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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
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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 Fall Meeting in Houston, Texas. In addition, we have included earlier newsletters of the Committees on Arbitration and ADR and Carriage of Goods which had not been picked up in the Fall 2009/Spring 2010 edition.

We have resumed the practice, initiated by Gordon Paulsen some years ago, of including in the MLA Report short remembrances of departed Association members who have materially advanced the Association's work. In this edition we honor Andrew J. Goldstein of New Jersey, a former chair and long-time member of the Committee on Practice and Procedure, who passed away on February 2, 2011.

We have had the benefit, in the preparation of this edition, of proof-reading and cite checking assistance from the following members of the Committee on Young Lawyers: Asher Brooks Chancey of Palmer Biezup & Henderson LLP, in Philadelphia, Patrick J.R. Ward of Hand Arendall LLC in Mobile and Arthur Alan Severance of Sands Lerner LLC in Los Angeles. We very much appreciate their help.

As in the past, we remind readers that articles, case notes and comments published in this MLA Report are for informational purposes only, are not intended to be legal advice, and are not necessarily the views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Andrew J. Goldstein

Andrew J. Goldstein, who was the Chair of the MLA Committee on Practice and Procedure from 2004 to 2008, passed away on February 2, 2011. Andy practiced maritime law in Newark, New Jersey for many years, serving as New Jersey counsel for several of the Manhattan admiralty law firms. He was a graduate of Grinnell College and the University of Detroit Mercy School of Law and served in the United States Marine Corps during the Vietnam War.

He was actively involved in the Committee on Practice and Procedure for decades and was one of the original authors of the first MLA Model Local Admiralty Rules in 1986 and in their subsequent updates. Andy regularly attended the MLA meetings in New York and other locations and the Tulane Admiralty Law Institute. He also served as Chair of the Admiralty and Maritime Litigation Committee of the Section of Litigation of the American Bar Association.

Andy is best remembered, however, for his kind soul, his dry wit, and his good-natured arguments with Phil Berns on almost any topic – sometimes even including admiralty law and procedure. He was a good friend to many of us. In later years his family obligations prevented him from attending several of the "away" meetings, which he dearly missed. He truly enjoyed his "MLA experience," meeting and working with members on the local admiralty rules projects and other practice and procedure matters that were dear to his heart. His soft voice and gentle good humor will be missed.

By: James W. Bartlett, III
Philip A. Berns
Robert J. Zapf

COMMITTEE ON ARBITRATION AND ADR

Chair: Keith M. Heard

Newsletter – May 6, 2010

1. SUPREME COURT NIXES CLASS ACTION ARBITRATION.

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 130 S. Ct. 1758, 559 U.S. ---, 176 L. Ed. 2d 605, 2010 AMC 913 (2010), the Supreme Court vacated an arbitration award in which the Panel had concluded that class action arbitration was permitted by a charter party arbitration clause that did not expressly prohibit such a procedure.

In a case that has been closely followed by our Committee, a Panel of arbitrators concluded that since none of the arbitration clauses at issue specifically prohibited class action arbitration, the arbitration could go ahead as a class action. The U.S. District Court, per Judge Rakoff, vacated the award as one in manifest disregard of the law, but the Second Circuit Court of Appeals reversed and reinstated the award. The Supreme Court granted writ of certiorari and reversed the Court of Appeals.

Plaintiff AnimalFeeds and others were cargo shippers who sued Stolt-Nielsen and other parcel tanker operators for alleged price-fixing. The tanker operators obtained a stay of the lawsuits, pending arbitration. The parties then asked a Panel of the American Arbitration Association to determine whether the various claimant arbitrations could proceed as a class arbitration or must proceed separately. The arbitration Panel determined that since the arbitration clause at issue did not specifically prohibit class arbitration, there was nothing to prevent claimants from proceeding in that way.

The tanker operators filed a motion in the Southern District of New York to vacate the award, which Judge Rakoff granted on the basis that the award was in manifest disregard of the law. On appeal, the Second Circuit reversed and reinstated the award. The Supreme Court then granted writ of certiorari and reversed the Court of Appeals, vacating the award.

Reviewing what the arbitrators had done, the Supreme Court observed that "the arbitrators' proper task was to identify the rule of law that governs" when the parties agreement was "silent" on the issue of class action arbitration. *Id.* at 1768. However, rather than look to the Federal Arbitration Act, maritime law or New York state law, the Panel, according to the Court, "proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." *Id.* at 1769. The Court noted that, under either New York law or the general maritime law, evidence of "custom and usage," which favored the tanker operators' position against class action arbitration, would have been "relevant to determining the parties' intent when an express agreement is ambiguous." *Id.* at 1769, n. 6. Going further, the Court remarked that "[t]he conclusion is inescapable that the panel simply imposed its own conception of sound policy." *Id.* The Court concluded that, in doing so, the panel "exceeded its powers," in violation of section 10(a)(4) of the Arbitration Act.

The Court also concluded that the confusion in the case stemmed in part from the parties' interpretation of the Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003). The Court pointed out that, in *Bazzle*, the plurality opinion concluded that the arbitrators and not the court should decide whether contracts were "silent" on the issue of class action arbitration. However, *Bazzle* "did not establish the rule to be applied in deciding whether class arbitration is permitted." *AnimalFeeds*, 130 S. Ct. at 1772. *Bazzle* left that question open, requiring its consideration by the Court in *AnimalFeeds*.

In setting the stage for this review, the Court quoted from its past rulings in which it had stressed that arbitration "is a matter of consent, not coercion" and that the central or "primary" purpose of the FAA is "to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Id.* at 1773 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). The Court also noted that an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties." *Id.* at 1774 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)).

On the basis of this review, the Court concluded:

> From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue, see App. 77a. The critical point, in the view of the arbitration panel, was that petitioners did not "establish that the parties to the charter agreements intended to *preclude* class arbitration." App. to Pet. for Cert. 51a. Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

AnimalFeeds, 130 S. Ct. at 1775.

The Court also noted that "[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate" because "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* Clearly, one of the Court's concerns was that, while class actions may proceed in court, the prospect of having them in arbitration was troubling because "the scope of judicial review is much more limited." *Id.* In short, the Court concluded that, where parties had not specifically agreed to class action arbitration in their contract, arbitrators could not compel them to proceed with such arbitration simply because their contract was silent on that issue.

Justice Ginsburg wrote a dissenting opinion, in which Justices Stevens and Breyer joined. The dissent took issue with the majority for "addressing an issue not ripe for judicial review" and for failing to "adhere to the strict limitations" the FAA "places on judicial review of arbitral awards." Id. at 1777.

With respect to ripeness, the dissent contended that the award "was abstract and highly interlocutory." *Id.* at 1778. Specifically, the dissent noted that the panel did not decide whether the claims AnimalFeeds asserted were suitable for class resolution, nor did it delineate a class or consider whether, "if a class is certified, . . . members of the putative class should be required to 'opt in' to th[e] proceeding," *Id.* The dissent complained that "[n]o decision of this Court, until today, has ever approved immediate judicial review of an arbitrator's decision as preliminary as the "partial award" made in this case." *Id.* at 1779.

Turning to the merits, the dissent took the majority to task for concluding that the arbitrators "exceeded their powers" when, in fact, according to the dissent, the panel did precisely what the parties requested, *i.e.*, determining whether class action arbitration was permitted under the arbitration clause. As Justice Ginsburg put it, "[t]he parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case." *Id.* at 1780. According to the dissent, the majority was "essentially" allowing the parcel tanker operators to "repudiate [their] submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's de novo determination." *Id.*

Editor's note: *Quaere* what the dissent might do with a Partial Final Award from a maritime arbitration in light of its statement that "[i]t cannot be true . . . that parties or arbitrators can gain instant review by slicing off a preliminary decision or a procedural order and declaring its resolution a 'partial award'." *AnimalFeeds*, 130 S. Ct. at 1779.

2. FIFTH CIRCUIT REVERSES DISTRICT COURT'S REFUSAL TO COMPEL ARBITRATION OF DIRECT ACTION CLAIM AGAINST STEAMSHIP MUTUAL.

In *Zimmerman v. International Companies & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997), and *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989), the Fifth Circuit Court of Appeals ruled that direct actions by injured plaintiffs against the tortfeasors' insurers were not subject to a mandatory stay pursuant to section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, despite the presence of an arbitration clause in the underwriters' contracts with their assureds, because the injury plaintiffs were not parties to the insurance contracts. In *Todd v. Steamship Mutual Under-*

writing Ass'n (Bermuda) Ltd., 601 F.3d 329, 2010 AMC 1143 (5th Cir. 2010), the court concluded that the Supreme Court's decision in *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 556 U.S. ---, 173 L.Ed.2d 832 (2009) has effectively overruled *Zimmerman* and *Big Foot*. As a result, in *Todd*, the court reversed the district court's refusal to compel arbitration and remanded for further proceedings in light of its ruling.

Plaintiff Todd won a Louisiana state court judgment for personal injury against the owner of a replica steamboat entered in Steamship Mutual. When the shipowner went bankrupt, Todd filed suit against Steamship pursuant to Louisiana's "direct action statute, which "allows injured individuals to proceed directly against insurers when an insured tortfeasor is insolvent." After removing Todd's action to federal court, Steamship Mutual moved to stay the proceedings and compel Todd to arbitrate his claims pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). However, the District Court denied the motion to compel on the basis of the Fifth Circuit's decision in *Zimmerman*. (Note: according to the Fifth Circuit, the District Court, which ruled before the Supreme Court decided *Carlisle*, "found *Zimmerman* to be so dispositive that it decided not to write an opinion explaining its decision, as it concluded that writing anything at all would be merely 'wasting trees.'").

On appeal, the Fifth Circuit noted that in *Carlisle*, "the Supreme Court rejected the reasoning in *Zimmerman* and *Big Foot*, concluding instead that non-signatories to arbitration agreements (such as direct action plaintiffs) may sometimes be compelled to arbitrate . . . through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" In this case, Steamship Mutual contended that Todd must arbitrate his claims because inter alia "he is purportedly a third party beneficiary" of the insurance contract. The Fifth Circuit concluded that "on remand, the district court is not bound by our statement in *Zimmerman* that direct action plaintiffs cannot be required to arbitrate as third party beneficiaries, as this conclusion was necessarily contingent on our now discredited view that federal arbitration law has no application to non-signatories." Since the District Court had ruled that *Zimmerman* was necessarily controlling, it did not consider many of the arguments made by the parties. Accordingly, the Fifth Circuit remanded the case for consideration of those arguments, including whether the third party beneficiary issue was affected by the fact that English law governed the insurance policy.

3. THIRD CIRCUIT AFFIRMS DISTRICT COURT'S CONFIRMATION OF MARITIME ARBITRATION AWARD.

In *Andorra Services Inc. v. Venfleet, Ltd.*, 355 Fed. Appx. 622 (3d Cir. 2009), the Court of Appeals affirmed a ruling by the District Court for the District of New Jersey confirming an award by sole arbitrator Jack Berg in favor of the shipowner and against Chemoil Corporation and Andorra Services, Inc. BVI with respect to the former's claim for substantial discharge port demurrage and the latter's claim for water contamination to cargo.

The claims arose from a voyage on which the M/V EOS carried fuel oil from Amuay Bay, Venezuela, to the Port of New York. Upon the vessel's arrival in New York, Chemoil ordered the vessel to suspend discharge due to the cargo's excessive water content. The ship then waited for approximately twenty days while various joint surveys and inspections took place. Ultimately, discharge resumed and was completed. Chemoil and Andorra filed suit against the Owner and the vessel in the District of New Jersey to recover $471,435.81 for damage to the cargo. The parties then agreed to submit the dispute to arbitration. In that proceeding, Owner counterclaimed for $1,190,112.54 for demurrage and various expenses. Both parties sought legal fees.

The arbitrator concluded that although some water leaked into the cargo from the vessel's malfunctioning heating coils, this was not enough to cause the damage of which Chemoil and Andorra complained. Instead, the arbitrator found that the cargo had excessive water content before it was loaded on the ship. Thus, he ruled in favor of Owner, finding "no evidence to support Appellants' rationale for forcing the EOS to remain at sea for twenty days prior to discharging the fuel oil." *Id.* at 625.

The district court granted Owner's motion to confirm the award and denied Chemoil and Andorra's cross-motion to vacate or modify, entering judgment in favor of the former in the amount of $1,986,882.67, plus interest and costs.

On appeal, Chemoil and Andorra argued that the district court should have vacated the award because the arbitrator (a) allegedly exhibited bias in refusing to consider certain evidence, contrary to section 10(a)(3) of the FAA; (b) manifestly disregarded the law in reaching his conclusion; and (c) allegedly exceeded his authority by awarding pre- and post-award interest rather than leaving the issue for the District Court to decide.

The Third Circuit rejected all of these arguments. With respect to the first, the court wrote that "[t]here is no evidence to suggest that the arbitrator's refusal to delay the proceedings and order the production of this evidence was motivated by bias, nor is there any indication that it resulted in a fundamentally unfair proceeding." *Id*. at 626. With respect to manifest disregard, the court said it "need not decide . . . [w]hether this concept continues to exist today as an independent, viable ground for vacatur" because the case did not constitute "one of those 'extremely narrow circumstances' supporting a decision to vacate." *Id*. With respect to the interest argument, the Court of Appeals observed that "[t]here is simply no basis for believing that the arbitrator was to handle only certain matters, while leaving related pieces of the overall dispute for the District Court to resolve." *Id*. at 628.

4. SOUTHERN DISTRICT REFUSES TO STAY ARBITRATIONS ON THE BASIS OF AN ALLEGED LACK OF ARBITRABILITY OF THE ISSUES INVOLVED.

In *re Reuters America LLC*, 694 F. Supp. 2d 242 (S.D.N.Y 2010) involved separate petitions by Reuters America LLC for a stay of two AAA arbitrations, one involving its failure to deduct Newspaper Guild dues from employees' paychecks and the other involving a grievance by a Reuters employee and Guild member. Reuters argued it was no longer obligated to arbitrate either dispute because the Collective Bargaining Agreement ("CBA") between it and the Guild expired on February 28, 2009, with the result that any obligation it had to arbitrate the disputes ended at that time.

The Newspaper Guild countered that a provision in the CBA, which the Guild called an "evergreen" clause, kept all terms of the contract, including the obligation to arbitrate and to deduct Guild dues from employee paychecks, in effect until the parties entered into a new CBA or bargaining reached an impasse. The clause on which the Guild relied provided that "[t]he terms and conditions of [the CBA] shall remain in effect during such negotiations as required by applicable law." *Id*. at 244. Reuters argued that it never intended the language of this provision to be interpreted as an evergreen clause and that is why the language "as required by applicable law" was added to later versions of the contract, including the one at issue here. *Id*.

The arbitration clause in the CBA excluded from its coverage disputes arising from the interpretation or application of the contract's terms insofar as they relate to "renewal of the Agreement." Reuters argued that both of the disputes here concerned "renewal of the Agreement" and should therefore be excluded from arbitration under the language of the CBA.

The court began its analysis by observing that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." 694 F. Supp. 2d at 244-5 (quoting from *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)). With respect to the instant case, the court concluded that the parties' dispute really centered on the meaning of the purported evergreen clause, not the arbitration clause. The issue for the court, then, was to determine whether the parties agreed to arbitrate the dispute over the meaning of the evergreen clause. Nevertheless, the court concluded that the arbitration clause was sufficiently "sweeping" to include the parties dispute concerning the meaning and scope of the so-called evergreen clause. *Id.*

The court concluded that, although a provision in the CBA provided that the arbitrator did not have the power to determine a grievance relating to "renewal of the Agreement", the clause did not prevent an arbitrator from interpreting the existing clauses in an article in the CBA covering "duration and renewal" provisions. Addressing the Reuters' argument about parenthetical language in the clause that seemed to restrict the scope of arbitrability, the court reasoned that this language applied either to "new provisions which may be incorporated into the agreement at the time of an extension or renewal of the agreement or when a new agreement is executed, . . . or (2) if there is an issue as to whether the contract has been renewed at all." *Id.* at 245-6. The court ruled that the parenthetical language did not mean that Reuters simply no longer had any obligation to arbitrate after expiration of the CBA.

The court also rejected Reuters' argument based on the "as required by law" language that was subsequently added to the evergreen clause. The court accepted that neither dues check-off provisions nor arbitration clauses continued to apply as a matter of law after the expiration of the CBA. However, the court concluded that these provisions did not relate to "renewal of the Agreement" and, therefore, the disputes over the meaning of the evergreen clause were still arbitrable "as long as negotiations are taking place and the parties have not bargained to an impasse." *Id*. Accordingly, the court denied both of Reuters' petitions to stay the arbitrations.

5. SECOND CIRCUIT REVERSES DISMISSAL OF ALL CLAIMS IN FAVOR OF DEFENDANTS WHO WERE NOT EVEN PARTIES TO THE ARBITRATION CLAUSE ON WHICH THE DISMISSAL WAS BASED.

Baker & Taylor, Inc. v. AlphaCraze.Com Corp., 602 F.3d 486 (2d Cir. 2010) involved a dismissal of all of plaintiffs' claims in favor of arbitration even though: (a) neither signatory to the relevant arbitration agreement sought arbitration; and (b) the nonsignatory defendants who did move to dismiss in favor of arbitration disclaimed any interest in participating in the arbitration and any obligation on their part to do so.

Plaintiffs filled customer orders arranged by defendant AlphaCraze.com Corp., an online retailer. Plaintiff Baker & Taylor, Inc.'s initial contracts with AlphaCraze did not contain arbitration clauses. Baker & Taylor obtained guaranties from officers, directors and affiliates of AlphaCraze to protect Baker & Taylor, Inc. if AlphaCraze did not honor its obligations. Each guaranty was an absolute guaranty of payment that was in no way conditioned or contingent upon an attempt to collect from AlphaCraze, and none of the guaranties contained arbitration clauses.

Baker & Taylor subsequently re-structured its business so that goods and services to fulfill customer orders were provided through its subsidiary, Baker & Taylor Fulfillment. The relationship between Baker & Taylor Fulfillment and AlphaCraze was memorialized in a contract that contained an arbitration clause. In addition, the new Fulfillment Agreement was backed up by a corporate guaranty signed by AlphaCraze and a personal guaranty signed by the company's president and chief executive officer. Neither of these guaranties contained an arbitration clause.

AlphaCraze became delinquent in its payments under the Fulfillment Agreement and allegedly owed Baker & Taylor $2.7 million for good and services provided by Baker & Taylor Fulfillment between March 2006 and May 2007. Baker & Taylor then filed suit in the U.S. District Court for the District of Connecticut to recover for breach of the Fulfillment Agreement, unjust enrichment and breach of the various guaranties. In

February 2008, a default was entered against AlphaCraze. The individual defendants then moved to dismiss the action, arguing in part that the Fulfillment Agreement required Baker & Taylor to arbitrate with AlphaCraze and that the claims against the individual defendants should be dismissed or stayed in favor of that arbitration.

The District Court concluded that, even though neither AlphaCraze nor Baker & Taylor had sought arbitration, the Fulfillment Agreement's arbitration provision required dismissal of all of Baker & Taylor's claims. The District Court reasoned that all of Baker & Taylor's claims "stem from the same debt allegedly owed under the Fulfillment Agreement" and that the claims are therefore barred by that Agreement's arbitration clause. *Baker & Taylor, Inc. v. AlphaCraze.com Corp.*, 578 F.Supp.2d 374, 379 (D. Conn. 2008).

On appeal, the Court of Appeals noted the unusual posture of the case, pointing out that Baker & Taylor brought the suit, seeking to have its claims adjudicated in the District Court, and that AlphaCraze defaulted rather than demand arbitration. Most of the individual defendants then demanded arbitration even though the guaranties they signed predated the Fulfillment Agreement and did not provide for arbitration. However, the arbitration they demanded was not of Baker & Taylor's claims against them but of its claims against AlphaCraze, in which they contended they were under no obligation to participate. Not surprisingly, the Second Circuit stated in a per curiam ruling that "[w]e know of no authority holding that two parties can be forced to arbitrate against their present wishes, even if they originally signed a contract agreeing to arbitrate, when the only parties espousing arbitration are nonsignatory parties who refuse to participate therein." 602 F.3d at 491.

Some of the individual defendants argued that a nonsignatory may enforce an arbitration agreement. The Court of Appeals agreed but pointed out that those cases involved situations where the nonsignatories intended to arbitrate, not just compel others to do so. The Court concluded that "[e]ven assuming that [the individual guarantors] had some basis on which to insist on arbitrating their dispute with Baker & Taylor--a matter on which we express no opinion--their explicit disclaimer of any legal obligation to arbitrate and their refusal to do so effectively waives any such claim." *Id.* at 491-2.

The Court of Appeals concluded that defendant AlphaCraze had also waived its right to arbitrate by failing to appear or defend itself in any way and by not resisting plaintiffs' motion for entry of a default judgment. The District Court had determined that the arbitration clause in the Fulfillment Agreement prevented it "from entering judgment against *any* defendants appearing in this case, *in default*, or in absentia," and as a result dismissed the claims against all defendants, including AlphaCraze. *Id*. at 492 (emphasis in original). The Second Circuit viewed this as "in effect, a *sua sponte* vacatur of [the] default" that had been entered against AlphaCraze. *Id*. The Second Circuit concluded that this had been done in error, and reversed the District Court's entry of that vacatur as to AlphaCraze. *Id*.

6. AWARD IN REINSURANCE DISPUTE VACATED FOR "EVIDENT PARTIALITY."

Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 732 F. Supp. 2d 293 (S.D.N.Y. 2010), involved a petition to vacate an award issued pursuant to a reinsurance contract. Scandinavian Reinsurance Co. Ltd., St. Paul Fire & Marine Insurance Company, St. Paul Reinsurance Company, Ltd. and St. Paul Re (Bermuda) Ltd. (collectively "St. Paul") entered into a Retrocessional Casualty Stop Loss Agreement under which St. Paul ceded a portion of its casualty reinsurance portfolio to Scandinavian Re. When disputes arose under that agreement, St. Paul demanded arbitration. Each party appointed an arbitrator, who then selected a neutral umpire.

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

Scandinavian Re filed a petition with the U.S. District Court for the Southern District of New York to vacate the award on the basis that Gentile and Dassenko exhibited "evident partiality" under section 10(a)(2) of the FAA by failing to disclose their simultaneous participation in the arbitration to which Platinum Bda was a party that involved "a common witness, similar disputed issues and contract terms, and the company [i.e., Platinum Bda] that succeeded to the business of St. Paul." *Id*. at *1.

The District Court began its legal analysis by observing that, pursuant to the decision in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007), "[a]n arbitrator who knows of a material relationship with a party and fails to disclose it meets [the] 'evident partiality' standard" established by the Second Circuit in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984).

St. Paul argued that the undisclosed relationships were "trivial" because (1) neither Dassenko nor Gentile had any financial (or other) interest in the outcome of the Platinum Bda arbitration and (2) neither Dassenko nor Gentile had any direct relationship with St. Paul. The court disagreed, however, noting that the absence of these factors "is not dispositive as to whether a relationship is material--all of the circumstances must be considered, including the timing of the arbitrators' relationships with each other, and with witnesses to the arbitration." 2010 WL 653481 at *8.

Of particular importance here was the fact that Mr. Hedges, the witness who testified in both arbitrations, offered testimony "that supported interpreting the Platinum Bda Agreement as written but interpreting the Scandinavian Re Agreement in light of Scandinavian Re's *intent* at the time it entered into the agreement." *Id*. (emphasis in original). The Court expressed concern that:

> By participating in both the Scandinavian Re Arbitration and the Platinum Bda Arbitration, Dassenko and Gentile placed themselves in a position where they could receive *ex parte* information about the kind of reinsurance business at issue in the Scandinavian Re Arbitration, be influenced by recent credibility determinations they made as a result of Hedges's testimony in the Platinum Bda Arbitration, and influence each other's thinking on issues relevant to the Scandinavian Re Arbitration. *Id*.

The court concluded that "[t]aken together, these factors indicate that Dassenko and Gentile's simultaneous service as arbitrators in the Scandinavian Re Arbitration and the Platinum Bda Arbitration constituted a material conflict of interest. *Id*. at 9. The arbitrators' failure to disclose their participation in the Platinum Bda arbitration met the Morelite standard for evident partiality because the undisclosed relationships involved in that other arbitration "collectively were material." *Id*. Thus, the court vacated the award and remanded the case for arbitration before a new panel of arbitrators, not including any of the three who had served in the proceedings at issue.

7. AWARD IN REINSURANCE DISPUTE VACATED FOR IRRATIONALITY.

In *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F.Supp.2d 631 (E.D. Pa. 2009), the court vacated the award in the Platinum Bda arbitration that was relevant to the ruling in *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293 (S.D.N.Y. 2010)(discussed immediately above), on the basis that it was "completely irrational." The judge concluded that the award could not be rationally derived from the contract between the parties or from their submissions in the arbitration.

COMMITTEE ON CARRIAGE OF GOODS

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CARGO NEWSLETTER NO. 55

Spring 2010

COURT FOLLOWS SCORE WRITTEN BY CARRIER

St. Paul Travelers Insurance Co. v. M/V MADAME BUTTERFLY, 700 F. Supp. 2d 496, 2010 AMC 1299 (S.D.N.Y. 2010) *aff'd sub nom.*, *St. Paul Travelers Ins. Co. v. Wallenius Wilhelmsen Logistics A/S*, 2011 U.S. App. LEXIS 10304 (2d Cir. N.Y. May 20, 2011)(unpublished)

A 72-foot yacht was damaged when a crane toppled over while the yacht was being offloaded from the vessel at Port Hueneme, California. The subrogated underwriter sued against the vessel interests, the crane lessor and the stevedores responsible for off loading the yacht seeking to recover $4,179,938.00

The underwriter argued that the defendants were liable under a service contract entered into by the ocean carrier for the shipment of various yachts with a freight forwarder who was acting as agent for its assured. The defendants countered that the governing contract was actually the bill of lading. Under the service contract, the limitation of liability would be calculated according to the Hague-Visby Rules and the service contract also called for arbitration in London. The bill of lading would limit liability to the $500 package limitation of COGSA and also contained a choice of forum clause designating the Southern District of New York. Plaintiff's amended verified complaint referred only to the bill of lading and did not mention the service contract.

Defendants moved for partial summary judgment limiting liability to $500 and cross-motions were made requesting dismissal of cross-claims. Plaintiff likewise moved for summary judgment asking for the full amount of the damages to the yacht.

The service contract provided that the ocean carrier "will affix the service contract number to the relevant bill of lading for contract shipments." It was undisputed that no service contract number was affixed to the bill of lading for the shipment in this case and the service contract gave the ocean carrier the exclusive discretion to waive the requirement that the service contract number appear on the bill of lading. The court also noted that the freight rate for the yacht involved did not appear in the service contract.

The bill of lading contained a provision calling for $500 for packages and for goods not shipped in packages, per the customary freight unit, unless a higher value was declared and the higher freight rate paid. The bill of lading also provided "Each unpackaged vehicle or other piece of unpackaged cargo on which freight is calculated, constitutes one customary freight unit." The bill of lading further stated that the Declared Value was "none" and the number of units or packages was listed as "1". It further described the shipment received as "One Unit(s)."

The bill of lading also contained a Himalaya Clause and a provision that no claim would be made against anyone other than the carrier.

The court found it was clear from the undisputed facts that the bill of lading was the contract governing the carriage of the yacht. It found the service contract, while governing a shipping relationship between the ocean carrier and the freight forwarder (agent for the shipper/insured), it did not apply to the specific shipment of the yacht in this case. The bill of lading did not contain the service contract number and the ocean carrier had the exclusive discretion to waive the requirement that the service contract number appear on the bill of lading. The ocean carrier plainly had not waived the provision in this case.

The court also referred to the fact that the service contract did not provide a freight rate for the specific shipment involved and, indeed, a separate tariff was negotiated and filed with the FMC for this shipment.

Further, the court did not accept a declaration from the shipper's agent to the effect that the bill of lading acted as a receipt, rather than the contract between the parties. The court rejected this parol evidence as conclusory and without reference to the actual terms of the documents. The service contract's required procedures, such as the use of the service contract number on the bill of lading, were not followed.

The court further rejected an argument that there was a deviation and the COGSA limitation should not apply because the bill of lading was a "false" bill of lading. The court noted that false bill of lading exceptions to the COGSA package limitation has been limited to "misrepresentations concerning the physical condition or location of the goods at the time the bill of lading was issued." Any "errors" (i.e. possibly erroneous departure date and disputed freight prepaid clause) were not material and not related to the loss of the yacht.

As to plaintiff's argument that the customary freight unit should be per metric ton and thus liability should be based on the weight of the yacht, the court noted a higher value had not been declared by the shipper and there was a specific provision that each unpackaged vehicle or other piece of unpackaged cargo on which freight was calculated constituted one customary freight unit. It also found the bill of lading provided the shipper with an opportunity to declare a higher value.

The court also referred to several decisions which applied the $500 package limitation where a yacht in a cradle was damaged during unloading and found "the bill of lading is clear that the yacht constituted either one package or one customary freight unit. The COGSA limitation is therefore $500."

As to the claims against the crane lessor and the stevedores, the court referred to the bill of lading provision that no suit was to be brought against any party other than the ocean carrier. It dismissed the plaintiff's claims against both and further stated that in the absence of any agreement not to sue, the crane lessor and the stevedore would still be protected by the same limitation on liability that applied to the ocean carrier, referring to the Himalaya Clause which was sufficiently broad to cover not only subcontractors but servants or agents of a subcontractor.

The court granted the ocean carrier's motion to limit its liability to $500, denied plaintiff's motion for summary judgment, and dismissed the claims against the crane lessor and the stevedore.

COURT HOLDS BILL OF LADING DEFINES "CUSTOMARY FREIGHT UNIT"

American Home Assurance Co. v. Wallenius Wilhelmsen Lines, A.S., Civ. No. 08-7848 (PAC) (S.D.N.Y. March 16, 2010).

The subrogated underwriter sought to recover for alleged damages to four unpackaged vehicles shipped on four separate voyages between Savannah, Georgia, and ports abroad (2 to Bremerhaven, 1 to Australia and 1 to Japan). The ocean carrier defendants moved for partial summary judgment seeking to limit liability to $500 per vehicle.

The court considered the sole question at issue to be was whether the customary freight unit for each of the four vehicles was the vehicle itself or the cubic meters that the vehicle occupied? If the customary freight unit was each vehicle, liability would be capped at $2,000; however, if the customary freight unit was the cubic meter, the liability would be approximately $108,000.

The four vehicles were shipped from Savannah pursuant to bills of lading which provided that if COGSA applied to the contract, the carrier's liability would be limited to $500 per package or, for goods not shipped in packages, per customary freight unit, unless a higher value was declared in the declared value box on the face of the bill of lading and a higher freight rate paid. It further provided "each unpackaged vehicle or other piece of unpackaged cargo on which freight is calculated, constitutes one customary freight unit." *See* Slip Op. at *M/V Madame Butterfly*.

There was no question that the freight for each of the four vehicles was calculated per cubic meter and that each vehicle was shipped unpackaged.

The court referred to the purpose of the COGSA limitation as to "limit the liability of common carriers for damage to cargo where the value of the cargo is not known to the carrier." *Id*. (citing *General Motors Corporation v. Moore-McCormack Lines*, 451 F.2d 24, 26 (2d Cir. 1971)). COGSA limits liability to $500 per package or per customary freight unit unless the nature and value of the goods has been declared by the shipper before shipment and inserted in the bill of lading. Thus, if a shipper wants to avoid the $500 limit, it can declare a higher value for the cargo, thereby "alerting the carrier of its potential liability and allowing it to charge extra freight, if appropriate." *Id*. (citing *Moore-McCormack Lines, supra*).

While COGSA does not define the term "customary freight unit" the Second Circuit has explained that to determine the customary freight unit, the court is to "examine the bills of lading, which expresses the contractual relationship in which the intent of the parties is the overarching standard." *Id*. (citing *FMC Corporation v. S.S. MARJORIE LYKES*, 851 F.2d 78, 80 (2d Cir. 1988)

The carrier defendants argued that Clause 10 of the bill of lading was clear and unambiguous stating that any piece of unpackaged cargo on which freight was calculated constituted "one customary freight unit." The plaintiff underwriter asserted that if the freight charges were based solely on an unpackaged vehicle, then the unpackaged vehicle would be the customary freight unit; however, under the service contract the freight was charged not per vehicle, but instead per cubic meter and, therefore, the customary freight unit should be the cubic meter.

The court stated the most natural reading of the clause was that the unpackaged vehicles were one customary freight unit each, regardless of whether the freight for the vehicle was determined by reference to the vehicle's volume. Clause 10 of the bill of lading did not say that only unpackaged vehicles freighted by lump sum constitute the customary freight. The phrase "on which freight is calculated" indicates the intent of the parties that even if freight is calculated by a measure other than the per unpackaged vehicle, the unpackaged vehicle is the customary freight unit.

The court found the bill of lading clearly defined the customary freight unit as each unpackaged vehicle. The shipper could have declared higher values and paid a higher freight, but chose not to. The court stated "Clause 10 showed the intent of the shipper and the defendants to define customary freight unit as each unpackaged vehicle." It granted the motion limiting recovery of the plaintiff subrogee to $500 per vehicle.

MANAGER DOES NOT MANAGE TO ESCAPE

Fortis Corporate Insurance. *v. Viken Ship Management AS*, 597 F.3d 784, 2010 AMC 609 (6th Cir. 2010).

The subrogated underwriter sued for rust damage to steel coils caused by exposure to sea water during a journey from Szczecin, Poland, to Toledo, Ohio. The central issue stated by the court was "whether a ship manager charged with providing a Master, officers and crew, and performing various other ship-management tasks for the shipping vessel qualifies as a 'carrier' under the Carriage of Goods by Sea Act." The underlying dispute had previously come before the Sixth Circuit in 2006. *See Fortis Corporate Insurance*. *v. Viken Ship Management*, 450 F.3d 214 (6th

Cir. 2006). The District Court had dismissed the case against the vessel owner and its manager, finding that it lacked personal jurisdiction. The district court noted the touchstone of personal jurisdiction is whether a defendant purposefully established "minimum contacts" in the forum state, such that it could anticipate being hauled into court there. The court found the owner and its manager was "in essence, the same company," and concluded there was no jurisdiction because they had not established the necessary minimum contacts in Ohio. That decision was reversed on appeal. The appellate court found defendants had more than sufficient notice they might be subject to jurisdiction noting the long-term Charter Agreement, stating the vessel was suitable for "Toledo," that the vessels were rigged to travel in the Great Lakes, that a substantial sum of money was earned for the days spent in Ohio ports over five years and remanded the case to the district court for further proceedings.

On remand, the defendant's moved for summary judgment based on the one-year time bar provided in COGSA. The district court found that Viken Lakers was a carrier and the suit against it was barred. However, it found that Viken Shipmanagement AS was not a COGSA carrier, and therefore could not invoke the one-year statute of limitations. The court found VSM could not qualify because it was not an owner or a charterer or party to the contract of carriage. Summary judgment was granted in favor of the owner and the claim against the manager proceeded to a bench trial.

The question was whether the crew should have noticed and repaired a leak before sufficient sea water entered damaging the steel coils. Critical to that question was when the crack in the ship's hull occurred. The court noted bilge soundings for hold no. 2 in which the cargo was stowed increased after its departure from Poland. These readings were considerably higher than those recorded for the other cargo holds on the ship. The crew made visual inspections; however, did not note anything amiss other than an excess of humidity in the No. 2 hold. The Master ordered the bilge pumped to remove water; however, on the day after the bilge was emptied, the soundings indicated the bilge were yet again nearing its total capacity. The Chief Mate reported that the ship was taking on water from the starboard side. It was then the ship's Master inspected the No. 2 hold and observed a crack in the hull was allowing water to leak into the ship. The hull was temporarily repaired; however, 99 steel coils sustained substantial rust damage caused by the sea water which entered the No. 2 hold.

