted. The scope of this paper is introductory and he welcomes requests for further clarification, at jss@jssusa.com. This paper is an update of one that originally appeared in Benedict's Marine Bulletin, Vol. 14, No. 3 — Third Quarter 2016

[2] The CMI was established in 1897. It is a non-governmental not-for-profit international organization established in Antwerp, whose object is to contribute to the unification of maritime law in all its aspects.

Bent Nielsen (Denmark) (Chairman)

Richard Cornah (UK) (Association of Average Adjusters) (Co-Rapporteur)

Taco van der Valk (Netherlands) (Co-Rapporteur)

Andrew Bardot (UK) (International Group of P&I Clubs)

Ben Browne (UK) (IUMI - International Union of Marine Insurance)

Frederic Denefle (France)

Jurgen Hahn (Germany)

Michael Harvey (UK) (AMD - Association Mondiale de Dispacheurs)

Kiran Khosla (UK) (ICS - International Chamber of Shipping)

Jirou Kubo (Japan)

Sveinung Makestad (Norway)

John O'Connor (Canada)

Peter Sandell (Finland)

Jonathan Spencer (USA)

Esteban Vivanco (Argentina)

Those shown in **bold** are practicing average adjusters, who contributed significantly to the successful outcome of the IWG's work, which began in 2012. It should also be noted that ICS worked closely with BIMCO[3].

[3] Self-described as "the world's largest international shipping association, with more than 2,200 members globally [providing] a wide range of services to our global membership — which includes shipowners, operators, managers, brokers and agents."

The York-Antwerp Rules for the Adjustment of General Average[4] (YAR) have existed since the 1860's and have been the subject of revisions at approximately 20 to 25 year intervals. Early versions of the Rules were drafted by commercial interests and average adjusters, to bring uniformity to the adjustment of general average; since the late 1940's revisions have taken place under the auspices of the CMI, which is often described as their "custodian". The Rules do not have the force of law (although different versions have been incorporated at different times into the national laws of countries as diverse as the Soviet Union, Egypt, and Norway) and they become binding on the parties to a common maritime adventure by reason of their incorporation into the contract of carriage, typically embodied in a charter party or bill of lading, and their application is near-universal.

Historically, each successive revision has replaced the one that preceded it; this was not the case with the prior revision of the Rules in 2004, which did not have the support of vessel operating interests, largely because crew wages were no longer allowed while a vessel was detained at a port of refuge after a general average act and because of the revisions to Rule VI, dealing with salvage, discussed below under a separate heading; most model charter parties and bills of lading have continued to provide for the application of the extant, 1994 Rules. The only significant entities that adopted the 2004 Rules were various oil majors and US Government departments and there is no clear indication whether this was a policy decision or simply a practice of adopting the most

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4 The word "average", in this context, comes from a proto-Indo-European root meaning marine damage. Rule A of the York-Antwerp Rules gives the following defmition-

> There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

recent version. Most average adjusters have not encountered a case falling under the 2004 Rules

Nevertheless, the CMI was perturbed at the lack of uniformity arising from the co-existence of the 1994 and 2004 Rules and resolved to develop a revision acceptable to all stakeholders. It is therefore of note that the proposed text that was brought before the New York Assembly enjoyed the unanimous support of the vessel-owner representatives, being ICS and BIMCO, and of IUMI which, although its membership comprises both hull and cargo insurers, has been the voice of the cargo interests in this forum.

This was the product of an extensive review process, which began with a questionnaire that was circulated to national maritime law associations and trade and professional associations representing the various stakeholders. Twenty-six responses were received; notably, there was no support from any quarter for the proposition that general average should be abolished.

Subsequently, BIMCO has revised its principal charter party and bill of lading forms to provide for the application of the new Rules.

A set of **CMI Guidelines for the Adjustment of General Average** also were adopted in New York. This is a new document developed by the IWG, in preference over a suggestion that the York-Antwerp Rules should be expanded to include a set of definitions, and its stated intention is to *"to assist in dealing with general average cases and to provide:*

- *general background information*

- *guidance as to recognized best practice*

- *an outline of procedures."*

It is written very much with the non-practitioner in mind, and its operation and effectiveness will be monitored by a Standing

Committee representing stakeholders and practitioners, consisting of-

- Taco van der Valk (Convenor)
- Ben Browne (IUMI)
- Jonathan Spencer (US and Canadian AA)
- Jorn Groninger (Germany)
- Jurou Kubo (Insurer, Japan)
- Kiran Khosla (ICS)
- Michael Harvey (AMD)
- Richard Cornah (AAA)
- Sveinung Makestad (Insurer, Norway)

YAR 2016 and the Guidelines are available on the CMI website at http://comitemaritime.org/Review-of-the-Rules-on-General-Average/0,27140,114032,00.html, together with all the documents generated during the work of the IWG.

A number of changes were made to YAR simply for clarity, and a consistent numbering protocol was adopted. This commentary will concentrate on the substantive changes.

YAR are organized in a group of lettered rules (A-G), setting out broad principles as to what constitutes general average, and twenty-three numbered rules dealing with specific instances of sacrifice – the giving of property in time of peril to preserve the interests involved in a common maritime adventure, and expenditure – the giving of money, for the same purpose in the same circumstances.

Streamlining

The general average regime has been criticized as being too time-consuming. Rule E.2 has been amended to provide that "All parties to the common maritime adventure shall, as soon as possible, supply particulars of value in respect of their contributory interest and, if claiming in general average, shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution, and supply evidence in support thereof " Formerly it additionally provided that if such information was not provided within twelve months of a request for it, the average adjuster could estimate the information. There was concern that the 12-month clock was reset each time the adjuster chased the information, and it has been re-written as follows:

> Failing notification, or if any party does not supply particulars in support of a notified claim, within 12 months of the termination of the common maritime adventure or payment of the expense, the average adjuster shall be at liberty to estimate the extent of the allowance on the basis of the information available to the adjuster. Particulars of value shall be provided within 12 months of the termination of the common maritime adventure, failing which the average adjuster shall be at liberty to estimate the contributory value on the same basis. Such estimates shall be communicated to the party in question in writing. Estimates may only be challenged within two months of receipt of the communication and only on the grounds that they are manifestly incorrect.

Further, average adjusters have reported having to re-adjust claims, a time-consuming and expensive process, because one or more parties to the adventure did not advise that they had made a recovery from a third party in respect of a loss allowed in general average. Rule E.4 has been introduced with the intention of averting these situations:

> Any party to the common maritime adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the average adjuster and, in the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within two months of receipt of the recovery.

Rule XVII deals with contributory values and, in the case of intermodal cargoes, where the commercial invoice shows the price of the goods at their ultimate, inland destination, average adjusters have struggled to establish the value at the termination of the maritime adventure. Rule XVII(a)(i) has addressed this problem by providing that the "commercial invoice may be deemed by the average adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage." This means that where documentation for a particular shipment clearly indicates the ocean freight as a separate item, the adjuster will be able to calculate the value of the goods at the termination of the maritime adventure. Where the freight to final destination is shown as a lumpsum, he is not required to obtain a breakdown of the ocean and inland freight costs.

Rule XVII(a)(ii) has gained new wording to endorse an existing practice, consistent with the position that exists under Clause 15 of the Lloyd's Standard Salvage and Arbitration Clauses, providing-

> Any cargo may be excluded from contributing to general average should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution.

Modernizing

Rule XIII, dealing with the deductions "new for old" to be made from the cost of repairs to sacrificial damage to the vessel, has been amended to allow half the costs of bottom painting if the ship had been painted within the 24 months preceding the date of the general average act rather than 12 months as previously, to reflect the longer service life of current bottom coatings.

Financial issues

Through YAR 1994, under Rule XX — Provision of Funds, a commission of 2% was allowed on general average disbursements. This has been eliminated as being inconsistent with modern banking practices[5].

Under Rule XXI, interest is allowed on general average sacrifices and expenditures. Under YAR 1994, the rate was 7% per annum, which had become unrealistically high. Under a formula adopted in YAR 2004, interest was established annually at a rate that

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[5] Under United States practice, advancing commission of 2.5% is allowed. Contracts of affreightment occasionally provide that general average be adjusted per YAR "and, as to matters not provided for in those Rules, in accordance with the laws and usages of the Port of New York" (or other US port); the Association of Average Adjusters of the United States and Canada has not taken a position on how they will approach commission under YAR 2016, though it seems possible that in certain cases such an allowance might be inconsistent with YAR's Rule Paramount.

most shipowners considered too low.[6] Rule XXI(b) now contains a formula accepted as realistic by the principal stakeholders:

> The rate for calculating interest accruing during each calendar year shall be the 12-month ICE LIBOR for the currency in which the adjustment is prepared as announced on the first banking day of that calendar year, increased by four percentage points. If the adjustment is prepared in a currency for which no ICE LIBOR is announced, the rate shall be the 12-month US Dollar ICE LIBOR, increased by four percentage points.

Rule XXII — Treatment of Cash Deposits, needed to be amended because its requirement that deposits be held in an account in the joint names of the shipowners and the depositors cannot be met under current banking regulations. Funds are now required to be held by the average adjuster in a special account "constituted in accordance with the law regarding client or third party funds applicable in the domicile of the average adjuster. The account shall be held separately from the average adjuster's own funds, in trust or in compliance with similar rules of law providing for the administration of the funds of third parties."

Clarification

Rule B, dealing with tug and tow cases, was introduced in 1994 and immediately gave rise to uncertainty over whether the disconnection of one vessel from another to achieve the safety of the disconnecting vessel could be a general average act. The Rule was

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[6] The rates applicable to the 2004 Rules can be found at http://comitemaritime.org/York-Antwerp-Rules-and-General-Average-Interest-Rates/0,2754,15432,00.html.

amended in 2016 to provide greater clarity about "disconnection" cases and to briefly address port of refuge expenses, as follows:

> 2. If the vessels are in common peril and one is disconnected either to increase the disconnecting vessel's safety alone, or the safety of all vessels in the common maritime adventure, the disconnection will be a general average act.
>
> 3. Where vessels involved in a common maritime adventure resort to a port or place of refuge, allowances under these Rules may be made in relation to each of the vessels. Subject to the provisions of paragraphs 3 and 4 of Rule G, allowances in general average shall cease at the time that the common maritime adventure comes to an end.

