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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

THE MLA REPORT

Editor

Gordon W. Paulsen of New York

Associate Editors

LeRoy Lambert of New York

and

Matthew A. Marion of Stamford

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EDITORIAL COMMENT

This will be my "Swan Song" as Editor of the *MLA Report*. I gladly took on the post at the behest of past MLA President, David Owen, of Baltimore, who founded the publication in 1983 while I was President. As David told me at the time, he believed there should be a permanent record of the various important written work of the MLA, such as committee reports and other publications, and was concerned that it would be impossible to retrieve this work without some sort of MLA indexing system (see the MLA document number in the upper right-hand corner of the first page of this issue). Hence, the *MLA Report* was created. Elliott Nixon succeeded Dave Owen as Editor, and I, in turn, took over after Elliott Nixon.

I have very much enjoyed the years that I was privileged to serve the MLA in this capacity and hope that the Membership has found the *MLA Report* to be helpful. I feel that the time has come for me to retire as Editor and have so informed MLA President, Bill Dorsey. I recommended that he appoint Associate Editor, Matthew A. Marion, of Stamford, Connecticut, as my successor. Bill accepted my resignation and appointed Matt as my successor. I am pleased to announce that Matt agreed. As a result, he will become Editor starting with the Fall 2001 issue.

I wish Matt great success as Editor of the *MLA Report* and hope that he will enjoy being Editor as much as I have.

Gordon W. Paulsen,
Editor

COMMITTEE ON CARRIAGE OF GOODS BY SEA
CARGO NEWSLETTER NO. 38, SPRING 2001

Editor: Michael J. Ryan

Associate Editors: Edward C. Radzik
David L. Mazaroli

HARTER ACT STAYS WET. . . .

Cargo was shipped from Germany to Indiana pursuant to a through Bill of lading. The goods arrived at the Port of Baltimore and were then transported overland by road. The goods were damaged when the trailer overturned while on the way to Indiana.

The cargo plaintiff initially sued the trucker who argued that the suit was time-barred by the Bill of lading's one year time-bar. The cargo plaintiff contended that the suit was governed by limitations in the trucker's contracts of carriage and tariffs. The district court found the time-bar in the through Bill of lading applied to all aspects of the through bill and granted summary judgment in favor of the trucker. The cargo plaintiff did not appeal.

It then filed a suit against the ocean carrier who, in turn, brought a third party action against the trucker for contribution and indemnity. The cargo plaintiff then moved for summary judgment against the ocean carrier who filed a cross motion for summary judgment. The district court, without opinion, granted summary judgment in favor of the cargo plaintiff against the ocean carrier in the amount of the package limitation ($1,000.00 plus post-judgment interest) and in favor of the ocean carrier against the trucker in the same amount. The cargo plaintiff appealed the amount of the award and the trucker cross appealed, contesting liability. The ocean carrier did not appeal, thus not contesting the finding of liability.

The circuit court considered the case to present an issue of first impression regarding the applicability of federal maritime statutes to inland transportation under a through Bill of lading.

The court noted it had decided a number of cases interpreting similar Bills of Lading and their reference to the Harter Act, but in none of those cases had the goods begun inland transportation. The Bill of lading referenced COGSA and the Harter Act and the court noted the distinction that COGSA applies from tackle to tackle and the Harter Act to the period

between discharge and "proper delivery." The court went on to note the Harter Act did not define "proper delivery;" however, it referred to several cases where delivery under Harter was considered.

Generally, proper delivery includes unloading the cargo onto a dock, segregating it by Bill of lading and count, putting it in a place of rest so it is accessible to the consignee and affording the consignee a reasonable opportunity to come and get it. These requirements can be modified by "the custom, regulations [and] law of the port."

The Bill of lading provided that to the extent the Harter Act was compulsorily applicable, the carrier's responsibility would be subject to COGSA and, further, that the carrier would not be liable for more than $500.00 per package or unit. Therefore, if the Harter Act was compulsorily applicable to the inland transportation portion, the district court correctly limited liability to $500.00 per package.

The Bill of lading also stated where COGSA was found not to be applicable, and where the occurrence of damage could be shown to occur during transportation "in the United States," the responsibility of the ocean carrier would be to "procure transportation subject to the inland carrier's contracts of carriage and tariffs and any law compulsorily applicable."