Plaintiff's expert opined on trial that the crack occurred prior to the first inspection by the crew (October 21) and likely from being struck while in port by a tug. In his view, the bilges should have been pumped immediately and if the crew had properly monitored the bilges and responded sooner to the high readings, sea water would not have reached and damaged the coils.

On the other hand, the expert for vessel interests posited that the hull crack did not occur until October 21 and that the crew reacted in a timely fashion. He theorized the crack was probably caused by debris or especially rough seas striking the vessel. He also argued that the coils had been exposed to rainwater as they were being transported and loaded onto the vessel and this water escaped and caused the bilge soundings to rise and also testified that cargo sweat could have played a significant role in raising water levels in the bilges.

The district court concluded that the breach occurred prior to the first inspection by the crew and that the only realistic explanation was the ship's hull was cracked at the outset of the voyage to Toledo. The court discredited the theory that cargo's sweat and rain water seeping out of the coils could have been the source for roughly 600 gallons of water, nearly filling the bilges during the first few days of the journey. The Court concluded that the ship manager's negligence in investigating and attending to the sea water flowing into the cargo hold was the direct cause of the rust damage and the failure to properly and timely investigate the rising water levels was a breach of the ship manager's duty of reasonable care. 579 F. Supp. 2d 974 (N.D. Ohio 2008).

On appeal, the vessel's manager argued that it was a COGSA carrier entitled to the one-year statute of limitations and, secondly, the district court's finding of negligence was based on clearly erroneous factual findings.

Justice Sandra Day O'Connor, sitting by designation, noted that COGSA defined "carrier" as including the owner or the charterer who enters into a contract of carriage with a shipper. The vessel manager argued that it qualified as a carrier because it performs functions traditionally carried out by a carrier and that COGSA defined "carrier" in an open-ended fashion to include owners and charterers who enter into contracts of carriage, but does not expressly exclude any actor in particular.

The court noted the United States Supreme Court considered and rejected a similar argument in *Herd v. Krawill*, 359 U.S. 297, 79 S. Ct. 766, 3 L. Ed. 2d 820 (1959).

The court further rejected additional arguments by the vessel manager as contrary to *Herd, supra*. As to an argument that unless the manager was covered as a COGSA carrier, it would be subject to all of the liabilities of the carrier with none of the protections, the court stated the manager was subjected to neither the liabilities nor the protections of a COGSA carrier. It did not have to meet the complicated burden-shifting mechanism of COGSA, but was held liable for common-law negligence in managing the vessel and, in that capacity, was treated as a simple tortfeasor.

The court, citing *Norfolk Southern Railway v. Kirby*, 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004) noted that shipping parties were free to extend COGSA's coverage by adding provisions to bills of lading extending the COGSA regime to any and all agents or independent contractors who participate in the shipment of goods under a particular contract. If the parties in the case had wanted the manager to be covered by COGSA terms, they could have provided for that contractually by way of a Himalaya Clause. However, they chose not to do so.

Finally, the manager argued that it was already established that it is a carrier because the Court of Appeals and the district court treated the vessel owner and manager as "in essence, the same company" when evaluating the initial jurisdictional question. It thus argued that it must be a carrier under the law of the case as the owner was found to be a carrier.

The court rejected this argument "treating two entities as equivalent for jurisdictional purposes does not somehow mean they are the same in all other ways." The court affirmed the district court's finding of negligence was not clearly erroneous.

FORUM CLAUSE IS GOOD, BUT NO IT ISN'T

Federal Insurance Co. v. M/V CMA CGM Marlin, 2010 AMC 653, 2010 WL 727217 (S.D.N.Y. February 23, 2010).

A suit was brought seeking damage for loss and damage to cargo against an NVOCC who, in turn, filed a third-party complaint against the actual carrier. The actual carrier moved to dismiss both the Complaint and the Third-Party Complaint on the basis of a mandatory and exclusive forum selection clause contained in its bill of lading with the NVOCC. This bill of lading provided that "all claims shall be determined by the courts of Marseilles at the exclusion of the courts of any other country." The actual carrier argued that the NVOCC acted as the agent of the plaintiff in entering the bill of lading and bound it to the terms of the bill of lading. Plaintiffs argued that the bill of lading between the NVOCC and the actual carrier was not binding on them because an agent, intermediary or non-vessel operating a common carrier may not contract away a cargo owner's right to bring a damage action in the forum of its choosing.

The NVOCC also moved to dismiss the plaintiff's complaint on the basis of a forum selection clause contained in the bill of lading it issued to the plaintiff insured. That bill of lading provided that any dispute or claim "shall be determined by the U.S. District Court for the State of California."

The court noted that forum selection clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. It found the forum selection clause in the NVOCC/actual carrier bill of lading reasonably communicated the clause to the party resisting enforcement (the NVOCC specifically referred to it in its third-party complaint); the language evidenced an intent to make the Court of Marseilles the exclusive jurisdiction between those parties; the bill of lading was a contract governing the shipment of goods between the NVOCC and the actual carrier and the NVOCC failed to allege any facts which would rebut the presumption of enforceability. The court, therefore, granted the actual carrier's motion to dismiss the third-party complaint.

However, the court went on to state that bill of lading, and its forum selection clause, was not binding on the plaintiffs (subrogated insurer and shipper/insured). There was no evidence that the clause on the face of the bill of lading was reasonably communicated to the plaintiffs; nor were the plaintiffs party, directly or by representative, to the bill of lading. There was no evidence that the NVOCC was given authority to limit plaintiff's right to sue exclusively in the court of Marseilles. In referring to the case of A. T. *Moeller-Maersk A/S v. Ocean Express Miami,* 550 F. Supp. 2d 454 (S.D.N.Y. 2008), the court noted that case involved a shipper as being bound to the ocean carrier's bill of lading even though the shipment was booked with an NVOCC, in that the shipper filed its lawsuit under the actual carrier's bill of lading and, therefore, accepted all of the terms of that bill of lading.

In the instant case, plaintiff did not sue under the actual carrier's bill of lading calling for determination in Marseilles. Rather, the plaintiffs specifically referred to the NVOCC bill of lading which called for resolution in California. On this basis, the actual carrier's motion to dismiss the complaint was denied.

The court distinguished the actual carrier's reliance on the Supreme Court's decision in *Norfolk Southern Railway v. Kirby,* 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283, 2004 AMC 2205 (2004):

> In *Kirby* the Supreme Court ruled that 'intermediaries entrusted with goods are agents only in their ability to contract for liability limitations with carriers downstream.' *Id*. at 34. However, as Judge Hellerstein noted in *Royal and Sun Alliance Inc*., *PLC the Ocean World Lines, Inc*. 572 F. Supp. 2d 379, 397 (S.D.N.Y. 2008), nothing in *Kirby* can be read to extend that ruling to a forum selection clause.

Turning to the bill of lading issued by the NVOCC and calling for determination in California, the court noted the NVOCC reserved its contractual rights to such defense, including the affirmative defense in its answer. Its conduct in the course of the litigation did not amount to a waiver. The court found the clause to be mandatory invoking the word "shall."

The court granted the actual carrier's motion to dismiss the third-party complaint; however, denied its motion to dismiss the complaint and granted the NVOCC's motion to dismiss the complaint to the extent that it ordered the claims as against the NVOCC to be transferred to the United States District Court for the Central District of California.

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CARMACK CONTROLS

Travelers Property Casualty Company of America v. legacy Transportation Services, Inc., 2010 WL 1463574 (N.D. Cal. April 13, 2010).

The plaintiff entered into a contract with the defendant carrier for transportation, rigging and installation of an oncology machine from Wisconsin to a hospital in New Jersey. The machine was damaged during the offloading of the machine. The cargo underwriter paid for the loss and instituted suit against the carrier in state court.

Thereafter, the defendant removed the state action to the federal court on the basis of the preemptive effect of the Carmack Amendment to the Interstate Commerce Act. Plaintiff moved to remand the case to the state court.

The court noted the Carmack Amendment is among the few statutes that completely preempt well-pleaded state law claims and is the exclusive cause of action for interstate-shipping contract claims alleging delay, loss, failure to deliver or damage to property. The plaintiff argued that the Carmack Amendment should not apply as the loss was not incurred during the transportation of the machine. The court noted the Carmack Amendment broadly defined "transportation" to include "services related to that movement, *including arranging for, receipt, delivery, elevation,* transfer and transit, refrigeration, icing, ventilation, storage, *handling*, packing, *unpacking,* and interchange of passengers and property." Referring to prior precedent, it noted the broad interpretation of the Carmack Amendment's "preemption definition of transportation".

As to an argument by plaintiffs that the original contract agreed that any dispute would be resolved in the local county superior court, because the Carmack Amendment preempts state law claims relating to transportation, the forum selection clause designating a state court could not be enforced in this context.

As to the possibility that the defendant may have only acted as a broker in the transaction giving rise to damages, the court noted Carmack distinguished between a motor carrier and a broker and covered the conduct of interstate carriers, but not state claims against brokers. Nevertheless, at oral argument, it was made clear that the defendant acted as a carrier. Accordingly, the court found the Carmack Amendment preempted all state claims and denied plaintiff's motion to remand.

SHRIMP GO "POOF"; TRUCKER GOES "POOF"; BUT LIABILITY UNDERWRITER GOES NOWHERE

Ocean Garden Products, Inc. v. Northfield Insurance Co., 2010 WL 1640940 (S.D. Tex. April 21, 2010).

Six hundred cartons of block-frozen shrimp were loaded in Nogales, Arizona for carriage to Newark, New Jersey. The trucker drove the shrimp to a tractor trailer yard in El Paso, Texas and parked there on a Friday. A different driver arrived on the following Monday to discover the tractor-trailer missing. The next day it was located but the shrimp were gone, never to be found. The defendant insurance company insured the trucker for liability for cargo loss at the time of the shrimp's disappearance. The policy had a limit of $100,000 with a $2,000 deductible and at the time of the loss, the fair market value of the shrimp was at least $120,000.

The court noted that under the Carmack Amendment as well as common-law bailment, the trucker was liable for the loss of the cargo as the bill of lading showed the shrimp were delivered to the trucker and never redelivered to the shipper.

The trucker reported the loss to its insurance company who investigated the matter, interviewed a representative of the trucker, and was apprised that the shipper demanded payment on several occasions. The cargo insurer paid the claim and the trucker's insurer was notified about the claim for reimbursement on three separate occasions, but it closed its file without denying coverage.

Suit was brought against the trucker and a broker. The trucker never appeared and never notified its insurer of the lawsuit, but the plaintiff did, sending the insurance defendant a copy of the Complaint and proof of service on the trucker. It again sent the trucker's insurance company copies of the Complaint with a warning that it would soon be moving for a default judgment against the trucker. A default judgment was subsequently issued by the court and a copy of it was also sent to the trucker's insurer. The plaintiff subsequently added the trucker's insurance company as a defendant in this action.

The insurance defendant argued that the trucker had voided coverage by not notifying it of the lawsuit and by refusing to cooperate in the investigation. In Texas, for an insurer to avoid liability, it must show that it has been prejudiced by the insured's breach of the policy. The court noted actual notices given multiple times of the loss and of the lawsuit, stating "The facts are simple and strong that Northfield was not prejudiced as a matter of law by Loga's failure to report directly Ocean's lawsuit."

As to the argument that the trucker had voided coverage by refusing to submit to an examination under oath or furnish documents, the court noted "Loga did not simply sit mute; it collapsed, and the principals disappeared". The court rejected the argument noting that the insurance company did not consider examining its assured until two months after the loss and the insurance company was not able to demonstrate what it would or could have learned from an examination and documents that would release it from its responsibility to pay the claim. It did not show how it was harmed by its insured's "reticence", thus its insured's "lack of cooperation" did not preclude the insurance company's responsibility, stating "Cooperation clauses are intended to develop defenses toward he insured's substantive liability, not to determine whether the occurrence is covered by the policy."

Here, the trucker's liability was certain and the defendant did not show it had been prejudiced by any breach by its insured.

As to the co-defendant distributor, the court found it did not accept the cargo or contract as a carrier, but rather as a broker, arranging for the trucker to ship the shrimp. The trucker, by signing the bill of lading, undertook carrier liability and the trucker's insurance company could not blame the co-defendant for the trucker's loss.

With respect to attorneys' fees, the court found the trucker dissolved shortly after the shrimp disappeared and its principals could not be located. If it had not dissolved, the trucker would have sued Northfield for breaching the contract by failing to defend it and failing to pay the claim. Because the trucker no longer existed, the plaintiff was forced to sue to enforce the policy. As a successor to Loga, the court found the shipper equitably entitled to the rights and remedies the trucker would have had and, when a policyholder successfully sues its insured for breach of contract, it is entitled to attorneys' fees and costs to that action.

The court held the plaintiff entitled to judgment from the insurer defendant in the amount of $98,000, the policy limit less the amount of the deductible; and its reasonable attorneys' fees for pursuing the default judgment and for enforcing that judgment.

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CARGO NEWSLETTER NO. 56

Fall 2010

STARE DECISIS IN OPERATION

Mitsui Sumitomo Insurance Co., Ltd., v. Evergreen Marine Corp., 621 F.3d 215, 2010 AMC 2775 (2d Cir. 2010).

A containerized shipment moved from Japan destined for North Carolina via the port of Los Angeles. The ocean transportation was completed and the shipment started by rail to its final destination; however, it was damaged while in the custody of the railroad. The district court, relying on the second circuit's decision in *Sompo Japan Insurance Co. of America*, the *Union Pacific Railroad Co.*, 456 F. 3d 54 (2d. Cir. 2006), held that the Carmack Amendment applied and granted summary judgment in favor of the plaintiff cargo underwriter. *See* Cargo Newsletter No. 52. An appeal was filed; however, in the interim, the Supreme Court decided to the contrary in a case involving facts materially indistinguishable from the instant case. *See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 561 U.S. ---, 177 L. Ed. 2d 424 (2010).

Accordingly, the circuit court vacated the judgment of the district court and remanded for further proceedings consistent with its opinion.

The court noted the Supreme Court's decision in *Regal-Beloit* held the Carmack Amendment did not apply to an intermodal shipment that originated outside the United States and was performed pursuant to a single through bill of lading issued by a vessel owning-carrier. Carmack only applied to a shipment of goods where a "receiving rail carrier" as opposed to a "delivering" or connecting rail carrier was required to issue a Carmack-compliant contract for the carriage of goods.

This standard requires that two conditions be met before the Carmack Amendment would apply to a shipment: First, the rail carrier must provide transportation or service subject to the jurisdiction of the Surface Transportation Board and, second, that carrier must receive the property for transportation under the Surface Transportation Board's jurisdiction over domestic rail transport. With respect to goods received in a foreign location (not in the United States for rail transport), such as China or Japan, the ocean carrier was not a "receiving rail carrier" for the purposes of the Carmack Amendment. The circuit court noted the ocean carrier in this case was not a "receiving rail carrier", having received the property at the shipment's point of origin (Japan) and took possession to perform "overseas multimodal import transport, not domestic rail transport". It found the same was true as to the inland rail carrier: A rail carrier "does not become a receiving carrier simply by accepting goods for *further transport* from another carrier in the middle of an international shipment under a through a bill of lading."

The court went on to reject arguments put forth by the cargo underwriter that *Regal-Beloit* was distinguishable, asserting the Supreme Court reached its conclusion based on a concession at oral argument that the railroad was a "mere delivering carrier." The court noted that the *Regal-Beloit* court was aware of the concession by railroad's counsel; however, characterized the concession as a "necessary" one under the terms of the statute. It therefore rejected the argument that the lack of any similar concession warranted a different outcome.

As to an argument that the railroad transported the cargo pursuant to a "separate bill of lading for the interstate rail carriage", the court presumed this assertion referred to the railroad's Exempt Rail Transportation Agreement and the Exempt Circular Master Intermodal Transportation Agreement between the railroad and the ocean carrier. The court considered this to be a distinction without a difference. The waybill issued by the ocean carrier called for transportation between Japan, the point of origin and North Carolina, the ultimate destination, with the port of Los Angeles being a midpoint along the journey, not a second point of origin. The court noted the Supreme Court had indicated that it "would be a quite difference case if…the bills of lading for the overseas transport ended at this country's ports and the cargo owners then contracted with [UP] to complete a *new journey* to an inland destination in the United States. (emphasis in original)(citation omitted). But this is not such a case." The MITA-2A and the ERTA did not call for a "new journey." Collectively, the documents represented a subcontract between the ocean carrier and the railroad carrier for the inland portion of the carriage and such subcontracts were expressly contemplated by the ocean carrier. Under *Regal-Beloit*, they fell outside the purview of the Carmack Amendment.

The Cargo Underwriter argued that the Supreme Court in *Regal-Beloit* relied "in large part on the determination that suit could not be filed in a Carmack-compliant venue, i.e. a District Court in the United States", and the instant case was different because the ocean carrier bill of lading provided for venue and jurisdiction solely in the federal or state courts of New York. The court stated "whatever the parties' agreements may say about venue and choice of law, Japan is the "point of origin" of the shipment at issue. There is no "judicial district", for purposes of the Carmack Amendment, "in which the point of origin is located,"

Finally, the court held that *Regal-Beloit* applies retroactively to all cases open on direct review at the time the Supreme Court issued its decision.

COURT CHUCKS CARPET CLAIM TO CALIFORNIA

Federal Insurance Company, et al. v. Bax Global Inc., et al., 2010 WL 3738033 (E.D.N.Y. September 20, 2010).

A shipment of custom made carpets moved from Georgia to Southern California; however, upon receipt, the purchaser returned them because of a "manufacturing deficiency". The carpets were returned via various truckers and warehouses; however, upon arrival in Georgia, they were found to be damaged.

The plaintiff Cargo Underwriter initially filed its action in the Southern District of New York; however, the District Judge, *sua sponte,* transferred the case to the Eastern District of New York, finding the only connection between the suit and the Southern District of New York was plaintiff's place of business and there were no references in the Complaint to any events occurring the District of New York. After the case was opened in the Eastern District of New York, the defendants filed a motion pursuant to 28 U.S.C. § 1404(a) to transfer the case to the Southern District of California in the interest of judicial efficiency and for the convenience of parties and witnesses.

The court noted that under Section 1404(a), a District Court may transfer a civil action to any other district court or division where it might have been brought and determination of the issue requires the balancing of conveniences, which is left to the discretion of the district court. The court noted that the papers in support of the motion contained a claim that New York was an improper venue and noted this ground was consistent with 28 U.S.C. 1406(a) which allows dismissal or transfer of an action brought in an improper venue. The difference between the two sections is venue does not need to be improper for Section 1404(a) to apply; however, because a resolution of the transfer issue under Section 1404(a) was dispositive of the case, it was unnecessary to determine whether the transfer would also be appropriate under Section 1406(a).

The court went on to consider whether the action could have been brought in the Southern District of California and found that venue was proper in California under the Carmack Amendment's Special Venue Provision; i.e. an action may be brought against the delivering carrier in the federal district court of a state in which the delivering carrier operates. While there was a dispute as to which of the two defendants was the "delivering carrier", the Court found that it made little difference as both defendants operated in the Southern District of California and both maintained warehouses within that district. Thus, either way, venue would be proper in the Southern District of California and the action could have been brought there originally.

The court went on to consider various convenience factors under a motion to transfer pursuant to Section 1404(a). The court found the carpets passed from California to Georgia, never passing through New York. Thus, plaintiff's choice of forum was not accorded significant weight. It further found the majority of possible material witnesses were located in California and this strongly weighed in favor of transfer. As to the convenience of the parties, while plaintiff was in New York and defendants were in California, the convenience of the parties become a neutral factor in the transferring analysis, if transferring venue would merely shift convenience from one party to the other. However, third-parties defendants in this action were both located in California and this factor added some weight in favor of transfer.

Given the location of events giving rise to the action, it was clear that the damage to the carpets occurred either in California, Georgia or somewhere in between. In any event, it was undisputed that the damage did not occurred in the Eastern District of New York and, while it was not clear that the damage occurred in the Southern District of California, it was also undisputed that the shipment originated there, thus giving the possibility that the damages involved occurred there.

Lastly, because the action was brought as a violation of federal interstate commerce law, (pursuant to the Carmack Amendment), there were no "complex questions of another state's laws" and this factor did not weigh heavily in either direction. While no single factor in the analysis pursuant to Section 1404(a) was dispositive, the Court found defendants met their burden to demonstrate that transfer was indicated for convenience and the interest of justice. In particular, the convenience and attendance of the potential witnesses strongly weighed in favor of transfer to transfer venue to the Southern District of California.

FAILURE TO PAY FREIGHT IS A FEDERAL CASE

OEC Freight (NY) Inc. v. Philip Whitney, Ltd., 2011 AMC 549, 2010 WL 4116954 (E.D.N.Y. October 18, 2010).

Suit was brought by a freight forwarder against shippers for failure to pay $39,929 for services rendered in transporting the defendants' goods from various ports in or near China to New York. The plaintiff invoked the admiralty and maritime jurisdiction of the Court pursuant to the Carriage of Goods by Sea Act. Defendants moved to dismiss for lack of subject matter jurisdiction, which would thereby abort arbitration of its claims. (The Local Civil Rules of the Eastern District of New York compelled arbitration of civil disputes involving claims of up to $150,000, however, the Court, as a condition precedent to the arbitration, must address the threshold issue of whether it has jurisdiction).

Defendants argued that the Carriage of Goods by Sea Act ("COGSA"), was not applicable. However, the court stated this was irrelevant as the plaintiff's claim was for breach of contract. Pursuant to the court's general admiralty or maritime jurisdiction, jurisdiction depended on the nature of the contract at issue. The court found the dispute involved centered around the defendants' alleged failures to pay for the carriage of the goods which was clearly at the core of "business of maritime commerce."

As to the argument that the plaintiff was a freight-forwarder, *i.e.* an agent of the shipper that arranged for the transport of the goods rather than the actual carrier of the goods, the court noted the Second Circuit has counseled that when considering whether a freight-forwarding contract falls within admiralty jurisdiction, the "character of the work performed under the contract is determinative whether the agreement was maritime" (citing *Ingersoll Milling Machine Company v. M/V Bodena*, 829 F.2d 2393 (2d Cir. 1987)). Like the freight forwarder in Ingersoll, the plaintiff secured bill of ladings from carriers transporting defendant's goods, a task that is not preliminarily in nature, and "an integral part of the shipping process."

The court found it had subject matter jurisdiction over the breach of contract claim, and the matter could proceed to arbitration.

IF YOU CAN'T SEE IT, YOU GOTTA SHOW IT

Ohio Star Transportation LLC v. Roadway Express, Inc., 2010 WL 3666982 (S.D. Ohio September 14, 2010).

A shipment of used computers was transported from Utah to Ohio. The computers were separated onto two pallets and shrink-wrapped prior to pick-up by the defendant carrier. During shipment, some of the computers on one of the pallets broke through the wrapping and slid off the pallet. At delivery in Ohio, 112 computers on the pallet with the torn shrink-wrap were refused and the balance of the shipment accepted.

Suit was filed pursuant to the Carmack Amendment against the defendant seeking to recover $34,681.92 for 112 computers. Defendant moved for summary judgment asserting the plaintiff could not prove the elements of a *prima facie* case of liability under the Carmack Amendment and that any damages to the shipment were caused by the plaintiff's own negligence in the packaging of the goods. Defendant also argued that summary judgment would be proper as to the amount of any possible damages due to the plaintiff.

The court noted the plaintiff submitted merely a bill of lading issued at the deposit of the goods with the defendant as proof of the original condition of the computers at the time of issue. "As a general rule, a shipper's burden of proof that goods were delivered to a carrier in good condition is met by the proffer of a clean bill of lading." (citing cases). However, the court continued, "This proffer is only effective if the cargo at issue was packaged in a way that allowed its inspection by the carrier. In the case *sub judice* Plaintiff has not shown the computers were packaged in a way that allowed their inspection by Defendant." (citation omitted). The contents were not visible or open to inspection by the carrier. "In such a situation, a clean bill of lading does not meet a plaintiff's burden of proof on the element of good condition at deposit; instead, a plaintiff must present additional evidence of the condition of the cargo." (citations omitted).

In addition to the clean bill of lading, the plaintiff merely presented an affidavit of its agent stating the computers on the second pallet were resold and, based on discussion with the purchaser, operated without problems. The court found the statement did not provide evidence of the condition of the goods involved at the time of deposit to the Defendant, but rather the statement spoke to the condition of other goods post-delivery. Plaintiff presented no other evidence of the computers' condition at the time given to the Defendant. Because the plaintiff did not present a *prima facie* case, the court found the defendant was entitled to Summary Judgment.

The court went on to address the defendant's remaining arguments, while noting they were rendered moot by the failure of the plaintiff to present a prima facie case. It addressed the issue of the "shipper defense," *i.e.* that under the Carmack Amendment, a carrier is liable for damage to goods unless it can show the damage was caused by the act of God, the public enemy, an act of the shipper, public authority, or the inherent nature of the goods. Defendant raised this argument, but the plaintiff did not respond, thereby waiving its ability to challenge the argument and effectively conceding the point. Thus, even if the plaintiff had met its evidentiary burden, its recovery would still be precluded.

Finally, as to an argument concerning the extent of the damages, the defendant asserted that any recovery should be limited to $312.50 and if the court found summary judgment for the plaintiff, it would also be appropriate as to the amount damages due. The court remarked that the plaintiff also failed to respond to this argument. The released value of the goods was $5 per pound. Defendant conceded that four of the 112 computers were damaged which represented 3.57% of the total weight of the 112 computers, and thus had an approximate weight of 62.5 pounds. The plaintiff did not present any evidence that the damage exceeded the four computers as conceded by the defendant. As a result, the court stated any liability of defendant, if liable, would be limited to $312.50.

IF IT QUACKS LIKE A DUCK

Samsung Fire and Marine Insurance Company Ltd. v. MPIO Inc., Case No. 09-cv-23258 (JORDAN) (S.D. Fla. October 13, 2010).

Defendant moved to dismiss for improper venue based on a forum-selection clause contained in its warehousing and transportation agreement covering the shipment involved. The plaintiff underwriter asserted that the forum-selection clause was ineffective because the action was subject to the Carmack Amendment, which would override a forum-selection clause absent a clear statement in the forum-selection clause to the contrary. The moving defendant replied that the Carmack Amendment did not apply.

The court considered the motion to dismiss based on choice of forum to be under Rule 12(b)(3), and stated the plaintiff had the burden of showing its choice of forum was proper. The court delineated the issue to be whether the forum-selection clause applied as being fully dependent on whether the Carmack Amendment applied. The moving defendant said it did not apply because it was a broker for the purposes of the particular shipment. The plaintiff responded that the Defendant was responsible for the care and custody of the shipment from the point of origin to the place of delivery, even if it subcontracted all or part of the transportation to other carriers.

The court stated that under the Carmack Amendment "whether a company is a broker or carrier is not determined by what the company labels itself, but by how it represented itself to the world and its relationship to the shipper." Based solely on the limited affidavits provided, the court held there is a dispute of fact as to how the defendant held itself out to the plaintiff.

Accordingly, the court allowed the plaintiff the right to take discovery on the issue of defendant's role to determine if the Carmack Amendment applied. In the event discovery on the issue supported the defendant's contention that it was merely a broker, it could resubmit its motion to dismiss.

FROSTY OUTCOME WARMS UP

Eli Lilly and Company v. Air Express International USA, Inc., 615 F.3d 1305 (11th Cir. 2010).

The district court found DHL liable on house airway bills for damage to temperature sensitive insulin products which have been exposed to sub-freezing temperatures. Because of this exposure, the insulin products were destroyed. The district court found the plaintiffs' state law claims preempted by the Montreal Convention had held the actual carrier liable to a cap set forth in the Montreal Convention's (SDRs per kilo). However, as to DHL, the court found a service agreement applicable and that DHL's liability was capped at twice the total fees payable to it under the Service Agreement. See Cargo Newsletter No. 53.

On appeal, the circuit court noted the principle issue to be whether DHL's liability would be limited to 17 SDRs per kilo and in accordance with the Montreal Convention, or whether the long-term service agreement between DHL and the shipper constituted a stipulation to waive those limits.

The court noted the airway bill issued by DHL and the Service Agreements were separate contracts and that they were not executed contemporaneously. Indeed, the service agreement was entered into some eleven months before the Montreal Convention entered into force. While the court recognized that parties may stipulate that a contract shall be subject to limits of liability in excess of the 17 SDRs per kilo, it looked to whether the parties intended the liability provision in Article 5 of the long-term service agreement to constitute a stipulation to increase the carrier's potential liability.

The court considered that the Montreal Convention would allow a stipulation to increase such liability even if it should not be set forth in the individual waybill itself; however, considering the service agreement took effect prior to the Montreal Convention, if the parties had intended for the service agreement to constitute a stipulation to waive limits on liability, this would not have been expressly permitted by the Warsaw Convention and may have been invalid. This suggested the parties did not intend such a result. The service agreement made no mention of the Montreal Convention, the Warsaw Convention, the concept of declared value or limits of liability imposed by law. It did not contemplate that the service agreement would modify any subsequently executed air waybill contracts.

Noting the waybills did not contain any declaration of value of the cargo or a stipulation to waive the limits, the court found the course of conduct and dealings between the parties supported its conclusion that the parties did not intend to incorporate the service agreement's liability provision so as to waive the Convention's limits.

The court noted the plaintiff purchased insurance to fully cover the value of the cargo in the event of damage or loss in transit, and considered this purchase to be evidence suggesting that the plaintiff had declined to opt out of the Montreal Convention's liability regime.

The court found the parties did not intend for the liability provision of the service agreement to subject the airway bill contracts to increased limits of liability.

As to an argument presented by DHL objecting to an affidavit presented to and excepted by the district court, the court found the district court relied on only portions of the Affidavit relating to "business records" and found the witness qualified to testify concerning those documents, as they fell within the business records except to the hearsay rule.

As to arguments made that there were issues as to damages during transit and spoliation of evidence, the court noted the plaintiff produced records showing the insulin had been subject to sub-freezing temperatures; that any testing of insulin subject to sub -freezing would result in the destruction of the insulin and that the insulin would be unsaleable regardless of whether actual damages incurred. As to the alleged spoliation, the circuit court agreed that the destruction of the insulin did not affect DHL's ability to make a claim of defense as the exposure to sub-freezing temperature rendered the products worthless, regardless of the results of any tests that DHL may have conducted. Thus, DHL suffered no prejudice and the district court did not abuse its discretion in denying the claim for spoliation.

The Court of Appeals affirmed the district court's grant of summary judgment in favor of plaintiff on the issue of liability and affirmed denial of DHL's motion for summary judgment and for sanctions for spoliation. It reversed the ruling that DHL's liability should be governed by the terms of the service agreement and vacated the judgment and remanded to the district court with instructions that liability should be capped at 17 SDRs per kilogram of the damaged cargo pursuant to Article 22 of the Montreal Convention.

MERE LABEL DOESN'T SELL

Travelers Insurance v. Panalpina Inc., 2010 WL 3894105 (N.D. Ill. September 30, 2010).

A containerized shipment of pajamas moved from Hong Kong to Seattle and then by rail to a railroad yard just outside of Chicago. The owner of the pajamas retained one of the defendants to coordinate the transportation by truck from the railyard to the ultimate warehouse in Roanoke, Indiana. That defendant issued a delivery order "dispatching" shipment to a co-defendant (ITG), who had a property broker's license but not a license to be a carrier of goods. ITG was free to subcontract the transportation of the containers to another entity and did so to co-defendant Buckley who became the actual trucker.

The container was picked up from the railyard and delivered to Buckley's facility in Rockdale, Illinois, where it was to be held until making delivery to Roanoke, Indiana. A fire broke out in Buckley's trucking yard when a tractor in the trucking yard was set on fire and rolling down a hill, colliding with the container containing the pajamas. The fire and the smoke from the fire damaged the portion of the pajamas.

The plaintiff's subrogated underwriter moved for summary judgment against ITG on the issue of liability under the Carmack Amendment claiming that ITG was a "carrier" instead of a "broker" and therefore liable under Carmack. Summary Judgment was also asserted against Buckley on the issue of liability.

ITG claimed it was merely a broker and not liable under the Carmack Amendment which imposes liability only upon the "carriers" and "freight forwarders", not "brokers". Parsing through the definition of "carrier", "freight forwarder" and "broker" the court found ITG's status as "carrier" or "broker" focused on the nature of its relationship between itself and the entity retaining it, "not the label put on ITG's services." Plaintiff claimed that ITG held itself out to the public as a "trucking company".

The court found the facts asserted by ITG did not create a genuine issue of a material fact: "A broker's license is not dispositive evidence that the defendant is a broker, rather, the heart of the analysis is the relationship between the two relevant parties." The court found the undisputed facts established that ITG was a carrier and granted Plaintiff's motion for partial summary judgment against it.

As to the co-defendant trucker, plaintiff claimed it was liable under the Carmack Amendment as a carrier in possession of the container when the damage occurred. The trucker, however, argued that the Carmack Amendment provides for freedom from liability because the act of arson caused the fire.

The court noted that courts had not directly addressed the issue of whether arson is the type of conduct which would fall under the "public enemy" defense; however, courts have indirectly indicated that arson may constitute that defense. At the same time, the court considered it to be premature to make this determination because the cause of the fire was still under investigation and yet to be determined. Therefore, the court denied Plaintiff's motion as to the actual trucker.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

Chair: Robert D. Peltz
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THE ABC'S OF THE IMO'S: ISM CODE FOR SMS COMPLIANCE

Robert D. Peltz
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Confusion has been generated over the past few years by certain so-called experts regarding the requirements and operation of the International Safety Management (ISM) Code regulations regarding the development of establishing Safety Management System (SMS) procedures. Some experts have erroneously contended that the ISM sets forth specific standards and guidelines for the investigation, reporting and analysis of accidents and incidents. These experts have gone on to argue that shipowners will violate these ISM standards if their accident reporting and analysis do not comport with the expert's interpretation of "the ISM standards."

The argument of these experts has been based in part upon a misreading of 33 C.F.R. § 96.230, which states that a vessel owner's Safety Management System must "provide for safe practices and vessel operation," "establish and implement safeguards against all identified risks," "establish and implement actions to continuously improve safety management skills with personnel ashore and aboard vessels," and "ensure compliance with mandatory rules and regulations, taking into account relevant national and international regulations, standards, codes and maritime industry guidelines, when developing procedures and policies for the Safety Management System."

The ISM Code was adopted by the International Maritime Organization (IMO) "to provide for safe practices in vessel operation and a safe work environment aboard vessels." *See Eisenberg v. Carnival Corp.*, No. 07-22058-CIV, 2008 WL 2946029, at *3 (S.D. Fla. July 7, 2008). The ISM Code accomplishes this purpose by requiring ship owners to develop <u>their own</u> unique Safety Management System, which establishes individual requirements for incident reporting investigation, analysis and correction. 33 C.F.R. § 96.240 provides in pertinent part:

> The functional requirements of the Safety Management System must include-- . . .
>
> (d) Procedures for reporting accidents, near accidents, and non-conformities with provisions of the company's and vessel's Safety Management System, and the ISM Code;. . .
>
> (f) Procedures for internal audits on the operation of the company and vessel(s) safety management system; and
>
> (g) Procedures and processes for management review of company internal audit reports and correction of non-conformities that are reported by these or other reports.