Rule G deals with the situation where cargo is forwarded from a port of refuge in a different vessel and general average allowances continue to be made under a non-separation agreement, the so-called "Bigham Clause" in Rule G.4 providing that the proportion thus attaching to cargo "shall be limited to the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense." Differences in practice among average adjusters had emerged as to whether the cap applied to the entire amount claimed as contribution from cargo or whether allowances made under the substituted expenses provision of Rule F[7] should be excluded. The 2016 Rule now includes the clarification, "This limit shall not apply to any allowances made under Rule F."

Rule XI(c)(ii), dealing with expenses at a port of refuge, was added to address an unsatisfactory English case[8] involving additional tug assistance at a port of refuge, where the judge decided

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[7] "Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

[8] *Trade Green* [2000] 2 Lloyd's Rep. 451, 456.

that the term "port charges" related only to the charges a vessel would ordinarily incur in entering a port. The Rule was therefore re-worded to reflect prevailing practice—

> For the purpose of these Rules, port charges shall include all customary or additional expenses incurred for the common safety or to enable a vessel to enter or remain at a port of refuge or call in the circumstances outlined in Rule XI(b)(i).

Salvage

The allowance of salvage expenditure as general average is a classic example of general average. A uniform treatment was introduced in YAR 1974 and rapidly became controversial with cargo interests, who in many cases thought that they were being asked to contribute to substantial adjusting fees while the financial outcome was often no different than had the salvage expenditure been allowed to lie where it fell when settled under the applicable mechanism for determining the quantum of the salvage. IUMI insisted that the treatment of salvage be very much restricted in YAR 2004 and the following text was adopted:

> Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salved values and not General Average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the

> adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.

Average adjusters, who are trained to achieve an equitable distribution of losses, found this very hard to accept.

The principal difficulty arises because payments to salvors are assessed on the value of the property at the time the salvage services terminate, whereas contribution to general average is "adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the common maritime adventure ends."[9] The contributory value for general average purposes includes "the amount allowed as general average for property sacrificed."[10] An inequity arises if a piece of property with significant value is sacrificed before or during the salvage operation. Having no value, it contributes nothing under the salvage settlement but the amount of its sacrifice is made good in general average. In an adjustment under YAR 2004, it is in a better financial position than the cargo that was saved, since it receives its sacrifice made good, but does not contribute to the salvage expenditure."

As a corollary, if a piece of property is lost or damaged after the salvage services have been rendered, but prior to the termination of the maritime adventure, it would still be liable to pay salvage, even though nothing was ultimately saved.

The solution now adopted under YAR 2016 is to allow salvage under the general average adjustment if to do so materially affects the outcome of the case. Under Rule VI(b), "salvage shall only be allowed should any of the following arise:

> (i) there is a subsequent accident or other circumstances resulting in loss or damage to

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[9] Rule G.1.

[10] Rule XVII(b).

it Certain commentators have suggested that principles of hypothetical salvage should apply in such a case but it is not known whether such principles have ever been applied in practice.

property during the voyage that results in significant differences between salved and contributory values,

(ii) there are significant general average sacrifices,

(iii) salved values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses,

(iv) any of the parties to the salvage has paid a significant proportion of salvage due from another party,

(v) a significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest."

Where salvage remains outside the general average adjustment, settlements made by the parties still rank as a deduction from contributory value and Rule XVII(b) has been amended to clarify that such "deductions in respect of payment for salvage services shall be limited to the amount paid to the salvors including interest and salvors' costs" with the effect that the adjuster does not have to make inquiry of the contributing interests regarding ancillary expenses, such as costs of providing security, and of legal representation during the salvage arbitration.

Port of Refuge Expenses

Wording was added to Rule X(b)(ii) to make it clear that when cargo is discharged and stored ashore as a general average measure, the provisions of Rule XI, dealing with wages and maintenance and port of refuge expenses, apply while the cargo is being restowed.

Rule XI was changed to allow wages and maintenance during the extra detention while a ship is under average at a port or place of refuge, reverting to the pre-2004 position.

Guidelines

As discussed, a preliminary version of the CMI Guidelines was adopted in New York. The first major endeavor of the Standing Committee is the development of model general average security documents, with the intention that an approved draft should be in place in time for adoption at the CMI' s next Assembly, scheduled to take place in Genoa in September 2017.

Of additional interest is the proposal that a form of average guarantee has been developed specifically to cover time charterers' bunkers and freight at risk. These interests can represent a significant proportion of contributory values, but shipowners have tended to be reluctant to ask their chartering customers for general average security in respect of these. It is hoped that their inclusion in the Guidelines will ratify this as a best practice.

The drafts have previously been put before AIMU and the chairs of the MLA COG and Marine Insurance committees. US insurers historically have tended to insist on signing their own forms of GA guarantee rather than those that are in near-universal use elsewhere. It might be that the market no longer has any strong feelings on this point but certainly if the drafts are adopted in Genoa substantially in their present form, the international shipping and adjusting community likely will expect the US market to issue GA guarantees in the agreed form rather than continuing to use their own wordings.

The Standing Committee will circulate final drafts, with accompanying notes, among the national MLA's for further review in advance of the Genoa conference.

New York
July 2016 rev. April 2017

EXAMINATIONS UNDER OATH

QBE Seguros v. Morales-Vazquez, No. CV 15-2091 (BJM), 2017 WL 775789, (D.P.R. Feb. 27, 2017)

Examinations Under Oath Need Not Comply with Federal Rules of Civil Procedure

by Jason P. Minkin and Jonathan A. Cipriani,
Bates Carey LLP Chicago

Examinations under oath (EUOs) can be a critical investigative tool for an insurer. A recent decision by a federal magistrate judge in Puerto Rico demonstrates the flexibility that insurers have to use EUOs in investigating claims, free from the more formal rules that govern depositions under the Federal Rules of Civil Procedure. *QBE Seguros v. Morales-Vazquez*, No. CV 15-2091 (BJM), 2017 WL 775789, (D.P.R. Feb. 27, 2017). In *QBE Seguros,* the court denied a policyholder's motion to dismiss his marine insurer's complaint to void the insurance policy based on a breach of the *uberrimae fidei* doctrine, holding that an EUO need not comply with Federal Rule of Civil Procedure 27. Contrary to the position taken by the policyholder, the statements allegedly obtained in the EUO could be used by the insurer in its complaint to void the policy. Notably, this is not the first time this case was discussed in the Marine Insurance and General Average Newsletter. A prior ruling in the case was discussed in the Fall 2016 Newsletter (MLA Report, MLA Doc. 825 at 19433), where the court rejected the policyholder's argument that the passage of the United Kingdom's Insurance Act of 2015, which abolished the doctrine of *uberrimae fidei,* served as a model for likewise abandoning the doctrine in the United States. After ruling that the case could go forward, the policyholder then sought to dismiss the complaint on the grounds that the EUO did not comply with Federal Rule of Civil Procedure 27, because the insurer did not first file a petition with the court requesting a deposition under that rule.

Background

The insurer, QBE Seguros, issued an ocean marine insurance policy to the plaintiff, Morales, for his yacht. The insurance policy application stated that "answers provided [in the application] are warranted by [the applicant] to be true and correct." The insurance policy separately provided that it would "be void and without effect" if the insured made a false statement or concealed or misrepresented any material fact or circumstance relating to the insurance on the application form. After making a claim for damage to the yacht, Morales underwent an EUO at the insurer's request, pursuant to the requirement in the policy that he submit to an EUO. During the EUO, Morales allegedly made statements "which indicated that he had not been completely forthcoming" in his insurance policy application. Morales allegedly did not disclose a 2010 accident involving a boat he was operating, which resulted in a total loss, and failed to disclose his ownership of multiple other vessels. The insurer later filed a complaint for declaratory judgment relying on these statements to void the policy.

Decision

Morales sought to dismiss the insurer's complaint, arguing that the insurer improperly obtained his statements during the EUO because that examination did not comply with the requirements for taking a deposition under Federal Rule of Civil Procedure 27. Rule 27 is meant "'to apply to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced.'" *QBE Seguros*, 2017 WL 775789, at *2, *citing Petition of Ferkauf,* 3 F.R.D. 89, 91 (S.D.N.Y. 1943). The Rule permits a federal district court to authorize a deposition where the anticipated litigation is within federal jurisdiction; the petitioner is unable to bring or cause to be brought the underlying action; and there is a reason or need to perpetuate the testimony sought.

Morales took the position that any statements from the EUO should be stricken from the insurer's complaint, which he contended was not sufficient to state a claim without those statements. The

court rejected this argument. The court noted that Rule 27 and EUO serve different purposes: the former is meant to preserve testimony that may otherwise be lost, while the purpose of the latter is for the insurer to obtain information as part of its investigation of a claim, rather than for litigation. Citing precedent from the Seventh and Eleventh Circuits, the court explained that the right to take an EUO is contractual, and that federal procedural rules governing depositions are at most of only persuasive value. *See Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.,* 528 F.3d 508, 521 (7th Cir. 2008) ("[T]he Federal Rules of Civil Procedure are not authoritative or dispositive regarding the contractual obligations [relating to EU0s] at issue here."); *United States Fid. & Guar. Co. v. Welch,* 854 F.2d 459, 461 (11th Cir. 1988) ("right to obtain sworn statements" during EUO "arises from the policy provisions" and thus right to take EUO "is not to be confused with procedures authorized by statute for taking depositions"). It was uncontested, according to the court, that the insurance policy had at least two unambiguous clauses that required him to submit to an EUO. The court found the insurer "had a right — arising under the marine insurance contract" — to ask Morales to participate in the EUO. Such a contractual right, the court explained, was distinct from the protections under the Federal Rules, which meant the insurer did not have to abide by Rule 27 prior to conducting the EUO. Because the insurance policy unambiguously required Morales to submit to an EUO, and because the insurer did not have to comply with Rule 27 before taking the EUO, the court denied Morales' motion to dismiss.

Conclusion

The court's straightforward decision demonstrates what should, by now, be an uncontroversial point: EUOs are creatures of contract, not statute or rule. As such, they are not bound by the same formal restrictions that govern depositions under the Federal Rules of Civil Procedure, and those rules are no bar to including statements from an EUO in a complaint.

RECENT CASES OF INTEREST

Defense Costs and Policy Limits

American Commercial Lines, LLC, et al. v. Water Quality Ins. Syndicate, 679 F. App'x 11 (2d Cir. 2017)

Case note by Laura Beck Knoll, Chaffe McCall LLP New Orleans

In this case, the United States Court of Appeals for the Second Circuit interpreted a primary oil pollution policy and held that the primary insurer was not obligated to continue paying defense costs incurred after the policy limit was exhausted. The decision was based on the specific language of the policy, its overall purpose and scheme, and the parties' actions after the limit was reached.