The cargo plaintiff argued that proper delivery under the Harter Act occurred when the inland trucker acquired control and began inland transportation. The ocean carrier argued that the through Bill of lading provided for carriage to the ultimate destination, therefore, under Harter, proper delivery had not yet occurred.

The court noted there was no precedent by any circuit court interpreting the Harter Act and proper delivery with respect to the inland portion of a through Bill of lading. However, it referred to the decision of the district court in Jagenberg, Inc. v. Georgia Ports Authority, 882 F. Supp. 1065 (S.D. Ga. 1995). The court quoted from Jagenberg, which held that, because of the maritime nature of the Harter Act, inland transportation under a through Bill occurs after Harter Act proper delivery. The court noted that Jagenberg was adopted in the M/V Atlantic Conveyor, 1997 AMC 1478 (S.D.N.Y. 1997). Noting that the courts in Jagenberg and Atlantic Conveyor were not aware of a single case extending Harter to all stages of a through Bill of lading and that no contrary authority was cited by the parties in the case sub judice, the court concluded that the Harter Act was not compulsorily applicable at the time the goods were damaged.

The court stated it did not preclude contractually limiting liability during the entire time when the carrier has custody or control over the cargo. Its holding was limited to the situation where parties contractually tie that limitation to the extent where the Harter Act is compulsorily applicable.

In the district court, neither the cargo plaintiff nor the ocean carrier had moved for summary judgment against the trucker. Regardless of this, the district court granted judgment in favor of the ocean carrier against the trucker. The circuit court found this to be error. While the district court may grant summary judgment sua sponte, it must provide adequate notice and an opportunity to respond. The circuit court found the trucker to have a potentially valid defense that it was not on notice to raise. The judgment was reversed and remanded.

Mannesman Demag Corporation v. M/V Concert Express, No. 98-20877 (5th Cir. Sept. 8, 2000).

CARRIER CYCLES BACK ON LAND. . . .

A shipment of bicycles from Wisconsin to the Netherlands suffered a theft in Belgium (see Cargo Newsletter No. 36). The district court found COGSA to apply to the entire movement and awarded plaintiff full value of the lost bicycles. If COGSA applied, the value of the bicycles was less than the package limitation; however, if the CMR should apply, there would be a significant limitation. The Magistrate Judge found limitation under CMR did not apply and that the carrier had unreasonably "deviated" from the bill of lading.

On appeal, the Second Circuit wrestled with several issues. It found that, although an amended notice of appeal was untimely, dismissal was not warranted because the initial Notice of Appeal provided adequate notice of the interest of all defendants to appeal.

It then addressed the issue of subject matter jurisdiction noting the district court somewhat side-stepped whether admiralty jurisdiction applied, dealing with the matter on diversity. The circuit court looked at admiralty jurisdiction because the district court's opinion and the plaintiff's arguments were based, in part, on the application of Federal Common Law principals developed in admiralty.

The bill of lading involved qualified as a "mixed contract" in dealing with transportation by truck, rail and sea. Noting that the loss occurred while

the cargo was being transported on land in Belgium, the circuit court found the loss did not arise from a breach of severable maritime obligations.

It went on to consider whether the land segment was "incidental" to transport by sea. Noting that the bill involved land shipment from Wisconsin by Chicago by truck; Chicago to Montreal by rail; and Antwerp to Spijkenisse, Netherlands by truck, the court took judicial notice that the sum of these segments of overland transportation was at least 850 miles. It therefore concluded that the bill of lading involved land carriage that was more than incidental to sea carriage, placing the dispute outside admiralty jurisdiction.

Looking to diversity jurisdiction, the court stated the case was governed by applicable State choice-of-law rules. In looking at the bill of lading, it noted the choice-of-law provisions in the contract and found there were two applicable choice-of-law provisions. Clause 4 provided that each stage of the transport should be governed according to the law applicable to such stage, while clause 23 provided that COGSA or COGWA "except as otherwise provided herein" should govern before loading and after discharge and while subject to bill of lading.