The ISM Code does not set forth actual rules or requirements for accident investigation, analysis, reporting or risk assessments. Instead it merely requires the shipowner to create its own safety management system for accident investigation, reporting and analysis "that meets certain objectives and provides a minimum level of documentation." *Eisenberg*, 2008 WL 2946029, at *3; *see* also 33 C.F.R. § 96.200, 96.220. The resulting unique and individual system must thereafter be approved by the flag state, which is normally accomplished by delegation to various classification societies or approved inspectors. The ship owner's compliance <u>with its own SMS</u> is thereafter subject to audit by the flag state.

Therefore, experts who testify that a cruise line violates the ISM Code by failing to perform a certain type of investigation or accident analysis and/or to send accident reports to the Coast Guard for all passenger and crew injuries fail to understand (or deliberately misstate) the actual operation of the Code. The Code only requires the shipowner to develop its own SMS to establish individual guidelines for accident reporting, documentation and analysis.

Once the ship owner's SMS is approved by its flag state and a document of compliance (DOC) is issued, the sole issue under the ISM is whether the shipowner has complied <u>with its own guidelines</u> and not whether it complied with the expert's opinion of the type of investigation, documentation and risk assessment which he believes should be required under the ISM.

[15995]

ENACTMENT OF THE CRUISE VESSEL SECURITY AND SAFETY ACT

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On July 27, 2010, President Obama signed into law the Cruise Vessel Security and Safety Act of 2010, Pub. L. No. 111-207, 124 Stat. 2243 (2010) (codified at 46 U.S.C. §§ 3507-08 and in scattered sections of 46 U.S.C.).. Although many of the provisions were already in place and were voluntarily followed by the cruise industry, the Act formalizes safety and security requirements and imposes penalties for failure to comply. Various provisions of the Act are scheduled to take effect at different times over the course of approximately three years.

The Act touches on safety design features as well as practices for reporting and dealing with allegations of crimes. The provisions of the Act include requirements for:

- Peepholes or other means of visual identification, security latches and time sensitive key technology on all passenger and crewmember cabin doors (46 U.S.C. § 3507(a)(1)(B)-(C));
- Maintenance of on-deck electronic video surveillance (46 U.S.C. § 3507(b)(1));
- Maintenance of rape kits and medication to prevent sexually transmitted diseases as well as the availability of medical staff trained in forensic sexual assault examination (46 U.S.C. § 3507(d));
- Training of crewmembers in the prevention, detection and preservation of evidence (46 U.S.C. § 3508); and
- Reporting of alleged crimes occurring anywhere in the world and the maintenance of a ship log which would record all deaths, missing persons and alleged crimes including sexual assaults, missing persons and thefts (46 U.S.C. § 3507(g)).

CASE LAW UPDATE

Jones Act

Wagner v. Kona Blue Water Farms, LLC, 2010 WL 3566731, 2010 U.S. Dist LEXIS 96105, 2010 AMC 2455 (D.Haw. 2010)

The district court concluded that the U.S. Supreme Court's recent decisions in *Atlantic Sounding Company v. Townsend*, 129 S.Ct. 2561, 2009 AMC 1521 (2009) and *Exxon Shipping Company v. Baker*, 554 U.S. 471, 2008 AMC 1521 (2008), did not change the well established line of authority holding that punitive damages are not recoverable under the Jones Act, 46 U.S.C. § 30104, since they constitute non-pecuniary damages, which are excluded under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. *See, e.g., Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1987 AMC 2024 (9th Cir. 1987), *modified on reh'g and reh'g en banc denied,* 866 F.2d 318 (1989), *cert. denied*, 110 S.Ct. 200 (1989); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 1985 AMC 769 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985); *see also Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913) (FELA). Although observing that a footnote (note 12) in the *Townsend* decision left open the question of whether punitive damages may be recovered in claims brought under the Jones Act, the court concluded that the majority's failure to expressly address this question was not sufficient to change the well established pre-existing law. A contrary conclusion was reached in a California superior court decision involving the same defendant. *See Larson v. Kona Blue Water Farms, LLC*, 2010 AMC 1230 (Cal. Sup. Ct. 2010).

Utoafili v. Trident Seafoods Corp., 2010 AMC 887 (N.D. Cal. 2009)

Although the Jones Act, 46 U.S.C. § 30104, generally incorporates the rights of railway workers under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (FELA) to seamen, not all FELA provisions will apply. Therefore, while FELA has been interpreted to prohibit forum selection clauses in employment contracts, most courts that have considered the issue have refused to apply this prohibition to seamen. *See, e.g., Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 2007 AMC 442 (5th Cir. 2007); *Great Lakes Dredge & Dock Co. v. Larrisquitu,* 2007 AMC 2141 (S.D. Tex. 2007). The amendments to the Jones Act in 2006 and 2008, which deleted the Jones Act's internal venue provision, were found not to change the pre-existing rule in light of the stated Congressional intent "to codify and 'make clearer' [the] existing law."

Endicott v. Icicle Seafoods, Inc., 224 P.3d 761, 2010 AMC 624 (Wash. 2010)

While the Jones Act, 46 U.S.C. § 30104, affords a seaman the right to select the jurisdiction for his lawsuit, where he chooses to file suit in state court the defendant will not be precluded from insisting upon a jury trial.

In re Vulcan Materials Co., 674 F.Supp. 2d 756, 2010 AMC 1251 (E.D. Va. 2009)

A U.S. Navy land-based supply clerk, who was killed in a collision between a Navy boat and a private barge while on a training exercise, was not a Jones Act, 46 U.S.C. § 30104, seaman. Since the decedent was also not covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq., or otherwise engaged in maritime trade, he was considered a non-seafarer under *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996), whose beneficiaries were entitled to recover those damages permitted by the applicable state law.

Dise v. Express Marine Inc., 714 F.Supp. 2d 558, 2010 AMC 1701 (D.Md. 2010)

Neither the Jones Act, 46 U.S.C. § 30104, nor the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, precludes a shipowner from recovering for damage to its property caused by its negligence in a counter-claim to a seaman's personal injury suit. *See also Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 2006 AMC 58 (5th Cir. 2005) (Jones Act does not bar employer counter-claims); *Cavanaugh v. W. Md. Ry. Co.*, 729 F.2d 289 (4th Cir. 1984), *cert. denied*, 469 U.S. 872 (1984) (FELA did not bar a counterclaim against an injured railroad worker).

Maintenance and Cure

Royal Caribbean Cruises, Ltd. v. Whitefield,
664 F.Supp. 2d 1270, 2010 AMC 325 (S.D. Fla. 2009)

A federal district court may exercise discretion to dismiss a petition for a declaratory decree filed by a shipowner seeking to determine a seaman's entitlement to maintenance and cure where the seaman *subsequently* files a state court action seeking recovery under the Jones Act, 46 U.S.C. § 30104, and for maintenance and cure.

Clausen v. Icicle Seafoods, Inc., 2010 AMC 793
(Wash. Super. Ct. 2010)

A trial court concluded that particularly egregious conduct on the part of a shipowner coupled with a seaman's extreme vulnerability justified a punitive damage award of $1.3 million even though the seaman's compensatory damages only amounted to $465,525.00. The court observed that a footnote in the U.S. Supreme Court's decision in *Atlantic Sounding Company v. Townsend*, 129 S.Ct. 2561, 2009 AMC 1521 (2009), noted that the one to one ratio established in *Exxon Shipping Company v. Baker*, 554 U.S. 471, 2008 AMC 1521 (2008), did not apply to maintenance and cure claims. Even if the ratio was applicable, the court concluded that the particular circumstances in the case justified a departure from it.

Death Claims

In re Maryland Marine, Inc., 641 F.Supp. 2d 579, 2010 AMC 351
(E.D. La. 2009)

Damages for loss of society are not recoverable under the general maritime law for the death of a passenger occurring in state territorial waters. The parties had previously agreed that Alabama's wrongful death statute would not be applicable, and accordingly the court only considered the application of general maritime law. The district court refused to extend the holding in *Sea Land Services, Inc. v. Gaudet,* 414 U.S. 573, 1973 AMC 2572 (1974), which had allowed such recovery for the widow of a longshoreman, based upon binding case law that had refused to apply *Gaudet* to non-seafarers in the past. *See, e.g., Tucker v. Fearn*, 333 F.3d 1216, 2003 AMC 1705 (11th Cir 2003), *reh'g and reh'g en banc denied*, 82 Fed. Appx. 216 (2003), *cert. denied*, 540 U.S. 1149 (2004).

Shore Excursions

Winograd v. Carnival Corp., No. 36-2-8051, 2010 WL 9318 (N.J. Super. Ct. App. Div. May 28, 2010) (per curiam), *cert. denied*, 203 N.J. 438 (2010)

In a case handled by Cruise Line Committee member Kevin McGee, the Appellate Division of the Superior Court of New Jersey affirmed the trial court's dismissal of a passenger's claim for injuries, which were sustained when she was attacked and robbed during a shore excursion, under the one year time bar clause of her ticket. The court applied the time bar provision to the plaintiff even though her traveling companion purchased and retained possession of the tickets. The appellate court also upheld the dismissal of the plaintiff's consumer fraud claim under New Jersey law on the grounds that the plaintiff was required to file suit in Broward County as required by the ticket forum selection clause.

Admiralty Jurisdiction

In re Parkwest Galleries, Inc., 2010 AMC 644 (W.D. Wash. 2010)

Claims of fraud arising from art auctions held aboard cruise ships at sea are subject to admiralty jurisdiction. Accordingly, maritime law will pre-empt provisions of state consumer protection laws that allow attorney's fees and punitive damages that conflict with maritime law.

Civil Procedure

Krupski v. Costa Crociere S.p.A., 130 S.Ct. 2485, 2010 AMC 1564 (2010)

In an unanimous decision, the U.S. Supreme Court reinstated a passenger's personal injury lawsuit against Costa Crociere, which had been dismissed after the carrier had been added to the litigation following the running of the statute of limitations. The plaintiff filed its lawsuit three weeks before the expiration of the time bar period in the U.S. District Court for the Southern District of Florida as required under the forum selection provisions of the ticket. The suit, however, named Costa Cruise Lines, rather than Costa Crociere, the actual carrier. Following the expiration of the time bar period, Costa Cruises brought the existence of Costa Crociere to the attention of plaintiff's counsel in its answer, through its interested party corporate disclosure statement and then by virtue of its motion for summary judgment.

Following oral argument on the motion for summary judgment, the district court gave the plaintiff leave to amend her complaint in order to add Costa Crociere. Although the plaintiff filed and served her amended complaint within the time period set forth in the court's order, the plaintiff had not sought to file her amended complaint until after 130 days following the filing of her initial complaint. The district court concluded that the relation back provisions of Rule 15(c) of the Federal Rules of Civil Procedure had not been met in full, because subsection (1)(C) states that: (1) the amended complaint must be served within the 120 day requirement set forth by Rule 4(m), and (2) the new defendant must "know or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." The district court concluded that the plaintiff had failed to timely act after learning of the "existence" of Costa Crociere.

After the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal, the U.S. Supreme Court reversed it, holding that the critical issue was not the plaintiff's knowledge of the existence of Costa Crociere, but whether the new defendant Costa Crociere knew or should have known that it would have been sued but for the plaintiff's mistake. The court further held that even though the plaintiff knew of Costa Crociere's "existence," it still could have been "mistaken" within the context of Rule 15(c), since confusion existed over which of the two defendants was the actual carrier.

Kurpiel v. Calument River Fleeting, 691 F.Supp. 2d 827, 2010 AMC 666 (N.D. Ill. 2010)

A party may not create a material issue of fact to defeat summary judgment by submitting an affidavit that contradicts its earlier deposition testimony. Accordingly, a seaman's employer was granted summary judgment where the plaintiff filed an affidavit attempting to contradict his earlier deposition testimony concerning the existence of available safety equipment.

Forum Non-Convenience

Pinder v. Moscetti, 666 F.Supp. 2d 1313, 2010 AMC 393 (S.D. Fla. 2008)

The doctrine of *forum non conveniens* is available in claims arising under the Death on the High Seas Act, 46 U.S.C. § 30202. Accordingly, the court dismissed a claim arising out of the boating death of a Bahamian resident occurring in the Bahamas even though it was caused by the alleged negligence of Florida residents. In its analysis, the court first determined whether U.S. law would apply to the case by using the eight factor test set forth in *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953). The court then utilized the four prong *forum non conveniens* analysis to conclude that the doctrine favored the handling of the case by the courts of the Bahamas. *See Gulf Oil v. Gilbert*, 330 U.S. 501 (1947); *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932 (11th Cir. 2005); *Leon v. Million Air, Inc.*, 251 F.3d 1305 (11th Cir. 2001).

Jurisdiction

Infant Doe v. Abercrombie & Kent, Inc., 2010 AMC 730 (S.D. N.Y. 2010)

The courts of New York did not have jurisdiction over an Ecuadorian cruise line, which conducted tours of the Galapagos Islands, under the facts of the case. The cruise line maintained no offices or agents within the state and had no direct contact with the plaintiff. Instead, the plaintiff purchased her ticket through an exclusive travel service, which marketed, arranged, reserved and supervised the trip that was carried out aboard a vessel owned by the Ecuadorian cruise line. Since the service provider did not have an exclusive arrangement with the cruise line, but instead arranged and marketed similar trips on numerous carriers throughout the world, the court concluded that the provider was not an agent of the cruise line for the purposes of creating jurisdiction.

Experts

American National Fire Insurance Co. v. M/V Seaboard Victory, 2010 AMC 675 (S.D. Fla. 2009)

A marine surveyor with sixteen years of experience in inspecting and adjusting marine cargo losses was found to be competent under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to provide expert testimony regarding the time period in which missing cargo was allegedly removed from its container.

State National Insurance Co. v. Anzhela Explorer LLC, 2010 AMC 421 (S.D. Fla. 2009)

A retired U.S. Coast Guard warrant officer was found qualified under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to testify as an expert witness regarding the cause of the sinking and the seaworthiness of a vessel based on his experience, which included acting as a deck officer, serving as a maritime security inspector and supervising major vessel conversions and new boat constructions.

T*aylor v. TECO Barge Line, Inc*., 642 F. Supp. 2d 689, 2010 AMC 1160 (W.D. Ky. 2009).

An expert subject to the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), was precluded from rendering opinions based upon National Institute of Safety and Health's Revised Lifting Equation in a seaman's action seeking recovery for a back injury, as the court concluded that it was not relevant and could not be used as proof of an employer's negligence in allowing an employee to lift more than fifty-one pounds. *See also Touray v. Glacier Fish Co*., 2007 AMC 1161 (W.D. Wash. 2007). The court expressed concerns about the application of the Lifting Equation to the real world, while also noting that it is designed to limit lifting to a weight that nearly all healthy individuals could perform repetitively over a substantial period of time. This is a separate issue from the idea that the lifting equation may be used as proof of negligence whenever an employer allows an employee to lift more than fifty-one pounds.

Time Bar Provisions

Lischinskaya v. Carnival Corp., 865 N.Y.S. 2d 334, 2010 AMC 427 (N.Y. App. Div. 2008), *mot. for leave to app. denied*, 912 N.E. 2d 1072 (N.Y. 2009)

A New York appellate court held that it was bound by federal maritime law in upholding a forum selection provision in a passenger ticket requiring suit be filed in the U.S. District Court for the Southern District of Florida. The appellate court further overturned the trial court's determination that it could require the cruise line, as a condition precedent to dismissal, to waive its one year time bar provision under the state's laws governing *forum non conveniens* dismissals. The appellate court noted that unlike *forum non conveniens* determinations, which have a discretionary aspect, the application of the contractual forum selection clause was mandatory and therefore did not permit the court to impose such conditions.

Discovery

Shames v. Celebrity Cruises, Inc., 2010 AMC 1399
(S.D. Fla. 2010)

Although a passenger is required under a forum selection clause to file suit in a specific forum (*i.e*., the Southern District of Florida), the passenger is still required to come to the forum for the purposes of giving a deposition.

Wolf v. James Miller Marine Services, Inc., 2010 AMC 1750
(E.D.N.Y. 2010)

There is no distinction under the Federal Rules of Civil Procedure between depositions taken for the purposes of discovery and those taken for use at trial. Accordingly, a deposition taken for "discovery purposes" prior to a *de bene esse* deposition was admissible at trial after the subsequent deposition was cancelled.

Limitation Proceedings

In re Mission Bay Jet Sports, LLC, 2010 AMC 1320
(S.D. Cal. 2010)

The court concluded that proceedings under the Limitation of Liability Act, 46 U.S.C. §§ 30501 et seq., were applicable to a claim arising out of a jet ski accident. *See also In re Vulcan Materials Co*., 674 F.Supp. 2d 756, 2010 AMC 1251 (E.D. Va. 2009) (holding that limitation proceedings were applicable to a rigid-hull inflatable boat used by the U.S. Navy in a training exercise).

Arbitration

Harrington v. Atlantic Sounding Co., 602 F.3d 113, 2010 AMC 1358 (2d Cir. 2010), *cert. denied*, 113 S.Ct. 1054 (2011)

A post injury arbitration agreement entered into between a seaman and his employer is not barred by virtue of either the Federal Employer' Liability Act, 45 U.S.C. § 56, or the Jones Act, 46 U.S.C. § 30104. In reaching this conclusion, the court further concluded that such an agreement is neither unconscionable nor against public policy. Although such an agreement may still be attacked on the grounds of a lack of mental capacity or intoxication, the seaman has the burden of proving these defenses and further establishing that he did not subsequently ratify the agreement.

Forum Selection Clauses

Wiesenberg v. Costa Crociere, S.p.A., 35 So. 3d 910 (Fla. Dist. Ct. App.), *rev. denied*, 51 So. 3d 1156 (Fla. 2011)

Florida's Third District Court of Appeal, which is the source of many decisions involving cruise line issues because of the location of many cruise lines within its jurisdiction, upheld a forum selection clause requiring that all suits be filed on the admiralty side of the U.S. District Court for the Southern District of Florida. Previously, the Third District had upheld clauses requiring suit to be filed in the Southern District of Florida, which permitted resort to diversity jurisdiction in the proper case. In *Leslie v. Carnival Corp.*, 22 So. 3d 561, 2008 AMC 380 (Fla. Dist. Ct. App. 2008), *aff'd by an equally divided court on reh'g en banc*, 22 So.3d 567 (Fla. Dist. Ct. App. 3d DCA 2009), *rev. denied*, 44 So. 3d 1178 (Fla. 2010), *cert. denied*, 131 S.Ct. 1603 (2011), the Third District had previously held that such clauses were enforceable even where they had the effect of requiring the passenger to file suit on the admiralty side because of a lack of diversity jurisdiction. Apparently, in reliance upon this decision, Costa Crociere amended its ticket to require all passenger suits to be filed on the admiralty side of the federal district court, thereby excluding any right to trial by jury in such cases.

This decision allows cruise lines to preclude jury trials in any passenger cases. However, since the court's opinion involves a question of maritime, rather than state law, a federal district court would not be bound by the Third District's decision and could therefore permit suit to be filed on the civil side.

Damages

Stacy v. Rederiet Otto Danielsen, A.S., 609 F. 3d 1033, 2010 AMC 1782 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 1493 (2011)

The U.S. Court of Appeals for the Ninth Circuit held that under the "zone of danger" rule for negligent infliction of emotional distress, the plaintiff need only prove that he was directly in danger and then suffered emotional distress and not that he witnessed an accident or peril to someone else. Accordingly, the court held that the district court had erred by dismissing the claim of a fisherman whose boat was passed by an unseen freighter so close in dense fog that he could hear its engines and feel its wake. Shortly thereafter, the fisherman heard a radio report of a collision and began to look for survivors. Four days later, he learned that after passing his boat the freighter had run into another fishing vessel causing the death of her captain.

Ticket Provisions

Hadlock v. Norwegian Cruise Lines, Ltd., 2010 AMC 1167
(C.D. Cal. 2010)

Evidence of the booking practices of a cruise line, including the content of its website and electronic communications procedures, was found to be sufficient to establish the terms of a passenger's ticket without production of the ticket itself. In this case, the court required enforcement of an arbitration provision applicable to all claims other than for personnel injury, illness or death against a passenger's claim based upon the alleged failure to provide him with proper accommodations for his handicap under the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq*.

COMMITTEE ON FISHERIES

Chair: Kevin J. Thornton
Editor: David S. Smith, Esq. of Ouellette & Smith, Gloucester, MA

FISHERIES CASE BRIEFS

Van Valin v. Locke, 628 F. Supp. 2d 67 (D.D.C. 2009).

Operators of charter fishing vessels challenged National Marine Fisheries Services (NMFS) regulation limiting charter sport fisherman in Southeast Alaska area of northern Pacific Ocean to one Pacific halibut per calendar day. This rule was supported by local commercial and subsistence halibut fishermen who intervened as defendants. The plaintiffs challenged the rule on various bases, including that it was not fair and equitable as required by the Halibut Act, 16 U.S.C. § 773(c); that the Secretary did not make a finding of fairness and equity under the Act; and that the Secretary improperly relied on stale data. After an analysis under the Administrative Procedures Act, Halibut Act and Magnuson-Stevens Act, the Court concluded that the Secretary was not required to make finding of fairness and equity before issuing the rule; that the rule was fair and equitable; and the Secretary considered the best scientific information available when issuing the rule.

General Category Scallop Fishermen v. Secretary of U.S. Dept. of Commerce, 720 F. Supp. 2d 564 (D.N.J. 2010).

Former general category scallop permit holders challenged a final rule issued by NMFS on April 14, 2008, known as Amendment 11 to the Atlantic Sea Scallop Fishery Management Plan that established criteria and authority for determining the percentage of scallop catch allocated to the general category fleet, and establishing an individual quota (IFQ) permit system based upon a control date that was set on November 1, 2004. The plaintiffs argued that the lack of advance notice that NMFS would implement a control date, and subsequent adoption of retroactive control date, violated the standards for rule-making under the Magnuson-Stevens Act and the Administrative Procedures Act. In the end, the court stated that it was "sympathetic to the plight of the plaintiffs, [but] the narrow scope of review under the Magnuson Act and APA precludes the Court from granting the plaintiffs the relief they seek."

Duckworth v. Locke, 705 F. Supp. 2d 30 (D.D.C. 2010).

Commercial Fishermen appealed a final decision of the Secretary regarding Notice of Violation and Assessment (NOVA) and Notices of Permit Sanctions (NOPS) issued to fishermen for alleged violations of the Magnuson-Stevens Act. There were 15 counts brought against the fishermen, eight pertained to false statement in connection with fishing permit application and seven counts pertaining to unlawful fishing for lobsters. An ALJ concluded that the fishermen should be fined $130,000 and revocation of operator and vessel permits for the false statements and another $910,000 for the lobster violations. The ALJ rejected the fishermen's contention that the sanctions should be reduced due to their inability to pay. On appeal to the Administrator the fines were reduced to $50,000 for the false statements and $50,000 for the lobster violations. The permit sanctions were changed to a 48 month suspension. On appeal, the District Court affirmed the Agency's actions and concluded that the fines did not violate the Magnuson-Stevens Act, its regulations or the Eighth Amendment's Excessive Fines Clause.

Borkowski v. F/V MADISON KATE, 599 F.3d 57, 2010 AMC 872 (1st Cir. 2009).

Commercial fishing vessel crew filed suit against the vessel's owner for unpaid wages. There was no written agreement memorializing the terms of employment. The crew members were paid on a lay-share system under which the net proceeds are divided up into "shares" that are then awarded, in whole or part to crew members depending upon their experience and performance. Procedurally, after the parties made openings, they then submitted the case on their trial briefs without submitting any testimony. The District Court concluded that two of the crew members were to be awarded nothing, while the other crew member, who was given a lesser share should have his "share" adjusted upwards to be the same as the other two. The First Circuit concluded that the fishermen's claim stalled due to lack of evidence of the highest rate of wages at the port from which the seaman was engaged as required by 46 U.S.C. § 11107. This case is a good example of what is necessary to bring a fishing crew members claim for unpaid wages.

Gonzalez v. U.S. Dept. of Commerce, 659 F. Supp. 2d 474 (S.D. Tex. 2010)

Shrimp trawler owners brought an action challenging four separate but related administrative actions concerning civil penalty assessments and permit sanctions issued by the Defendant. The sanctions in question amounted to relatively small dollar fines, but the bigger issue concerned permit sanctions. These sanctions were issued to two companies that were owned by plaintiff Gonzalez. These two companies had nothing to do with the underlying offense, yet the permits issued to the two companies were sanctioned without an opportunity for a hearing to contest the permit sanctions. The plaintiffs challenged the agency's assessments against them under Magnuson-Stevens Act and the APA. In the end, the Court concluded that the Notice of Permit Sanctions and/or Notice of Intent to Deny Permit (NOPS/NIDP) should not have been issued to the two non-violating sister corporations of the corporate violator without an opportunity to contest the permit sanctions imposed on them first. As such the NOPS/NIDP that were issued against the two non-violating sisters corporations were vacated and remanded for further hearing at the agency level.

Western Sea Fishing Company v. Locke, 722 F. Supp. 2d 126 (D. Mass. 2010).

This is another case where fishermen "caught in the regulatory net" have been denied the necessary permits and will no longer be able to fish for their targeted species, herring. The issue was a permit splitting ban that stated if a vessel acquired its permit via permit splitting it would no longer "remain valid." The court found that the implementation of the permit-splitting ban did comply with the Magnuson-Stevens Act's requirements. The court considered the issues of whether the Secretary was empowered to make regulations to protect future optimum yield when that fishery is not presently in danger of being overfished, and whether the secretary can regulate for the good of all fisheries without regard to meeting the optimum yield of any single fishery. The optimum yield as defined at 16 USC § 1802(33)(c) in the case of an over-fished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield "on a continuing basis." The court said that the language "on a continuing basis" created a duty to allow for harvesting at optimum yield in the present, while at the same time protecting fishery output for the future, consistent with Congress' intention that fisheries be preserved for food production and recreational use. The court went on to say that the justification for refusing to grant Cape Clam a license was not rationally related to achieving optimum yield when there is simply no evidence of contention of a current danger of over-fishing. The justification seems likely to exacerbate the gap between landings and optimum yield. In addition, the action would maintain landings well below optimum yield. The court held that maintaining landings well below optimum yield in one fishery as a means of preventing over-fishing in other fisheries does not comport with the National Standard 1 as again, such a concern should be reflected in the analysis when setting the optimum yield.

Stacy v. Rederiet Otto Danielson, A.S., 609 F.3d 1033, 2010 AMC 1782 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1493 (2011)

Owner and operator of commercial fishing vessel sued the owners and operators of large freighter for negligent infliction of emotional distress, after freighter passed vessel at close quarters in dense fog and then collided with a different fishing vessel, resulting in death of captain of that vessel. The freighter owner filed a motion to dismiss for failure to state a cause of action. The Plaintiff alleged that he was within the zone of danger and that he suffered emotional distress from the fright caused by the negligent defendants. The court cited the test from *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) which held that "the zone of danger" test allowed recovery for "those plaintiffs who sustain a physical impact as a result of a defendant's negligence conduct, or who are placed in immediate risk of physical harm by that conduct. The Ninth Circuit noted that the Supreme Court quoted a law review article that stated 'for those within the zone of danger of physical impact can recover for fright, and those outside of it cannot." The court allowed the Plaintiff's case to go forward because he alleged he was within the zone of danger and that he suffered emotional distress from the fright caused by the defendant. Nothing else was requited to be asserted, such as physical manifestations.

[16010]

COMMITTEE ON MARINE ECOLOGY AND MARITIME CRIMINAL LAW

Chair: Dennis Minichello

BILGE & BARRATRY

Volume I, Issue 2, November 2010

From the Chair

It seems like only yesterday when we rolled out Volume 1, Issue 1 of this newsletter, and here we are publishing Issue 2. This issue contains several noteworthy contributions, including an update on the Asian Carp threat to commercial navigation in the Great Lakes from Stephanie A. Espinoza; a report from Christine Fazio on a legal challenge to New York's water quality certificate for the vessel general permit; recent conflicting cases from the Eastern District of Virginia involving piracy skillfully analyzed by H. Allen Black III; case summaries of maritime criminal cases reported by Vince C. Reuter; and, finally, a summary of CERCLA action from the Northern District of Illinois with implications for vessel operators in which the Chair represented one of the third-party defendants. I am sure you will find something useful, or at least interesting in each of these contributions.

Dennis Minichello,
Chair Editor

Articles

Asian Carp - The Newest Threat To The Great Lakes

Stephanie A. Espinoza*

The Great Lakes have long been affected by various invading non-native species. Lamprey eels, alewives, the round goby and, most recently, zebra mussels have all threatened the delicate ecosystem of the Lakes themselves, while having repercussions on the commerce that takes place on the Lakes. Scientists, environmentalists, fishermen and those connected to maritime commerce have been following the rise of the Asian carp as the newest, and potentially most aggressive, species to endanger this area. While the federal government has been addressing this issue for years with monitoring, sampling and erection of electrical barriers to combat the migrating fish, the fight surfaced this year when the state of Michigan began a courtroom battle with litigation which sought to impose extreme measures to respond to this threat, such as closing several locks along the Chicago waterways leading to Lake Michigan, and even disconnecting the century-old Chicago waterway system itself

This Article will briefly address the biological characteristics of the "Asian carp" species itself, and its origins in the United States. This Article will further address the recent litigation and political attempts to reduce or eliminate the threat of Asian carp to the region. Finally, this Article will discuss the ramifications of the battle against the Asian carp to the maritime industry.

Biological Characteristics of the Asian Carp

The term "Asian carp" actually refers to a group of four different types of carp: the bighead carp, the silver carp, the grass carp and the black carp. Eaxch of these fish has somewhat different characteristics, eating preferences and breeding preferences. However, they are similar in their voracious appetites for vegetation and plankton, high mobility, fast reproduction rates and ability to reach large sizes.[1] Asian carp are viewed as a grave threat to both plant life, as well as native species of fish which feed on that plant life. In addition, Asian carp can be dangerous to humans. There have been numerous reports of Asian carp jumping out of the water and onto watercraft, sometimes injuring passengers on board.

The Asian carp has been present in the United States since the 1960's. The various species of carp were voluntarily introduced to a number of southern states in the 1970's, primarily as a way to combat certain algae in commercial fisheries.[2] The very characteristics which now render the Asian carp to be a threat to the ecosystems of the Great Lakes were what drew commercial fisheries to these fish: they are insatiable eaters who controlled aquatic vegetation and plankton in commercial ponds. It is believed that some of these carp escaped from contained ponds near the Mississippi River in states such as Arkansas and Mississippi, and slow-

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[1] Rasmussen, Jerry L., "The Cal-Sag and Chicago Sanitary and Ship Canal: A Perspec tive on the Spread and Control of Selected Aquatic Nuisance Fish Species," U.S. Fish and Wildlife Service, January 1, 2002, at 5.

[2] Id.

ly migrated north. Asian carp have been breeding over the past several decades, and have established a large breeding population in the Illinois River. Asian carp have also been reported in Lake Erie, Lake Michigan and near Lake Ontario, in limited or isolated numbers.[3]

The federal government has been following the increase in population and northern migration of the Asian carp for years. In 2002, the U.S. Army Corps of Engineers began building one of three electrical dispersal barrier systems over the Illinois River. This electrical barrier works by emitting a slight current through the water, producing an electric field. As the fish enters this electric field, it becomes uncomfortable, but is not killed, and is generally forced to turn around.[4] It is believed that the electrical barrier has been successful in deterring Asian carp from traveling north. Since the installation of the barriers, only one live Asian carp has been caught north of the barriers, and due to its age, it is believed that carp may have been living in the waters of Lake Calumet prior to the erection of the barriers.

The focus of the battle against the Asian carp has fallen on Illinois, and particularly the greater Chicagoland area, because of the unique system of waterways leading into the Chicago River, and, ultimately, Lake Michigan. Thousands of years ago, it is believed that the Great Lakes Basin and the Mississippi River Basin were connected through a system of shallow lakes and marshes, resulting in various fish species migrating northward and ending up in the Great Lakes.[5] About 6000 years ago, after the last glaciers receded, the Great Lakes Basin and the Mississippi Basin were separated.[6] It was not until the late 1800's, when Chicago built the Chicago Sanitary and Ship Canal for the purpose of allowing sewage to flow southward and away from Lake Michigan, that the two bodies of water were connected again.[7] Subsequently, additional canals were built to facilitate increased navigation on the Illinois, Chicago and Calumet Rivers. Today, the canal is known as the Cal-Sag and Chicago Sanitary and Ship Canal.[8]

Currently, there are large breeding grounds of Asian carp in the Illinois River. The Illinois River has been deemed an ideal habitat for Asian

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[3] Id.
[4] www.asiancarp.org/frequently-asked-questions/#40
[5] Rasmussen at 1.
[6] Id.
[7] Id.
[8] Id. at 2.

carp to breed and live, given the temperature and food sources available in the river. However, only one live carp and one dead carp have been found north of the electric barriers. Thus, it is greatly disputed whether Asian carp pose as imminent a threat as some environmentalists and state Attorneys General have asserted, or whether they would even be able to establish a sustainable population in the Great Lakes.

There is a small market for commercial fishing of Asian carp, generally exported to Europe, Asia and Canada. However, there is not much of a market for Asian carp as a food source here in the United States. Asian carp have many tiny bones that make them difficult to fillet. At least one upscale Chicago restaurant has made creative efforts to market the fish, however.[9]

Litigation Addressing the Asian Carp Problem

On December 21, 2009, the state of Michigan filed suit against the state of Illinois and the Metropolitan Water Reclamation District of Chicago in the United States Supreme Court, seeking injunctive relief in the form of closure of the navigational locks leading to Lake Michigan. Michigan attempted to reopen a decades-old case involving water rights between itself and Illinois, but in early 2010, the United States Supreme Court declined to reopen the matter.

On July 19, 2010, the states of Michigan, Minnesota, Wisconsin, Ohio and Pennsylvania filed suit in the U.S. District Court for the Northern District of Illinois against the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District, seeking injunctive and declaratory relief. Specifically, the Complaint includes a count for Public Nuisance and seeks administrative review of the Army Corps' actions in addressing the Asian carp problem. Subsequently, a number of entities have intervened in this suit, including the Coalition to Save our Waterways, Wendella Sightseeing Tours, the City of Chicago and the Grand Traverse Band of Ottawa and Chippewa Indians.

The plaintiff states sought a preliminary injunction against the defendants, requiring them to temporarily close and cease operation at several locks and sluice gates along the canal system, install block nets and gates at the sluice gates and to continue the use of strategic poisoning of areas

[9] http://articles.chicagotribune.com/2010-04-22/entertainment/ct-play-0422-vettel-asian-carp-taste-20100421_1_carp-sea-bass-fish

in which Asian carp may be present. Most severely, the plaintiff states requested that the court enter an order "requiring the District and the Corps to take all appropriate and necessary measures to expeditiously develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin and the CAWS from Lake Michigan so as to prevent the migration of bighead carp, silver carp, or other harmful aquatic invasive species into Lake Michigan."[10] Essentially, the plaintiff states, led by the state of Michigan, seek to have the intricate canal system that has been in place for over one hundred years totally dismantled in an effort to keep the Asian carp from entering Lake Michigan.