The underlying pollution incident was a 300,000 gallon oil spill from a barge in the Mississippi River on July 23, 2008, after the tow of the WV MEL OLIVER collided with the MAT TINTOMARA. American Commercial Lines ("ACL"), the discharging barge's owner, had a $5,000,000.00 primary pollution policy and three excess layers totaling approximately $295,000,000.00 in marine liability coverage for the incident. Water Quality Insurance Syndicate ("WQIS"), as the primary insurer, immediately began managing the pollution response effort with a Marine Pollution Response Team. Within approximately five weeks of the collision, on August 27, 2008, the primary policy's $5 million limit was reached, and the excess underwriters then separately hired the Marine Pollution Response Team to continue the oil spill response management. Over a year later, in October 2009, ACL submitted its first claim for reimbursement of defense costs to WQIS, then in September 2009, ACL sued WQIS for breach of the policy alleging that WQIS failed to cover (1) approximately $300,000 in defense costs before the $5 million coverage limit was reached and (2) approximately $2,000,000 in defense costs after the $5 million coverage limit was reached.

The two relevant policy provisions were coverage for liability and defense costs, Coverages A and C, respectively:

> COVERAGE A
>
> The Discharge or Substantial Threat of a Discharge of Oil
>
> 1) Liability to the United States or to any Claimant imposed under Section 1002 of the Oil Pollution Act of 1990 (Public Law 101-380, as amended), hereafter the "Act", and costs and expenses incurred by the Assured for Removal of Oil for which liability would have been imposed under Section 1002 of the Act, had the Assured not undertaken such Removal voluntarily;
>
> COVERAGE C
>
> Investigation and Defense
>
> Costs and expenses incurred by the Assured with the prior consent of WQIS for investigation of, or defense against, any liabilities covered under COVERAGE A or B of PART I of the policy.

The district court held that WQIS was obligated to pay defense costs even after the $5 million indemnity coverage limit was reached. In other words, that WQIS was responsible for defense costs under Coverage C notwithstanding that its obligation under Coverage A had ended. The Second Circuit reversed.

The Second Circuit observed that the policy language was ambiguous because "a reasonably intelligent person" could conclude either: (1) Coverage A and C clauses operated independently; or (2) that even though there was no explicit dollar amount for defense costs under Coverage C, that obligation ceased once Coverage A did. Moving on from the plain language interpretation, however, the Second Circuit was persuaded that continuing the insurer's *indemnity* obligation for defense costs, "when it no longer had an interest in defending or minimizing liability for the incident," would be an absurd result. Finally, the court buttressed its opinion by relying on the customs and practices of the industry as described in affidavits from both the WQIS claims handler and an excess insurer stating that WQIS ceased its active participation in ACL's claims after reaching the $5 million of liability. The Second Circuit therefore reversed the grant of summary judgment in ACL's favor and instructed the district court to consider the extrinsic evidence and interpret the policy to give effect to the intent of the parties as developed in discovery.

Maritime Contracts — Choice of Law

Hartford Fire Ins. Co. v. Harborview Marina & Yacht Club Cmty. Ass'n, Inc., 2017 AMC 832, 2016 U.S. Dist. LEXIS 170438 (D. Md. 2016)

Case note by Laura Beck Knoll, Chaffe McCall, New Orleans

In this decision, the United States District Court for the District of Maryland determined that a Marina Operators Legal Liability and Boat Dealer Policy was not a maritime contract simply because the insured was a marina and yacht club. In arriving at this conclusion, the court conducted a law review style analysis of when a contract is sufficiently "salty" in order for maritime law and admiralty jurisdiction to apply.

The claim arose out of the collapse of a fixed pier at Harborview's marina. Following an investigation into the cause of the collapse, Hartford filed a declaratory judgment action in admiralty against Harborview contending *inter alia* that coverage

was absent or void based on Harborview's breach of the conditions of coverage, misrepresentation of the pier's condition and/or lack of fortuity.

The court began its colorful and detailed analysis by recapping the law on admiralty jurisdiction over maritime contracts both before and after the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby.* Then, after noting that "[t]he Fourth Circuit, however, has yet to drop anchor on the question of whether a mixed insurance contract is a maritime contract," the court engaged in a detailed review of *post-Kirby* authority from the Second, Sixth, Fifth, and Ninth Circuits, highlighting the points of agreement and disagreement among the circuits. Ultimately, the court distilled the circuit court approaches into "four potential considerations ... : (1) the nature of the dispute; (2) the type or form of the policy at issue; (3) the scope of the policy's coverage; and (4) the interests insured by the policy." Significantly, the court agreed with the Second Circuit's view that "coverage determines whether a policy is 'marine insurance,' and coverage is a function of the terms of the contract and the nature of the business insured."

The court then applied its test to the policy written by Hartford which covered fixed docks and piers, roadways, benches, flag poles, pool equipment, trash receptacles and furniture, all traditionally land-based risks, and which did not cover floating docks, floating piers, vessels, marina operations like vessel launching and hauling, collisions, pollution or other classically maritime risks. The court concluded that the focus of the risks insured and the "primary objective" of the policy was the protection of land-based property and not on maritime commerce. The court rejected Hartford's claim that coverage for salvage charges and terrorism justified the application of admiralty jurisdiction as "all sail and no anchor." Accordingly, the court declined to exercise admiralty jurisdiction over the case, precluding the concomitant application of substantive maritime law doctrines like *uberrimae fidei* on which Hartford had apparently intended to rely.

In the final analysis, the Harborview policy was "an insurance policy for land-based property bearing at most a tangential

relationship to marine commerce" and that it lacked a primary objective fundamentally maritime sufficient to be a maritime contract.

In re: Crescent Energy Servs., LLC, No. CV 15-5783, 2016 WL 6581285 (E.D. La. Nov. 7, 2016)

While the *Harborview* decision focused on the "saltiness" of the insurance contract, this decision centered on whether an underlying commercial contract was sufficiently maritime in order to avoid the application of a Louisiana state law barring indemnity agreements in oil and gas contracts. Here, the insurers contended that maritime law did not apply in order to avoid liability to additional insureds.

This limitation action arose out of a well blow out which caused severe personal injuries to a pump operator working aboard a barge owned by Crescent Energy Services, LLC ("Crescent"). At the time of the blow out, Crescent/the barge were hired by Carrizo Oil & Gas, Inc. ("Carrizo") to plug and abandon Carrizo's off-shore wells. Carrizo contended that it was entitled to contractual indemnity from Crescent and coverage from Crescent's insurers as an additional insured. Crescent's insurers, Liberty Mutual, Starr, Torus and Lloyd's of London, denied coverage and filed motions for summary judgment. The primary issue before the court was whether the contract between Crescent and Carrizo was a maritime contract which would require the court to apply the general maritime law and not the state law of Louisiana. The outcome of this analysis would determine whether the indemnity obligations created by the contract were enforceable under the general maritime law or entirely unenforceable under the Louisiana Oilfield Anti-Indemnity Act which declares indemnity provisions in oil and gas agreements void.

Following the general rule that a contract must have a "genuinely salty flavor" in order to be considered a maritime contract, the court followed the fact specific analysis required by the Fifth Circuit in *Davis & Sons, Inc. v. Gulf Oil Corp.,* 919 F.2d 313, 1994 AMC 1519 (5th Cir. 1990). After noting that the historical precedent on the issue was unclear and had been described as a

"marshland," the court held that the *Davis* analysis required a finding that the contract was maritime and the indemnity provision was enforceable. The insurers' motions were denied.

Richard v. Anadarko Petroleum Corp., 850 F.3d 701, 2017 AMC 609 (5th Cir. 2017)

Case note by Laura Beck Knoll, Chaffe McCall LLP, New Orleans

In this case, the United States Court of Appeals for the Fifth Circuit held that the parties to a maritime contract could equitably reform the agreement to include standard knock for knock indemnity by applying Louisiana state law of mutual mistake and not federal maritime law. The court allowed the reformation under state law even though it expanded the liability of an interested third party insurer.

The issue arose out of a Master Services Contract ("MSC") between Offshore Energy Services ("OES") and Anadarko. The MSC provided for reciprocal indemnity of employee work-related accidents for OES or Anadarko and their "subcontractors," but not "contractors" even though the extension of reciprocal indemnity to "contractors" is an industry standard. The mistake came to light when Richard, an OES employee, was injured and sued OES, Anadarko, Dolphin Drilling and Smith International. Richard's case settled and OES' insurer provided coverage for OES' s expenditures except for those related to Dolphin Drilling and Smith International, who turned to OES through the chain of contractual indemnification with Anadarko, on the basis that OES owed no indemnity to either Dolphin or Smith because those companies were Anadarko's "contractors" (not covered) and not "subcontractors" (covered).

The threshold issue for the Fifth Circuit was which law governed the parties' right to reformation. The insurer argued that federal maritime law foreclosed reformation, while the other parties argued that state law permitted it. The analysis was complicated by the fact that the MSC was a maritime contract which required the application of federal maritime choice of law rules. Ultimately, the Fifth Circuit affirmed the district court's use of state law as a "gap

filler" and further affirmed the district court's determination that Louisiana state law applied.

Having settled which law applied, the Fifth Circuit then addressed whether grounds for reformation existed. First, the court observed that an adverse impact on the insurer, standing alone, would not bar the reformation, relying primarily on a Louisiana Supreme Court case, *Samuels v. State Farm Mutual Automobile Ins. Co.* Next, the Fifth Circuit distinguished two of its own more recent opinions declining to reform contracts, *American Electric Power Co. v. Affiliated FM Ins. Co.* and *Wilcox v. Wild Well Control, Inc.*, on the basis that those cases involved redefining terms contrary to the basic norms of fairness.

Finally, the Fifth Circuit found that Liberty Mutual unequivocally did not review or rely on the language of the MSC before issuing the OES policy and OES had provided the insurer with a loss history reflecting similar indemnification claims. The Fifth Circuit reasoned that the insurer could not then complain that of an unfair surprise for redefining unambiguous terms when the insurer "[w]ith the unreformed MSC and OES' s "Loss History" in hand . . . had reason to perceive OES and Anadarko's shared, ultimately mistaken perception of the MSC indemnity provisions' scope." The district court's order reforming the MSC was affirmed.