In September of 2010, Judge Dow heard three days of testimony on Michigan's request for a preliminary injunction. The plaintiff states presented one witness, Dr. Lodge of Notre Dame University. He presented testimony regarding his oversight of the controversial e-DNA research that has attempted to pinpoint areas in various bodies of water where Asian carp DNA may be present, thus suggesting the presence of the fish themselves. He also gave opinions as to the environmental and economic impact that Asian carp would have on Lake Michigan and the Great Lakes if a breeding population was established in those areas. The defendants presented evidence in the form of numerous witnesses, demonstrating that the Army Corps of Engineers is doing everything within its power to keep the Asian carp at bay. Further, the defendants vigorously cross-examined Dr. Lodge to discredit the e-DNA methodology and establish that the results obtained were not an accurate method for establishing the presence of Asian carp, and his research has not been subjected to peer review. The court heard closing oral arguments on October 18, 2010, and a ruling on the preliminary injunction is expected before the end of the year.

Repercussions for the Maritime Community

The ramifications for this lawsuit on the maritime industry are obvious, and ominous. Should Judge Dow grant the preliminary injunction, the navigational locks on the Chicago Sanitary and Ship Canal would be closed, no longer allowing commercial or recreational vessels to travel through that route. This blockage of traffic would immediately result in numerous businesses either going out of business, or being faced with increased operating costs that would severely impact their ability to com-

[10] Complaint, Request for Relief, p. 31.

pete.[11] This cost would most surely be passed on to the consumer. In addition, for those businesses which had to find alternate routes for transporting goods, this would lead to a substantial increase in the amount of motor traffic in the Chicagoland area and beyond. Not only do the locks serve a navigational purpose, they are also essential for flood control for the greater Chicagoland region. Should the locks be closed, the Metropolitan Water Reclamation District would have virtually no control over flooding during periods of heavy rain.

Even if the preliminary injunction is denied, the Asian carp problem is here to stay. There will still likely be periodic lock closures for monitoring and poisoning parts of the river in which Asian carp are suspected to be. The construction of the third electronic barrier may also bring delays in navigation. It is certainly in the interest of members of the maritime community to support the control of the Asian carp population. However, the potential threat of this species to the riverways and Great Lakes should not override the significant public interest in maintaining the canal system for commercial and recreational use.

Conclusion

The fight against the Asian carp, both in the rivers and in the courts, continues to become more heated with each passing day. The U.S. and local governments continue to do everything in their power to address this threat, while other interests continue to put pressure on these entities to do more. While this current climate may, at first glance, seem counterproductive, it has caused all parties to maintain a high level of vigilance in confronting this very real problem. It is hoped that the goal of keeping a breeding population of Asian carp from establishing a presence in or near the Great Lakes can be met, while retaining the free use and enjoyment of all of the navigational waterways of this area in their current form. More information regarding this issue can be found through the website of the Asian Carp Regional Coordinating Committee, www.asiancarp.org.

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

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[11] See testimony of Prof. Joseph Schwieterman.

[16016]

NEW YORK'S WATER QUALITY CERTIFICATE FOR THE VESSEL GENERAL PERMIT: LATEST NEWS

Christine Fazio*

Background

In October, 2008, the New York State Department of Environmental Conservation (NYSDEC) proposed new standards for the discharge of ballast water from commercial vessels operating in New York waters to address the problem of aquatic nuisance species that may be introduced into New York waters via ships' ballast water. After a brief public comment period, the standards were finalized on November 30, 2008, and amended on December 17, 2008. NYSDEC created these standards through a certification under Section 401 of the Federal Clean Water Act, rather than by statute or rulemaking. The requirements apply to vessels that call on New York ports <u>and</u> vessels that simply transit New York waters destined for ports in other states or countries and that do not discharge ballast waters in New York. The 401 Certificate is part of the U.S. Environmental Protection Agency's Vessel General Permit (VGP).

Under this 401 Certificate, by January 1, 2012, all vessels operating in New York waters will be required to install environmental technology that can treat ballast water to meet a standard for destroying organisms that is 100 times more stringent than international standards established by the International Maritime Organization (IMO) in 2004. All vessels constructed after January 1, 2013 operating in New York waters must install environmental technology that can treat ballast water to a level 1000 times more stringent than IMO standards.

The Legal Challenge in New York Court

In December 2008, a group of stakeholders including ports, vessels owners and operators and maritime industry associations challenged the New York ballast water regulations in New York State court on the grounds that New York exceeded its authority under the Clean Water Act and U.S. Constitution and failed to follow New York administrative law and environmental review requirements. In June 2009, the trial court rejected the petition with little explanation. An appeal was taken and in February 2010, the New York State Supreme Court Appellate Division, Third Department affirmed the lower court's decision, again with very little explanation. New York's highest court, the Court of Appeals, did not grant the motion for certiorari.

Because challenges to water quality certifications can only be filed in state court and not federal court, the plaintiffs had no choice but to file the petition in state court. With regard to the procedural and environmental review of the state law claims, the New York courts simply granted deference to NYSDEC. The courts did not attempt to address thoroughly any of the federal claims. In particular, because the Clean Water Act applies to pollutant discharges, plaintiffs argued that NYSDEC has no authority to regulate ships simply transiting in New York waters when there is no discharge of ballast water. The New York courts failed to discuss this transit claim.

Current Status

The New York 401 Certificate provides for vessels owners and operators to seek extensions of the 2012 date to install ballast water treatment systems if no treatment systems exist that can meet the 100x IMO standards. All ships that transit through New York waters are believed to have filed such extension requests with NYSDEC that demonstrate that no treatment systems are available to meet the 100x IMO standards established in the 401 Certificate. Decisions on the requests are pending.

The extension requests filed were based on several sources of information.

• The Shipping Industry Ballast Water Coalition, including the World Shipping Council, Chamber of Shipping of America, and the Shipping Federation of Canada, worked together to monitor the development of ballast water treatment technologies. The Great Lakes Ballast Water Collaborative, an informal group of shipowners, state and federal officials, researchers and other stakeholders, also met to examine the development of ballast water treatment technology and verification methods to assist Wisconsin in the development of standards for Wisconsin's general ballast water discharge permit that will take effect in 2014 for oceangoing vessels.

• In March 2010, the World Shipping Council sent letters to 36 leading ballast water treatment technology vendors with questions about the treatment standards the technology will meet, the testing standards used to evaluate the technology, and the equipment's production, availability and installation requirements. Eleven companies responded, including five which had obtained Type Approval Certification demonstrating that their technologies meet the IMO standard, five companies which were working towards but had not yet obtained Type Approval Certification and one company which responded that it had removed itself temporarily from the ballast water treatment market after recent tests indicated that its system would require additional testing. None of respondents nor any other ballast water technology developers contacted provided documentation, certifications, or any other materials demonstrating that their systems would be able to meet the 100x IMO standard required in the New York Certification. In fact, most technology vendors stated that they were not capable of knowing whether their systems would be able to meet the 100x IMO standard because there is no approved testing protocol to test systems to standards above the IMO standard.

• Shipping companies and associations also reviewed the comments filed on the Coast Guard's proposed ballast water regulation, including: comments by Dr. Mario Tamburri, Director of the Maritime Environmental Resource Center, which further confirmed that it is scientifically inappropriate to try to extrapolate data from test methods used to certify technology to meet IMO standards for standards that are 100x or 1000x more stringent; and information by the Royal Netherlands Institute for Sea Research, which further confirmed the difficulties of testing treatment systems to demonstrate compliance with a 100x IMO standard because of the large volume of treated ballast water that is necessary.

Overall, it is expected that the U.S. Coast Guard will soon finalize ballast water regulations to require treatment systems on ships, requirements which would be incorporated into the VGP. It is believed that many states have been frustrated with the slow pace of federal action to address aquatic nuisance species and this frustration has been the reason that states have chosen to develop their own standards that are more stringent than the best management practices adopted by EPA in the VGP. Nonetheless, it is hoped that in order to protect the U.S. economy, including international and interstate commerce, and in recognition that marine shipping is the environmentally preferred mode to transport cargo, that New York and other states will recognize the national ballast water standards, once finally adopted, and will thereafter withdraw state standards that are not achievable.

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PIRATES WIN 1, LOSE 1 IN VIRGINIA SPLIT DOUBLE HEADER

H. Allen Black, III*

The judges in two strikingly similar piracy cases pending in the Eastern District of Virginia have reached diametrically different conclusions in defining the crime of "piracy under the law of nations" pursuant to 18 U.S.C. § 1651. In *U.S. v. Said*, Criminal Action No. 2:10cr57, 2010 WL 3893761 (E.D. Va. Aug. 17, 2010), Judge Raymond A. Jackson applied an 1820 Supreme Court holding that piracy means "robbery at sea" and dismissed piracy charges against the allegedly unsuccessful pirates. However, in *U.S. v. Hasan*, Criminal No. 2:10cr56, 2010 WL 4281892 (E.D. Va. Oct. 29, 2010), Judge Mark S. Davis applied the definition of piracy as set out in Article 101 of the United Nations Law of the Sea Convention ("UNCLOS") to uphold charges against similarly inept pirates.

Background

Both cases arise from incidents that would be semi-comic, if not for the fatal outcomes and the threat such incidents pose to shipping. Both incidents occurred in the early morning hours of April Fools Day, April 1, 2010, off the coast of Somalia, and involved Somali nationals.[12]

The defendants in the *Said* case had approached the *USS ASHLAND* in a skiff in the Gulf of Aden at around 5:00 on the morning of April 1, 2010. As the ship loomed up out of the dark, at least one person in the skiff fired a weapon at the *ASHLAND*. The *ASHLAND* is, of course, a U.S. naval vessel, and it fired off an overwhelming response, destroying the skiff and killing one of the persons on board. As the sailors from the *ASHLAND* were recovering the survivors from the water, they saw an AK-47, a ladder and a hook, common implements of Somali pirates, lying the in the burning and sinking skiff.

The defendants in the *Hasan* case were also lying in wait for a ship to attack that night, when they spotted a passing vessel. Three of the defendants boarded a skiff with AK-47 rifles and an RPG and raced to attack the ship. Unfortunately for them, their intended victim turned out to

[12] The background facts stated in this note are based on the allegations set out in the indictments, and the courts assumed them to be true for the purposes of deciding the motions.

be the U.S. Navy Frigate *USS NICHOLAS*, which returned fire. The skiff attempted to flee, but was caught by the *NICHOLAS*, which went on to capture the other two defendants on the pirate mother-ship.

In due course, the defendants in both cases were brought to Norfolk, Virginia, to face a battery of charges, including charges of violation of § 1651, piracy under the law of nations. In virtually identical motions, the defendants in each case moved their respective courts to dismiss the charges of piracy. They argued that since they were not alleged to have actually boarded, captured or taken anything of value from the target vessels, the allegations failed to state the crime of "piracy under the law of nations." The defendants asserted that piracy under the law of nations had been defined as "robbery at sea," and robbery requires an actual taking. Accordingly, each court had to resolve an interesting and challenging legal question – what is the definition of "piracy under the law of nations"

The *Said* Court's Analysis

Judge Jackson in the *Said* case agreed with the defendants that the specific charge – "piracy under the law of nations" in violation of 18 U.S.C. § 1651 – was defined by the 1820 U.S. Supreme Court case of *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), to mean "robbery at sea." Accordingly, since the government did not allege that the defendants had boarded, captured, or taken anything of value from the *ASHLAND*, the allegations were insufficient to allege piracy under the law of nations.

The court began its discussion by asserting that it must look to relevant judicial opinions to determine "what Congress meant by piracy as defined by the law of nations, as stated in § 1651 at its 1819 enactment." *Said*, 2010 WL 3893761, at *3. The court noted that *Smith* was the only case to have specifically examined the definition of piracy under § 1651. However, the court failed to recognize that the Congressional reference to the "Law of Nations" was necessarily a reference to an international "common law" that develops over time. *See, e.g.*, E. Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction,* 103 Nw. U. L. Rev. 149, 157 (2009) (noting that the Congressional references to the law of nations in the eighteenth and early nineteenth centuries were intended to incorporate customary international law as part of American general law).

The court further ignored the recent case of *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), in which the Supreme Court has made clear that Congressional references to the "Law of Nations" or customary international law are intended to be references to that law as it exists at the time of the alleged offense.

Instead, the court seized on *Smith's* 1820 definition of piracy as "robbery at sea" and disregarded the government's argument that since *Smith* actually involved robbery at sea, it necessarily did not address whether other acts could constitute piracy as well. In the course of attempting to support its limited view of piracy, the court relied on several cases having nothing to do with piracy, and a handful of early nineteenth century cases that, like *Smith*, involved the taking of vessels and property.

Oddly enough, the court went so far as to mis-cite the case of *United States v. Libellants & Claimants of The Schooner Amistad*, 40 U.S. 518 (1841) as support for *Smith's* narrow definition. Apparently forgetting the practice in earlier reporters of summarizing counsel's arguments, the court erroneously attributed to the Supreme Court's opinion the argument of the attorney general that the Africans who took over the slave ship to regain their freedom were by that act pirates, citing to *Smith* as authority for the proposition.

The *Said* court went on to reject specific examples offered by the government of instances in which piracy was held to encompass acts beyond robbery. Most notably, the court chose to disregard the case of *Harmony v. United States*, 43 U.S. 210 (1844), in which the Supreme Court expressly considered whether acts that stopped short of robbery would constitute "piracy under the law of nations" under the Act of 1819 (the same Act considered by the Court in *Smith*). The Supreme Court had concluded that piracy encompassed all acts of "piratical aggression," stating that it "punishes any piratical aggression or piratical search, or piratical restraint, or piratical seizure, as well as a piratical depredation. Either is sufficient. The search or restraint may be piratical although no plunder follows, or is found worth carrying away." *Id*. at 233.

However, Judge Jackson rejected the *Harmony* case on the basis of a line from the Syllabus of the case which stated that "the word 'piratical' in the act is not to be limited in its construction to such as by the laws of nations are denominated piracy." *Said*, 2010 WL 3893761, at *5. However, a review of the opinion itself shows that the line is in error. Nowhere in the opinion does the Court purport to distinguish between "piratical acts" and piracy under the law of nations. To the contrary, the Court expressly referred to the acts at issue as being within piracy under the law of nations as stated in the Act.

Ultimately, Judge Jackson addressed – and rejected – the government's central argument that "piracy under the law of nations" is to be determined based upon current international law, and that contemporary international law would include the alleged actions within the scope of "piracy." The court concluded that current international definitions were not helpful, noting the different definitions offered by various writers on the subject. Further, the court pointed to the continuing references to the *Smith* case as evidence that contemporary international law did not offer any better definition. *Id*. at *6-11.

Perhaps most puzzling was the summary rejection of the reference to the UNCLOS, which includes an express definition of piracy at Article 101. Although approximately 160 nations have ratified UNCLOS, and although the United States has recognized it as setting out customary international law, the court rejected UNCLOS on the basis of a law review note criticizing the clarity of the Convention's definition. *Id*. at *10. The court ultimately dismissed the usefulness of UNCLOS by noting that "the United States has chosen not to ratify it." In so doing, the court apparently confounded the political and diplomatic questions presented by the Convention with the articulation of a virtually unanimous acceptance of a codified law of the sea. Moreover, the court ignored the fact that the precise Article at issue – the definition of piracy under the law of nations – was essentially the same as that in the High Seas Convention of 1958, to which the United States was a signatory.

In any event, the court determined that Constitutional due process constraints called for a conservative approach to defining piracy under the law of nations. *Id*. at *10. The court noted that the defendants were charged with a number of more specific crimes that more precisely fit the alleged conduct, while the definition of piracy in the international community is unclear. Accordingly, the court dismissed the charges of piracy under the law of nations, effectively concluding that an attack against a ship cannot be piracy, unless it succeeds.

The *Hasan* Court's Analysis

Judge Davis in the *Hasan* case takes a far more detailed and analytical approach to the question in a lengthy but well-written review of the law of piracy. Of course, he had the benefit of Judge Jackson's opinion from the *Said* case, and in many ways, his opinion can be read as an extraordinarily thorough rebuttal of his fellow-judge's reasoning and conclusion.

Indeed, following the release of Judge Jackson's opinion in the *Said* case, the government offered a supplemental response to the motion to dismiss in the *Hasan* case , formally noting to Judge Davis the decision in the *Said* case and the conclusion there that "Contemporary International Law is Unsettled on the Definition of Piracy." However, the government also attached what is in essence an expert statement of international law from Professor Harold Hongju Koh, the Legal Adviser of the U.S. Department of State, directly rebutting Judge Jackson's disregard of UNCLOS. In a remarkably concise statement, Professor Koh notes the evolution of the law of nations and that law's definition of piracy through the High Seas Convention and ultimately to UNCLOS. In a footnote to his opinion, Judge Davis ultimately granted the defense motion to strike the submission as untimely, but noted that the court "essentially reaches the same conclusion as the Koh Declaration."

The thoroughness of the Judge Davis's opinion is best reflected by an outline or table of contents of the decision. The court begins with a comprehensive analysis of the historical context. That analysis reviews the Constitution's "Define and Punish" Clause (Art. I, § 8, cl. 10) under which § 1651 was enacted, explains the understanding of piracy by the Founders and early legislatures, addresses the distinction between piracy under the law of nations and piracy as defined by national law, and discusses the application of universal jurisdiction as the distinguishing feature of piracy under the law of nations.

The court then reviews the legislative implementation and development of the crime of piracy under the law of nations, from 1790 to the present. In particular, the court notes that the law of 1819, which first used the term "piracy under the law of nations," was a direct response to the Supreme Court's 1818 decision in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641-42 (1818). In that case, the Court had held that the Act of 1790, which provided a statutory definition of piracy, failed to invoke universal jurisdiction because such jurisdiction could only be asserted against piracy as accepted by the law of nations. Accordingly, Congress enacted the predecessor of § 1651 to create an express prohibition against "piracy under the law of nations," thereby adopting that crime as a separate offense punishable by United States courts. From there, Judge Davis reviews the chain of cases involving piracy under the law of nations in both the United States and foreign courts, and the references to piracy under the law of nations in international treaties and conventions.

Having "set the stage," the court then begins its proper analysis by reviewing the definition of piracy under the law of nations as it was understood in the Nineteenth Century, and then asking the question that Judge Jackson in the *Said* case ignored – specifically, whether the definition of "piracy under the law of nations" could evolve, or was stuck at the definition established in 1820. After tracing the statutory language, and its meaning as understood by the drafters, the court reviews Supreme Court cases regarding the development of the law of nations and international law to conclude that the term "law of nations" "connotes a changing body of law … the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense." As a consequence, Judge Davis holds that the court need not delve into an extensive analysis of the contours of the decision in *U.S. v. Smith*, but rather must determine how the law of nations defines piracy today.

The court then surveys current customary international law as set out in the High Seas Convention and UNCLOS, relevant judicial decisions from recent piracy trials in Asia and Africa, and scholarly writings. Judge Davis ultimately holds that the definition of "piracy under the law of nations" is expressly defined in Article 101 of UNCLOS, as an expression of the overwhelming consensus of the international community. In response to the concern (as noted by Judge Jackson) that the United States has not ratified UNCLOS, Judge Davis notes that the United States did ratify the High Seas Convention – in which the definition of "piracy" is virtually the same.

Finally, applying the facts alleged in the indictment – that the accused persons cruised towards the USS NICHOLAS and fired upon the vessel on the high seas for private ends – the court has no difficulty in concluding that those facts fairly allege violations of piracy under the law of nations. Accordingly, the court sustained the charges.

With the *Said* case already on appeal to the Fourth Circuit Court of Appeals, and the *Hasan* case likely to follow, the matter will now be squarely presented to the Court of Appeals. The scope and detail of the Hasan decision suggests that much of that court's work has already been done for it. However, one practical issue suggested by Judge Jackson, and perhaps the only issue overlooked by Judge Davis, is how the definition of piracy and the corresponding universal jurisdiction set out in UNCLOS stands up against the tepid international legal response to the ongoing piracy crisis off of Somalia.

Earlier this year, the Secretary General of the United Nations published a report on the international prosecution of piracy, Report S/2010/394, noting that even though UNCLOS provides an internationally accepted definition of piracy, effective prosecution has been lacking. International naval forces routinely release unsuccessful "pirates," declining to prosecute, or even arrest, those whose attacks against vessels fail to result in the capture of the vessels or the taking of property.

That notable absence of prosecution of captured pirates reflects a bigger question raised by the restricted jurisdictional principles in the Convention for the Suppression of Unlawful Acts at Sea (the "SUA Convention"). The SUA Convention, created in response to the terrorist acts on the passenger ship ACHILLE LAURO, applies a "nexus" requirement to jurisdiction over the various prohibited acts. In the more recent U.N. Security Council resolutions addressing piracy off of Somalia, the U.N. has referred to the SUA Convention for enforcement measures. In practice, Kenya is the only nation to have prosecuted pirates without some jurisdictional nexus to the forum. If the U.N. does not endorse piracy as a crime of universal jurisdiction, can the UNCLOS definition still be as definitive as held by Judge Davis?

Government officials from around the world, and the Secretary General, readily identify persons zipping around in skiffs with machine guns, RPGs, hooks and ladders off the Somali coast as "pirates." However, the absence of a coherent international legal response could undercut the use of UNCLOS as a criminal standard in a U.S. court. Thus, Judge Jackson's ultimate point, that the reference to "piracy under the law of nations" is so vague as to raise a due process issue, may be the most powerful part of his decision, and only question mark to the opinion of Judge Davis.

In any event, one hopes that the Fourth Circuit will offer some clarity to meaning of the nineteenth century term "piracy under the law of nations" in an era of twenty-first century pirates.

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CITY OF WAUKEGAN VS. NATIONAL GYPSUM CO., ET AL.: A MOST UNUSUAL CASE

Dennis Minichello*

The Comprehensive Environmental Response Compensation Liability Act of 1980 ("CERCLA") was legislation intended to provide a response to and remedy for heavily polluted sites in the United States requiring cleanup. In the 1980s, the U.S. EPA put the Harbor in Waukegan, Illinois and some of the surrounding land on the National Priorities List primarily because the harbor was determined to be contaminated with PCBs that had been discharged into and around the harbor by the now defunct Outboard Marine Corp., a marine products manufacturer. In 1992, OMC completed a remediation project that involved dredging, treating and disposing of around one million pounds of PCB-contaminated sediments. Subsequently, in 2000, OMC closed its plants in the area of the Harbor and filed for bankruptcy. The City of Waukegan then claimed that it took title to portions of the site in 2002 and 2005. Notwithstanding the action of the U.S. EPA and the remediation project, completed by OMC pursuant to the National Contingency Plan as defined by the CERCLA statute, the City of Waukegan claimed that the PCB contamination persisted in the harbor sediments at levels above the original regulatory limit set for purposes of the remediation project. In 2007, the City filed a lawsuit in the U.S. District Court for the Northern District of Illinois, Eastern Division against National Gypsum Co.; Bombardier Motor Corp. of America; Lafarge North America, Inc.; Lafarge Building Materials, Inc., f/k/a Blue Circle, Inc.; St. Mary's Cement, Inc.; and the Waukegan Port District, all companies which operated businesses or used the harbor for the operation of their businesses, alleging both CERCLA and Illinois statutory law claims.

Before the court pushed all of the parties into settlement negotiations resulting in a final consent decree, the court issued seven Memoranda Opinions and Orders ruling on various motions to dismiss. The salient features of each of those motions and Memoranda Opinions and Orders are summarized below.

560 F. Supp. 2d. 636, 2008 AMC 1168 (N.D. Ill. 2008).

The essential issue addressed in this decision was whether the defendants were either "an owner or operator" as those terms are defined under CERCLA. For purposes of this summary, the main issue is whether the defendants could be considered operators because each of them was alleged to have caused vessels to come into the harbor in connection with their normal business operations and disturbing lake sediment by their prop-wash. The court answered that question in the negative regarding most of the defendants, but then noted that: "the entities that owned the vessels that traversed the harbor conceivably could be said to have conducted the activities in the harbor that caused the alleged releases and, thus, to the operators of the harbor with respect to those activities." The referenced activities were the disturbance of the PCB contaminated sediments on the harbor floor by the propellers of the offending vessels. Because of this language, the defendants subsequently filed third party claims against numerous vessel owning companies that had operated various types of vessels in the harbor within the applicable period of time.

2008 WL 4201680, 2008 U.S. Dist. Lexis 83808;
(N.D. Ill. Sept. 8, 2008).

The plaintiff's reaction to the first opinion was to file a second amended complaint, which was addressed in the next Opinion and Order. The main issue in this opinion had to do with the applicable statute of limitations (whether the three year or six year limitation found in 42 U.S.C. § 9613(g)(2) applied). The court found it necessary to determine whether the underlying consent decree involved a "removal action" or a "remedial action." The court decided that the consent decree made it clear that the cleanup at the site was a "remedial action" causing the applicability of the six-year statute of limitations, resulting in a finding that the CERCLA claims were time-barred.

587 F. Supp. 2d 997 (N.D. Ill. 2008).

By the time this Opinion and Order was issued, the court had vacated its previous ruling on the time-bar issue on the plaintiff's motion for reconsideration and this opinion dealt with the remaining grounds for dismissal, which had been cited by the defendants in their motion to dismiss. The primary issues, again, were the status of the individual defendants as either owners or operators. The motion was met with a mixed response from the court, which did not finally resolve the case in favor of the defendants. For purposes of this newsletter, a footnote in the decision, again, mentions the potential liability of vessel owners due to the prop-wash of their vessels making deliveries to the defendants operating in the harbor. The court also stated that: "Operating a vessel that causes a release of hazardous substances may not be the equivalent of breaking into a facility to maliciously discharge such substances, but it implies a greater degree of control than just contracting for vessels to make deliveries."

<u>2009 WL 674347, 2009 U.S. Dist Lexis 20356,
(N.D. Ill. March 12, 2009).</u>

Several of the defendants had filed counterclaims against the City of Waukegan seeking contribution under § 113(f)(1) of CERCLA. Here the court, after an analysis of the prior consent decree, ruled that the counterclaims were barred because the consent decree encompassed the substance of the defendants' contribution claims, requiring the dismissal of those counterclaims.

<u>2009 WL 972608, 2009 U.S. Dist. Lexis 29796
(N.D. Ill. April 9, 2009).</u>

This Memorandum Opinion and Order was the result of the defendants' asking the court to reconsider its earlier decision dismissing their counterclaims against the plaintiff and seeking to file an amended counterclaim. The court changed its mind again and allowed the filing of one count of the proposed amended counterclaim, finding that it did not address matters that were covered by the underlying consent decree.

<u>2009 WL 3053725, 2009 U.S. Dist. Lexis 93333
(N.D. Ill. Sept. 2, 2009).</u>

By this time in the litigation, the defendants had filed third-party complaints against numerous vessel owners/operators for contribution pursuant to § 113(f) of CERCLA, 42 U.S.C. § 9613(f), which had included the Port District itself, the U.S. Army Corps of Engineers and the U.S. Coast Guard, as well as other vessel owning/operating companies that had operated vessels within the harbor. That action had generated a motion to dismiss both the third-party complaint and the plaintiff's second amended complaint. The court decided to first order that the plaintiff file a third-amended complaint before it would rule on those motions. The reason for ordering the filing of the third-amended complaint was the commencement of a new remedial investigation by the EPA in 2008, after the lawsuit was filed. The subsequent study and plan that was developed proposed a dredging project to remove sediment containing PCBs and at the time of this ruling it was anticipated that the EPA would issue an amended record of decision, but the EPA had publicly stated that it anticipated that the cost of the cleanup project would be paid by the government and the state of Illinois. Consequently, the court wanted more particularity in its pleading (citing the *Twombly* decision of the U.S. Supreme Court) as to the exact nature of the past and future response costs claimed by the plaintiff and whether those would still be available under either § 107(a) or § 113(f), or possibly both of CERCLA in view of the EPA's remediation plan.

2009 WL 4043295, 2009 U.S. Dist. Lexis 109413
(N.D. Ill. Nov. 20, 2009).

This final Memorandum Opinion and Order came in the wake of the filing of the third-amended complaint by the plaintiff. This Memorandum Opinion and Order, again, focused on § 107(a) and § 113(f) in light of the record of decision issued by the EPA. Essentially, the court found that the third-amended complaint stated sufficient facts to survive a motion to dismiss with regard to some of the response costs.

After this final Memorandum Opinion and Order, the court began a process which pushed the parties toward settlement and finally did result in a settlement between all of the parties. The political climate in the City of Waukegan had changed and it was looking to obtain a final resolution of the claim before incurring any further legal expenses. The defendants and third-party defendants, facing extensive litigation costs, were encouraged by the court to contribute to a settlement fund. The case was finally settled and the appropriate consent decree entered by the court.

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CASE SUMMARIES

Crew Member Pleads Guilty to Charges Related to Pollution on High Seas [U.S. Attorney's Office-Eastern District Louisiana, Press Release October 20, 2010]

Michael Murphy, age 56, from Phoenix, AZ, pled guilty today in federal court before U.S. District Judge Sarah Vance for making false statements to the U.S. Coast Guard, announced U.S. Attorney Jim Letten and the U.S. Department of Justice.

According to the factual basis, Murphy admitted he was the chief engineer on the R/V Laurence M. (L.M.) Gould, a 2,966 gross ton American-flagged ice-breaking research vessel that served under contract for a national science foundation. As chief engineer, one of his duties was to ensure the vessel's Oil Record Book was accurate when presented to U.S. Coast Guard, Murphy further admitted, while on the high seas from July 2004 through September 2005, in an effort to keep the bilge tank from filling to capacity, he routinely ordered crew members to discharge oily wastewater overboard. He also admitted that he was aware that the Oily Water Separator was not working properly, and had not been maintained or repaired. On September 27, 2005, Murphy presented the Oil Record Book knowing the book contained false entries, to U.S. Coast Guard personnel conducting an inspection.

Murphy faces a possible maximum sentence of five (5) years imprisonment, a $250,000 fine, and three (3) years supervised release. Murphy is scheduled to be sentenced on January 12, 2011.

In a related case, the owner of the R/V Gould, Offshore Service Vessel, Inc., pled guilty on July 29, 2010 before Judge Eldon Fallon, to discharging oily wastewater from the bilge tank of the R/V Gould overboard on the high seas, and agreed to pay a fine of $1,750,000 and a community service payment of $350,000. OSV is scheduled to be sentenced on November 4, 2010.

This case was investigated by the U.S. Coast Guard Criminal Investigative Services and was prosecuted by Senior Trial Attorney Dan Dooher with the Environmental Crimes Section, Department of Justice, and Assistant United States Attorney Dorothy Manning Taylor.

Submitted by Dennis Minichello of Marwedel, Minichello and Reeb, P.C.

United States v. Aksat Denizcilik Ve Ticaret A.S. (M/T KERIM), Department of Justice, Press Release, May 21, 2010.

On March 24, 2009, the United States Coast Guard, using information gathered from several crew members, boarded and inspected the M/T KERIM while it lay anchored at the Port of Tampa. The U.S. Coast Guard officials discovered a "magic pipe" used to bypass the ship's oil pollution prevention equipment. That pipe was constructed and used by the vessel's officers and crew members to discharge oil sludge directly into the ocean. In turn, crew members failed to record the "magic pipe" discharges in the M/T KERIM's oil record book.

The case was subsequently investigated by the U.S. Coast Guard and the Environmental Protection Agency. It was then prosecuted by the Justice Department's Environmental Crimes Section and the U.S. Attorney's Office for the Middle District of Florida.

On May 21, 2010, Aksat Denizcilik Ve Ticaret A.S., the Turkish corporation that operated the vessel between 2006 and 2009, pleaded guilty to two felony counts for knowingly failing to fully and accurately maintain an oil record book. The court sentenced the company to pay a $725,000 fine and to serve three years of probation. The court also ordered the company to implement an environmental compliance plan.

United States v. Cooperative Success Maritime S.A. (M/T CHEM FAROS), Department of Justice, Press Release, June 7, 2010.

On March 29, 2010, while at port in Morehead City, North Carolina, a crew member aboard the M/T CHEM FAROS, a 21,145 gross-ton cargo ship, notified a United States Coast Guard inspector through a handwritten note that that vessel was "discharging bilge illegally" through the use of a "magic pipe." The crew member went on to point authorities to its location in the workshop of the engine department. The subsequent investigation revealed that the pipe was used up to 10 times to pump oil-contaminated waste directly overboard from September 2009 to March 2010.

The investigation was conducted by the U.S. Coast Guard and the Environmental Protection Agency with assistance from the FBI's Computer Forensic Team. It was then prosecuted by the Justice Department's Environmental Crimes Section and the U.S. Attorney's Office for the Eastern District of North Carolina.

On June 7, 2010, Cooperate Success Maritime, S.A., the operator of the M/T CHEM FAROS, pleaded guilty in U.S. District Court for the Eastern District of North Carolina for violating the Act to Prevent Pollution from Ships, and to making material false statements. The district court sentenced the company to pay a $850,000 penalty. At least $150,000 of this will be paid to the National Fish and Wildlife Fund as a community service payment. Lastly, the court sentenced the company to serve five years of probation, during which they must implement an environmental compliance plan.

United States v. Vaja Sikhardulidze (M/T CHEM FAROS), Department of Justice, Press Release, June 7, 2010; *see also* The United States Attorney's Office, Eastern District of North Carolina, Press Release, August 17, 2010.

The "magic pipe" incident involving the M/T CHEM FAROS also included charges against a seafarer employed by Cooperate Success Maritime, S.A. According to the investigation, on March 18, 2010, Vaja Sikharulidze, the chief engineer, personally ordered Crewmembers to bypass the oil-water separator through the "magic pipe" and discharge oil-contaminated bilge directly into the ocean.

Mr. Sikharulidze, a citizen of Georgia, also acknowledged making false entries in the oil record book from approximately March 6, 2010 to March 17, 2010 to conceal the true amount of bilge waste stored by the M/T CHEM FAROS. He further stated that the prior chief engineer had initiated the practice, but that he had continued using the false data without correction.

On May 3, 2010, approximately a month before his employer, Mr. Sikharulidze pleaded guilty to violating the Act to Prevent Pollution from Ships. On August 17, 2010 a judge for the U.S. district court for the Easter District of North Carolina sentenced the seafarer to one-year probation to include seven days of home detention. This sentence is said to reflect a reduction based on substantial cooperation in the investigation.

United States v. Irika Shipping S.A. (M/V Iorana), Department of Justice, Press Release, July 9, 2010; *see also* United States Attorney's' Office, District of Maryland, Press Release, September 21, 2010.

On January 8, 2010, the U.S. Coast Guard boarded the M/V IORANA (Greece) to investigate the suspected use of a “magic pipe” to purposefully and illegally pollute United States’ waters. A Cewmember earlier sparked this investigation when he passed a note to Customs and Border Protection upon the ship’s arrival in Baltimore, Maryland. The whistleblower also handed over photographs of the device taken on his cell phone. In turn, Coast Guard authorities discovered a 103-foot long hose that rerouted oily waste and sludge from the separator to the ship’s boiler blow down system. Further, the Coast Guard seized the oil record book that had concealed the process.

Seventh months later, on July 8, 2010, Irika Shipping S.A., the owner and operator of the M/V IORANA, pleaded guilty in the United States District Court for the District of Maryland. According to the plea agreement, the company pleaded guilty to two counts of violating the Act to Prevent Pollution from Ships for failing to maintain an accurate oil record book, one count of obstruction of the Coast Guard’s inspection, three counts of concealing evidence, one count of making materially false statements, and one count of obstruction of justice. In their plea, Irika Shipping, S.A. admitted that the M/V IORONA dumped approximately 23 cubic meters of oil contaminated sludge and bilge waste directly overboard in December 2009. Further, they admitted deliberately concealing the bypass hose before arriving at each port, and not having any budget dedicated to properly dispersing waste.