Policy Contract Construction

AGCS Marine Ins. Co. v. World Fuel Servs., Inc., 220 F. Supp. 3d 431, 2016 AMC 2984 (S.D.N.Y. 2016)

This case was originally reported in the Fall, 2016 edition of this Newsletter (MLA Report, MLA Doc. 825 at 19428). Briefly, the original decision resolved a coverage dispute between marine insurer AGCS and its insured, World Fuel, over whether the policy covered a multi-million dollar loss of bunkers as a result of a fraud perpetrated on World Fuel. AGCS filed the action against its insured seeking a declaratory judgment that the loss was not covered. On summary judgment, the court disagreed and found that the loss fell within the period of all-risk transit coverage because,

under New York law, delivery to a fraudster, rather than a bona fide customer, does not terminate coverage. Last November, the parties returned to court on cross motions for summary judgment which resolved the remaining issues in the case including the calculation of damages and the award, and rate, of prejudgment interest.

In deciding damages, the court was asked to apply the policy's "valuation clause" which stated that the insured property was to be valued at "invoice value (premium included)." AGCS argued that invoice value was set by the supply invoice i.e. the amount that World Fuel paid its supplier. World Fuel asserted that the correct measure of invoice value was set by the re-sale invoice to the (fraudulent) buyer which was over $900,000 higher than supply invoice. To resolve the question, the court applied New York law and rejected AGCS's interpretation as both "factually and linguistically" wrong. Noting that the policy did not define the term "invoice value" and that the case law was sparse, the court followed the reasoning of an opposite case *Groban v. S. S. Pegu*, 331 F. Supp. 883, 1972 AMC 460 (S.D.N.Y. 1971), *affd sub nom. Groban v. Am. Cas. Co.*, 456 F.2d 685, 1973 AMC 538 (2d Cir. 1972)which contained an essentially identical valuation clause and which determined that the proper measure of damages was the amount of the re-sale invoice, not the supply invoice, a construction that favored World Fuel's position. The court stated that "parties to a commercial agreement that uses terms construed in reported decisions are assumed to negotiate against the backdrop of such case law." Viewed against this backdrop, the court held for World Fuel.

With regard to pre-judgment interest, the parties disputed the applicable rate and the accrual date. World Fuel argued for the New York statutory rate of 9%. AGCS argued for the T-bill rate of 0.33%. Siding again with World Fuel, the court based its decision on the fact that the substantive law used to resolve the parties' claims was exclusively New York law notwithstanding the fact that the court had both admiralty and diversity jurisdiction over the suit. The court also noted that it had broad discretion in admiralty to set the rate of interest and, for the avoidance of doubt, the court would have selected the 9% rate in its discretion in order to serve the function of awarding interest in an amount which will fully compensate the

party for the actual damages suffered, considers fairness and the relative equity of the award, the remedial purpose of the statute involved and any other general principals deemed relevant. The court then construed the plain language of the policy on the accrual date as the "earliest ascertainable date the cause of action existed" and held that the earliest date was thirty days after a proof of loss was filed and not on the date that the claim was "final" as argued by AGCS.

Sullivan v. Certain Underwriters at Lloyds, No. 3:15-CV-926-YY, 2016 WL 7422649, 2016 U.S. Dist. LEXIS 177132 (D. Or. Dec. 22, 2016)

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

This decision on the construction of a navigation limits clause arose out of a wrongful death claim filed by plaintiff Sullivan, as personal representative of his deceased son, against the owners of a yacht insured by Certain Underwriters at Lloyds ("Lloyds"). Lloyds declined to defend or indemnify its insured in that action, claiming that the accident occurred outside of the navigational limits of the insurance policy. The yacht owners then assigned their rights against Lloyds to the plaintiff, and the plaintiff commenced this action seeking a declaratory judgment that Lloyds had breached its duty to defend and indemnify its insured in the wrongful death action.

The accident at issue occurred while the yacht was underway on the Oregon side of the Columbia River near St. Helens, Oregon. The insurance policy, however, limited coverage to "losses which occur within the navigational limits as stated on the declaration page." The declaration page contained a navigational limit, permitting coverage only when the vessel is "confined to the use and navigation of Washington and British Columbia including the inland lakes and rivers." It was on this basis that Lloyds declined coverage.

The parties filed cross motions for summary judgment. Lloyds alleged that, because the yacht was not on a Washington

river at the time of accident, coverage was excluded under the navigational limits clause. The plaintiff argued that the navigational limits clause was ambiguous, and that the navigational limits included the entirety of the Columbia River. Applying Washington law, the U.S. District Court for the District of Oregon upheld a magistrate judge's recommendation and granted summary judgment in favor of the plaintiff. The court held that the phrase "inland lakes and rivers" is ambiguous as to whether it included "inland lakes" and all "rivers" or only "inland lakes" and "inland rivers." The court stated that it was not reasonable to interpret an insurance policy to cover a vessel only on one side of a river. In addition to finding the policy clause ambiguous, the court relied on an 1859 statute that provided Washington and Oregon concurrent jurisdiction over the entire Columbia River for civil and criminal matters. Accordingly, the court held that the navigational limits clause was ambiguous, and that it was not reasonable to construe the policy as limiting coverage to only the Washington side of the Columbia River.

Lloyds has appealed the decision to the Court of Appeals for the Ninth Circuit The appeal remains pending.

Overbeek v. Fremont Ins. Co., No. 329339, 2017 WL 187996, 2017 Mich. App. LEXIS 57 (Mich. Ct. App. Jan. 17, 2017)

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

In this case, plaintiff Overbeek hired a fishing guide, defendant John Matson, to take him fishing on the Pere Marquette River in Michigan. On the day of the accident, the plaintiff and Mr. Matson arrived at a boat launch in Mr. Matson's truck with the fishing boat in tow. Mr. Matson backed the truck and trailer down the boat launch ramp, but forgot to shift his truck into park. As the plaintiff and Mr. Matson were winching the boat, the truck began to rapidly descend down the ramp towards the river. The plaintiff tried to engage the truck's brake, but was seriously injured when his arm was pinned between the truck's tire and the concrete steps of the ramp.

The plaintiff sought recovery under Mr. Matson's marine insurance policy, issued by defendant Fremont Insurance Company. The policy specifically excluded coverage for property damage or bodily injury resulting from transporting the insured boat or trailers on land. The trial court granted summary disposition in favor of the plaintiff, holding that the exclusion did not apply in this instance. The Michigan Court of Appeals affirmed, holding that the exclusion did not apply to negate coverage. The court stated that the plaintiff and Mr. Matson were not "transporting" the vessel at the time of the accident. The court reasoned that when the boat and trailer arrived at the boat launch, transportation had ceased. Further, no one was moving the vehicle or vessel at the time of the incident, as it was sliding down the ramp, because the brake had not been engaged. As such, the policy exclusion did not apply, and summary disposition was appropriate.

Arbitration Clauses are Enforceable

O'Connor v. Mar. Mgmt. Corp., No. CV 16-16201, 2017 WL 1018586, U.S. Dist. LEXIS 37798 (E.D. La. Mar. 16, 2017)

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

Plaintiff O'Connor originally brought suit in a Louisiana state court alleging that he contracted lung cancer as a result of asbestos exposure from years spent working as a machinist aboard several oil tankers in the early 1980s. One of the defendants, West of England, removed the matter to federal court invoking the removal provisions of the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), 9 U.S.C. § 205. In support of this argument, West of England cited an arbitration clause found in its Club Rules that was in effect at the time of the plaintiff's employment. The plaintiff opposed the removal and filed a motion to remand.

The U.S. District Court for the Eastern District of Louisiana denied the plaintiffs motion to remand, holding that the arbitration clause in West of England's Club Rules could conceivably affect the

outcome of the plaintiff's lawsuit. The court interpreted § 205 of the New York Convention broadly, holding that it conferred federal question jurisdiction upon district courts. Because West of England's arbitration agreement fell under the New York Convention, the dispositive issue was whether the arbitration clause related to the plaintiffs lawsuit. Citing Fifth Circuit precedent in *Beiser v. Weyler,* 284 F.3d 665, 669 (5th Cir. 2002), an arbitration clause "relates to" a plaintiffs suit whenever the clause could conceivably have an effect on the outcome of the case. The *O'Connor* court held that West of England's arbitration clause could conceivably have an effect on the plaintiff's lawsuit. As such, the matter was properly removed to the federal district court where it remains pending.

Voorhees v. ACE Am. Ins. Co., 244 F. Supp. 3d 861 (E.D. Wis. 2017)

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

In *Voorhees,* the U.S. District Court for the Eastern District of Wisconsin granted the defendant-insurer's motion to compel arbitration and held that a determination of whether the insurer had waived its right to compel arbitration was for the arbitrator to decide.

The case stems from a generator failure and related repairs that occurred on an insured's yacht. The *Voorhees* plaintiffs, the owners of the yacht, filed suit against the yacht's insurer, defendant ACE American Insurance Company ("Ace"), in Wisconsin state court. ACE removed the matter to federal court and moved to compel arbitration based on a clause in its insurance policy stating that the parties agreed to arbitrate "any controversy or claim...arising out of or related to this Policy, the interpretation, enforcement, or breach thereof, or handling of any claim involving this Policy." In compelling arbitration, the federal district court held that the clause was not ambiguous. In opposing the motion, plaintiffs claimed that ACE had waived its right to arbitrate by ignoring a pre-suit request for arbitration and by failing to respond to a pre-suit notice of arbitration. ACE responded that the pre-suit

request for arbitration was untimely, and the pre-suit notice of arbitration fell below the policy deductible. As such, ACE argued that its lack of response to these notices was appropriate.

The federal district court ultimately enforced the arbitration clause, staying the litigation and compelling arbitration. To the extent that ACE's pre-litigation conduct waived its right to arbitrate the claims, the federal district court recognized that the arbitrators could and should determine that issue.

Gemini Ins. Co. v. Certain Underwriters at Lloyd's London, No. CV 1-1-17-1044, 2017 WL 1354149, 2017 U.S. Dist. LEXIS 56583 (S.D. Tex. Apr. 13, 2017)

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

Plaintiff Gemini Insurance Company ("Gemini") issued a marine liability insurance policy to Galveston Bay Energy, LLC. Defendant Certain Underwriters at Lloyd's London ("Lloyds") underwrote another policy issued to Galveston Bay ("Galveston"). The insurers disputed whether Lloyd's was required to help fund a settlement in a personal injury action against their mutual insured. Gemini had funded part of the settlement, in excess of its *pro rata* share, in exchange for which Galveston assigned its rights against Lloyd's to Gemini.