Because the Greek-flagged cargo ship had earlier made port calls to Tacoma, Washington and New Orleans, Louisiana, the plea agreement also included admissions and penalties in all three districts. In all, Irika Shipping was sentenced to pay a $4 million total penalty, be placed on probation for a maximum period of five years, and be subject to the terms of an Enhanced Environmental Compliance Program.

The proposed $4 million penalty includes a $3 million criminal fine and $1 million in organizational community service payments devoted to marine environmental projects. As reported, in Maryland $750,000 will go to the National Fish & Wildlife Foundation, in Washington, $125,000 will go to environmental projects in and around the waters of Puget Sound and the Straits of Juan De Fuca, and in Louisiana, $125,000 will go toward funding habitat conservation, protection, restoration, and management projects to benefit fish and wildlife resources and habitats.

United States v. Offshore Service Vessels (R/V GOULD), The United States Attorney's Office, Eastern District of Louisiana, Press Release, July 2, 2010.

On July 2, 2010, the United States Attorney's Office for the Eastern District of Louisiana issued a Bill of Information that charged Offshore Service Vessels, LLC, a Louisiana limited liability company headquartered in Galliano, Louisiana, with violation of the Act to Prevent Pollution from Ships.

The United States Attorneys allege that from July 2005 through September 2005, the R/V GOULD, an American-flagged vessel owned and operated by Offshore Service Vessels, LLC, discharged oily waste water directly into United States' waters without first having it pass through the required oil-water separator.

According to the press release, if convicted, Offshore Service Vessels, LLC could face a maximum fine of the greater of $500,000 or twice the gain or loss resulting from the criminal offense.

United States v. Transmar Shipping Co., S.A. (M/V NEW FORTUNE), United States Department of Justice, Northern District of California, Press Release, July 30, 2010.

On February 16, 2010, the United States Coast Guard began a routine inspection of the Marshall Islands-registered vessel M/V NEW FORTUNE as it entered the Port of Oakland, in Oakland, California. The vessel had recently arrived from a trans-Pacific journey from South Korea. The investigation had been sparked by whistleblowing crewmembers who alerted authorities that the crew was deliberately polluting the water in violation of United States' law.

The investigation revealed that crewmembers had constructed a "magic hose" to bypass the oil-water separator and thus dispose of oily waste directly overboard. Further investigation revealed that crewmembers aboard the M/V NEW FORTUNE had made false entries in the vessel's Oil Record Book to conceal the operation.

On July 30, 2010, Transmar Shipping Co, S.A., the operator of the M/V NEW FORTUNE, pleaded guilty in federal court in Oakland for failing to maintain an Oil Record Book and making false statements to the U.S. Coast Guard. The court sentenced the company to pay a fine of $750,000, a community service payment of $100,000, and ordered it to follow an agreed-upon environmental compliance plan. This plan is required to develop, fund, and implement a comprehensive, fleet-wide environmental compliance plan to ensure future compliance aboard all of the company's vessels. This requires, in part, that Transmar Shipping Co., S.A. must designate a corporate compliance manager to develop the environmental plan, oversee its implementation, and fully staff its facilitation with both inside and outside consultation.

United States v. Dimitrios Dimitrakis (M/V NEW FORTUNE), United States Department of Justice, Northern District of California, Press Release, July 30, 2010; *see also* United States Justice Department, North District of California, September 3, 2010.

United States v. Volodymyr Dombrovskyy (M/V NEW FORTUNE), United States Department of Justice, Northern District of California, Press Release, July 30, 2010.

The "magic pipe" case involving the M/V NEW FORTUNE also included actions against two engineers then employed by Transmar Shipping Co., S.A., and aboard the vessel during the transgressions.

On July 30, 2010, Dimitrios Dimitrakis, the chief engineer, pleaded guilty to failing to maintain an accurate Oil Record Book when the vessel was deliberately dumping oily waste into United States' waters. Additionally, Volodymyr Dombrovskyy, the second engineer, pleaded guilty to aiding and abetting the failure to maintain the Oil Record Book.

The two seamen were aboard the M/V NEW FORTUNE from March 1, 2009 to February 16, 2010 when the ship travelled from South Korea to Oakland, California. Mr. Dimitrakis admitted to having overall responsibility of the engine room where the "magic hose" was used, and both Mr. Dimitrakis and Mr. Dombrovskyy further admitted to ordering subordinate crewmembers to use the device to bypass pollution prevention equipment. Lastly, they both admitted to concealing the operation by both physically hiding the "magic hose" equipment, and by making false and deceptive entries into the Oil Record Book.

Mr. Dombrovskyy, the second engineer, was immediately sentenced to two years probation, a $500 fine, and a $100 special assessment. Three months later, on September 3, 2010, Mr. Dimitrakis, the chief engineer, was sentenced in federal court in Oakland to three years probation, a $5,000 fine, and a $100 special assessment.

United States v. Yavuz Mogultay (M/V AVENUE STAR), United States Department of Justice, Middle District of Florida, Press Release, July 23, 2010.

United States v. Gunduz Avaz (M/V AVENUE STAR), United States Department of Justice, Middle District of Florida, Press Release, August 3, 2010.

On October 21, 2009, the United States Coast Guard received a tip from several crewmembers aboard the M/V AVENUE STAR that that vessel had been fitted with a "magic hose" to bypass the oil-water separator and dump oily waste directly into the ocean. The ensuring investigation was performed at the Port of Tampa where the vessel lay docked after its arrival from Honduras. In addition to finding the "magic hose," the U.S. Coast Guard discovered an Oil Record Book that made failed to mention the apparent waste disposal procedure.

Two Turkish engineers aboard the M/V AVENUE STAR at the time of the transgressions were charged in the United States District Court for the Middle District of Florida with crimes related to the Act to Prevent Pollution from Ships. Gunduz Avaz, the fifty-year-old chief engineer, later pleaded guilty to failing to adequately maintain the Oil Record Book. Additionally, Yavuz Mogultay, the thirty-one-year-old second engineer, pleaded guilty to the same crime of failing to adequately maintain the Oil Record Book. Both seamen face a maximum penalty of six years in federal prison.

Submitted by Vince C. Reuter of Carter & Fiske, LLC

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

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NEW REGULATION OF MARINE INSURERS IN CANADA

Shelley Chapelski
(Chair, Canadian Maritime Law Association Insurance Committee).

Over the past year, substantial regulatory changes have taken place in Canada regarding the requirements that insurers must satisfy in order to accept Canadian marine insurance business.

New requirements exist at both the federal and provincial levels of government which are intended to close what were perceived as loopholes in the insurance regulatory regime.

The secondary purpose to the changes is no doubt to ensure that taxes payable on insurance premiums are fully collected by the regulatory authorities.

The purpose of this article is to describe the changes that have taken place and the possible implications for marine insurers that may arise. In particular, there may be new requirements to comply with the insurance regulation regimes imposed by each province in which a marine insurer does business.

Regulatory Framework: Federal and Provincial Governments

In order to understand the current tensions in the regulation of marine insurance in Canada, it is necessary to appreciate that both the federal and provincial governments typically have jurisdiction over the regulation of insurers.

Under the Canadian constitution, the federal government has jurisdiction over international trade, interprovincial trade and navigation and shipping (which includes marine insurance).

The provincial governments have jurisdiction over property and civil rights. This constitutional responsibility has evolved to encompass almost all elements of commerce within a province including the law governing the contents of insurance policies and the sale of insurance to the public.

The operations of insurers may overlap the areas of jurisdiction meaning that in most circumstances to operate in Canada, foreign insurers must comply with the regulatory requirements of both the federal government and each of the provinces in which they insure risks.

Insurance is regulated federally by the Office of the Superintendent of Financial Institutions ("OSFI"). OSFI is responsible for regulating and supervising all banks in Canada and all federally incorporated or registered trust and loan companies, cooperative credit associations, life insurance companies, fraternal benefit societies, property and casualty insurance companies, and as of January 1, 2010, marine insurance companies.

With respect to insurance companies, OSFI enforces the provisions of the federal *Insurance Companies Act* (SC 1991) c. 47 (the "Federal Act"). OSFI's responsibilities include the regulation and enforcement of the solvency and asset requirements which must be met by insurers operating in Canada.

Generally speaking, the provinces traditionally recognized the effectiveness of the OSFI regime and if an insurer had federal authorization to sell insurance in Canada, obtaining a license for each province in which it wanted to operate was granted as a matter of course. OSFI and the provinces endeavoured to provide a harmonized financial reporting regime so that compliance with the solvency and asset requirements of OSFI meant compliance with the provinces' requirements followed.

However, that is no longer the case as several provinces have made it clear that they are no longer satisfied that the current federal regime is adequately regulating the activities of foreign insurers in Canada.

The first change: Marine Insurance

Until January 1, 2010, the federal *Insurance Companies Act* specifically excluded marine insurers from its application. Any insurers selling exclusively marine insurance were not subject to regulation by OSFI and were essentially unregulated in Canada.

For the most part, the provinces ignored marine insurance. The content of the policies themselves was governed by federal legislation under the federal government's jurisdiction over navigation and shipping. Marine insurance is a small part of the overall market and matters involving it seldom arise other than in the Canadian coastal provinces.

As a result, foreign insurers selling exclusively marine insurance flew under the regulatory radar in Canada. However, perhaps in response to complaints by domestic insurers about there being an uneven playing field as some foreign marine insurers were taking prominent positions in the Canadian market, the exclusion for marine insurance was removed from the Federal Act as of January 1, 2010. Thereafter, marine insurance fell under the OSFI regulatory regime.

The second change: "Insure in Canada a Risk"

A change in the federal regulatory environment occurred concurrently with marine insurance falling under the OSFI regime, which change provoked negative responses from the provinces and complicated matters for foreign marine insurers.

OSFI decided to change the interpretation of its existing mandate with respect to which insurers were subject to its jurisdiction.

As stated in s. 573 of the Federal Act, a foreign entity must by authorized by OSFI if it wanted to "insure in Canada a risk."

Formerly, OSFI interpreted that phrase in such a way that the place where the actual underwriting decisions were being made was considered paramount. This meant that foreign insurers accepting business through Canadian coverholders or from Canadian brokers were doing the actual "insuring" outside of Canada as the actual underwriting decisions were not being made in Canada.

Effective January 1, 2010, OSFI decided that the test of what meant to insure in Canada a risk should change from where the underwriting decisions were being made to where the business activities relating to the sale of insurance were occurring. This interpretation change meant that some insurers were no longer subject to OSFI regulation, while other insurers now were.

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What activities must occur to "insure in Canada a risk"?

In response to the alarm expressed within the insurance industry about the shifting interpretation, OSFI endeavoured to provide clarification by issuing interpretation advisories outlining when a foreign insurer will be deemed to "insure in Canada a risk." (see: www.osfi-bsif.gc.ca/osfi/index_e.aspx?DetailID=524 – 2007-01-R1 revised May 29, 2009)

In the revised advisory, it outlined nine questions regarding an insurer's activities that may be used to determine whether a foreign insurer is insuring in Canada a risk. Those questions include whether the foreign insurer:

(a) promotes insurance products in Canada;

(b) directly solicits a person in Canada to obtain coverage;

(c) receives in Canada a request for coverage;

(d) negotiates from Canada the terms and conditions of coverage;

(e) decides in Canada to bind coverage;

(f) communicates from Canada an offer to insure;

(g) receives in Canada acceptance of the offer to insure from a policyholder;

(h) receives in Canada the premium;

(i) interacts in Canada with a policyholder regarding coverage (including handling claims).

OSFI considers a foreign insurer is insuring in Canada a risk when its business model includes:

1) Two or more of the activities outlined in subparagraphs (b) to (h) of the advisory; or

2) Any one of the activities referred to in subparagraphs (b) to (h), and both of the activities referred to in subparagraphs (a) and (i); or

3) Reaching agreement on most or all of the material terms and conditions of coverage during the course of negotiations in Canada (assuming that 2(d) and at least one of 2(e) through (g) would be occurring).

OSFI's position is that a foreign insurer is NOT "insuring in Canada a risk" if its business model encompasses only one of the activities referred to in the above list. Having said that, OSFI also states that the list is not exhaustive.

The application of the new interpretation to Marine Insurers

With respect to insurers that write multi-lines of insurance, OSFI expected them to make transition under the new interpretation with few or little changes to their compliance obligations.

Therefore, it was not likely that OSFI sought to muddy the terrain for marine insurers with its new interpretation.

It is more likely that the regulators simply did not consider how foreign marine insurers might be impacted by the change in interpretation. Under the former interpretation, even if marine insurers had been subject to the Federal Act, most foreign marine insurers did not have to be authorized by OSFI because the actual underwriting activity did not take place in Canada.

With marine insurance now included in the OSFI regime, significant questions and potential problems loomed.

One example was whether P&I Clubs would now be required to be authorized in Canada before they could provide cover to Canadian risks?

The reality is that the Canadian P&I insurance market probably does not constitute a large enough market share to justify the cost to a P&I Club of meeting the OSFI compliance requirements, let alone justifying opening up a Club's financial books to Canadian regulators and auditors.

Another alarm that was set off was with respect to the certificates of financial responsibility mandated by Transport Canada for pollution claims involving vessels. The gold standard of compliance is proof of entry with a P&I Club. If P&I Clubs had to obtain authorizations from

OSFI, and refused to do so, could Transport Canada rely on P&I entry as providing evidence of financial responsibility?

Of further concern to Transport Canada and the marine industry is the fact that mandatory liability insurance for commercial passenger vessels is expected to be legislated in due course.

The Canadian marine insurance market simply does not have the capacity to meet this demand for liability insurance, let alone for the particular type of cover provided by P&I Clubs. If P&I Clubs cannot provide coverage in Canada without being authorized by OSFI, and ultimately choose not to do so, would the Canadian marine industry be seriously hamstrung in its ability to meet its own regulatory and business demands for liability insurance?

Furthermore, marine insurance can be a fluid product as it accompanies vessels and cargo on their international voyages. Its unique and international nature has been expressly recognized by the Supreme Court of Canada. *Terrasses Jewellers Inc. v. Triglav*, [1983] 1 SCR 283 (Can.).

The Canadian Maritime Law Association has lobbied aggressively with OSFI to emphasize the potential problems insofar as marine insurance was concerned.

OSFI has subsequently acknowledged that the P&I Clubs (except for The Shipowners' Mutual Protection & Indemnity Association (Luxembourg) which has a permanent agency office in Canada and is authorized both federally and provincially) do not need to be authorized assuming that their business model does not fall within the scenarios described in the OSFI advisory.

However, the same concerns and questions continue to exist with respect to foreign insurers providing hull, liability and cargo insurance. Will they submit to OSFI regulation if their business model requires them to do so? And if not, will Canadian marine business suffer from the reduced capacity and available choices?

OSFI, for a fee of $4000 or so, will review a business model and provide a guidance ruling to an insurer as to whether it must be authorized by OSFI. However, some insurers would rather rely on their own conclusion based upon the advice contained in the advisories than seek a ruling and have to contend with an adverse decision.

What are the ramifications of not being federally authorized if required?

The failure to be properly authorized could result in a contravention of the Federal Act.

If an individual is convicted of contravening the Act, he may face jail time or fines of up to $100,000 for a summary conviction and $1,000,000 for an indictable conviction. The fines against a company may be up to $500,000 for a summary conviction and $5 million for an indictable conviction.

A foreign insurer unable to or unwilling to comply with the licensing requirements of OSFI may also find that their products are less attractive to Canadian brokers working on behalf of insureds for some of the following reasons, any of which could result in e&o claims against a broker:

- policies would be "unlicensed" and if an account went awry, the broker could be accountable for the fact that it placed the business with an unregulated foreign insurer;

- federal and provincial taxes may be payable on the premium money departing the country. If that tax is not collected by the broker and the insured is subsequently audited (which can be years later), to its great surprise, it may have to directly pay the taxes on the premiums; and

- the provisions of the provinces' respective insurance regimes may still be applicable to the insurer and as will be described herein, could choke hold brokers who are trying to comply with them.

Furthermore, the failure to be federally licensed may restrict marketing and business development activities that the insurer wishes to pursue so that it avoids engaging in more than one activity listed in the OSFI advisory.

Finally, the insurer may simply find that its product is less attractive to the public without the ability to assure the market that it has assets available in the jurisdiction. OSFI has issued a public notice alerting consumers to the potential problems including the lack of Canadian oversight and availability of assets to satisfy claims should they deal with unauthorized insurers.

Regulation of Marine Insurers by the Provinces

As described, formerly federal authorizations and financial reporting was readily recognized by the provinces as being sufficient. It promoted the harmonization of the financial reporting and solvency test demands placed on insurers.

That is no longer the case, at least in the provinces of British Columbia, Alberta and Quebec. Although, this remains a shifting landscape as OSFI continues to try to satisfy the provincial regulators to return to a more harmonized scheme, at least insofar as financial reporting is concerned.

The provinces' concerns do not arise from anything specific to marine insurance. Marine insurers are simply collateral damage because of provincial dissatisfaction with the revised OSFI regime generally.

The BC insurance regulators ("FICOM") recently took the position that the federal change determining which companies were subject to regulation created a loophole and swept in legislation requiring that even if a company was not required to be authorized federally, it may still have to be licensed in BC. To accomplish this, BC now requires any company which insures a risk "located in BC" to be licensed in BC. As well, BC brokers have been restricted in their ability to place insurance with unlicensed foreign insurers.

Marine insurance is considered part of the federal constitutional power over shipping and navigation. While the provinces may agree that they cannot regulate the content of marine insurance policies as a result of the constitution, they will not agree that they are prevented from regulating the sale of any type of insurance including marine.

A recent Supreme Court of Canada case confirmed that even federally incorporated and regulated banks are subject to provincial laws if they engage in the sale of insurance. The government regulators are of the view that this case applies equally to the sale of marine insurance. The view of the Canadian Maritime Law Association is otherwise as the Supreme Court of Canada has previously recognized that marine insurance is integral to shipping. It is part and parcel of international trade while the sale of home owners' insurance policies is not integral to banking. However, whether the opportunity will exist to encourage a court to confirm the opinion of the Canadian Maritime Law Association is an uncertain matter.

In any event, several provinces are insisting on regulating the sale of marine insurance either directly by demanding that foreign marine insurers be licensed provincially, or by exercising their authority over insurance brokers, i.e. restricting the ability of brokers to seek and sell provincially unlicensed insurance products to their clients.

Provincial Premium Sales Tax

The stated objective of protecting the public from unauthorized insurers may in part disguise another agenda. Typically provinces collect a sales tax on insurance premiums ("premium tax"). If an insurer is no longer required to be authorized federally (and report its premiums), a province may lose its opportunity to track the premium tax that would be payable. The provinces are not prepared to let OSFI changes erode their premium tax base. If a province cannot control the sale of an insurance product, it may be hamstrung in its ability to collect its poundage.

Again, marine insurers are collateral damage. Marine insurance premiums are not subject to premium tax, at least in BC, as the content of marine insurance policies is federally regulated in Canada.

However, BC's regulatory authorities are aggressive in concluding that aspects of modern marine policies are actually property and casualty insurance – examples include marina and terminal policies, the land transport portions of ocean cargo policies, hull policies for dredges which do not navigate, legal defence coverage and boiler & machinery coverages. The BC financial regulators demand that premium tax is payable on any aspect of marine insurance that is not a traditional marine adventure as defined in the federal *Marine Insurance Act*.

The Canadian maritime bar waits for a client prepared to test the restrictive definition of marine insurance relied upon by the BC financial regulators with respect to when or when not the premium tax can be imposed.

Summary

Until January 1, 2010 the federal Canadian insurance regulator OSFI excluded marine insurers from its authorization requirements. The inclusion of marine insurance under the OSFI umbrella accompanied by the change in the interpretation of the test of which insurers had to be authorized in Canada meant that P&I Clubs and other foreign based hull and cargo insurers were now potentially subject to the requirement to obtain Canadian authorization in order to accept Canadian marine business.

While those marine insurers have been navigating OSFI's authorization requirements or falling easily within OSFI's exemptions, several of the country's provinces have leapt into the fray, fragmenting the Canadian insurance regulatory regime. The provincial demands have been made with little or no consideration of the limits to the Canadian marine insurance capacity and the intrinsic nature of many marine insurance products.

Therefore, foreign insurers who offer no other products but marine insurance in Canada, especially in the provinces of BC and Quebec, should carefully review the current regulatory requirements being placed upon them by both the federal government and the provinces in which they have business to ensure that they are in compliance.

[Our sincere thanks to Shelley Chapelski, of Bull, Housser & Tupper LLP, Vancouver, BC, www.bht.com, for the foregoing article. – Eds.].

RECENT CASES OF INTEREST

Hurricane Katrina – Indemnity and Defense Costs

N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 2011 AMC 90 (2d Cir. 2010).

On March 15, 2010, the Second Circuit issued its decision in *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102 (2d Cir. 2010). The consolidated appeals, involving three separate declaratory judgment actions between Lafarge North America Inc. ("Lafarge") and several of its insurers, were brought in order to determine the insurers' obligations with respect to indemnity and defense costs relating to claims brought against Lafarge as a result of the breakaway of the Barge ING 4727 from Lafarge's New Orleans terminal during Hurricane Katrina. Lafarge had been sued in the Eastern District of Louisiana for damages in excess of $100 billion relating to the flooding of New Orleans during Hurricane Katrina, based on allegations that the barge had hit and breached the levee in the New Orleans Industrial Canal during the storm.

Lafarge had $50 million in marine liability (wharfinger's) coverage with primary insurer New York Marine and General Insurance Company ("NYMAGIC") and excess insurer Northern Home Assurance Company of America ("AHAC"). Additionally, Lafarge had P&I coverage for its own fleet of vessels through its entry in the American Steamship Owners Mutual Protection and Indemnity Association (the "American Club"), although Barge ING 4727 was not owned by Lafarge but rather by Ingram Industries. Lafarge and its marine liability insurers all appealed from an order entered on January 29, 2007, as well as summary judgments entered on October 27, 2008 and February 19, 2009 in the United States District Court for the Southern District of New York (Haight, J.). The decision by the district court had, *inter alia*, (1) granted summary judgment to the American Club in its declaratory judgment action seeking a declaration of no coverage for the ING 4727; (2) granted Lafarge recovery of its defense costs in respect of two of the three law firms it retained to defend the actions; (3) denied Lafarge's motion for Summary Judgment; and (4) denied Lafarge's motion to transfer the American Club action to the United States District Court for the Eastern District of Louisiana.

The first issue addressed in the consolidation appeals was whether the district court correctly denied Lafarge's motion to transfer the American Club's declaratory judgment action to New Orleans. The Second Circuit considered a number of arguments made by Lafarge that the case should have been transferred to New Orleans, but found that there was no error to conclude the district court abused its discretion in denying Lafarge's motion to transfer venue. The Second Circuit relied on the fact that the American Club policy was negotiated in New York, was issued by a New York insurer, stipulated in the policy to apply New York law and even required Lafarge to bring any claim brought against the American Club under the policy in the Southern District of New York. Thus, locus of operative facts and the interests of efficiency and fairness favored a New York forum.

Next, the Second Circuit examined whether the district court had correctly determined that the Ingram owned barge ING 4727 was not automatically entered with the American Club under the Chartered Barges Clause contained in Lafarge's Certificate of Entry with the American Club. The issue turned primarily on the interpretation of the term "or otherwise" contained in the Chartered Barges Clause, a clause which provided automatic coverage under the American Club Policy to Lafarge in the event Lafarge "*acquires an insurable interest in any vessel in addition to or in* *substitution for those set forth herein, through purchase, charter, lease or otherwise*."

While the Second Circuit's decision affirmed the district court's ruling on this issue, it did disagree with the district court's finding that the language of the Chartered Barges Clause was unambiguous, finding that the American Club Policy had more than one reasonable single plain meaning on its face. The Second Circuit, however, found that this case was one of those rare instances where, although contract language is ambiguous, summary judgment in favor of the insurer was still appropriate because the uncontroverted extrinsic evidence regarding the parties' intended meaning of the clause made clear that neither the American Club nor Lafarge intended the Chartered Barges Clause to cover third party barges like the ING 4727.

In its finding, the court relied on the deposition testimony of Lafarge's own insurance broker, as well as Lafarge's own conduct. Specifically, Lafarge had never declared or tendered any premium for the more than 3,000 other third-party owned barges that had passed through its terminals during the seven years it had been a member of the American Club. The court noted that it was not until nearly two years after the commencement of litigation against it in Louisiana that it attempted to declare premium for these barges, despite the fact that any declarations and premiums were due annually pursuant to the Chartered Barges Clause.

Additionally, the Second Circuit addressed cross-appeals brought by Lafarge and its primary and excess marine insurers on whether the policies covered legal expenses for the three firms retained by Lafarge to defend it, without notice to, or consent from, its primary marine liability insurer. The district court had ruled that in light of the exceptional circumstances of Hurricane Katrina, it was reasonable for Lafarge to act quickly and to initially retain three law firms. The district court determined, however, that under a naming clause included in the primary policy, the primary insurer had the right to appoint defense counsel for Lafarge for the long-term defense of the claims. NYMAGIC had offered Lafarge a list of six maritime firms with experience in mass tort defense located in New Orleans, but Lafarge refused to consider any of the six local law firms. The district court found Lafarge's refusal to appoint one of the six firms as its local defense counsel unreasonable. Thus, Lafarge was not entitled to the reimbursement of legal expenses after the date NYMAGIC requested that Lafarge appoint other local counsel.

The Second Circuit reversed in part the district court's decision on legal expenses. The Second Circuit agreed with the district court that the retention of counsel initially to investigate the cause of the breached levee was reasonable and thus Lafarge was entitled to reimbursement for all of those early legal expenses incurred in the first month after the hurricane. The Second Circuit also agreed that Lafarge's refusal to consider the several law firms specializing in maritime law and experienced in class actions was a breach of its duty to the primary insurer to act in good faith. The Second Circuit expanded the district court's ruling, however, holding that Lafarge cannot recover any of its attorneys' fees incurred for both its national and local counsel beyond the date that is was offered the choice of approved counsel by NYMAGIC.

Clyde & Co US LLP acted for the American Club in this litigation.

[Our sincere thanks to John Woods, Esq., of Clyde & Co. US LLP for the foregoing summary.].

Timely Notice of Lawsuit

Pactrans Air & Seas, Inc. v. N.Y. Marine & Gen. Ins. Co., 387 Fed. Appx. 43 (2d Cir. 2010).

Plaintiff Pactrans, a shipper of goods from China to the U.S., appealed an award of summary judgment in favor of its insurer, New York Marine, in Pactrans' suit claiming that the insurer was obligated to defend and indemnify it in two lawsuits arising out of a damaged shipment of drywall and related delays. The court of appeals affirmed.

Pactrans gave New York Marine timely notice of the occurrence giving rise to the lawsuits, but not of the lawsuits themselves. The insurer disclaimed coverage under New York's "no-prejudice" rule. The court held that, prior to legislative amendments enacted after commencement of the case, the New York "no-prejudice" rule was described as follows:

> [W]here a primary insurance contract requires the insured to provide prompt notice after an occurrence potentially giving rise to liability, "the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339; 794 N.Y.S.2d 704, 706; 827 N.E.2d 762 (2005)

(citing *Sec. Mut. Ins. Co. of N.Y. v. Acker – Fitzsimons Corp.*, 31 N.Y.2d 436, 440-43; 340 N.Y.S.2d 902, 905-07; 293 N.E.2d 76 (1972)). In *AXA Marine & Aviation Insurance (UK) Ltd. v. Seajet Industries, Inc.*, 84 F.3d 622, 628 (2d Cir. 1996), this court, predicting how the New York Court of Appeals would resolve the question, held that the no-prejudice rule applies where, as here, the insured provides timely notice of an occurrence but untimely notice of a claim or lawsuit arising from the occurrence.

The court noted that under federal maritime law, it determines the scope and validity of marine insurance policy provisions and the consequences of breaching them in accordance with state law. Here, the policy provided that disputes are subject to New York statutes, and the parties agreed that New York law applies. Therefore the court declined to fashion federal maritime law to resolve the dispute. The court also declined to extend an exception to the rule carved out by the New York Court of Appeals in the context of Supplemental Uninsured Motorist ("SUM") coverage to the facts before it.

The New York Court of Appeals has yet to disavow the holding in AXA, supra., that the no-prejudice rule applies in New York where the insured provides timely notice of an occurrence but late notice of suit. The appellate court chose not to disturb the district court's finding that Pactrans' failure to give notice of the two lawsuits until 7 and 9 months after it became aware of them was unreasonable as a matter of law, where the insured had no justification for the delay.

Breach of Fiduciary Duties

Indus. Mar. Carriers (Bahamas), Inc. v. Thomas Miller (Americas), Inc.,
2011 AMC 592, 2010 WL 3920524 (3d. Cir. Oct. 7, 2010)

Industrial Maritime Carriers and its managing agent Intermarine Inc. (collectively "IMB") appeal an order of the United States District Court for the District of New Jersey granting summary judgment in favor of Thomas Miller (Americas) and Thomas Miller (Miami) (collectively "TMM") on IMB's claims against TMM for negligence and breach of fiduciary duty. The Court of Appeals affirms.

Industrial Maritime Carriers, a Bahamian corporation, was an operator of ocean cargo vessels. Intermarine, a Louisiana corporation, was its agent. Thomas Miller (Americas), a New Jersey corporation, was a correspondent of Thomas Miller (Bermuda) ("TMB"), which managed the UK Club. Thomas Miller (Miami), a Florida corporation, was a correspondent of Thomas Miller (Americas).

In June and July of 1997, IMB entered into two separate contracts to transport cargos of construction equipment for Daewoo Corporation from Korea to Turkey aboard vessels that it chartered, named the Industrial Bridge and Amderma, respectively. IMB appointed Barwil Universal in Turkey as its agent for both shipments.

IMB obtained insurance for misdelivery claims in connection with cargo shipped aboard both vessels from underwriters at Lloyd's of London. With respect to marine insurance and indemnity coverage, however, it entered the Industrial Bridge with the German P&I club Trampfahrt and the Anderma with the U.K. Club.

IMB instructed Barwil to release the cargoes from both ships on arrival in Turkey without requiring receivers to present original bills of lading. The cargoes were warehoused under control of the Turkish Customs Authority, which apparently released them to a company called BMG.

Barwil later notified IMB that it had received a "payment order" from Daewoo, demanding compensation for misdelivery of the cargo carried aboard the Industrial Bridge. IMB's claims manager mistakenly sent notice of the claim to TMM and requested that the UK Club provide a defense, rather than notifying Trampfahrt.

Barwil engaged an attorney to object to the payment order, and TMM so advised IMB, stating that it assumed there would be no objection to his representing IMB as well. IMB did not reply, and the attorney appeared and made the necessary objections on its behalf. Barwil later received a similar payment order from Daewoo as to misdelivery of the cargo carried aboard the Amderma, which it sent directly to the same attorney for defense.

Daewoo filed suit in Turkey for misdelivery of both cargoes, naming as defendants Barwil and the vessels' owners, charterers, captains and operators. Barwil's errors and omissions insurer hired separate counsel to defend its insured, and the original attorney continued to represent IMB. The two attorneys worked together to prepare a joint defense. The attorney representing IMB passed away, and Barwil instructed its attorney to also represent IMB in the Daewoo lawsuit.

In February of 1999, TMM learned that the Industrial Bridge was not entered with the U.K. Club, but did not so advise IMB of that fact until March of 2000. Further, IMB claims TMM never notified it of the Turkish lawsuit, which it only learned of in November of 2002. However, IMB admittedly received a fax from Barwil advising of the two lawsuits filed against Barwil, and asking whether any suits had been filed against Intermarine, Inc. Barwil sent four additional faxes in 1999 and 2000 regarding the status of the case, three of which IMB denied receiving. IMB also sent a fax to Trampfahrt in 2000, requesting that its correspondent in Turkey "discreetly check out the status of this matter."

Notwithstanding these communications, IMB claimed it did not know of the Turkish lawsuit until approximately six months prior to May of 2003, at which time the court entered judgment against it as to both the Industrial Bridge and Amderma cargo misdeliveries.
In 2006, IMB initiated the present lawsuit alleging that TMM was negligent and breached its fiduciary duty in failing to notify IMB of the Turkish lawsuit, rendering it unable to participate in its own defense and ultimately leading to an adverse judgment. IMB further claimed that its Turkish attorney failed to raise certain preliminary defenses that would have resulted in dismissal of the action.

TMM moved for summary judgment, and the parties submitted conflicting opinions from Turkish law experts on whether all appropriate defenses and evidence were submitted. The district court granted summary judgment in favor of TMM for two reasons:

> 1. IMB failed to show that TMM had any duty, under negligence law or as a fiduciary, to notify IMB of the suit. IMB identified no course of conduct, contractual provision or UK Club rule that would create such an expectation, and IMB did not assert that TMM was its agent for service of process.
>
> 2. Even if IMB could establish a duty to notify, it failed to raise a genuine issue of material fact as to causation. It provided no evidence that, if promptly notified, it would have assisted in its own defense, nor that had it had the opportunity to assist, it would have prevailed. IMB made no showing of what, if any, efforts it made

in the six months between its alleged first notice of the lawsuit and the hearing in Turkey.

The court of appeals affirmed, agreeing that "even if TMM had a duty to notify IMB of the Amderma lawsuit, IMB has still failed to raise a genuine issue of material fact with regard to causation because the link between TMM's failure to notify IMB of the Anderma suit and the injury suffered by IMB is too speculative and attenuated." IMB did not object to the attorney it requested TMM to appoint on its behalf, and offered no explanation why TMM's failure to notify it of the suit caused that attorney to fail to raise the defenses that allegedly would have changed its outcome. [Our sincere thanks to Michael Marks Cohen of Nicoletti Hornig and Sweeney for calling the foregoing cases to our attention. – Eds.]

Hurricane Katrina – Wreck Removal

Danos Marine Inc.; Danos & Curole Marine Contractors, LLC v. Certain Primary P&I Underwriters; Certain Excess P&I Underwriters, 613 F. 3d 479, 2010 AMC 1987 (5th Cir. 2010)

The appellant Danos entities filed suit to recover costs of wreck removal from P&I insurers following the capsizing and sinking of the lift-boat Andre Danos in the Gulf of Mexico during Hurricane Katrina. The district court found that the policy covered wreck removal costs, but that the value of the sunken vessel exceeded the removal costs, and denied recovery.

The court of appeals vacated and remanded, holding that while the district court correctly found that the plaintiffs had a duty under the Wreck Act to remove the wreck, and incurred removal expenses in excess of $2,000,000, the lower court "erred in allowing any credit against the cost of removing the wreck because plaintiffs recovered nothing from the recovered property."

Prior to the hurricane, in negotiations to sell their fleet of eight (8) liftboats, the Danos entities had obtained an appraisal of the Andre Danos valuing the vessel at $4,000,000. Following the storm, those negotiations were resumed, but the value of the Andre Danos could not be ascertained because it remained capsized and submerged.

The resumed negotiations entailed both subtracting money from the bid for the fleet because the Andre Danos had lost value, and adding money because the market value of the other seven (7) liftboats had increased due to the destruction of liftboats and other oilfield equipment along the coastline, as well as increased demand for that equipment. The pre-Katrina agreed price for the fleet had been $45,000,000. The post-Katrina negotiations ultimately resulted in an agreed purchase price of $44,000,000 for all eight (8) vessels. The agreement allocated a purchase price of $500,000 to the still submerged Andre Danos. In addition, the purchaser agreed to pay $500,000 toward the cost of raising the vessel, and to reimburse $1,000,000 for the deductible in the hull policy on the Andre Danos. Finally, the parties agreed to transfer ownership of that vessel on the date repairs were completed or at the closing, whichever was later.