Lloyd's invoked an arbitration clause in the policy and filed for arbitration in England. Gemini filed a subrogation action in Texas state court, seeking a preliminary injunction barring the defendants from seeking arbitration. The Texas state court granted the temporary restraining order. When the matter was removed to federal court, Gemini submitted a petition for a preliminary injunction. The federal district court denied the application, and dissolved the state court restraining order.

The federal district court recognized that the Lloyd's policy contained a "Law and Practice" clause, providing for arbitration of all disputes in England. The policy also contained a "Service of

Suit" clause under which Lloyd's would submit to the jurisdiction of a United States court for claims of failure to pay any amount due under its policy.

The district ultimately denied Gemini's application for a preliminary injunction, upholding the policy's arbitration clause. The court held that the Service of Suit clause did not override the Law and Practice clause, as the Service of Suit clause was explicitly subject to the Law and Practice clause. The court further held that the Law and Practice clause specifically incorporated English law into the contract of insurance. As English arbitration law unambiguously provides that arbitrators have the power to decide threshold questions of arbitrability, the parties unmistakably consented to delegate to the arbitrator the authority to determine which claims are arbitrable. Thus, the court denied the preliminary injunction and dissolved the temporary restraining order, allowing the arbitration proceedings in England to go forward.

Lloyd's has since sought dismissal of the action in favor of arbitration in England. That motion remains pending.

Contractual Statute of Limitations

Equip. Corp. of Am. v. Hartford Underwriters Ins. Co., No. CV 16-178, 2016 WL 6635696 (W.D. Pa. Oct. 26, 2016), *report and recommendation adopted*, No. CV 16-178, 2016 WL 7187893 (W.D. Pa. Dec. 12, 2016)

This case involved coverage for a rotary drill rig under a Coverage Inland Marine Policy issued by Hartford. On June 13, 2013, a drill rig owned by Equipment Corporation of America ("ECA") rolled over and became damaged beyond repair. On June 20, 2013, ECA submitted a claim to Hartford for the rollover and Hartford accepted coverage for the replacement cost of the drill rig. However, based on Hartford's interpretation of the Other Insurance clause in the policy, Hartford contended it was only obligated to pay 1/3 of the replacement cost of the drill rig and not the full amount of the claim. Hartford then agreed to pay the claim on this basis up to the policy limit of $500,000. Subsequently, ECA's broker discussed

reforming the policy to increase the policy limits from $500,000 to $2M for reasons not apparent from the decision. Hartford then tendered its 1/3 share, or $581,709.88, to ECA. ECA had further discussions on Hartford's application of the Other Insurance clause, but Hartford declined to reconsider its determination of the amount due under the policy. ECA filed suit against Hartford for the full replacement value on April 12, 2016.

The policy contained a suit limitation clause requiring the insured to bring an action "within 2 years after you first have knowledge of the direct loss or damage." Hartford took the position that the last date to file suit was June 20, 2015 or two years after ECA submitted its claim to Hartford. ECA disputed that it did not have knowledge of the direct loss or damage it sustained due to Hartford's failure to perform under the policy until after the policy limits were reformed in October of 2015. The court disagreed and found that the phrase "loss or damage," as used repeatedly throughout the policy, referred to loss or damage of covered property and that ECA did not sustain loss or damage of its covered property due to the actions or inactions of Hartford.

The court further rejected ECA's claim that Hartford waived this defense and/or was estopped from asserting it. The court noted that Hartford's "undisputed" acts as asserted by ECA could not have lulled ECA into not filing suit as all the acts took place *after* the suit time limitation had expired nor did Hartford take any act which was inconsistent with the suit time defense. Similarly, the review of the policy to reform the limits did not extend the suit time limitation because Hartford's decision to review the policy could not have induced ECA to take any action which allowed the time limitation to expire. Suit was dismissed.

Uberrimae Fidei Strictissimi/Utmost Good Faith

Nat'l Liab. & Fire Ins. Co. v. Rooding, No. CV ELH-15-2572, 2017 WL 1294606 (D. Md. Jan. 20, 2017), *opinion amended and superseded*, 2017 AMC 434 (D. Md. Jan. 23, 2017)

This declaratory judgment action arose out of the loss of Rooding's vessel MARGARITAVILLE (the "vessel") when it sank at its dock. The investigation into the loss by a marine surveyor revealed that the sinking was caused when ice broke the sea strainer due to an open seacock valve on the supply hose. Water then entered the vessel, overwhelmed the bilge pumps and the vessel sank. The surveyor then determined that the loss occurred after the first freeze i.e. after January 2015 and before March, 2015. The vessel's insurer, National Liability & Fire Insurance Co ("National"), denied coverage asserting that the loss did not occur while its policy was in effect and, even if it had, the policy was void *ab initio* based on a breach of the implied warranty of seaworthiness and Rooding's breach of the fraud and concealment clause.

As a preliminary matter, National issued two policies to Rooding covering the vessel: the first was cancelled for non-payment of premium on December 4, 2014. The second policy was not issued until March 31, 2015 and covered port risks only. Both policies were issued on Rooding's various representations that the purchase price and/or value of the vessel was $25,000 when the actual purchase price was $9,515, and that the vessel was seaworthy when, in fact, at the time of the application on the first policy, the hull valve/seacock was missing a handle and was stuck in the open position. Rooding first reported the loss on May 1, 2015 without any indication of the actual date of the loss.

On a motion for summary judgment, National contended that the loss was not covered because there was no evidence that the vessel sank during the effective dates of either of the two policies. The court agreed noting that Rooding presented no evidence that the loss occurred before the first policy was terminated or after the second policy went into effect and that National had demonstrated that the sinking occurred while Rooding was uninsured. National

further asserted that any coverage that might have attached was void due to Rooding's misrepresentation of the purchase price of the vessel and his concealment of its unseaworthy condition i.e. seacock stuck in open position at the inception of the first policy. Again, the court agreed with National and found that Rooding had breached his duty of utmost good faith, *uberrimae fidei,* by failing to disclose all circumstances known to him, and unknown to National, which might materially affect the risk being insured. Relying on decisions from other circuits which found that the misrepresentation of a vessel's purchase price was a violation of the duty and permitted the insurer to void the policy, the court held that Rooding's misrepresentation of the purchase price was a material breach of his *uberrimae fidei* obligations which justified the actions taken by National in voiding the policy. Having found for National on these two grounds, the court then declined to decide the issue of whether Rooding violated the duty of implied seaworthiness.

The court then heard National's application for attorney's fees and costs associated with Rooding's apparent attempts to avoid service and granted the application with the amount to be determined.

Insurable Interest as Requirement for Coverage

Essex Ins. Co. v. Schooner's Bar & Grill, Inc., No. CV 3:15-15881, 2017 WL 778708 (S.D.W. Va. Feb. 28, 2017)

This declaratory judgment action arose out of the sinking of a permanently moored steel deck barge called SCHOONER'S (the "barge") which was operated as a bar and grill at a Marina known as Adams Landing. Essex Insurance Co. ("Essex") issued a marine insurance policy to "Schooner's Bar & Grill, Inc." ("Schooner's"). Following the loss, Essex filed its complaint asserting that Schooner's did not have an insurable interest in the barge, that the policy excluded the cause of the barge's sinking and that any coverage was void due to breach of the duty of cooperation. Essex then filed a motion for summary judgment.

In order to determine whether Schooner's had an insurable interest at the time of the loss, the court was forced to examine the complicated corporate and contractual relationships between the named insured, the marina, the barge and Adam Tolliver, the person at the center of all of the entities. This task was further muddled by Tolliver's testimony in the form of an examination under oath which caused the court to comment that Tolliver failed to follow corporate formalities and that Tolliver confused many of his business entities during his testimony. Tolliver also submitted an affidavit in opposition to Essex's motion which was inconsistent with some of the testimony in his EUO. Despite that, the court found that it would not grant summary judgment. In addition, relying upon West Virginia statutory law, the court noted that having an insurable interest in a property does not mean that the insured must own the property. Rather, the insured must prove that it has a "substantial economic interest" in the property in order to recovery under the policy. The court then determined that there were questions of fact as to whether Schooner's had a substantial economic interest in the property which was best left for the jury.

Tolliver and Adams Landing also sought coverage as "insureds" under the policy which the court rejected as a matter of law. Finding that the policy unambiguously named only Schooner's as a named insured, summary judgment in favor of Essex was granted.

COMMITTEE ON RECREATIONAL BOATING

Chair: Mark Buhler
Editor: Daniel Wooster

BOATING BRIEFS

Volume 26, No. 1, Spring 2017

First Circuit Upholds Sailor's $1.4 Million Award but Rejects Prejudgment Interest on Loss of Future Earnings

Nevor v. Moneypenny Holdings, LLC, 842 F.3d 113 (1st Cir. 2016)

Readers may recall our report last year about the case of Kenneth Nevor, a professional yacht-racing sailor injured during a personnel transfer at sea. Nevor was transferring from a 52-foot state-of-the-art sailboat—named the VESPER—onto a 35-foot rigid inflatable—named the ODD JOB. The transfer occurred in choppy seas, and the vessels were not tied together. Nevor slipped on the tender's gunwale tube and was left clinging to the VESPER'S lifeline. He fell to the deck of the tender and tore his bicep tendon. A subsequent surgery left him unable to straighten his arm, and he could not return to his career as a professional racer.

Nevor brought Jones Act and unseaworthiness claims against his former employer, Moneypenny Holdings, LLC. After a four-day bench trial, the court found that Moneypenny was negligent by conducting the transfer in choppy seas and by failing to implement safety procedures for underway transfers. The court also found that the tender was unseaworthy because its gunwale tube was not treated with nonskid.

With a working-life expectancy of 30 years, Nevor was awarded over $700,000 for loss of earnings, past and future. He was also awarded $750,000 for pain and suffering, for a total award of over $1.4 million. The trial court then added prejudgment interest on the entire award, using Rhode Island's 12% interest rate. This brought the final judgment to over $2.3 million.

Moneypenny appealed, challenging both the award of damages and the availability of prejudgment interest. (Moneypenny did not, however, challenge the trial court's use of Rhode Island's 12% interest rate.)

Moneypenny argued as an initial matter that the trial court's award of economic damages was based on speculation—in particular, supposition that Nevor had he not been injured would have gone on to enjoy a career as an elite and highly compensated sailor. But given the deference owed to the trial court's findings of fact, the circuit court discerned no clear error and upheld the award of economic damages.