Danos obtained a survey report stating that the Andre Danos had no value as it lay, and was "most likely a liability," but that if salvaged successfully, the hull and appurtenances might have a value in the range of $450,000. At the time of the closing the vessel had not been raised. Its position had shifted for the worse when Hurricane Rita struck following Katrina. A first effort to bring it to the surface failed when the slings broke. Eventually the vessel was brought ashore in May of 2006. Efforts to sell it for scrap were unsuccessful because cleaning costs were prohibitive. Danos paid a salvage and scrap company $150,000 to dispose of the wreck, pushing the total cost of raising and disposal over $2,000,000.

Pursuant to their agreement, because the vessel was a total loss, Danos refunded $785,000 to the buyer of the fleet, representing the insurance proceeds, minus the deductible and the buyer's share of salvage costs. The underwiters denied coverage on the grounds that removal of the wreck was not compulsory and that the amount Danos received for the vessel from the buyer of the fleet exceeded the removal costs.

On motions for summary judgment, the district court ruled that Danos in fact had a nondelegable duty to remove the vessel because it was an obstruction in a navigable channel and therefore the policy covered costs of wreck removal. The court also found that Danos sold the vessel for $4,000,000, and because that sum exceeded the cost of removing the wreck, Danos was not entitled to any recovery. The court of appeals agreed with the first conclusion, but not the second.

The appellate court interpreted and applied to the facts of the case the clause in the P&I policy which states that the insureds will be indemnified for:

> Liability for cost or expense of, or incident to, the removal of the wreck of the vessel named herein *when such removal is compulsory by law,* provided, however that:
>
> > (a) There shall be deducted from such claim for cost or expenses, the *value of any salvage* from or which might have been recovered from the wreck, inuring, or which might have inured, to the benefit of the Assured. [emphasis added].

The specific questions to be answered were: (1) whether the removal of the wrecked vessel from the Gulf of Mexico was "compulsory by law;" and (2) what, if any, of the funds involved in the sale of the fleet constitute "value of any salvage" recovered from the wreck to be deducted from the removal costs.

The court of appeals had previously interpreted the phrase "compulsory by law" in an insurance policy in a suit to recover wreck removal costs. *Cont'l Oil Co. v. Bonanza Corp*., 706 F.2d 1365 (5th Cir. 1983) (en banc). To determine whether a removal was legally compelled, the court adopted a test that asked whether a reasonable insured would have effected a removal. Removal is compulsory "when a reasonable owner, fully informed, would conclude that failure to remove would likely expose him to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal" *Cont'l Oil*, 706 F.2d at 1372. Such was the case here, where Danos had a compulsory duty under the Wreck Act, 33 USCA §409, to remove the vessel, which was sunk in a navigable channel. Based on precedent in the Fifth Circuit, an order by a governmental authority is not necessary to demonstrate that a removal is compulsory by law.

The sales agreement provided that ownership of the Andre Danos did not transfer to the buyer until the latter of the closing of the sale or repair of the vessel. Since the vessel was never repaired, ownership and the duty of removal remained with Danos. The district court did not err in determining that the Wreck Act imposed a compulsory obligation on Danos to remove the sunken vessel.

The court of appeals then examined "whether any salvage value was recovered from the wreck pursuant to the P&I policy." The court reasoned that, since when the Andre Danos was finally raised it had a negative value, "the question narrows to what relevance, if any should we attach to the sums allocated to the purchase price of the Andre Danos in determining the 'value of any salvage' recovered from the wreck…." In other words, should the district court have looked at the actual amount recovered for the wreck, or at the amount of the purchase price allocated by the Danos companies for the purchase of that vessel?

The district court took the view that Danos received $4,000,000 of the total fleet purchase price for the Andrea Danos. But the court of appeals pointed out that the schedule attached to the purchase agreement listed the purchase price of the vessel as $500,000. Danos, on the other hand, contended that none of the money paid by the buyer of the fleet constituted "value of any salvage recovered from the wreck." "Salvage" has been defined as "property saved or remaining after a fire or other loss, sometimes retained by an insurance company that has compensated the owner for the loss." Applying that definition, the value of the property remaining after the loss was zero. The policy plainly allows the insurer a credit only for "the value of the salvage recovered from the wreck, i.e., the value of the recovered property." Here, the buyer paid $44,000,000 to get seven (7) fully operational boats. Danos decided, for its own purposes, how to allocate the price over the eight (8) boats.

The court of appeals concluded that the district court erred in allowing any credit against the cost of removing the wreck because "plaintiffs recovered nothing from the recovered property," and remanded the case for further proceedings.

When Coverage Is Triggered

Tex. Farmers Ins. Co. v. Lexington Ins. Co., 380 Fed. Appx. 604 (9th Cir. 2010).

Texas Farmers appealed from a summary judgment declaring it responsible for the full amount of the settlement of a medical malpractice claim. The Ninth Circuit affirms. Both courts viewed the case as a dispute between a primary insurer (Texas Farmers) and an excess insurer (Lexington Insurance), even though Lexington did not have a direct relationship with the insured, Kaiser Permanente. The actual excess insurer, Ordway, ceded the risks involved to Lexington by means of a "following-form" facultative reinsurance policy issued to it by Lexington, so that Lexington stood in Ordway's place with respect to the claims of the underlying plaintiff.

The plaintiff, who suffered from diabetic retinopathy, underwent two eye surgeries at Kaiser Permanente of Hawaii in July and November of 2001, which left her blind. She had been treating there for diabetes since the late 1990s. Texas Farmers issued a claims-made policy to Kaiser in April of 1999, with a one-year term and $5 million per claim liability limit, (later changed by endorsement into an occurrence policy and renewed for another year). Coverage was reduced to $1 million per claim on April 9, 2001, effective for one year. Lexington (through Ordway) did not come on the risk until the 2001-2002 policy period.

The issue before the district court was whether Texas Farmers' coverage was triggered prior to April 9, 2001, when the $5 million liability limit was in effect, and before Lexington came on the risk.

The plaintiff's original complaint was based strictly on claims of negligence in performing the 2001 eye surgeries, but the parties later stipulated to add a claim that Kaiser's negligent treatment of her diabetes before 2001 caused kidney damage requiring her to undergo dialysis. When her case was settled in 2007, both the claim for kidney damage and the claim for retinopathy/botched eye surgery were on the table, and both were resolved in the settlement agreement and release.

Texas Farmers argued that the main purpose of the settlement was to dispose of the eye surgery claim, and in any event there is no evidence that the kidney damage claim arose before the 2001-2002 policy period, because the occurrence language in its policy requires that the injury manifest itself during the coverage period. It also argued that a claim for interrelated wrongful acts is considered to have been made on the earliest date written notice of the claim is received by any insured, which was after April 9, 2001.

The court of appeals rejects all of the arguments, pointing out that the policy applies to wrongful acts or occurrences that "take place during the coverage period." Determination of an occurrence date is subject to an "Interrelated Wrongful Act" provision, which defines such acts or occurrences as those "which are logically or causally connected and have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions." Any such interrelated wrongful acts, according to the policy, are "deemed to have happened at the time of the first Wrongful Act within those Interrelated Wrongful Acts." Texas Farmers conceded in the district court that the kidney damage claims and eye surgery claims were interrelated wrongful acts.

The Texas Farmers policy also defines "occurrence" to mean "an accident," with no reference to a manifestation requirement. Under California law, which the parties agree applies, "coverage under an occurrence policy is triggered when 'the complaining party was actually damaged,' not when the wrongful act was committed." *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1440 (9th Cir. 1994). The undisputed record showed that plaintiff's diabetic kidney damage had manifested and should have been detected by her doctors in 1999 and 2000, had they not failed to seek a nephrology consult.

Moreover, the settlement documents in the underlying lawsuit included the kidney damage claims. When a case settles, the insurer's obligation to pay and the determination of coverage must be based upon the facts inherent in the settlement. *See In re Feature Realty Litig.*, 468 F. Supp. 2d 1287, 1295 (E.D. Wash. 2006).

Since the "Interrelated Wrongful Act" provision established the trigger-of-coverage date "at the time of the first Wrongful Act," which was prior to the 2001-2002 policy period, the $5 million per claim limit of liability was in effect on the "imputed loss date." Since the $3.2 million settlement did not exhaust the primary coverage, Ordway's excess policy, which had become Lexington's obligation, was not triggered.

The court of appeals agreed with the district court that the "follow the settlement" doctrine did not require Lexington to pay a share of the obligation. That doctrine prevents facultative reinsurers from second guessing good-faith settlements and obtaining de novo review of the reinsurer's liability to its insured. Lexington was an excess insurer, not the reinsurer of Texas Farmers, and thus did not incur any liability to Texas Farmers under the follow-the-settlement doctrine.

Finally, the court of appeals declined to consider whether Ordway's coverage was "concurrent" rather than "excess," because Texas

Farmers raised the argument for the first time on appeal, and courts of appeal "generally do not entertain an appellate argument that was not 'raised sufficiently for the trial court to rule on it.'" *Arizona v. Components, Inc*., 66 F.3d 213, 217 (9th Cir. 1995).

[Our sincere thanks to Michael Marks Cohen of Nicoletti Hornig and Sweeney for calling this case to our attention. – Eds.]

Accidental Physical Loss of Vessel

Markel American Insurance Co. v. Pajam Fishing Corp., 691 F. Supp. 2d 260 (D. Mass. 2010)

Plaintiff Markel provided an "all risk" marine insurance policy to defendant Pajam Fishing, covering its fishing vessel, "Miss Sonya," for "accidental, direct, physical loss or damages … from an external cause or from a Latent Defect" in the vessel's hull or machinery. The vessel sank in March of 2008 off Gloucester, Massachusetts and cannot be examined.

Markel filed suit seeking a declaratory judgment that it had no obligation for damages resulting from the sinking. It moved for summary judgment as a matter of law on the ground that Pajam cannot explain the sinking, and thus, cannot demonstrate that it was the result of an accident and therefore covered by the policy. The court denies the motion, finding that Pajam established sufficient facts showing that the sinking was accidental to survive summary judgment.

Markel's policy covering the Miss Sonya, issued in December of 2007, contained the following coverage language:

> 1. COVERAGE
>
> If a premium charge is made for Watercraft and Equipment Coverage on the Declarations Page and if not *specifically excluded* under this Policy, We will pay for a*ccidental, direct, physical loss or damage* to the Insured Watercraft from an external cause or from Latent Defect in the Insured Watercraft's hull or machinery (excluding in all cases the cost of repairing or replacing the defective part) provided such loss or damage did not result from the want of due diligence by You.

The policy contained a number of specific exclusions, none of which include "unexplained loss." It also contained a list of definitions including the terms "bodily injury," "insured person," "insured watercraft," and "latent defect," but did not define the terms "accidental physical loss" and "accident."

In response to Markel's motion, Pajam submitted evidence that throughout its ownership the vessel was well-maintained, seaworthy and had never been involved in an accident or other incident that would have presaged it sinking.

As the vessel was returning from fishing for approximately 20-24 hours on the Middle Bank, its crew noticed that its stern seemed low, and on further investigation found water in the lazaret. They did not attempt to determine where the water came from but radioed the Coast Guard. They followed the Coast Guard's instructions to abandon the rapidly sinking vessel.

Pajam contends the wind at the time was 20-30 knots, with 3-to-5-foot swells. Markel describes the conditions as "calm seas and fair weather." Pajam submitted evidence that the weather conditions would have greatly reduced the crew's ability to notice any impact with an object. It also submitted an expert's affidavit opinion that the weather could have caused the boat to "wrack" from side to side and, given the rudder's design, may have caused a crack in the rudder stock tube below the waterline, causing the lazaret to fill with water.

Pajam denies that a complete investigation was done by Markel. There is no claim that Pajam intentionally sank the vessel, or engaged in other intentional conduct that led to the sinking.

The court began its analysis by noting that the insured generally bears the burden of proving that a particular claim falls within a policy's coverage, while the insurer has the burden of proving the applicability of a particular exclusion. The insurance contract is to be interpreted according to the fair and reasonable meaning of the words in which the agreement of the parties is expressed. It is appropriate for a court to consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered. Any ambiguities in policy language are to be interpreted against the insurer who wrote them and in favor of the insured.

In this case, the policy does not define "accidental physical loss." The common meaning of the work "accident" means an unexpected happening without intention or design, and the term is to be broadly construed in a policy insuring against damage by "accident." Courts have said that "accidental" is synonymous with "fortuitous," and that a loss is fortuitous unless it results from an inherent defect, ordinary wear and tear or intentional misconduct of the insured.

The policy in question is admittedly an "all risk" policy, under which recovery will generally be allowed, absent fraud or other intentional misconduct of the insured, unless it contains a specific provision expressly excluding the loss in question from coverage. Here, Pajam established sufficient facts to show that the sinking was the result of a fortuitous, accidental event, and hence not excluded by the policy language. To show a "fortuitous" loss, the insured need only show that the loss occurred, not prove its specific cause. If an insurer intends to exclude "unexplained losses" from coverage it must state an express exclusion in the policy, which was not done here.

Costs of Investigating and Defending Oil Spill

Am. Commercial Lines LLC v. Water Quality Ins. Syndicate, No. 09 Civ. 7957 (LAK), 2010 WL 1379763
(S.D.N.Y. March 29, 2010)

This was a coverage action concerning the extent to which the insurer's policy covered the insured's costs of investigating and defending an oil spill from its barge on the Mississippi River in 2008.

The insured, ACL, was sued for cleanup costs after its unmanned barge sank, releasing approximately 300,000 gallons of fuel oil into the river. WQIS asserted that its obligation to indemnify ACL for investigation and defense costs incurred with its prior consent ended when its payments under two other coverage clauses reached the policy limits for those coverages.

On cross-motions for summary judgment on the pleadings, the district court denied the motion of WQIS and granted that of ACL, holding that:

> WQIS's contractual obligation under the Policy to reimburse ACL for costs incurred and to be incurred by ACL in the investigation and defense of all claims asserted against ACL as a result of the subject oil spill continues until all such costs are reimbursed, regardless of whether other indemnity limits under the Policy have been reached….

The policy required WQIS to indemnify ACL for amounts it shall have become liable to pay and shall have paid for "pollution response or damages." In addition, WQIS agreed to reimburse ACL for certain "other costs and expenses" incurred, including costs incurred as to: the discharge or substantial threat of a discharge of oil (Coverage A); the discharge or substantial threat of a discharge of hazardous substances (Coverage B); and investigation and defense (Coverage C).

The policy also provided that the limit of liability per vessel, per occurrence under Coverages A and B shall be "the amount stated on the Vessel Schedule." A separate paragraph expressly stated that amounts payable under Coverage C for investigation and defense of liabilities under Coverages A and B "shall be in addition to the limits of liability stated" with respect to those coverages.

Applying New York law, which the parties agreed was appropriate, the court found the language of the policy to be unambiguous. The Coverage C obligation to reimburse costs and expenses for investigation and defense incurred with the prior consent of WQIS "contains no temporal or quantitative limit on WQIS's reimbursement obligation." Hence the fact that the other indemnity limits under the policy had been reached did not terminate the duty to pay the costs of investigation and defense.

COMMITTEE ON MARINE TORTS AND CASUALTIES

Chair: Mary Elisa Reeves

Fall 2010

Admiralty Jurisdiction

Gulf Coast Shell & Aggregate LP v. Newlin, 623 F.3d 235, 2011 AMC 421 (5th Cir. 2010)

A claim pursuant to Rule D of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Fed. R. Civ. P. Supp. Rule D, asserting only equitable interests, with no separate basis for admiralty jurisdiction, is not cognizable in admiralty.

Fulmer v. Louisiana Department of Wildlife and Fisheries, 50 So. 3d 843 (La. Ct. App. 2010) (en banc)

A state court, sitting *en banc*, held that an employee, as a crewmember of a state-owned vessel in navigation, has rights under the Jones Act, 46 U.S.C. 30104, or general maritime law, not only under the state's worker's compensation act, to sue his employer, the state.

Chambers v. Wilco Industrial Services, LLC, No. 09-7061, 2010 U.S. Dist. LEXIS 78667, 2010 WL 3070392 (E.D. La. Aug. 3, 2010)

An employee is not a Jones Act, 46 U.S.C. § 30104, seaman at the time of his injury when his employer permanently assigned him to a job on non-navigable waters and where the situs of the accident, a bayou, is not capable of navigation in interstate commerce; therefore, the employee cannot recover under the Jones Act.

Nikitjuks v. Stolt-Nielsen, S.A., No. 09-3901, 2010 WL 4273328 (E.D. Pa. Oct. 28, 2010)

The court noted that the U.S. Court of Appeals for the Third Circuit had upheld its determination that courts should apply the *Lauritzen-Rhoditis* analysis to determine choice of law, not subject matter jurisdiction, warning that that "treating the *Lauritzen* analysis as going to subject matter jurisdiction would be out of keeping with the approach of most jurisdictional inquiries, which tend to be straight-forward threshold questions." *See Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

In re Carter, 743 F. Supp. 2d 103, 2010, AMC 2574
(D. Conn. 2010)

A vessel was destroyed by fire after it spent ten months on land at a marina. The insurer of a neighboring boat that was also destroyed by the fire brought suit against the owner. The owner of the boat where the fire originated filed a limitation action.

The court in the limitation action held that it lacked admiralty jurisdiction, stating that there must be some line where navigable waters end and the land begins. The court distinguished a case from the U.S. Court of Appeals for the Fifth Circuit, *Am. E. Dev. Corp. v. Everglades Marina*, 608 F.2d 123, 1980 AMC 2011 (5th Cir. 1979), on the grounds that the vessel destroyed by fire in that case was re-launched nearly weekly, and therefore the court did not consider the owner's argument that the activities at issue-the storage and repair of pleasure boats-bore a significant relationship to traditional maritime activity. The court further distinguished between "on navigable waters" and "in navigation," stating that "there was no reason why this Court must give the phrase 'on navigable waters' when used in determining jurisdiction over maritime tort claims the same meaning that other courts have given the phrase 'in navigation' when used in determining liability under the Jones Act," 46 U.S.C. § 30104.

Having held that admiralty jurisdiction was not present in the underlying action, the court further held that the Limitation of Liability Act, 46 U.S.C. §§ 30501 et seq., did not, itself, grant admiralty jurisdiction where the incident occurred entirely on land.

Morrow v. MarineMax, Inc., 731 F. Supp. 2d 390, 2011
AMC 521 (D.N.J. 2010)

The District Court of New Jersey answered a question of first impression -- "may the exclusive remedy provision of a state's workers' compensation law bar a plaintiff's general maritime tort claim against his employer?" in the negative. The plaintiff was on board his employer's recreational vessel, which it was holding as inventory and regarding which it was therefore the owner of record, watching an air show off the coast of Atlantic City, New Jersey, when a fellow employee fell from the fly-bridge onto him causing cervical injury and paralysis. The parties had stipulated that the plaintiff was injured in the course of his employment.

The plaintiff alleged that he was a passenger on a U.S. vessel, and that the vessel owner, crew, and a fellow passenger were negligent. A second count was brought against the vessel's manufacturer for unseaworthiness. A third count was filed by plaintiff's wife for loss of consortium. The employer filed a motion for summary judgment as to the first and third counts arguing that the workers compensation statute's exclusive remedy provision barred the plaintiff's claims under general maritime law.

The court provided a thorough survey of the law when a conflict exists between state law and the general maritime law, finding two alternatives: (1) A court can look to see whether the plaintiff's cause of action exists under the general maritime law; if the U.S. Supreme Court has provided for this cause of action, and the otherwise applicable state law would bar such a claim, then the state law must yield. *See Pope & Talbot v. Hawn*, 346 U.S. 406, 410, 1954 AMC 1 (1953). (2) A court can resort to a traditional balancing test, weighing the equities between state and federal interests on a case-by-case basis. *See Kossick v. United Fruit Co*, 365 U.S. 731, 739, 1961 AMC 833 (1961), *reh'g denied*, 366 U.S. 941; *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1530-33, 1991 AMC 586 (11th Cir. 1990).

The court concluded that the first approach, as adopted by the U.S. Court of Appeals for the Fifth Circuit and other courts, is most faithful to U.S. Supreme Court precedent, and must control in the instant matter. The plaintiff was therefore not barred from bringing claims under general maritime law even though he was receiving workers compensation benefits from his employer.

Gossett v. McMurtry, 2010 AMC 2122 (D.S.C. July 26, 2010).

Where photographs of a defamatory nature are taken at sea but published only once ashore, an action for defamation cannot be maintained under admiralty jurisdiction, as the plaintiff cannot satisfy the location test. The court also held that plaintiff's negligence claim could not be maintained as the actions complained of are not the type that could interrupt maritime commerce.

Forum

Quinlan v. McDermott International, Inc., No. 08-04192, 2010 U.S. Dist. LEXIS 71723, 2010 WL 2836081 (E.D. La., July 16, 2010)

A forum selection clause in a form contract is only subject to scrutiny to ascertain that it is not fundamentally unfair regardless of whether bargaining did or did not occur, and forum selection clauses in seamen's contracts are properly analyzed under the presumption of validity pursuant to *M/S Bremen v. Zapata Off-shore Co*., 407 U.S. 1, 1972 AMC 1407 (1972). The court held that the forum selection clause at issue was not unreasonable as it allowed suit to be brought in Quinlan's own home country, with Qatar (the jurisdiction of the injury) as an alternative. Therefore, the court found the forum selection clause enforceable. Additionally, the court held that the definition of territorial waters in the United Nations Convention on the Law of the Sea arts. 3, 78, Dec. 10, 1982, 1833 U.N.T.S. 397, is not persuasive in interpreting the restriction on recovery by foreign seamen, 46 U.S.C. § 30105(b)(2). Thus, the plaintiff was precluded from suing under the Jones Act, 46 U.S.C. § 30104, and the general maritime law of the United States.

Aggarao v. Mitsui O.S.K. Lines, Ltd., 741 F. Supp. 2d 733, 2010 AMC 2797 (D. Md. 2010)

A Philippine seaman signed a contract ("POEA Contract") incorporating the Standard Terms and Conditions Governing the Employment of Filipino Seafarers On-Board Ocean Going Vessels ("POEA Terms"). The Philippine Overseas Employment Administration ("POEA"), a government agency, drafted both the POEA Contract and POEA Terms to ensure minimum employment standards for Filipino seamen employed by foreign corporations. The POEA Terms included a mandatory arbitration clause providing that "[i]n cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators." The seaman also signed a subsequent employment contract incorporating the terms of a collective bargaining agreement.

The seaman brought a Jones Act, 46 U.S.C. § 30104, claim in the Southern District of New York that was transferred to the District of

Maryland. The court found that, "This is not a case in which the United States must intervene to protect an oppressed seaman. The POEA requires any shipowner seeking to hire a Filipino seaman to enter into a POEA-approved contract, and when a dispute arises, the contract requires adjudication in the Philippines, thus ensuring a homeland forum."

The court held that the subsequent employment contract merely supplemented the POEA Contract, therefore the subsequent employment contract's provision regarding employee disability compensation could not be interpreted to expressly negate the POEA Contract's mandatory arbitration clause; that the equitable estoppel doctrine applied to permit non-signatories to the POEA Contract to enforce the arbitration clause; that seamen employment contracts are not excepted from the reach of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (the "Convention"), *implemented* at 9 U.S.C. §§ 901-08; that the POEA Contract provision calling for the arbitration of "all claims and disputes arising from this employment" in the Philippines required disputes over both the POEA Terms and the seaman's personal injury claims to be addressed through arbitration; and that the seaman's claim under Seaman's Wage Act, 46 U.S.C. § 10313, was also subject to Convention.

Statute of Limitations

Tobey v. Atwood Oceanics, Inc., No. H-10-0154, 2010 U.S. Dist. LEXIS 89448, 2010 WL 3447639 (S.D. Tex. Aug. 30, 2010)

A claim filed in the appropriate jurisdiction almost fifteen months after the claim was dismissed for improper forum in an earlier suit, was untimely because in actions arising under federal laws such as the Jones Act, 46 U.S.C. § 30104, that contain specific limitations periods, state savings clauses have no applicability. Additionally, when arguing tolling of the statute of limitations, plaintiff bears the burden of demonstrating sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Damages

Combo Maritime v. U.S. United Bulk Terminal, 615 F.3d 599, 2010 AMC 2196 (5th Cir. 2010)

The trial court improperly applied various presumptions and failed to allocate damages among the defendants in accordance with their relative fault in a case involving a barge breakaway and an allision on the Mississippi River (where the struck vessel sued the barge that broke away from a fleeting area, and the fleeting company filed a third party complaint against the vessel that struck the barge).

Jowers v. Lincoln Electric Co., 617 F.3d 346 (5th Cir. 2010)

The allocation of fault between an employer and a third-party defendant under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*, depends on whether the third party is a vessel or is a non-maritime entity. If the third party is a "vessel," then the LHWCA provides that the employee may bring a third-party cause of action against the vessel based on negligence, and the employer shall not be liable to the vessel for such damages directly or indirectly. However, the court noted, if the third-party defendant is a "non-maritime entity" (anything other than a "vessel"), the LHWCA is silent on the question of allocation of fault and the employee's claim against a non-maritime entity necessarily depends on the relevant state law's allocation of fault. The appellate court held that "federal maritime standards govern" even though no vessels were involved.

Bundy v. Transport Desgagnes, Inc., No. 2:07-CV-261 JVB, 2010 U.S. Dist. LEXIS 57133, 2010 WL 2346301 (N.D. Ill. June 9, 2010)

A court held that because a shipowner was in control of a gangway upon which an accident took place, it was reasonable to infer that a member of the vessel's crew placed the rope that caused damage to the plaintiff there. The court rejected the shipowner's arguments for remittitur, holding that the jury's award of future medical expenses and future pain and suffering was justified by the evidence and because the award of loss of consortium damages did not impress the court as being either monstrous or irrational.

Negligent Infliction of Emotional Distress

Stacy v. Rederiet Otto Danielsen, A.S., 609 F.3d 1033, 2010 AMC 1782 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1493 (2011)

Over a strong dissent, the U.S. Court of Appeals for the Ninth Circuit reversed the judgment and remanded the case, holding that there is no requirement that a plaintiff actually witness an incident, so long as he or she was within the zone of danger created by the conduct of the defendant. (The plaintiff was part of a covey of fishing vessels trolling for salmon when a merchant vessel transited through the same waters, coming within close proximity to his boat. Soon after, same merchant vessel collided with another fishing vessel, killing the captain as a result of the collision. The plaintiff did not witness the collision, but filed suit against the owners of the merchant vessel, alleging that the incident put him in grave and imminent risk of death or great bodily harm, impacting him emotionally so that he could not work and needed psychiatric help.)

Punitive Damages

Johnson v. American Interstate Insurance Co., No. 6:08CV1988, 2010 U.S. Dist. LEXIS 99176, 2010 WL 3802451 (W.D. La. Sept. 20, 2010)

In a case arguing whether terminating payments of maintenance and cure was arbitrary and capricious, the court denied a motion for summary judgment because reasonable minds could differ with regard to whether the refusal to pay maintenance and cure was arbitrary and capricious. Thus, summary judgment should be denied as there existed a genuine issue of material fact.

Wagner v. Kona Blue Water Farms, LLC, 2010 WL 3566731, 2010 U.S. Dist. LEXIS 96105, 2010 AMC 2455 (D. Haw. 2010)

The court held that *Evich v. Morris*, 819 F.2d 256, 1988 AMC 74 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1985), remains binding law in the Ninth Circuit and, as a result, punitive damages are available under general maritime law for claims of unseaworthiness.

Limitation of Liability

In re Great Lakes Dredge & Dry Dock, 624 F.3d 201 (5th Cir. 2010)

The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of claims filed by Hurricane Katrina flood victims against private companies that operated twenty-two dredging vessels along the Mississippi River Gulf Outlet (MR-GO) pursuant to contracts with the U.S. Army Corps of Engineers ("USACE") in the years preceding the Hurricane. The claimants alleged that several levee systems along the outlet failed during the Hurricane as a result of negligent maintenance dredging operations by the private companies, each of which in turn filed complaints for exoneration from or limitation of liability. The court held that the dredging companies owed no duty to the claimants because the devastation caused by Hurricane Katrina was not a foreseeable result.

Bauer v. MRAG Americas, Inc., 624 F.3d 1210 (9th Cir. 2010)

The U.S. Court of Appeals for the Ninth Circuit concluded that a plaintiff's decision (serving as a fisheries observer aboard vessel) to take a short on-board break did not limit her "service" as an observer, and therefore the injury she sustained occurred in the performance of her service as an observer on the vessel. Accordingly, the immunity provision of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1383a(e)(7)(A), barred her suit.

Collins v. Cottrell Contracting Corp., 733 F. Supp. 2d 690 (E.D.N.C. 2010)

A plaintiff seaman was injured while attempting to tie a skiff to a vessel during a multi-phase dredging project. The dredging company had completed three of four phases of a dredging project and was in the demobilization process at the time of plaintiff's injury. The plaintiff sought, by motion, to include the entire value of the four phases to the limitation fund as pending freight. The court held that only the value of the discrete phase being performed could be included, here the demobilization of a bulldozer from an island, and since there was no method to determine the value of that specific demobilization from the total demobilization value of $875,000.00 nothing would be added to the limitation fund.

In re Miller's Launch, Inc., No. 10 Civ. 0872(BMC), 2010 WL 3282627 (E.D.N.Y. Aug. 18, 2010)

A plaintiff allegedly sustained an injury when a large limb fell out of a debris container transported by the defendant's vessel to a trash facility where plaintiff worked. The defendant filed a limitation action within six months of the filing of suit but more than six months after receiving a notice of injury from the plaintiff's counsel. The plaintiff was a stranger to the defendants, and by all indications the accident itself was unknown to them. Because of that, any notices sufficient to alert them to the possibility of suit in excess of the value of their vessels, if not containing express statements of fundamental facts, had to contain at least enough information to allow them to make necessary inferences. Here, the absence of the name of the defendant's vessel involved in the accident was fatal. The court held that an owner cannot be expected to make a judgment as to whether a potential claim is in excess of the value of its vessel when it is given neither the name of the vessel nor sufficient information to discover the name.

Procedural Issues

Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2010 AMC 1564 (2010)

The Supreme Court of the United States ruled that filing an amended complaint after the running of the limitation period against the proper defendant may, in some circumstances, relate back to the original suit filed within the limitation period by mistakenly naming the wrong party. In this case, the plaintiff brought suit within the statute of limitation period, but mistakenly named the wrong party as the defendant. When the plaintiff learned of the mistake (after the limitation period had expired), she moved to amend her complaint so as to name the correct defendant. The district court allowed the amendment of the complaint, but then granted the defendant's motion for summary judgment, finding that the plaintiff had not made a mistake, but had intentionally elected to sue one party rather than the other. The Supreme Court reversed and remanded, holding that the "relation back" rule depends on what the party to be added knew or should have known, not on the plaintiff's knowledge or the timeliness in seeking to amend the pleading.

Raynes v. McMoran Exploration Co., Nos. 10-1730, 08-5018, 2010 U.S. Dist. LEXIS 114599, 2010 WL 4364109 (E.D. La. Oct. 26, 2010)

The court held that, under Louisiana law, an insurer making voluntary payments of benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 et seq., and the defendant owner of an oil rig on which the plaintiff was allegedly injured were solidary obligors because the plaintiff had alleged that the defendant was obligated to repair the same damage that insurer had volunteered to repair. Because when prescription is interrupted for one solidary obligor, it is interrupted for all solidary obligors, the insurer's voluntary payment of LHWCA benefits interrupted prescription against third-party tortfeasors.

Cotone v. Corrosion Control Systems, 46 So. 3d. 1288 (La. Ct. App. 2010)

Timothy Cotone ("Cotone") was employed as a shipyard supervisor by Superior Derrick Services ("Superior"). Superior was hired by Nabors Offshore Corporation ("Nabors") to convert an inland barge into a drilling rig. Corrosion Control Systems, Inc., ("Corrosion") was hired to perform sandblasting and painting services. Maxum Industries, LLC, ("Maxum") supplied temporary workers to Superior for the performance of welding and fitting services.

Cotone alleged that he was injured when he stepped into an open hole on Nabors' barge. Cotone initially only filed suit against Corrosion, alleging that a Corrosion employee removed the safety cables used to protect and secure the hole and covered the deck, including the hole, with a plastic covering. Maxum and other defendants were later impleaded.

Maxum filed a motion for summary judgment alleging that there was an absence of evidence that any employee of Maxum contributed to Cotone's injury. Cotone did not oppose the motion. Corrosion opposed the motion and asserted that there were genuine issues of material fact regarding Maxum's actions at and around the hole in question.

The trial court granted Maxum's motion, specifically finding that there was no evidence to show that a Maxum employee either removed the safety cables or placed the plastic over the hole. Accordingly, the trial court dismissed Cotone's claims against Maxum with prejudice.

Corrosion appealed the trial court's judgment, asserting that the trial court lacked the undisputed factual foundation necessary for its grant of summary judgment. The appellate court reviewed the record, noting that, based on the record evidence and the testimony, the trial court found that the majority of welders and fitters supplied by Maxum worked in other areas of Superior's yard and not on the barge. The appellate court concluded that Maxum's evidence need not dispose of the issue of who removed the safety barricades or placed the plastic sheeting over the manhole. No evidence was submitted to the trial court that could have allowed a reasonable trier of fact to conclude that a Maxum employee either removed the cables from the barrier or placed the plastic sheeting over the hole. The court agreed with the trial court that Corrosion failed to present any evidence that Maxum was responsible for Cotone's injuries. The summary judgment in favor of Maxum was affirmed.

Ramirez v. American Pollution Control Corp., No. C-09-343, 2010 U.S. Dist. LEXIS 82757, 2010 WL 3220667 (S.D. Tex. Aug. 13, 2010)

When a plaintiff conceals information of past injuries for a position requiring physical labor, such concealment constitutes materiality of concealed medical information. Because the plaintiff did not contest that there was a connection between the concealed information and the injury, the court concluded that the defendant met its burden and granted the defendant's motion for summary judgment.

Right to Trial by Jury

Willis v. Hercules Offshore, Inc., 2010 U.S. Dist. LEXIS 112827 (E.D. La. Oct. 14, 2010)

Andrew Willis ("Willis") alleged that he suffered injuries due to the negligence of multiple defendants while working as a wireline helper aboard a jack-up rig owned and operated by Hercules Offshore, Inc ("Hercules"). In his original complaint, Willis only asserted claims under general maritime law and identified the claim as an admiralty or maritime claim in accordance with Rule 9(h) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 9(h). Tana Exploration Company, LLC, filed an answer to the complaint and requested a trial by jury to the extent that it was entitled a jury under the Outer Continental Shelf Lands Act ("OCSLA"), 45 U.S.C. §§ 1331 et seq. Hercules filed a nearly identical answer also requesting a jury.

Willis moved to strike the jury requests that were contained in the defendants' original answers, arguing that the defendants were never entitled to a jury since Willis properly designated the action as an admiralty or maritime claim. The defendants respond by pointing out that the accident in question occurred on a jack-up rig that was "jacked up" on the outer continental shelf; therefore, OCSLA, which entitled defendants to a jury, applied to the dispute, not general maritime law.