Moneypenny also made two arguments against the award of prejudgment interest. First, Moneypenny argued that Nevor's success on the Jones Act claim precluded any award of prejudgment interest. Second, Moneypenny maintained that the district court erred in awarding interest on future damages (i.e., future lost earning capacity and future pain and suffering).

The circuit court acknowledged that Moneypenny's first argument presented a matter of first impression. Success on a general maritime claim like unseaworthiness is generally accompanied by an award of prejudgment interest. On the other hand, in a pure Jones Act action the prevailing view is that there should be no recovery of prejudgment interest. When it comes to a mixed action, *i.e.*, where a seaman prevails on both Jones Act and unseaworthiness claims, there is a split of authority as to whether prejudgment interest should be allowed.

Given the trial court's finding that the tender was unseaworthy and that this unseaworthiness substantially contributed to Nevor's injuries, the circuit court held that Nevor should not be denied prejudgment interest merely because he also prevailed on his Jones Act claim.

Having established that prejudgment interest was available, the court turned to Moneypenny's second argument. Agreeing with Moneypenny, the court held that prejudgment interest should not be

awarded on damages that have yet to accrue. That is to say, prejudgment interest "must be limited to items of loss that were in the rear-view mirror at the time of the damages award and the concomitant entry of judgment."

On remand, the trial court would therefore need to recalculate the award of prejudgment interest—omitting interest on items of loss not yet accrued, such as future wage loss and future pain and suffering.

TORTS

Tenth Circuit: No Duty to Warn Boat Renters About Weather Forecast

In re Aramark Sports & Entertainment Services, LLC, 831 F.3d 1264 (10th Cir. 2016)

This case arose from a fatal boating accident on Lake Powell. Three couples had rented the boat from Aramark. The boat was a Category C Baja 202 Islander, described by the manufacturer as having "limited ability to withstand wind and sea or water conditions" and designed to operate in winds only up to 31 mph. Aramark did not warn the boaters about these limitations.

The day before the trip, when the contract was signed, the weather forecast called for 15-23 mph winds and gusts up to 37 mph. The next day, before they set out, Aramark told the boaters about the weather channel on the boat's radio but did not provide them with the updated weather forecast, which called for sustained winds of 25-35 mph and gusts as high as 55 mph.

During the return trip the boat encountered heavy weather, took on water, and sank. Two of the couples died. Aramark, as the boat's owner, filed a petition under the Limitation of Liability Act. The district court denied the petition on the merits, finding that Aramark breached a duty to warn its customers about the weather forecast. According to the district court, the accident was foreseeable in light of the boat's limited capabilities and the

predicted weather conditions, and therefore Aramark had a duty not to allow the boaters to venture out onto the lake. Aramark appealed.

After finding that appellate jurisdiction existed under 28 U.S.C. § 1292(a)(3), which allows an interlocutory appeal from a decision that determines a right or liability of a party to an admiralty case, the Tenth Circuit reversed and remanded.

The appellate court disagreed with the district court's decision to impose a duty based on the foreseeability of danger. In a negligence case, the appellate court explained, foreseeability is used to assess whether a person acted with reasonable care. But rather than automatically imposing a duty whenever danger is foreseeable, one must first determine whether, as a matter of policy, a duty should be imposed at all.

Here the question was whether Aramark had a duty to warn about the weather forecast, a duty not to rent the boat because of the weather forecast, and a duty to warn of the boat's limited capability in high winds.

The court held that Aramark had no duty to provide a weather forecast to its customers since the forecast was available to them with minimal effort—i.e., by listening to the weather channel on the boat's radio. Since there was no duty to provide a weather forecast, neither was there a duty to shut down the rental business based on the weather forecast. "Imposing a duty that so limits personal choice in the context of recreation would be particularly inappropriate," the court wrote.

But the situation was different with respect to Aramark's not warning its customers about the boat's limited capabilities. "We can think of no reason of policy or principle to excuse Aramark from negligence for failure to warn a renter of a boat's limitations." Because the facts underlying this particular failure-to-warn claim were not well developed, the case had to be remanded.

Hitting a Wave is Not a "Collision" Under the Rules of the Road

In re Buccina, 657 F. App'x 350, 2016 AMC 2285 (6th Cir. 2016) (unpublished)

Plaintiff was riding as a passenger in a boat on the Maumee River in Ohio and was allegedly injured when the boat struck a large wave or wake generated by another vessel. Plaintiff claimed that the incident was a "collision" and that the boat's operator had violated the Rules of the Road. Plaintiff sought to invoke the *Pennsylvania* Rule, which places the burden on the vessel owner to prove that a violation of a statute or regulation did not cause the injury. The trial court held that the Rules of the Road address collisions between vessels, not contact with waves, and that the *Pennsylvania* Rule was therefore inapplicable.

Plaintiff moved to certify the issue for an interlocutory appeal, and the trial court obliged. The question certified was "[w]hether a 'collision,' as that term is used in Inland Navigation Rules 6 and 8, occurs when a vessel strikes a wake or wave, but not another vessel, so as to invoke the *[Pennsylvania* Rule]."

But the Sixth Circuit declined to hear the appeal, finding there to be no substantial argument that striking a wave would qualify as a collision under the Rules of the Road. Seemingly no court had applied the Rules of the Road in a case like this. Moreover, "from a common sense perspective, the idea that a collision occurs when a moving boat strikes a wave would seem to be an unworkable concept since boats, once launched, are repeatedly and continually hitting waves. Defining collision so broadly would lead to too many disputes whenever a driver of a boat comes into contact with a wave—which happens virtually every time a boat enters the water."

A concurring judge thought that the issue was not entirely free from doubt but nevertheless agreed with the dismissal of the appeal because the plaintiff did not present a compelling reason for interlocutory review.

SALVAGE

Eleventh Circuit: "Necessity" Not Necessary for Salvage Award

Girard v. M/V Blacksheep, 840 F.3d 1351 (11th Cir. 2016)

The WY BLACKSHEEP, a 125-foot yacht, was anchored a few hundred feet offshore near the Galleon Marina in Key West. During a test of the engine, the port propeller shaft dislocated from the gearbox coupling, and the yacht began taking on water. The captain made a distress call, indicating his location and requesting assistance in pumping water from the vessel's bilge.

Within four minutes, Arnaud Girard, a professional salvor, responded. The BLACKSHEEP's captain confirmed that he wanted Girard's assistance, and Girard began the dewatering operation with a high-capacity pump.

Girard, along with a co-salvor, then dove under the BLACKSHEEP and repositioned the vessel's propeller shaft closer to its proper location. Girard then installed a temporary patch to restrict the flow of water into the vessel. The Coast Guard placed a similar patch inside the vessel. The BLACKSHEEP was later towed to the dock.

Girard brought a salvage case *in rem* against the BLACKSHEEP. One year later, following a two-day bench trial, the district court ruled for the BLACKSHEEP, concluding that no award was due because Girard failed to show that his services were necessary to rescue the vessel from peril. In reaching this ruling, the district court relied on *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel,* 758 F.2d 1511 (11th Cir. 1985), which identified three elements for a salvage award: (1) a maritime peril from which the vessel or other property could not have been rescued without the salvor's assistance, (2) a voluntary act by a salvor who is under no official or legal duty to render the assistance, and (3) success in saving, or in helping to save, at least part of the property. While finding that the BLACKSHEEP was in peril, the trial court determined that Girard failed to prove that the vessel "could not have

been rescued without the salvor's assistance," i.e., that the salvor's actions were necessary to save the vessel.

On appeal, Girard argued that such a showing of "necessity" was not required. Rather, he submitted that once a "marine peril" is established, the first element of a salvage award has been satisfied. Given the Supreme Court's holding in *The Sabine*, 101 U.S. 384 (1879), the circuit court agreed.

The Sabine requires three elements for a salvage award: (1) a marine peril, (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part. The circuit court held that *Klein's* "necessity" requirement was inconsistent with *The Sabine* and with the public-policy interest in encouraging would-be salvors to come to the aid of ships in distress. Thus, salvage claimants in the Eleventh Circuit will no longer need to prove that, but for their assistance, the vessel would not have been rescued.

In light of this ruling, the circuit court remanded the case so that the district court could ascertain whether Girard's actions contributed to saving the BLACKSHEEP, and if so, to determine an appropriate salvage award.

JURISDICTION

Eleventh Circuit Rejects Portage as a Basis for Admiralty Jurisdiction

Tundidor v. Miami-Dade County, 831 F.3d 1328 (11th Cir. 2016)

A passenger on a boat operating in one of Miami's drainage canals hit his head on a water main on the underside of a low-lying bridge. The canal was connected to another canal, which itself led to the Miami River, which in turn emptied into Biscayne Bay and the Atlantic Ocean. The canals were partially obstructed by several low-lying bridges and other structures. More importantly, before flowing into the Miami River, the water passed through a "water control structure" with underwater gates that regulated drainage and

prevented saltwater intrusion. Vessels could not navigate through this structure, and beside the structure was a sign that read: "DANGER — NO BOATING BEYOND THIS POINT."

The injured passenger sued Miami-Dade County, the owner of the water main, in admiralty. The County moved to dismiss for lack of subject-matter jurisdiction, arguing that the canal on which the accident occurred was not navigable for purposes of admiralty jurisdiction. The district court agreed and dismissed the complaint. The Eleventh Circuit affirmed.

The appellate court explained that one of the criteria for admiralty tort jurisdiction is that the tort must occur on navigable waters (or must be caused by a vessel on navigable waters). A waterway is considered navigable for purposes of admiralty jurisdiction if it is presently capable of supporting interstate or foreign commerce.

Because the canal at issue was confined within a single state and could not support interstate or international commerce, the canal was not subject to admiralty jurisdiction. The Eleventh Circuit relied on cases from other circuits involving artificial structures, such as dams, that acted as barriers to commercial maritime activity and that therefore deprived the federal courts of admiralty jurisdiction over torts occurring on those waters.

The mere fact that the canal might once have been navigable or that Congress might have the power to regulate the waterway under the Commerce Clause had no bearing on the question of whether the waterway was presently subject to admiralty jurisdiction. The Eleventh Circuit noted that "extending jurisdiction to waters incapable of commercial activity serves no purpose of admiralty jurisdiction."

In a further attempt to ward off dismissal, the plaintiff relied on an affidavit from another boater who stated that he had rowed a canoe to an embankment near the water control structure, carried the canoe over land past the structure, and then relaunched the canoe and resumed his trip. The court concluded that such "portage" over

land was not a practicable way of conducting interstate commerce and therefore did not render the canal navigable for purposes of admiralty jurisdiction.