The court initially noted that the jurisdiction granted to district courts of the United States under OCSLA is independent of any additional maritime basis for federal jurisdiction and that a jack-up rig which is attached to the continental shelf to drill for oil is an OCSLA situs. Additionally, "wireline" services are non-maritime in nature, even if performed on a drilling rig vessel. As Willis's accident occurred on a jack-up rig that was connected to the outer continental shelf, the court concluded that OCSLA applied to the dispute. Furthermore, under OCSLA's choice of law provision, Louisiana law would apply to Willis's dispute unless general maritime law applied or Louisiana law was somehow inconsistent with Federal law. Noting that the U.S. Court of Appeals for the Fifth Circuit has consistently held that wireline services provided in connection with oil exploration and production are non-maritime in nature and therefore not subject to maritime or admiralty jurisdiction, the court held that Willis's case was governed by Louisiana law as required by OCSLA unless it is inconsistent with Federal law. Since there was no argument that Louisiana law was inconsistent with Federal law in any manner that was relevant to the case, the court held that the defendants were entitled to a jury. Willis's motion to strike their jury requests was denied.

Unseaworthiness

Nelton v. Cenac Towing Co., LLC, No. 10-373, 2010 U.S. Dist. LEXIS 111225, 2010 WL 4116851 (E.D. La. Oct. 19, 2010)

Brad Nelton ("Nelton") allegedly sustained injuries while employed as a seaman by Cenac Towing Co., LLC, ("Cenac") on board one of Cenac's vessels. Nelton alleged that he injured his neck and back while attempting to remove a nut that was fastened to a header valve blind, using a double-wrenching technique. Following his alleged injury, Nelton filed suit asserting claims under the Jones Act, 46 U.S.C. § 30104, and under general maritime law. Nelton claimed Cenac was negligent in its failure to supervise and train the crew and in its instructions and orders to its employees. Nelton also claimed that the vessel was unseaworthy.

Cenac denied liability and asserted a counterclaim against Nelton, seeking to recover maintenance and cure that it had paid since the incident at issue. Cenac also filed a motion for summary judgment with respect to Nelton's Jones Act claim, arguing the Nelton had failed to demonstrate a genuine issue of fact as to negligence and causation and noting that Nelton had provided deposition testimony that there was nothing the vessel's crew did or failed to do that contributed to the incident.

Nelton opposed Cenac's motion, arguing that there is evidence that Cenac knew of the danger of the double-wrenching technique and failed to instruct crew members not to use the technique. The court found that Nelton had proffered sufficient evidence that Cenac may have been negligent. Cenac's corporate representative acknowledged during his deposition that a double-wrenching operation is dangerous and that it can lead to personal injuries. The captain onboard stated during his deposition that the technique is commonly used and that he had approved of its use. If found credible, the court concluded the evidence would support the finding that Cenac was negligent and that its negligence played a part in producing the injuries for which Nelton sought relief.

To the extent that there was other evidence indicating that Nelton knew or should have known of the danger of the double-wrenching technique, this evidence merely went to the question of contributory negligence and was not a complete defense to Nelton's Jones Act claim. Cenac's motion for summary judgment was denied.

In re ALEX C Corp., 2011 AMC 157, 2010 WL 4292328
(D. Mass. 2010)

A tug allided with a ship it was undocking, resulting in an oil spill. The court found that the failure to maintain a fender on the ship docking tug which caused damage and an oil spill from steel-to-steel contact when the vessels came together rendered the tug unseaworthy. Further, leaving an unlicensed crewmember on another tug involved in the undocking, whose duties did not include piloting any vessels, rendered that tug unseaworthy.

Per se Negligence

Irons v. Matthews, No. 04-4825 (JEI/JS) 2010 WL 2540347 (D.N.J. June 15, 2010)

A defendant vessel owner and operator failed to wear a lanyard engine cut-off switch that was fitted in his vessel. The plaintiff argued that failing to wear the lanyard in violation of the state's administrative code amounted to *per se* negligence. The defendant argued that *per se* negligence does not apply, as the defendant did not violate a U.S. Coast Guard regulation. The court agreed, holding that while the defendant's failure to properly employ the lanyard cut-off switch may be evidence of negligence, the court declined to expand the test of *per se* negligence beyond the narrow set of factors specifically detailed in the *Smith v. Trans-World Drilling Co*., 772 F.2d 157, 160 (5th Cir.1985), decision. The court did not address whether the failure to wear the lanyard made the vessel unseaworthy.

Seaman Status

Teaver v. Seatrax of Louisiana, No. 10-1523, 2010 U.S. Dist. LEXIS 98169, 2010 WL 3418231 (E.D. La. Aug. 23, 2010)

A plaintiff is not a passenger on a utility vessel provided by his employer if he is an integral component of the vessel's mission and purpose (in this case a rig) and he spent at least at least thirty per-cent of his work in the service of a vessel in navigation. However, it is insufficient to show that the plaintiff is integral component of vessel's mission and purpose simply because he berths, eats, discusses work, and inspects tools. The court also held that the plaintiff additionally failed to demonstrate that he had a substantial connection with the vessel.

Blanda v. Kathryn Rae Towing, Inc., 43 So. 3d 355 (La. Ct. App. 2010), *writ denied*, 50 So. 3d 828 (La. 2010)

Robert C. Blanda was allegedly injured in a car accident while employed by Kathryn Rae Towing, Inc. ("KRT"). He was working a 14-day hitch, had just finished a 12-hour shift, and had left the boat to do his laundry. His captain on the shift, who had also just finished a 12-hour shift, was on his way home, driving his personal vehicle, and had agreed to give Blanda a ride because Blanda had no vehicle. Their car was struck by a drunk driver who crossed into their lane and hit them head-on.

After the accident, Blanda sued KRT under the Jones Act, 46 U.S.C. § 30104, seeking damages for his injuries. The trial court found that Blanda was not in the course and scope of his employment at the time of his accident and injuries, thus finding no liability against KRT under the Jones Act and dismissing Blanda's case against KRT.

Blanda appealed the trial court's dismissal of his claim, arguing that material issues of fact remain disputed, including the degree of control, whether by merely riding with his captain, Blanda was subject to the control of the vessel and his employer, whether Blanda was on a mission of the vessel or personal business, whether the vessel's failure to maintain its clothes washing machine forced Blanda to leave the ship to get his laundry done, and whether in doing so, he was on a mission for the vessel. The appellate court agreed with the trial court's finding that there were no material issues of fact in dispute and that KRT was entitled to judgment as a matter of law.

The court found it was undisputed that the tug captain was not in the course and scope of his employment at the time of the accident. He clearly stated that he exercised no control over Blanda at the time of the accident and had merely agreed to give Blanda a ride in his personal automobile. Nor was it disputed that, at the time of the accident, Blanda had finished his 12-hour shift and considered himself free to leave the boat, as did his captain.

The appellate court rejected Blanda's theory that he was forced to go ashore by the vessel's disrepair (an "unseaworthy" condition) because the clothes washing machine on the boat did not work. While it was undisputed that the washing machine on the boat was broken, the washing machine itself did not cause Blanda's injuries. Also, there were no facts offered to suggest that Blanda was required to have clean clothes or a certain uniform in order to perform his job. The fact that he may have wanted to wash clothes, therefore, was a personal mission, not one for the vessel. The trial court's judgment was affirmed in all respects.

Sepulvado v. Alpha Drilling, LLC, 730 F. Supp. 2d (W.D. La. 2010)

William Sepulvado began working for Axxis Drilling, Inc., as a floorhand. After sustaining several injuries and while recuperating from surgery, Axxis sent Sepulvado to crane operating school because working as a crane operator would be less strenuous than roughnecking. Sepulvado returned to work with Axxis as a crane operator and, while working as a crane operator aboard a self-propelled drilling barge, his right lower extremity was crushed between a crane and the crane's door, allegedly resulting in injuries to his right lower extremity and lower back.

Sepulvado eventually underwent a functional capacity evaluation and was released to medium work. Sepulvado's previous job as a crane operator constituted medium level work, but Axxis assigned Sepulvado to work as a galley hand on one of its land rigs. While working as a galley hand on the land rig, Sepulvado allegedly injured his cervical spine while unloading a 148 quart cooler packed with ice and meat from the back of a flatbed truck.

Sepulvado subsequently filed suit, seeking damages for both accidents. Thereafter, Axxis filed a motion for partial summary judgment arguing Sepulvado was not a Jones Act, 46 U.S.C. § 30104, seaman at the time of the second accident sued and that recovery for his second accident, if any, is limited to compensation under the Louisiana Workmen's Compensation Act, La. Rev. Stat. Ann. §§ 23:1021 *et seq*. Sepulvado argued that his position as a galley hand was not a permanent reassignment, and that Axxis continued to pay him the wages of a crane operator and only assigned him to land-based work temporarily, until a position for a crane operator became available. Axxis disputed the truth of Sepulvado's allegations by affidavit from the company president.

However, whether Sepulvado was transferred permanently, such that he lost seaman status, was found to be an issue in dispute by the court. The court pointed to Sepulvado's deposition testimony, in which he testified: 1) it was his understanding his assignment to land-based work was only temporary, effective until a crane operator position became available "on the barge"; and 2) during the period he worked on land he was paid the same amount he had been paid as a crane-operator. The court declined to determine which interpretation of the facts was correct, by way of this motion for summary judgment, finding that it would usurp the role of the jury in this matter as the finder of fact. Since more than one conclusion could reasonably be drawn concerning Sepulvado's seaman status from the facts of the case, the court held that partial summary judgment was not appropriate. Axxis's motion for partial summary judgment was denied because the court found that a genuine issue of material fact existed as to whether or not Sepulvado was permanently reassigned to land duties, and thus lost his status as a Jones Act seaman.

George v. Cal-Dive International., Inc., No. 09-5472, 2010 U.S. Dist. LEXIS 66055, 2010 WL 2696876 (E.D. La. July 1, 2010)

The court held it was insufficient to establish Jones Act, 46 U.S.C. § 301040, seaman status under the group of vessels concept when at no time could plaintiff expect permanent or prolonged placement with any particular vessel or concrete group of vessels under common ownership or control.

Death on the High Seas Act

Bowoto v. Chevron Corporation, 621 F.3d 1116 (9th Cir. 2010)

The U.S. Court of Appeals for the Ninth Circuit ruled that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30301 *et seq*., preempts a survival claim brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Relevant events in the instant case occurred on an oil platform located in the Atlantic Ocean nine miles off the coast of Nigeria. The platform was operated by a subsidiary of the defendant oil company. On May 25, 1998, over 100 Nigerians took over the platform in a protest action. After four days, the platform operator sought assistance from the Nigerian government. Nigerian Government Security Forces shot a number of the protestors, killing two. The injured protestors and the family of a deceased protestor brought suit. One of the claims (and the one on appeal here) was a survival action brought under the Alien Tort Statute. The court concluded that Congress intended DOSHA to preempt survival claims brought under other statutes, particularly a more general statute such as the ATS, which created no new causes of action.

Maintenance and Cure

Barker v. McAllister Towing of Philadelphia, Inc., No. 08-2910(AMD), 2010 WL 3258130 (D.N.J. Aug. 16, 2010)

A tug company and the ship its tug was docking stipulated in a settlement with an injured tug crewmember to being each 50% at fault for the injury of the tug crewmember. The tug company filed a motion for contribution against the ship to recover 50% of its maintenance and cure payments. The court held that an employer's right to reimbursement for maintenance and cure is not extinguished when the employer is apportioned part of the fault. Thus, an employer, even in partially liable for the injury to its employee, is entitled to reimbursement for maintenance and cure in accordance with the respective fault of the third-party tortfeasor. *See also Aljalham v. Am. S.S. Co.*, 724 F. Supp. 2d 729 (E.D. Mich. 2010), *reconsideration denied*, No. 08-14043, 2010 WL 2927422 (E.D. Mich. July 23, 2010).

Seaman Settlements

Irons v. Matthews, No. 04-4825 (JEI/JS), 2010 WL 2540347 (D.N.J. June 15, 2010).

The plaintiff and the defendant, both unrepresented by counsel, executed a release in the office of an attorney who represented a family member of the defendant in an unrelated matter. The defendant provided the release, a pre-printed form in black and red type with space provided to write in the particulars of the settlement, which he had previously obtained to deal with prior, unrelated situations. The plaintiff claims he filled out and signed the form as instructed by the defendant. The plaintiff also claims he may have been under the influence of drugs when he signed the release.

The release stated that in exchange for $23,000.00, which the plaintiff had already received, the plaintiff released the defendant and his wife from all claims and rights arising out of his back injury. It then reiterated, in various ways, that the release settled all claims, present or future, for damages, maintenance, cure, and wages. At the time he executed the release, the plaintiff did not know what maintenance and cure was. Three witnesses from the attorney's office signed the release, as did a notary public.

However, the release did not comport with the reality of the defendant's payments to the plaintiff. First, contrary to what was stated in the release, the plaintiff had not yet received a $23,000 payment when the release was executed. Second, without the plaintiff's knowledge, the defendant agreed with the plaintiff's parents to pay the plaintiff's settlement directly to the parents, rather than to the plaintiff. The defendant subsequently paid three checks to the plaintiff's mother, totaling $15,224. Third, the defendant may not have paid the plaintiff the full value of the $23,000 settlement. It was undisputed that defendant paid the plaintiff's mother $15,224 and purchased a truck for the plaintiff, costing $7,500. The total value of these payments was $22,724, which was less than the promised $23,000 settlement payment.

The court found the release to be void, stating that it was evident from the record that the plaintiff did not consult with an attorney, nor were his rights, including claims of maintenance and cure, ever explained to him.

LHWCA

Louisiana Insurance Guaranty Association v. Director, Office of Workers' Compensation Programs, 614 F.3d 179, 2010 AMC 2875 (5th Cir. 2010)

The U.S. Court of Appeals for the Fifth Circuit affirmed the award of benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq*., finding that the "last exposure" rule applied even though the insurer was a state entity standing in the place of a private insurance company that had become insolvent.

Allen v. M/G Transport Services, Inc., No. 09-791-JJB-CN, 2010 U.S. Dist. LEXIS 104754, 2010 WL 3894241 (M.D. La. Sept. 29, 2010)

Floyd Allen, Jr., ("Allen") was allegedly injured aboard an M/G Transport Services, LLC, ("M/G") barge while in the process of shoveling waste materials from atop the barge on behalf of his employer Cooper/T. Smith Stevedoring ("Cooper"). While Allen was atop the barge, and without first notifying him, members of Cooper's crew attempted to close the barge's roll-top cover with a crane, which caused the barge to jerk suddenly, throwing Allen from the top of the barge.

Allen filed suit against M/G under §905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq*., for the injuries he allegedly sustained while performing stevedoring operations. M/G removed the case from state court, where it was originally filed, to federal court and moved for summary judgment on the grounds that (1) Allen's case was barred by the statute of limitations, and (2) Allen had no right to relief under the LHWCA. M/G argued that Allen's suit was barred by the Uniform Statute of Limitations Act for Maritime Torts and the Allen's claim was subject to the three-year statute of limitations. The court found the three year prescriptive period inapplicable, holding that it was displaced by the LHWCA, which provides that a plaintiff has one year from the date of the last compensation payment in which to file its claim. The court denied M/G's motion for summary judgment on the grounds that Allen's claim was not timely filed, since he had filed his claim within one year of the date that Cooper had last paid voluntary compensation benefits under the LHWCA.

The court then turned to M/G's argument that Allen has no right to relief under the LHWCA under the facts established, arguing that it cannot be liable for the condition of the crane because the crane was not an appurtenance of the barge and M/G did not own or operate the crane. Rather, Allen's employer, Cooper, had exclusive control over the offloading of the barge, and M/G had no employees or personnel present on the date of the accident. The court agreed, finding that there were no genuine issues of material fact and that M/G was entitled to summary judgment. First, the crane, which allegedly had a defective horn, was not an appurtenance of the barge, nor did M/G own or operate the crane. Therefore, M/G bore no responsibility for the crane's condition. Allen failed to provide evidence that M/G maintained active control of the barge's operation at the time of the accident and failed to provide any evidence demonstrating that M/G had reason to know that Cooper's employees would attempt to close the barge's roll-top with a crane. Thus, Allen had failed to show that M/G knew or should have known that Cooper could not be relied upon to protect its own employees. Because M/G could not have violated its "duty to intervene," the court granted M/G's motion for summary judgment.

Slightom v. National Maintenance & Repair, Inc., 714 F. Supp. 2d 1032 (S.D. Ill. 2010)

Clifford Slightom ("Slightom") worked for National Maintenance & Repair, Inc., ("National Maintenance") as a shipbuilder and, while so employed, was diagnosed with carpal tunnel syndrome resulting from his work with National Maintenance. National Maintenance filed the appropriate report with the Louisiana Office of Workers' Compensation Programs, stating that the injury came under the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. §§ 901 *et seq*.

Slightom took a leave of absence so that he could obtain treatment for his injury. During this time, Slightom underwent surgery for carpal tunnel syndrome on his right hand. He also underwent surgery on his left hand for multiple crush syndrome, which occurs when one's nerves, veins, and arteries become impinged at the joints. Slightom ultimately went under the knife nine times. Slightom's physician eventually concluded he had reached maximum medical improvement, and Slightom returned to work with permanent restrictions.

National Maintenance eventually assigned Slightom to work in its tool room, where he was responsible for the distribution and repair of tools and equipment. Slightom was eventually terminated for violations of National Maintenance's absenteeism policy. In response to Slightom's termination, his union filed a grievance on his behalf; however, the union did not further pursue this grievance after National Maintenance denied it as untimely.

Slightom took legal action shortly thereafter. Slightom initially filed a charge of discrimination with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination on the basis of his age and disability. Unsatisfied with the disposition of his charge of discrimination, Slightom filed this suit against National Maintenance, alleging retaliatory discharge, punitive damages, and violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181 *et seq*.

National Maintenance removed the matter to federal court, from state court, claiming that the ADA count fell under the court's federal question jurisdiction. National Maintenance moved for summary judgment on all counts of the complaint, arguing that Slightom had failed to exhaust his administrative remedies and that Slightom did not qualify as disabled under the ADA. The court found that Slightom had clearly failed to exhaust his administrative remedies under the Longshore Act by not bringing his retaliation claim before any district director. Even if Slightom had followed the proper administrative channels, his case would be subject to review by the U.S. Court of Appeals for the Seventh Circuit, not the district court. The court held that the Longshore Act provided the unique and necessary means of addressing retaliation claims related thereto, and Slightom had not sufficiently argued or demonstrated why he should be exempt from its reach.

Although the court found that Slightom was a "qualified individual" under the ADA, the question it had to answer was whether Slightom's multiple crush syndrome substantially limited any of his major life activities. The court found that this question must be answered in the negative and held that no reasonable jury could disagree. The court noted that Slightom had not and could not argue that his permanent restrictions currently substantially inhibit his ability to care for himself, walk, eat, perform manual tasks, etc. This finding, coupled with the absence of any evidence that National Maintenance believed Slightom to be substantially limited in a major life activity, dictated that Slightom could not proceed under the "regarded as" prong of the ADA. The court granted National Maintenance's motion for summary judgment, dismissing Slightom's claims for retaliation and punitive damages without prejudice and dismissing his claim for violation of the ADA with prejudice.

Louisiana Insurance Guaranty Association v. Director, Office of Workers' Compensation Programs, 614 F.3d 179, 2010 AMC 2875 (5th Cir. 2010)

An appellate court found that under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*., the applicable law of allocation would have assigned all liability to the plaintiff's employer (which then became defunct), and consequently the plaintiff took on responsibility when it appeared as the replacement party for defunct carrier.

Scioneaux v. Elevating Boats, LLC, No. 10-0133, 2010 U.S. Dist. LEXIS 64192, 2010 WL 2651648 (E.D. La. June 28, 2010)

Antonie Scioneaux was an employee of Elevating Boats, LLC, ("EB") for approximately fifteen years prior to his death from acute myelogenous leukemia ("AML"). While employed with EB, Scioneaux worked in the shop, in the yard, and on numerous vessels owned by EB. Throughout his employment, Scioneaux was allegedly required to use numerous heavy, toxic chemicals to perform certain tasks. Scioneaux also allegedly had to use chemicals supplied by EB owned vessels to perform certain tasks during his time at EB.

On June 24, 1999, Scioneaux submitted an injury report stating that he came into contact with a high detergent soap that caused a serious chemical burn on his leg and ankle. Prior to his death, Scioneaux allegedly told his wife and his physician that he believed that he had contact with numerous benzene containing chemicals while cleaning EB's vessels. Scioneaux was diagnosed with AML, and he died a little more than three months later.

Scioneaux's widow filed this action, alleging that Scioneaux developed and died from AML as a result of being exposed to benzene while working at ED. The widow further alleged that Scioneaux was a longshoreman, and bought claims under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*., against EB as a vessel owner under § 905(b). EB moved for summary judgment, contending that there was no evidence that Scioneaux was exposed to benzene on a vessel owned by EB or that benzene exposure caused his death. The widow argued that Scioneaux died from AML three months after he was diagnosed with the disease. Thus, the majority of the information significant to this lawsuit could not be formally obtained from Scioneaux prior to his death. She argued that discovery was ongoing, EB's responses to discovery were imperative to her ability to pursue her case and, therefore, summary judgment was premature without further discovery. The court agreed with the widow and denied the summary judgment motion.

Rodriguez v. Reicon Group, LLC, 909 N.Y.S.2d 579
(N.Y. App. Div. 2010)

A dock builder was injured when he slipped while stepping from a pier onto a barge. He thereafter applied for benefits under the New York Workers' Compensation Law, N.Y. Workers' Comp. Law § 113. At a hearing, the employer and its workers' compensation carrier (hereinafter collectively referred to as the "employer") indicated that claimant had been receiving payments under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 et seq., and asserted that the applicability of the LHWCA precluded the Workers' Compensation Board from exercising jurisdiction over the claim. A workers' compensation law judge determined that the Board has concurrent jurisdiction over claims that also fall within the jurisdiction of the LHWCA, and continued the case. The court found concurrent jurisdiction among state workers' compensation laws and the LHWCA over claims arising from land-based injuries compensable under the LHWCA and that the LHWCA does not preempt, but rather supplements, state workers' compensation remedies.

Outer Continental Shelf Lands Act

Henderson v. McMoran Oil, No. 09-5625, 2010 U.S. Dist. LEXIS
110804, 2010 WL 4116839 (E.D. La. Oct. 18, 2010)

Denis Henderson ("Henderson") was allegedly injured when a crane reportedly fell on him while he was dismantling it. At the time, Henderson was working as a senior crane mechanic for Seatrax Services, Inc., on a McMoran Oil offshore platform beyond the boundary of Louisiana territorial waters on the outer continental shelf.

Henderson filed suit and one of his causes of action was his wife's loss of consortium claim. One of the defendants, Quality Production Management, LLC, ("QPM") filed a motion for summary judgment with respect to the issue of loss of consortium, arguing that Henderson was barred from asserting a claim for loss of consortium because he was injured on the outer continental shelf and general maritime law does not recognize such a claim. Henderson argued that the Outer Continental Shelf Lands Act, 45 U.S.C. §§ 1331 *et seq.*, borrows the law of the adjacent state. Accordingly, Henderson argued that because the law of Louisiana - the adjacent state in this matter - provided a cause of action for loss of consortium, summary judgment should be denied with respect to such issue.

The court initially noted that, because Henderson's alleged injury occurred on an offshore fixed platform, such accident did not occur on navigable waters and lacked the required connection to traditional maritime activity. The court agreed that when workers are injured or killed on the outer continental shelf in circumstances in which admiralty law would otherwise apply, their families have no cause of action for loss of consortium.

Nevertheless, in this case the court concluded that Louisiana law was not inconsistent with federal law. Although QPM was correct that general maritime law does not provide a cause of action for loss of consortium, accidents that occur on fixed man-made structures situated on the outer continental shelf are not governed by maritime law. Louisiana law provides a cause of action for loss of consortium. The court held that Henderson could avail himself of Louisiana's tort law, and QPM's motion for summary judgment with respect to the issue of loss of consortium was denied.

-- Compiled by Brian McEwing, Esq., Donna Adelsberger and Associates, P.C., and Laszlo M. Szabo, Esq., Port Auth. of New York and New Jersey. (Authors listed alphabetically). The authors wish to express their thanks to Dennis Bryant of Bryant's Maritime Blog and Tom Langan of Longshore Update.

RECENT CASES ADDRESSING LIMITATION OF LIABILITY ISSUES

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Dismissal of "tens of thousands" of Katrina claims affirmed by Fifth Circuit.

In re Great Lakes Dredge & Dock Co. LLC, 624 F.3d 201 (5th Cir. 2010)

In this consolidated limitation action, Claimants, who were Hurricane Katrina flood victims numbering in the tens of thousands, filed claims against the Limitation Petitioners, which were private companies that operated twenty-two dredging vessels along the Mississippi River Gulf Outlet pursuant to contracts with the United States Army Corps of Engineers. Claimants suffered damages from the flooding of Orleans and St. Bernard Parishes when several levee systems failed as a result of the erosion of protective wetlands allegedly caused by the Limitation Petitioners' negligent maintenance dredging operations. The Limitation Petitioners moved for dismissal under Rule 12(b)(1) and Rule 12(c). The court granted the motion,[1] holding as a matter of law that the Limitation Petitioners did not owe a duty to the Claimants and were therefore not liable because the Claimants' hurricane damages were not the legally foreseeable consequence of the Limitation Petitioners' allegedly negligent dredging activities. The Fifth Circuit affirmed, noting that "whereas in [*In re Signal International LLC*], the negligent barge-owner anticipated Hurricane Katrina's approach and failed to secure the barges to withstand the expected storm surge, the Limitation Petitioners in this case had no knowledge of an immediate and pending natural disaster that would affect how they conducted their dredging operations. Furthermore, it cannot be said that any dredger could have foreseen that performing its dredging activities negligently – as opposed to in conformity with the Corps of Engineers' specifications – would probably result in the series of events culminating in the catastrophic damages that occurred during Hurricane Katrina."

[1]While the court referenced both Rule 12(b)(1) and Rule 12(c) when granting the motion, on appeal the Fifth Circuit noted that the district court did not hold that it lacked subject matter jurisdiction. Rather, dismissal was entered with prejudice on the merits under Rule 12(c).

[16088]

Notice indicating claimant would hold third party liable for his injuries was insufficient notice to trigger the Limitation of Liability Act's six month prescriptive period.

In re Weeks Marine, Inc., No. 2:10-01794 (E.D. Pa. Oct. 13, 2010) [Not reported in West Law or AMC]

Michael Kilroy, who was employed as a dockbuilder by Weeks Marine, Inc., was standing on a barge when a tow line to the barge parted and struck Kilroy in the leg. Weeks began paying voluntary compensation to Kilroy under the LHWCA and put the towing company on notice that it was being held responsible for Kilroy's injuries as a negligent third party. Weeks subsequently received a letter from Kilroy's attorney informing Weeks that Kilroy intended to sue a third-party, not Weeks. When Kilroy eventually filed his third-party complaint in state court, Weeks was also named as a party. Weeks then removed Kilroy's complaint to federal court and filed a petition to limit its liability. Kilroy moved to dismiss the petition for limitation of liability, claiming that it was untimely and arguing that Weeks received a number of letters that put it on notice of Kilroy's claim yet failed to file its action for limitation of liability within six months of receiving the letters. The court found that the documents upon which Kilroy relied did not satisfy the notice of claim standard because they did not alert Weeks that Kilroy would seek to hold it liable for his injuries. "Indeed, the injury report contend[ed] that a party other than Weeks Marine was responsible for Kilroy's injuries." Based on the foregoing, the court held that Weeks' limitation of liability petition was timely filed.

Kilroy also asserted that his case should be remanded to state court because his cause of action involved only a single claimant. However, the court found that the contribution and indemnification actions filed against Weeks by its co-defendants, coupled with the lack of any stipulations to limit the liability of Weeks, rendered the case a multiple claimant situation. "As long as there is a potential set of circumstances in which a shipowner could be held liable in excess of the limitation fund, the reasonable prospect of claims for indemnification or contribution should constitute a multiple claimant situation necessitating a *concursus*." Based on the foregoing, the Court retained jurisdiction and declined to remand the case to state court.

[16089]

Notice of claim was inadequate for purposes of the Limitation of Liability Act.

In re Miller's Launch, Inc., No. 10-cv-0872, 2010 WL 3282627 (E.D.N.Y. Aug. 18, 2010)

Miller's Launch ("Owner") was a part owner of two garbage scows which were used to transport debris, garbage, and tree trunks from navigable waters to large debris containers located at the Bowery Bay Sewage Treatment Plant. The plaintiff in this action, Marcus Link, was an employee of Gaeta Interior Demolition and was allegedly injured when a large log fell out of one of the containers as he was moving debris into Gaeta's garbage trucks. Three weeks after the alleged incident, Link's attorney sent Owner a letter of representation in which the attorney gave notice that his firm was representing Mr. Link in his claim for "injuries sustained in an accident at Tallman Island Water Pollution Control Plant, College Point, New York on October 3, 2008." Owner responded two days later by advising that it had no knowledge of the alleged event at the treatment facility identified in the attorney's letter. On August 24, 2009, Link filed a personal injury lawsuit and on February 26, 2010, Owner commenced this proceeding for limitation or exoneration of liability under the Limitation of Liability Act. Link moved to dismiss the limitation proceeding for failure to file a complaint within six months after receiving Link's notice of claim as required by the Act. It was undisputed that Link's complaint served as proper written notice of a claim. The question before the court was whether the first notice sent by Link's attorney identifying the wrong facility was sufficient to trigger the six-month prescriptive period. Because Link was a stranger to Owner and because it appeared that the accident itself was unknown to Owner, any notice sufficient to alert Owner to the possibility of suit in excess of the value of their vessels, if not containing express statements of fundamental facts, had to contain at least enough information to allow them to make necessary inferences. The court found that the letter to Owner was insufficient to alert them to the possibility of suit in excess of the value of its vessels. It provided Link's name, the date of the accident, and the possibility of suit for an unspecified amount, but nothing further. The court found that since Link was not an employee of Owner, Owner "would be at sea in trying to determine who he was." More importantly was the absence of the name of Owner's vessel involved in the accident and the misidentification of the location of the accident. The court found that the latter was no trivial detail; rather, the place the accident happened may have been the most material fact necessary to put Owner on notice. While the requirements of notice under the Act are minimal, the written notice must be sufficient to allow the owner to investigate whether the amount of the claim or other claims likely to be the subject of litigation arising out of the same occurrence may exceed the value of the vessel. The court held that the purported notice here did not do that, and Link's motion to dismiss was accordingly denied.

State court lawsuit was sufficient notice for purposes of the Limitation of Liability Act.

In re Eckstein Marine Servs., No. H-10-0156, 2010 WL 3303640 (S.D. Tex. Aug. 19, 2010)

In this case, the court granted the sole claimant's motion to dismiss on the ground that the limitation petitioner failed to timely file the limitation proceedings within six months after it received written notice of the claim. In this case, the claimant contended service of process of his state court petition was sufficient notice to trigger the six-month prescriptive period. The limitation petitioner contended that its limitation petition, which was filed approximately 6 months and 8 days after it received the claimant's state court petition, was timely filed based on the principle that written notice of a claim sufficient to begin the six-month period must reveal a "reasonable probability" that the claim made is one subject to limitation. The issue in this case was whether the claimant's state court petition provided notice that the injuries presented a reasonable possibility that the damages could exceed the value of the vessel, which in this case was $750,000. Noting that the purpose of the six-month period is to permit the vessel owner time to investigate whether the injuries present a reasonable possibility of exceeding the vessel's value, the court found that the state court petition raised the possibility of damages exceeding the vessel's value and, at a minimum, there was no affirmative statement made on the part of the claimant (either in the petition or in the course of discovery during the six months following service of process) upon which the limitation petitioner could rely that the claim would not exceed the value of the vessel and thereby warrant a delay in filing the limitation.

Claimants allowed to bifurcate exoneration and non-exoneration issues.

In re Miss. Limestone Corp., No. 09-00036, 2010 WL 4174631 (N.D. Miss. Oct. 7, 2010)

On the Limitation Petitioner's motion to strike the Claimants' demand for a jury, Claimants conceded that that the Limitation Petitioner was entitled to proceed in admiralty without a jury while the court adjudicated the limitation of liability issues; however, claimants wished to bifurcate the case in order to ensure that the only issue resolved in the federal forum was the limitation of liability question and to reserve to the state court all non-limitation issues. The Limitation Petitioner, on the other hand, argued that the court should resolve more than just its initial liability and urged the court to decide the issues of exoneration, limitation of liability, and the liability of other parties, specifically the negligence apportionment and damages with respect to a third party, Teleflex. Further, the Limitation Petitioner asserted that the court should not empanel a jury at all. The court held that the Claimants were entitled to bifurcate the proceedings, stating that "not only does bifurcation make perfect sense here, it appears that the preferred approach, at least within federal district courts of the Fifth Circuit, is to decide the limitation issues and then allow claimants to return to state court if they so desire." Based on the foregoing, the court granted the Limitation Petitioner's motion to strike the jury demand only insofar as it related to limitation issues.

District court in Connecticut holds that Limitation Act does not provide independent source of admiralty jurisdiction over claims arising out of incident that occurred *entirely* on land.

In re Carter, No. 3:09cv2057 MRK, 2010 WL 3926006 (D. Conn. Sep. 30, 2010)

Boat owner brought action against insurance companies to limit his potential liability under the Limitation of Liability Act for damage to property at a boat yard which was allegedly caused by a fire originating on his boat which was stored on dry land. The insurance companies filed motions to dismiss based on their contention that the court lacked subject matter jurisdiction over the claims. The central question presented by the two motions was whether the Limitation Act confers admiralty jurisdiction over petitions that arise from incidents that occur entirely on land.

The court held that it did not have admiralty jurisdiction over this case based on: (A) the two-prong test for 28 U.S.C. § 1333(1) jurisdiction over maritime tort claims which provides that to fall within the court's admiralty jurisdiction, a tort must have both occurred on navigable waters and have a significant relationship to traditional maritime activity; and, (B) the Limitation of Liability Act not providing an independent source of admiralty jurisdiction.

In connection with the former, the court held that the first prong of the test for admiralty jurisdiction could not be satisfied because "the fire at issue in this case began on land and occurred *solely* on land. The case does *not* involve a tort that occurred on navigable waters and merely had *effects* on land. Furthermore, while it is true that under Supreme Court precedent vessels remain 'in navigable waters' when they are in a graving dock, this case involves storage of a vessel on land for a period of ten months, not temporary storage of a vessel in a graving dock."

The limitation petitioners also argued that once a vessel owner has filed a petition in a district court in conformance with the Limitation Act, there is no need for any further inquiry regarding subject-matter jurisdiction. In response, the court acknowledged that under *Richardson v. Harmon*, 222 U.S. 96, 101, 32 S.Ct. 27, 56 L.Ed. 110, 2001 AMC 1207 (1911), and *The No. 6*, 241 F. 69, 71 (2d Cir.1917),[1] it is undeniable that the Limitation Act confers admiralty jurisdiction independent of 28 U.S.C. § 1333(1) in *some* circumstances and that it was bound to follow Supreme Court and Second Circuit decisions. However, the court went on to conclude that *Richardson* and *The No. 6* were not controlling because neither the Supreme Court nor the Second Circuit specifically considered whether the Limitation Act confers jurisdiction over a petition seeking limitation of liability based on an incident that occurred entirely on land. In sum, the court concluded that it did not have jurisdiction over this action because the Limitation Act does not confer admiralty jurisdiction over petitions seeking limitation of liability based on incidents that occurred *entirely* on land. In so holding, the court also noted that every court of appeals that has considered the issue has reached the identical result.

[1]The controversy before the Supreme Court in *Richardson* involved a tort "due to a collision between a ship and a structure upon land." 222 U.S. at 101. The controversy before the Second Circuit in *The No. 6* involved virtually identical facts: a collision between a vessel on navigable waters and an underground structure. *See* 241 F. at 69.

Value of pending freight in a multi-phase dredging contract.

Collins v. Cottrell Contracting, 733 F. Supp. 2d 690 (E.D.N.C. 2010)

The district court denied claimants' motion seeking to increase the value of the limitation fund and to increase the amount of security posted. Specifically, claimants sought to increase the amount by $2,263,300, which was the value of a dredging contract between the limitation petitioner and the United States Army Corps of Engineers, arguing that the contract constituted "pending freight" as that term is used in 46 USC § 30505(a). First noting that the question of whether the value of a dredging contract may be included as pending freight had already been answered in the affirmative by other courts, this court framed the remaining question as whether the relevant "voyage" consisted of the entire multi-phase dredging contract or only a discrete portion thereof. The claimants urged that the entire value of the contract should be included in the contract price, likening the multi-phase contract to a round-trip voyage or a situation in which a vessel delivers cargo at multiple ports en route to its final destination, either of which constitutes a single voyage in assigning a value to "pending freight." In response, the court noted that the determination of the relevant voyage is a fact-specific inquiry that depends on the particular circumstances of the situation presented. In the instant matter, the court found that the entirety of the multi-part dredging contract at issue, including four separate dredging projects and mobilization and demobilization of those projects, did not constitute the relevant "voyage" for purposes of measuring "pending freight." Instead, the pending freight of the vessel engaged in a discrete phase of a multi-phase contract included the amount allotted only to the discrete phase at issue at the time of the incident. Although the contract stipulated that the value of mobilization and demobilization generally was $875,000.00, because there was no method for precisely calculating the value of the discrete project underway at the time of the incident (specifically, the removal of a bulldozer), no amount would be added to the limitation fund.

District Court in Utah adopts majority rule that stipulation must be signed by "all claimants".

In re Aramark Sports & Entm't Servs., 725 F. Supp. 2d 1309, 2011 AMC 486 (D. Utah 2010)

This limitation proceeding arose out of an incident on Lake Powell wherein several of the claimants (the Howeth Claimants) renting Aramark's houseboat were allegedly sickened by carbon monoxide, allegedly resulting in one fatality and many injuries. Pursuant to admiralty law, the court entered an Order Restraining Suits; however, the Howeth Claimants' counsel nonetheless proceeded to file suit in Chicago, Illinois and then moved to lift the stay in the limitation proceedings. Aramark responded to the Chicago action by notifying the Howeth Claimants that it would file a contempt motion unless the Chicago action was dismissed. Instead of dismissing Aramark from the Chicago action, the Howeth Claimants filed two matters in the limitation action. First, the Howeth Claimants filed a unilateral stipulation stating they would not challenge the limitation court's jurisdiction over the limitation proceeding and would not seek to enforce any judgment obtained in the Chicago action until the limitation court determined Aramark's rights in the limitation proceeding. An amended stipulation was subsequently filed on their behalf. Significant for the purpose of the present motions was the fact that the manufacturing claimants did not join in the stipulations. Second, the Howeth Claimants filed a motion to dismiss these proceedings. In response, Aramark filed a motion to dismiss or transfer in the Chicago action (wherein it raised the issue of the violation of the order staying proceedings) and filed a motion for contempt in the present action. Prior to the limitation court ruling on the motions pending before it, the Chicago court granted Aramark's motion to transfer and transferred that action to the same court where the limitation was pending.

In denying the Howeth Claimants' motion to lift the stay, the limitation court followed the majority position followed by the Eleventh, Fifth, Second and Third Circuits that the shipowner is only adequately protected by a stipulation signed by "all claimants." Because there was no such stipulation signed by all claimants in this case, the court held that the Howeth Claimants' stipulation could not ensure the shipowner's right to limit its liability such that the court could not lift the stay. The court also found that counsel for the Howeth Claimants were in civil contempt as result of their filing the personal injury complaint against owner after an order restraining suits had been issued.

Genuine issues of material fact precluded summary judgment.

In re Harnett, Nos. 06-cv-699 (LMM), 06-cv-3061 (LMM), 06-cv-3062 (LMM), 2010 WL 2834912 (S.D.N.Y. July 14, 2010)

Petitioner, the owner of the vessel Ready Jet Go, brought a claim for exoneration from or limitation of liability as a result of a collision between Ready Jet Go and a 45-foot rowing shell. The court denied petitioner's motion for summary judgment based on its findings that genuine issues of material fact concerning the time, light conditions, speed, adequacy of windshield visibility, and whether or not Ready Jet Go traversed too closely to the center of the Harlem River had to be resolved in order to ascertain whether or not the petitioner could exercise a right to limitation of liability.

Denial of owner's petition for exoneration from limitation of liability cannot be based solely on a finding that the owner was the operator of the vessel at the time the collision.

In re Tourtellotte, No. 09-2787 (MLC), 2010 WL 2723258
(D. N.J. July 8, 2010)

Three individuals, William Tourtellotte ("William"), Barbara Tourtellotte ("Barbara"), and Charles Tourtellotte ("Charles") (collectively "petitioners") commenced this action seeking exoneration from or limitation of liability in connection with a collision that occurred when William was operating a boat owned by his parents, Barbara and Charles. One of the claimants, Teleflex, moved to dismiss the claim for limitation insofar as it was asserted on behalf of William. Specifically, Teleflex argued that William was not entitled to the protections of the Limitation Act because he was not the owner or *pro hac vice* owner of the vessel; or, alternatively, if the court deemed William to be a pro hac vice owner of the vessel, he was not afforded protection under the Limitation Act because he was operating the vessel at the time of the collision and, as such, could not be said to be without "privity or knowledge" of the operation. The court held that the fact that William was operating the vessel at the time of the collision was insufficient by itself for purposes of the motion. "[A] denial of an owner's petition for exoneration from limitation of liability . . . [cannot] be based solely on a finding that the owner was the operator of the vessel at the time the collision occurred." However, the court did find that the complaint failed to properly allege William's status as a *pro hac vice* owner of the vessel. Rather, the complaint merely stated that William "was an owner *pro hac vice* of the [v]essel." It contained no allegations regarding William's responsibilities for and control over the vessel and the bare assertion of his status as *pro hac vice* owner was insufficient to survive this motion. The court did grant the petitioners leave to seek to amend their pleading to properly allege William's status as the *pro hac vice* owner

[16096]

Proof of claim and answer must be filed to contest petitioner's right to limitation.

In re Triton Asset Leasing, 719 F. Supp. 2d 753 (S.D. Tex. 2010)

This matter arises out of the explosion of the MODU Deepwater Horizon on April 20, 2010. Petitioners (various entities associated with the ownership and operation of the MODU *Deepwater Horizon* and collectively referred to as "Transocean") filed this Limitation Action seeking to limit their liability to $26,764,083, or the purported value of the vessel and its then pending freight, in the event that they are held liable for the explosion.

Motions to transfer, motions to expedite and motions to defer ("transfer motions" collectively) were filed by putative claimants, that is, parties who were subject to this court's injunction order but who had not yet filed claims or answers to Transocean's complaint. Putative claimants also filed motions to dismiss. Transocean moved to strike all of these motions, arguing that because none of the movants had filed a claim or answer in the matter prior to filing their motions, they were non-parties to the litigation and therefore had no standing to seek a dismissal or a convenience transfer under Rule F(9). Transocean maintained that it is a well-established practice that a claimant must first file a claim and/or answer in a limitation proceeding before he or she has standing to contest matters related to it. In response, several movants argued that there is nothing in the Supplemental Rules that required them to file a claim or an answer before contesting venue and, in the absence of any such provision in the Supplemental Rules, the Federal Rules of Civil Procedure and applicable case law govern, and they allow venue to be contested before an answer is filed.

The court held that those movants seeking dismissal of certain claims brought against Transocean were challenging Transocean's right to limit its liability with respect to these claims and, as such, were required, under Rule F(5), to first file a proof of claim and an answer to Transocean's Complaint. Because those movants had not done so, the court held that their requests were premature and, accordingly, dismissed their requests for dismissal without prejudice. In contrast, however, the court noted that the transfer movants were not directly contesting Transocean's entitlement to exoneration or limited liability. Instead, those movants only sought relief as to the venue in which this Action should be heard and in which their claims must be filed. "As several claimants correctly point out, nothing in Rule F(5) states that a claim or answer must be filed before any form or relief may be sought from the court. Instead, this requirement is triggered only when a putative claimant seeks to contest the merits of the limitation action or the petitioner's right to exoneration or limited liability." Based on the foregoing, the court found that the transfer motions were not subject to Rule F(5)'s requirements such that it did not provide a basis to strike the putative claimants' motions to transfer. Although the court concluded that Rule F(5) did not preclude the transfer movants from challenging venue prior to filing their claims, it noted that the transfer movants had to nonetheless have Article III standing in order to request the relief sought from the court in the transfer motions. In this regard, the court found that if the transfer movants were among the claimants whose claims had been enjoined pursuant to the court's injunction order and who had no choice but to litigate their claims within the scope of the limitation action, they acquired the requisite "stake" in this court's proceedings to confer standing. That standing, in turn, allowed the transfer movants to challenge the venue in which the limitation action was to be heard, as their interest clearly extended to the forum in which they were now required to bring their enjoined claims in order to have them adjudicated. Based on the foregoing, the court held that in order to demonstrate standing to challenge venue pursuant to Rule F(9), the transfer movants need only show that they were subject to this court's order.

Limitation of Liability is not a defense to a claim for maintenance and cure.

Keliihananui v. KBOS, Inc., No. 09-00151 JMS/LEK, 2010 WL 2176105 (D. Hawaii, May 24, 2010)

Plaintiff, who was employed by KBOS, Inc., assisting with its parasailing tours and other duties, alleged that he injured his knee while boarding a KBOS parasailing vessel. Plaintiff subsequently filed causes of action including Jones Act negligence, unseaworthiness and maintenance and cure. Plaintiff then moved for summary judgment on his status as a seaman, for maintenance and cure and on KBOS' affirmative defense under the Limitation of Liability Act. For the purposes of this newsletter, we will limit our discussion of this opinion to the motion for summary judgment on KBOS' affirmative defense under the Limitation of Liability Act.

The court held that, to the extent that KBOS pled the limitation of liability as a defense to Plaintiff's claim for maintenance and cure, "such defense did not apply – a shipowner cannot limit its liability for maintenance and cure. It may bring a limitation action only in response to a finding of negligence or unseaworthiness." Accordingly, to the extent that KBOS alleged a limitation defense on Plaintiff's claim for maintenance and cure, the court granted Plaintiff's motion for summary judgment. However, as for Plaintiff's other claims, the court denied Plaintiff's motion for summary judgment as premature due to the burden-shifting framework required in determining KBOS' claim for limited liability. More particularly, the court noted that under the Limitation Act, a claimant seeking to recover damages must first demonstrate the vessel owner's negligence or unseaworthiness of the vessel. If the claimant does not carry its burden, then the vessel owner is exonerated on those claims. If the claimant does carry its burden, then the burden shifts to the vessel owner to show lack of privity or knowledge. Plaintiff asked the court to skip the first inquiry and address only the second inquiry arguing that case law addressing limitation actions – as opposed to the defense of limitation – supported the proposition that the court may decide privity and knowledge without addressing liability. In response, the court acknowledged that some courts have held that where privity and knowledge are apparent, the proper course of action is to allow the injured party to bring its own action so that a jury may determine negligence. However, the court found no such circumstances applied in the instant matter, noting that the cases cited by Plaintiff did not address the *defense* of limitation of liability raised by KBOS herein and which, unlike a limitation action, did not impede Plaintiff from litigating his claims in his chosen forum.

COMMITTEE ON RECREATIONAL BOATING

Chair: Lars Forsberg

Boating Briefs, Fall/Winter 2010

PROCEDURE

Subrogation Action Dismissed Due to Claim Splitting

Federal Insurance Co. v. Cheoy Lee Shipyards, Ltd., No. 09-61193-CV, 2010 WL 2557486 (S.D. Fla. June 23, 2010)

The U.S. District Court for the Southern District of Florida dismissed a subrogated insurer's suit against a yacht builder and seller, holding that the insurer impermissibly split causes of action by not asserting its claims in an earlier suit brought by the insured against the same defendants.

In the earlier suit, the yacht owner asserted breach of contract and warranty claims, alleging numerous deficiencies such as undersized rudders, problems with the paint, inadequate deck fittings, and substandard electrical equipment. The owner's complaint mentioned that the vessel's coach roof was damaged but expressly stated that the owner was not seeking recovery for that damage, no doubt because it was covered by his insurer. The owner's suit was eventually settled and dismissed with prejudice.

The insurer then brought a separate subrogation action based on the coach-roof damage, and the defendants moved for summary judgment on the theory that the insurer was impermissibly splitting claims.

Applying Florida law (this was a diversity case), the court ruled that although the coach-roof damage was not at issue in the earlier suit, the insurer's claims were essentially the same as the owner's in that they alleged the same kind of wrong: construction defects that caused damage to the yacht or diminished its value. The coach-roof incident occurred nine months before the owner filed his suit, the damage from that incident was known to the insurer and quantifiable, and hence the insurer should have asserted its subrogation claim by joining in the owner's suit. The court therefore entered judgment for the defendants.

INSURANCE

Named-Operator Warranty Needed No State Approval

Markel American Insurance Co. v. Bachmann, No. 09-CV-226-bbc, 2010 WL 3809832 (W.D. Wis. Sept. 24, 2010)

The U.S. District Court for the Western District of Wisconsin held that a policy on a high performance boat was a policy of "ocean marine insurance" and not subject to a state law requiring that policy wording be approved by the state insurance commissioner. The policy's named-operator warranty was therefore enforceable, and the insured's breach of the warranty left him without coverage.

The vessel at issue was the subject of a prior coverage dispute that arose from an apparent collision with a submerged object (*Progressive Northern Insurance Co. v. Bachmann*, 314 F.Supp. 2d 820, 2005 AMC 1745 (W.D. Wis. 2004) (reported in Boating Briefs Vol. 13:1)). In that case, the court applied Wisconsin law and held that the insured's breach of a maximum-horsepower warranty did not preclude coverage because the insurer did not give timely notice, required by Wisconsin law, that it was relying on the breach as a basis to deny coverage.

Several years later, the same vessel flipped over while being operated by someone other than the owner or his wife, who were the only people allowed to operate the boat as per the named-operator endorsement. Coverage litigation again ensued, this time with a different insurer.

After numerous rounds of motion practice, the court determined that the only issue in dispute was the applicability of Section 631.20(1) of the Wisconsin Statutes The statute provides that—except in the case of "ocean marine insurance"—an insurer may only use policy wordings that have been approved by the state insurance commissioner. The named-operator endorsement did not have such approval.

The insured argued that the term "ocean marine insurance" applied only to vessels operating on oceans and not to recreational boats plying inland waterways.

Noting that the jurisdiction of the American admiralty court extends to all navigable waters, whether ocean or inland, the court held that the policy was indeed one of "ocean marine insurance" because it insured the vessel against traditional marine perils. This holding was buttressed by an informal opinion issued by the Wisconsin insurance commissioner (though the commissioner had originally taken the opposite view in response to an inquiry from the insured's counsel). Since the endorsement wording did not need to be approved by the insurance commissioner, and the insured had no other basis to overcome his breach of the endorsement, there was no coverage.

Proximate Cause vs. Concurrent Cause in Yacht Sinking

New Hampshire Insurance Co. v. Krilich, 387 Fed. Appx. 940 (11th Cir. 2010) (unpublished)

A yacht developed a fracture in its fiberglass keel, allowing water to enter a sewage holding tank. The watertight cover of the holding tank was unsecured, and water began to enter the engine room. The sea-chest covers were not securely fastened, the engine room bilge pumps were either turned off or inoperable, and the bilge alarms did not function. As the water flowed in, the yacht partially sank at its berth. The weather was calm.

The insurer sought a declaratory judgment on the basis of a policy provision that excluded coverage for damage arising out of "lack of reasonable care or due diligence . . . in the operation or maintenance" of the yacht. After a five-day bench trial, the district court concluded that the proximate cause of the sinking was not the keel fracture but rather the insured's failure to properly secure the sewage tank and sea-chest covers. The district court noted that the experts on both sides agreed that the sinking would not have occurred in the manner it did had the sea-chest covers been secured. Accordingly, the district court found for the insurer.

On appeal, the insured argued that the district court should have applied Florida's "concurrent cause doctrine" rather than the maritime rule of proximate cause. In the insured's view, the keel failure was a concurrent cause of the sinking, and since there was no evidence that the keel failure was the product of poor maintenance, the claim should have been covered.

The U.S. Court of Appeals for the Eleventh Circuit assumed for the sake of argument that state law could supply the causation standard in a marine insurance dispute, but decided that Florida's concurrent cause doctrine did not apply in any event because the keel fracture was not a "separate and distinct risk." Rather, the unsecured sea-chest covers were the last link in the unbroken chain of events connecting the keel fracture to the sinking. As the keel fracture was not an independent cause of the sinking, it did not serve as a basis for coverage under the policy.

FINANCING

Loan Guarantor Secures Jury Trial on Counterclaims Against Mortgagee

Bank Meridian, N.A. v. M/Y "IT'S 5 O'CLOCK SOMEWHERE," No. 2:09-CV-594-MBS, 2010 WL 3169367 (D.S.C. Aug. 6, 2010)

A lender filed a mortgage-foreclosure action under Rule 9(h) of the Federal Rules of Civil Procedure, designating the claim as one in admiralty and electing a bench trial. One of the in *personam* defendants, a guarantor of the debt, counterclaimed for damages based on fraud, misrepresentation, conspiracy, and a host of other theories. He also demanded equitable relief in the form of rescission, accounting, and dissolution. He alleged that the lender had induced him to invest in the mortgaged yacht by making false representations about the borrowers' solvency. His counterclaims included a jury demand, which the lender moved to strike.

Applying the decision of the U.S. Court of Appeals for the Fourth Circuit in *In re Lockheed Martin Corp*. 503 F.3d 531, 2007 AMC 2304 (4th Cir. 2007), *cert. denied*, 553 U.S. 1017 (2008), the court held that notwithstanding the lender's designation under Rule 9(h), the guarantor was entitled to a jury on all of his counterclaims except those seeking equitable relief. The counterclaims were compulsory, and although there was no basis for federal jurisdiction apart from admiralty, the guarantor had the right under the Seventh Amendment, U.S. Const. amend. VII, to have his claims for money damages heard by a jury. The entire case would be tried simultaneously, with the mortgagee's admiralty claims and the guarantor's equitable claims tried to the judge, and the guarantor's money-damage claims tried to a jury.

MARINAS

Yacht Club's Exculpatory Clause Upheld

Martin v. Metropolitan Yacht Club, Inc., 388 Fed. Appx. 6, 2010 AMC 2398 (1st Cir. Aug. 5, 2010) (unpublished)

In a decision authored by U.S. Supreme Court Justice David Souter, the U.S. Court of Appeals for the First Circuit upheld a "red letter" clause shielding a yacht club from liability.

The plaintiff brought a limitation action after his vessel caught fire and damaged nearby boats while in winter wet storage. The cause of the fire was faulty wiring beneath the dock adjacent to plaintiff 's vessel. There was no allegation that the yacht club was grossly negligent.

As proceedings ballooned in *concursus*, the yacht club moved for summary judgment that it was liable to nobody by virtue of a club by-law expressly absolving it of liability for, among other things, fire. The magistrate judge granted the motion, and plaintiff and other boat owners and insurers brought this interlocutory appeal, arguing that the exculpatory clause was not bargained for, and in any event not applicable to boats in winter storage. (Boat owners had to fill out a separate application before putting their boats in winter storage.)

Holding that the owners were not victims of the superior bargaining power of the yacht club, the First Circuit upheld the lower court's decision. There was no monopoly since there were other boat-storage facilities nearby, and the club by-laws formed a part of a compact that served members by limiting the cost of membership. Additionally, the exculpatory provision was open to revision by the club's membership.

The court also rejected the owners' contention that the by-laws did not apply to winter storage. The bylaws governed the relationship between the club and its members, and it was "simply not reasonable to assert that submission of [a winter storage] application proposed a contractual relationship wholly distinct from membership." The exculpatory clause was therefore operative.

No Liability for Breakaway Caused by Act of God

Simmons v. Lexington Ins. Co., No. 07-5911, 2010 WL 1254638 (E.D. La. Mar. 19, 2010), *aff'd sub nom., Simmons v. Berglin*, 401 Fed. Appx. 903 A (5th Cir. 2010) (*per curiam*) (unpublished)

The U.S. District Court for the Eastern District of Louisiana ruled that a Category 4 hurricane was an Act of God sufficient to bar a claim against an owner whose yacht broke away from a dock.

The plaintiff, a marina owner, brought suit after the yacht broke free of its slip and damaged marina facilities during Hurricane Katrina. The plaintiff alleged that the owner failed to heed warnings of the impending storm and failed to take appropriate measures to ensure that her vessel was adequately secured.

The defendant responded with a motion for summary judgment, arguing that she took all reasonable measures available and that the breakaway was due to an Act of God.

In support of her motion, the defendant introduced evidence that she had enlisted the services of a former U.S. Coast Guard officer with forty years of maritime experience to ensure the vessel was prepared for the storm. The officer testified that he took every available measure to ensure that the moorings were sufficient to meet the impending storm.

Because the docks to which defendant's vessel was attached were completely washed away by the storm, and all sailing vessels moored at the facility were swept free of their moorings during the storm, the court concluded that the defendant proved her Act of God defense. The loss was due to an extraordinary force of nature that proper skill and precaution could not guard against.

City Not Liable for Allowing Untrained Minor to Launch Jet Ski

Lynch v. Thorwart, No. L-370-08, 2010 WL 2696742 (N.J. Super. Ct. App. Div. June 29, 2010)

John Lynch brought a survival action against the city of Ocean City, New Jersey, after his sixteen-year-old daughter died while operating a jet ski that she had launched from a municipal boat ramp. The plaintiff alleged that the city was liable for negligently supervising its recreational facilities and for failing to enforce a municipal ordinance that required jet-ski operators to have taken a safety course or passed a written exam. The trial court found the city immune because, under New Jersey's Tort Claims Act, N.J. Stat. Ann. § 59:2-4, a public entity has no liability for injuries caused by its failure to enforce a law. Additionally, the court ruled that the facts did not support a negligent-supervision claim.

On appeal, the lower court's ruling was affirmed. Although the municipal attendant working at the boat ramp did not ask Lynch whether she had appropriate training or competency to operate a jet ski, the attendant had no statutory duty to do so. Also, the City could not be held liable on the negligent-supervision claim because "Lynch was not injured by any object or condition related to the municipal ramp or in any proximity to the ramp," and the ramp attendant had no duty to supervise jet skiers once they left the area.

LIMITATION

Jet Ski Owner May Not Limit Liability for Negligent Entrustment

In re Hartman, No. 08- 5562 (JEI/JS), 2010 WL 1529488
(D.N.J. Apr. 15, 2010)

Two men borrowed jet skis from Kimberly Hartman and operated them while she was at work. One man, Jeffrey Borquin, was an experienced boater who had taken a boating safety course. Hartman and Borquin knew that Gregory Forte, the other man, was inexperienced and had not completed a boating safety course.

When operating the jet skis, Borquin led the way and traveled at a high speed. As Forte followed Borquin, a wake from a nearby boat pushed Forte and his jet ski into a day marker. Forte's leg was broken, and he sued Borquin and Hartman for personal injury. He also sued Hartman's insurer for breach of contract and bad faith (apparently on the theory that he was an insured under Hartman's policy). Hartman filed a limitation action, and the underlying litigation was stayed.

Forte argued that the limitation action should be dismissed because (1) the jet ski was not a "vessel" within the meaning of the Limitation of Liability Act, 46 U.S.C. §§ 30501 <u>et seq.</u>, (2) the limitation action was untimely, (3) Hartman could not limit liability for negligently entrusting the jet ski to Forte, and (4) Hartman was vicariously liable for Borquin's alleged negligence.

As a threshold matter, Forte claimed that a jet ski was not a vessel, but the court noted that jet skis have long been treated as vessels for purposes of the Limitation Act (citing *In re Keys Jet Ski, Inc*., 893 F.2d 1225, 1990 AMC 1225 (11th Cir. 1990), and *Gorman v. Cerasia*, 2 F.3d 519 (3d Cir. 1993)).

Forte further claimed that the limitation action was time-barred because he had given Hartman written notice of the claim more than six months before she filed the limitation action. However, Forte's letters were not sent to Hartman herself but rather to her insurer. Moreover, the letters did not indicate an intention to seek damages or make any allegation of negligence against Hartman, but instead simply requested payment of first-party medical benefits. In these circumstances, the letters were insufficient to start the clock on the six-month limitation period.

Because the threshold issues were resolved against Forte, the court went on to consider the merits. As to the negligent-entrustment claim, the court observed that a vessel owner may limit liability only if she is without privity or knowledge of the negligence that caused the accident. Here, Hartman knew that Forte was inexperienced and had no safety training, and if it was negligent of her to entrust the jet ski to Forte and Forte's inexperience contributed to the accident, then necessarily she had personally participated in the underlying negligence. Thus, she could not limit her liability on the negligent-entrustment claim.

But as to Forte's claim that Hartman was vicariously liable for Borquin's alleged negligence, there was no evidence that Hartman had any reason to believe that Borquin would operate the vessel in an unsafe manner, as he was an experienced and certified boater. Therefore, Hartman could limit her liability on the vicarious liability claim.

[16107]

TORTS

State Workers' Compensation Act Does Not Bar Employee's Maritime Negligence Claim Against Employer

Morrow v. MarineMax, Inc., 731 F.Supp. 2d 390 (D.N.J. 2010)

This matter relates to an injury, a workers' compensation claim, and a federal claim for negligence under general maritime law. The plaintiff was paralyzed on a yacht during an employee-appreciation event sponsored by his employer, a boat dealer. At the time of the injury, the yacht was off the coast of New Jersey and those on board were waiting to watch an air show. The plaintiff was in the stern cockpit area when another passenger, who had been swimming, slipped in the flybridge area and fell on plaintiff, fracturing his cervical vertebrae and causing paralysis. The parties stipulated that plaintiff was acting within the scope of his employment. The plaintiff received New Jersey workers' compensation benefits but then filed an admiralty action against his employer, asserting negligence under general maritime law.

The sole issue for the court was whether the exclusive-remedy provision of the state workers' compensation statute barred the plaintiff's general maritime tort claim. The district court evaluated case law from other trial and appellate courts and noted that there are essentially two types of preemption analyses that other districts have followed: that developed by the U.S. Court of Appeals for the Eleventh Circuit and that of the U.S. Court of Appeals for the Fifth Circuit. The Eleventh Circuit analysis is a balancing test, where the court first determines whether admiralty jurisdiction exists, and then applies a balancing test similar to a standard conflicts-of-law test. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1991 AMC 586 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The Fifth Circuit simply asks whether admiralty jurisdiction exists, and if so, holds that the state law must give way to the federal maritime claim. *See Green v. Vermillion Corp.*, 144 F.3d 332, 1998 AMC 2328 (5th Cir. 1998), cert. denied, 526 U.S. 1017 (1999).

Here, the district court determined that the Fifth Circuit's test was the most appropriate and most likely to promote uniformity by ensuring that the application of maritime law did not depend on the "ebbs and flows of state legislation." According to the court, the Eleventh Circuit's balancing test was somewhat redundant because evaluating admiralty jurisdiction itself provides the opportunity to ascertain whether there is a sufficient relationship to maritime activity.

Despite a meaningful analysis of the preemption issue, the court's opinion offered little discussion of why admiralty jurisdiction should apply to the facts at hand. Noting that the plaintiff was not covered by the Jones Act, 46 U.S.C. § 30104, or the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*., the court seemed to assume that since the plaintiff was injured aboard a vessel in navigable waters, the claim was necessarily subject to admiralty jurisdiction. The court cited other cases in which a person with land-based employment was injured on navigable waters (with some of those courts finding that admiralty jurisdiction existed and others finding that it did not), but there was no discussion of whether the incident in this case had the potential to disrupt maritime commerce or whether the activity giving rise to the incident was substantially related to traditional maritime activity.

In any event, the court concluded that the New Jersey workers' compensation statute, notwithstanding its exclusivity provision, could not deprive plaintiff of his substantive admiralty right to bring a cause of action for negligence.

No Duty to Act As Lifeguard for Adult Passengers Taking a Swim

Binno v. Binno, No. 291437, 2010 WL 2384966
(Mich. Ct. App. June 15, 2010) (unpublished)

This case arose from a tragic drowning. Several friends and family members took a pontoon boat out on a Michigan lake. The boat was operated by either Frederick Binno or Jeffrey Dabish. Two of their passengers wanted to go for a swim, so Frederick or Jeffrey stopped the boat and turned the engine off without anchoring the boat. The passengers finished swimming and climbed back onto the boat. Weather conditions appeared normal. After some time passed, five more people decided to go for a swim, including Frederick and decedent Ryan Binno.

The weather changed dramatically after the group entered the water: the wind increased, the waves became bigger, and swimming became more difficult. Ryan did not show obvious signs of distress. Either Frederick, who was able to return to the boat, or Jeffrey, who had not gone swimming, moved the boat closer and threw life jackets to the swimmers.

Ryan was the only swimmer who did not return to the boat; he drowned some distance away.

His personal representative filed suit against Frederick and Jeffrey and another person who may have owned the boat but who was not on board. The allegations included negligence, willful and wanton misconduct, and gross negligence. The trial court granted summary judgment for the defendants.

The plaintiff appealed, asserting that the defendants breached duties imposed by Michigan's Marine Safety Act, Mich. Comp. Laws §§ 324.80101 *et seq*. Specifically, the plaintiff argued that the defendants had a duty to anchor the boat, to ensure that the boat remained near the swimmers, to maintain a careful lookout and ensure the swimmers' safety, to require the swimmers to wear life jackets, and to pay attention to wind and weather conditions. The defendants argued that the statute was inapplicable because at the time of the drowning the boat was not navigating through the water and hence was not "operating" as that term is used in the statute. They also denied that they breached any duty to the decedent.

The source of plaintiff's proposed duties appears to have been Section 324.80145 of the Act, which provides that anyone "operating or propelling" a vessel on state waters must do so "in a careful and prudent manner" and at a speed that will not unreasonably endanger anyone's life or property. The statute defines "operating" as being "in control of a vessel while the vessel is under way and is not secured in some manner such as being docked or at anchor." Mich. Comp. Laws § 324.80103(g). Similarly, an "operator" is defined as "the person who is in control or in charge of a vessel while that vessel is under way." Mich. Comp. Laws § 324.80103(h). The court was therefore left to determine the meaning of the term "under way." The court concluded that, although the pontoon boat was not being moved forward deliberately, it was in motion and not anchored and was therefore "under way." Accordingly, the defendants *did* owe a duty to their passengers to operate the boat in a careful and prudent manner.

Nevertheless, the court held that there was no liability because the manner in which the defendants operated the pontoon boat was in no way involved with Ryan's death. The plaintiff 's argument that a boat operator should effectively act as a lifeguard and insurer of the safety of adult passengers was deemed to have no basis in statutory or common law. To hold the defendants liable would be to create a duty to ensure safety that did not exist in the statute or at common law, and would effectively relieve an experienced adult swimmer of his duty to exercise reasonable care for his own safety. Therefore, the trial court's judgment for the defendants was affirmed.

Verdict for Plaintiff in Texas Propeller-Guard Case

Brochtrup v. Mercury Marine, No. 1:07-cv-00643-SS (W.D. Tex.)

In April 2010, a federal jury in Austin found Mercury Marine liable for manufacturing a sterndrive system without a propeller guard.

The plaintiff, a recent high-school graduate, was boating with a group of friends on a 17-foot Sea Ray. He entered the water to retrieve a tow rope and the boat's operator, apparently not realizing the plaintiff was in the water, backed the boat over him. The boat's spinning propeller caused severe lacerations to the plaintiff's upper leg, and the leg had to be amputated. The plaintiff brought suit on the basis that the sterndrive was defectively designed due to the absence of a propeller guard.

In the lead-up to trial, the plaintiff's experts developed a shield mechanism as a proposed safer alternative to the unguarded propeller. The mechanism was mounted to the sterndrive below the waterline and surrounded the propeller. A metal shield, hinged at the top, was suspended behind the propeller. The shield was kept in the open position by the thrust of the propeller when the engine was operating ahead, but would fall into place when the engine was stopped or put in reverse. Field tests were performed, but the parties disagreed about the extent to which the mechanism impaired the boat's stability and maneuverability. Mercury Marine also argued that the mechanism was very susceptible to fouling.

The case was tried three times, the first two trials ending with a deadlocked jury and the third resulting in a $3.9 million gross verdict for the plaintiff, with 66% of the liability allocated against Mercury Marine, 17% against the boat operator, and 17% against the plaintiff himself.

Mercury Marine has appealed, arguing that the plaintiff failed to show that the unguarded propeller was unreasonably dangerous under the risk-utility test used in Texas product-liability cases, that the plaintiff failed to prove that his alternative design was economically feasible, and that the jury instructions were erroneous. The U.S. Court of Appeals for the Fifth Circuit case number is 10-50534.

Thanks to Gavin O'Hare of CED Investigative Technologies, Inc. for alerting us to this case.

LEGISLATION

Regulations Implementing LHWCA Amendment

As reported in Boating Briefs Vol. 18:1, the 2009 federal stimulus package, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 803, 123 Stat. 115, 187, made the Longshore and Harbor Workers' Compensation Act (LHWCA) inapplicable to workers employed to repair recreational vessels. See 33 U.S.C. § 902(3)(F). The Department of Labor has now proposed regulations to expressly define the term "recreational vessel" and to clarify the types of work that take an employee out of LHWCA coverage. Comments on the proposed regulations should be submitted to the Department of Labor by November 17, 2010. Details can be found in the Federal Register. Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Recreational Vessels, 75 Fed. Reg. 63,425 (Oct. 15, 2010) (to be codified at 20 C.F.R. pt. 701), *available at* http://edocket.access.gpo.gov/2010/pdf/2010- 25895.pdf.

SUMMARY OF STATE BOATING LAW CHANGES IN 2010

Arizona has instituted a temporary 1% sales tax increase, bringing the state rate to 6.6%. This increase is set to expire on May 31, 2013.

California raised its mandatory lifejacket age; now all children under age 13 are required to wear life preservers while aboard. (Cal. Harb. & Nav. Code § 658.3.)

Florida placed an $18,000 cap on sales tax from the sale of a boat. (Fla. Stat. § 212.05.)

Kansas raised the state sales tax 1%, to 6.3%.

Louisiana passed legislation requiring anyone born after January 1, 1984, to complete a National Association of State Boating Law Administrators (NASBLA) approved course in order to operate a motorboat with more than 10 horsepower. (La. Rev, Stat. Ann. § 34:851.36.)

Maryland now requires everyone under the age of 16 to have a certificate of boating safety education. (Md. Code, Nat. Res. § 8-712.2.) The state also raised the mandatory lifejacket age from 7 to 13 years of age, for children on boats less than 21 feet. (Md. Code, Nat. Res. § 8-743.)

North Carolina now mandates that everyone under 26 years of age must complete a NASBLA-approved course to operate a motorboat with more than 10 horsepower. (N.C. Gen. Stat. § 75A-16.2.)

Vermont now requires its boater safety classes to educate boaters on the problems caused by invasive species and how to prevent those problems by cleaning boats and trailers after use. (23 Vt. Stat. Ann. § 3305b.)

[Submitted by Todd Lochner, Chair of the Subcommittee on State Legislation, with research assistance from Joshua S. Parks.]

TABLE OF CASES