SALES

Boat Dealer Held Liable for $24 Million in Class Action Over "Document Fees"

McKeage v. TMBC, LLC, 847 F.3d 992 (8th Cir. 2017)

A boat dealer headquartered in Missouri but with outlets across the country had a nationwide practice of charging buyers a $75 "document fee" over and above the purchase price. The fee purported to cover the cost of filling out the sale contract, bill of sale, power of attorney, and title and registration documents. The dealer's standard sale contract, used in transactions nationwide, included a Missouri choice-of-law provision and a "loser pays" fee-shifting provision.

A buyer in Missouri sued the dealer, claiming that by charging a document fee the dealer was engaging in a "law business" in violation of a Missouri statute that prohibits non-lawyers from "drawing or . . . procuring . . . or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights." Anyone violating the statute is subject to treble damages (i.e., three times the amount he charged to prepare the document).

A nationwide class action against the dealer was eventually certified, and the trial court granted summary judgment for the plaintiff-buyers, finding that the imposition of the document fee constituted a "law business" in violation of Missouri law. Based on the Missouri choice-of-law clause in the dealer's standard contract, the court applied Missouri law even to sales that occurred outside Missouri, and calculated the total award by trebling all the document fees collected in transactions governed by the Missouri choice-of-law provision. The judgment against the dealer came to over $21 million. The trial court declined, however, to award counsel fees

over and above that amount and instead directed that plaintiffs' counsel be paid out of the common fund. Both sides appealed.

The Eighth Circuit affirmed the imposition of liability. Under Missouri law, the fact that the dealer's employees were filling out standard forms did not mean that they were not engaging in a law business. At a minimum, a power of attorney was a legal document as to which the dealer was prohibited from charging a preparation fee. "[T]he act of charging a fee for the preparation or completion of that document constitutes unauthorized law business, even when a non-lawyer does not exercise any legal judgment in completing the form."

The appellate court also rejected the dealer's argument against applying the Missouri statute to sales outside Missouri. By including a Missouri choice-of-law clause in its contracts, the dealer had elected to have its conduct in respect of those contracts governed by Missouri law. This was not a case in which the state of Missouri itself was attempting to assert police power outside its borders.

Finally, the appellate court held that the "loser pays" provision in the contracts obligated the dealer to pay the reasonable fees of plaintiffs' counsel. The district court therefore erred by requiring that counsel fees be paid out of the common fund. Such fees were to be paid by the dealer, on top of the principal award, bringing the total judgment to over $24 million.

STATE LEGISLATION

Eugene Samarin of Annapolis submitted the following state-law summary, which was prepared with assistance from Logan Pearce, a law student at the Roger Williams University School of Law.

Connecticut

People operating a paddle craft are now required to wear life jackets between October 1 and May 31. They do not need to wear one between June 1 and September 30, but must have one life jacket on hand per person in case of emergencies.

Florida

Proposed legislation would make marijuana THC concentration higher than 5 nanograms per milliliter of blood a criminal offense of boating under the influence. *HB 237.*

Proposed legislation would also prohibit anyone under the age of 16 from operating vessels powered by a motor of 10 horsepower or greater unless that minor is under the supervision of a person over 21 years of age or the minor is participating in a school-sanctioned activity. Further, a parent, guardian or supervising adult, if found to be under influence while supervising a minor, would commit a misdemeanor of the second degree. *HB 1227 (referred to transportation committee).*

Private residential multifamily docks grandfathered-in to use sovereignty submerged lands by January 1, 1998, may moor a number of boats that exceed the number of units within the private multifamily development as previously authorized. The owner or operator of a vessel or floating structure may not anchor or moor such that the nearest approach of the anchored or moored vessel or floating structure is within 150 feet of any marina, boat ramp, boatyard, or other vessel launching or loading facility, 300 feet of a superyacht repair facility, 100 feet outward from the marked boundary of a public mooring filed (this does not apply to government, construction or dredging, commercial fishing vessels, or vessels actively engaged in recreational fishing if persons onboard are actively tending hook and line fishing gear or nets). *HB 7043 (enrolled).*

Idaho & Kentucky

In response to 33 C.F.R. § 174.16(b), which dictates that all boat Hull Identification Numbers (HIN) are valid/formatted correctly and can be verified at time of renewal registration. For all 1972 or newer manufactured vessels without a HIN or with an incorrectly formatted HIN must come into compliance prior to the 2018 renewal period.

Idaho is requiring mandatory verification of each vessel's HIN and that all boat owners provide a "unique identifier" for every owner listed on a boat's title or bill of sale. This unique identifier can be one of two things: a driver's license and a date of birth for Idaho residents only; or a tax identification number such as a social security number, employer identification number, or individual tax identification number. *Idaho Code §67-7004.*

Starting in 2018, Kentucky boaters will need to verify all HINs when renewing or applying for new registration. *2016 Ky. Rev. Stat. 186A.015 (2017).*

Maryland

Proposed legislation would make "bow riding" illegal. *HB0160.*

Minnesota

Effective May 1, 2017, "Sophia's Law" *(SF 2678)* brings the Minnesota definition of enclosed accommodation compartment in line with ABYC standards. It also prohibits any new boats from being operated on Minnesota waters without a carbon monoxide detection system. All boats 19 feet or longer will also now be required to have carbon-monoxide warning labels; these labels will be supplied by the Department of Natural Resources. *Minn Stat. §86B.532 (2016).*

Montana

Effective July 1, 2017, boaters operating in Canyon Ferry and Tiber will be required to launch and exit Tiber and Canyon Ferry Reservoirs at designated boat ramps, unless they are officially certified as local boaters by FWP. Local boaters would not be required to decontaminate their boat each time they leave Tiber or Canyon Ferry but they still must stop at inspections stations where they will be expedited through after a brief interview. Also, watercraft owners must complete educational training on aquatic invasive species and sign an agreement with FWP pledging to only

use the boat at either Tiber or Canyon Ferry Reservoir. *HB 622 (transmitted to governor on 5/1/2017).*

North Carolina

"Sheyenne's Law" imposes stronger charges and penalties against impaired boaters who cause a death or serious injuries. N.*C.G.S.A. §75A-10.30 (2016).*

Oregon

Wildlife poachers will face tougher penalties starting in 2017, and if convicted of breaking wildlife laws three times in 10 years, a judge will now order the seizure of the offender's gun, boat, or anything else used to commit the crime. *ORS 496.705, 496.992 and 498.042.*

Utah

Starting this year, those who have gone boating at Lake Powell or Deer Creek Reservoir must remove the drain plugs from their boats and not replace them until they get home. If a given vessel has been slipped or moored at Lake Powell for two or more weeks, the following must be done before leaving the reservoir:

A phone call to the Utah Division of Wildlife Resources aquatic invasive species specialists at Lake Powell to arrange an inspection of the vessel;

If mussels are found on the vessel, the operator will be directed to a private business. The operator will have to pay the business to professionally decontaminate your boat.

If the specialist finds that mussels have attached themselves to the vessel, the operator let the boat dry for the required amount of time-18 days in the spring and seven in the summer—before launching anywhere else in Utah. The dry time is in addition to getting the vessel professionally decontaminated.

COMMITTEE ON SALVAGE

Chair: Jason R. Harris
Editor: J. Ben Segarra

NEWSLETTER

Spring 2017*

RECENT DEVELOPMENTS IN SALVAGE LAW

Girard v. M/Y BLACKSHEEP, 840 F.3d 1351 (11th Cir. 2016)

Plaintiff Arnaud Girard, a professional salvor, undertook a rescue mission for a 125-foot yacht, the BLACKSHEEP. As the BLACKSHEEP lay some 200 feet offshore from the Galleon Marina in Key West, Florida, her captain attempted to test her port engine, but somehow managed to break the engine's prop shaft in the process, leaving the BLACKSHEEP anchored but taking on water. The captain made a distress call to the Coast Guard, who then issued a radio bulletin regarding the BLACKSHEEP's state of distress near the marina. When Mr. Girard arrived within four minutes, the BLACKSHEEP's captain eagerly accepted his help, and asked if Mr. Girard had a pump, which the latter did. The stricken yacht was then pumped, patched, and taken in tow (or "dispatched") back to the marina.

Mr. Girard took his salvage claim to the United States District Court for the Southern District of Florida, which ruled that his service were not *necessary* to the rescue of the BLACKSHEEP, and so denied the salvage award, using the Eleventh Circuit's *Klein* factors, which required that a salvor prove (1) A maritime peril from which the ship or other property could not have been rescued without the salvor's assistance; (2) A voluntary act by the salvor-

* 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.

that is, he must be under no official or legal duty to render the assistance; and (3) Success in saving, or in helping to save at least part of the property at risk. *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel,* 758 F.2d 1511, 1985 AMC 2970 (11th Cir. 1985).

On appeal, Mr. Girard argued that the two-fold first prong of the *Klein* test—which required him to show that the BLACKSHEEP was in peril *and* that it could not have been rescued without his assistance— was *contra* the general maritime law of salvage, which would only require that the BLACKSHEEP be in peril and a successful salvage venture.

Recognizing binding precedent in Mr. Girard's favor, the Eleventh Circuit rejected and overruled *Klein,* agreed with Mr. Girard, and reversed and remanded for the consideration of whether Mr. Girard's efforts saved the BLACKSHEEP.

Halle v. Galliano Marine Service, LLC, 855 F.3d 290, 2017 AMC 913 (5th Cir. 2017)

Kyle Halle, an operator of remote-operated vehicles (ROVs) for offshore applications, brought an FLSA action against his former employer and the company responsible for issuing his paychecks, seeking to recover unpaid overtime. The ROV operators steer the ROVs from a windowless shipping container located on a support vessel using joysticks and video feeds. These operators, termed "technicians," are considered by the support vessel's crew to be "passengers," and as such, are part of an entirely separate chain of command from that of the crew. Halle's particular supervisor and manager were both land-based, and he took no part in the upkeep or maintenance of the support vessel. Halle did, however, regularly maintain the ROVs. Finally, Halle would, on occasion, relay GPS coordinates to the support vessel's captain either by radio or by pointing to a chart.

In an attempt to avoid paying Halle overtime, the employer argued that as a seaman, Halle was exempt from the FLSA's overtime provisions. Halle claimed he was *not* a seaman, following

the Fifth Circuit's 20% of daily activity rule. Finding him to be a seaman, the United States District Court for the Eastern District of Louisiana granted the employer's motion for summary judgment on seaman status grounds. Rather than being pulled into the Jones Act jurisprudence, however, the Fifth Circuit sagely noted that the FLSA has its *own seaman status jurisprudence,* and reversed and remanded for appropriate findings of fact.

1715 Fleet-Queen Jewels, LLC v. Unidentified Wreck, 2016 WL 7742984 (S.D. Fla. April 28, 2016)

Intervening into a treasure salvage operation, third-party Gold Hound, LLC, attempted to stay the distribution of the *res* on the supposed grounds that it has developed a proprietary mapping software which the salvor used to find nearly one billion dollars' worth of gold some 160 miles off the South Carolina coast. In response, the court noted that the salvor's predecessor-in-interest discovered the wreck *before* Gold Hound formulated any of its mapping data, and that Gold Hound was *hired as a subcontractor* by the salvor after the salvor was awarded exclusive salvage rights.

Sunglory Maritime, Ltd. v. PHI, Inc., 212 F. Supp. 3d 618 (E.D. La. 2016)

As a whirlybird operated by defendant PHI, Inc. was en route to an offshore oil platform in the Gulf of Mexico, her pilot noticed unusual vibrations in the throttle, and so made an emergency landing aboard the MAT AEOLIAN HERITAGE, a Panamax bulk carrier. The vessel then carried the copter back to shore, where it was unceremoniously removed by a crane.

Not wanting to lose out on remuneration for her good deed, the AEOLIAN HERITAGE filed a claim for salvage under the 1989 Salvage Convention, over and above a claim (undisputed by PHI) for extra bunkers expenses, demurrage, and survey costs.

Interestingly, the helicopter attempted to contact the AEOLIAN HERITAGE several times without success, then circled her twice before touching down, in rolling seas, on the vessel's "H"-

marked hold cover. It was undisputed that this landing caused the vessel no damage whatsoever. After the helicopter landed, the vessel's crew stood by with a fire hose (due to the visible smoke coming from the whirlybird's rear rotor), then fed and berthed the copter's 8 passengers for the next two days.

At the bench trial of the matter, the court held: 1) the vessel owners had standing to pursue salvage claim; 2) the helicopter was property subject to salvage award; and that 3) the helicopter faced marine peril required for salvage award. The court also held that the vessel offered voluntary service required for salvage award; and that a salvage award of $50,000 plus actual costs was warranted.

Perhaps most interestingly, the court addressed a mysteriously-ignored piece of American salvage jurisprudence on which this author has written in a more formal setting, the 1989 Salvage Convention.

Evans v. Vidalia Dock & Storage Co., 662 F. App'x 241 (5th Cir. 2016)

We all know (except maybe Dagmar—hi Dagmar!), a shipowner has an absolute, nondelegable duty to provide a seaworthy vessel. Perhaps unsurprisingly, this duty does *not* extend from the owner of a wrecked or imperiled vessel to would-be salvors. Hence, if a someone is injured in the process of performing his (or her!) business, it may sometimes behoove that someone's employer to claim that the *real* nature of the operation was not actually salvage, but rather towage, a situation in which the duty of seaworthiness remains intact.

Such was the case in *Evans.* There, the BOI 227 (a barge, although it sounds like it could be Taylor Swift's latest single) was grounded on the banks of the Mississippi after liberating itself from its moorings. In the rescue attempt (which resulted in the sinking of the barge), an employee of a third-party (a dock and storage company) was injured in some fashion.

The Fifth Circuit soon found itself in a full-blown towage-versus-salvage determination, and noted that the fact of the involvement of a tow is not dispositive, but rather whether the tow was meant to *expedite* the barge's movement or instead to rescue it from an actual marine peril. Holding that retrieving the errant barge from its muddy hedonism was actually in the nature of salvage, the Fifth Circuit affirmed the court below, and common sense scored itself a major victory.

Recovery Ltd. P'ship. v. Wrecked and Abandoned Vessel, 204 F. Supp. 3d 864, 2016 AMC 2776 (E.D. Va. 2016)

One of the wonderful things about reading salvage cases, especially after working on other matters for days (or weeks), is the fanaticism of the sub-genre's case styles. While we might *want* or passively "not be opposed" to having the opposing party in many of our cases to be "wrecked and abandoned," here, *they really, really are*— and we get to call them that and have everyone think that we're still nice, civilized people that probably send holiday cards and maybe even pear baskets to our friends and distant family.

In this particular cathartic example, the salvor-in possession of the wreck of the fabled SS CENTRAL AMERICA, a 280-foot sidewheel steamer lost off the coast of South Carolina in 1857 while headed to Havana, sought a salvage award, in *specie*, of not less than 100% of the value of all of the items it had recovered from the wreck, and prejudgment interest on its expenses. Running through the seven factors by which courts determine the amount of a salvage award, the United States District Court for the Eastern District of Virginia found that the balance of factors weighed strongly in favor of an *in specie* award, including the money ($7.6M) expended by the salvor, the 2,093 hours of dive time, the great skill in recovering nearly 16,000 items over one mile below the waves and some 160 miles from shore, and the salvor's diligent efforts to protect the historic and archeological value of the wreck site and the retrieved treasure. Despite finding overwhelmingly in the salvor's favor, the court did *not* go the extra measure of granting the salvor pre-judgment interest.

COMMITTEE ON YOUNG LAWYERS

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

NEWSLETTER

Vol. 2017-1, April 2017

"THEORETICALLY QUARTERLY"

Message from the Chair

The Maritime Law Association spring meeting in New York is fast approaching. This year's meeting will be held May 3 — 5, 2017. After last May's joint meeting with the Comite Maritime International and last October's joint meeting with the Tulane Admiralty Law Institute, the upcoming meeting will be an opportunity for the Association's standing committees and members to convene in a more traditional meeting format.

I hope everyone who is able to attend has made plans to do so. I look forward to seeing many of you here in New York. In addition to the substantive committee meetings, the annual meeting, and the Friday night dinner, we will have our usual committee meeting Thursday afternoon and our always-anticipated social event Thursday night.

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.

This will be my last meeting as chair of the MLA Young Lawyers Committee. It has been an honor and a pleasure to work with so many old friends and colleagues across the country and to

meet new ones. I will be moving on to take over as chair of the CMI's Standing Committee for Young Lawyers (Young CMI), so don't be surprised if I task some of our YLC members for assistance in the future!

The incoming officers of the Young Lawyers Committee are **Jennifer Porter** (Chair), **Imran Shaukat** (Vice Chair), and **Kasee Heisterhagen** (Secretary). The Young Lawyers Committee is in very capable hands.

See you in New York!

- Blythe Daly

YLC in NYC

The Young Lawyers Committee meeting is as follows:

Thursday, May 4, 2017
1:30 — 3:30 p.m.
Holland & Knight LLP
31 W. 52nd St.

In addition to addressing our usual business, this year's meeting will feature a panel discussion about the changing landscape for container lines and ports with the advent of new alliances and megaships. **Jennifer Porter** (Keesal, Young & Logan) will moderate the panel. Panel members include **Jonathan Doyle** (Ports America), **Kristi Hunter,** (CMA CGM (America) LLC), **Eric Lee,** (Holland & Knight), and **Susan Lee** (Thomas Miller (Americas) Inc.). **Edward Carlson** (Skuld North America Inc.) will also provide an update on sanctions under the Trump Administration.

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

After the business meeting, the Young Lawyers Committee will reconvene nearby for our annual Social Event on Thursday evening.

Thursday, May 4, 2017
Cocktails 6:30 - 7:30 p.m.
Dinner 7:30 p.m.
Papillon Bistro & Bar — Midtown East
(22 East 54th St. @ Madison Avenue)

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 RSVP to Lindsay Sakal at LindsaySakal@hotmail.com. The price for the 3-course dinner is $66 and should be paid in advance by check, Venmo, or PayPal to Lindsay. Details are located on the YLC webpage.

A special thanks to **Lindsay Sakal** for her superb coordination of this event.

SPRING MEETING YLC HIGHLIGHTS

While the YLC committee meeting will be a "don't miss" event, the following YLC members will be speaking at various standing committee meetings:

- **Kirby Aarsheim,** Practice & Procedure
- **Sarah Gayer,** Recreational Boating
- **Aaron Greenbaum,** Inland Waters & Towing
- **Scott Gunst,** Fisheries
- **Carlos Llinas Negret,** Cruise Lines & Passenger Ships
- **Sean Pribyl,** MLA Joint Committee (Government Counsel/Marine Ecology and Maritime Criminal Law)

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program assigns one YLC member to each of the MLA's standing committees to serve as a liaison for a term of three years. 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 or if you are interested in volunteering to serve as a YLC liaison, please e-mail Imran Shaukat, at ishaukat@semmes com, and incoming secretary Kasee Sparks Hesiterhagen, at ksparks@burr.com.

RECENT YLC PROJECTS& ACTIVITIES

Sean Pribyl organized and participated on an ABA Panel, on best practices in marine casualty investigations, co-sponsored by the MLA and reported by Liskow & Lewis: http://www.theenergylawblog.com/2016/12/articles/maritime/7-takeaways-from-the-maritime-investigations-presentation-at-this-years-work-boat-show-in-new-orleans/. The ABA AMLC posted an update via pdf: http://apps.americanbar.org/dch/committee.cfm?com=i1200000, listed under the Upcoming Committee Events.

On March 20, 2017, in Stamford, CT, **Sarah Gayer, Stephanie Penninger,** and **Blythe Daly,** together with former YLC member Boriana Farrar, organized and participated in a joint ABA and WISTA panel entitled *Batten Down the Hatches: Navigating the Seas of 2017 Hot Maritime Topics,* addressing Recent Developments in Punitive Damages, Managing Cybersecurity, the

Role of Freight Forwarders, and the Jones Act from the P&I Club perspective, respectively.

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: **J. Ben Segarra, Stephanie Propson,** and **Christine M. Walker**

Several YLC members assisted **Olaf Aprans** in the preparation of the Marine Insurance and General Average Newsletter this fall, including **Hugh D. Baker** and **Theresa M. Carroll.**

ONGOING 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.

FALL MLA MEETING: NAPA!

The MLA Fall Meeting will be held in conjunction with the Pacific Admiralty Seminar in Napa, California October 18-21, 2017. 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 and make your reservations!

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.

PUBLICATION OPPORTUNITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to *Benedict's Quarterly Maritime Bulletin.* You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair, or director unless s/he is a Proctor or Non-Lawyer member. Proctor applications may be obtained and submitted on the MLA website.

YLC MEMBERSHIP LIST ON 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 unsub scribe.

TABLE OF CASES

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