The district court applied COGSA to the entire intermodal carriage; however, the Second Circuit concluded this was error. COGSA did not apply to the loss ex proprio vigore, which was termed by the court as a "quaint and famous Latin aphorism of the law." Treating COGSA or COGWA as another contractual term, the court applied contractual construction to give a reasonable and effective meaning to all terms of a contract if possible and held the most reasonable interpretation was that the clauses provided for the application of COGSA, unless there was a different law specifically directed at the particular stage of transport, in which case the latter would govern.

As the loss was from a truck in Belgium and Belgium had ratified the CMR, it found the CMR to apply and the carrier's liability should be assessed using the relevant portion of the CMR.

The court vacated the district court judgment and remanded with instructions that the district court should determine whether an exoneration provision in the bill of lading would be valid under CMR. Clause 4 of the bill of lading provided that the carrier would only be liable for a loss that could be attributable to its own act, not those of "Participating Carriers." If the clause is not valid under CMR, the district court should then decide whether the limitation of liability under CMR was applicable, evaluating plaintiff's

contention that even if CMR applied, the carrier could not avail itself of the limitation because they engaged in willful misconduct. Barring willful misconduct, recovery should be limited to an amount in accordance with CMR's limitation of liability provision.

Hartford Fire Ins. Co. v. OOCL (Europe) Ltd., No. 99-9502 (2d Cir. Oct. 27, 2000).

CAN-MAKER ON FLAT-RACK CANS CARRIER. . .

An action was brought to recover damage to a can-making machine, allegedly resulting from exposure to rain water during ocean transport from Seattle, Washington, to Yokahama, Japan. The cargo plaintiff moved for partial summary judgment.

The principle argument was that stowage of the cargo on-deck under a clean Bill of lading constituted an unreasonable deviation, depriving the ocean carrier of the package limitation. Assuming that the can-making machine was damaged as a result of on-deck stowage, the court found the package limitation did not apply.

The can-making machine was covered with polyethylene sheet and packed in a large plywood box which, in turn, was covered with thick tarred paper at the top and lined with polyethylene sheet. The wooden crate was then placed on a flat-rack which was stowed on deck. At the time of delivery to the consignee's warehouse, the machine was discovered to be in a heavily wetted and rusted condition.

The court found the cargo plaintiff had established the first "prong" of its prima facia case with the carrier's clean Bill of lading and evidence that a former employee supervised the packaging of the can-making machine and observed that it was in good order and condition when delivered to the carrier. No rebuttal evidence was presented.

As to demonstrating that the machine was damaged at the time it left the carrier's custody, the court rejected a surveyor's report annexed to the affidavit of counsel as containing several hearsay statements. Another declaration was found inadmissible as hearsay. As the cargo plaintiff failed to offer admissible evidence demonstrating the cargo was damaged when it left the carrier's custody, it had failed to establish the second prong of its prima facie case. On this basis, the court denied summary judgment on the issue of liability.

The court then turned to the package limitation and the argument that on-deck stowage constituted an unreasonable deviation, depriving the carrier of the package limitation.

Noting that, absent an agreement or established custom, a clean Bill of lading imports stowage below-deck and, above-deck stowage (when below-deck stowage is required) will normally constitute an unreasonable deviation. At the same time, a carrier may prove circumstances such as space limitations, safety and loading difficulties, or the custom and practice within the industry or between the parties where unauthorized deck stowage may be held reasonable. However, the carrier has the burden of establishing such where the parties did not agree to on-deck stowage.

The court stated that above-deck stowage of containerized cargo aboard container ships, specifically designed to carry containers on-deck, does not constitute an unreasonable deviation. While referring to an initial factual dispute as to whether the vessel was, in fact, a container ship, even if it was, the cargo involved was not placed in an enclosed container and was therefore subject to the traditional risks associated with on-deck stowage, particularly exposure to the elements.

The court found the carrier failed to show that on-deck stowage of the cargo placed on a flat-rack was reasonable. It did not present any concrete evidence as to the existence of custom or practice of on-deck stowage of flat-racks in the Port of Seattle or practical exigencies which would favor on-deck stowage.

The rationale behind the exception for containerized cargo aboard container ships was inapposite, where the cargo was not placed in an enclosed container and, therefore, subject to greater risk.

The court denied the motion on the issue of liability; however, it held stowing the can-making machine in an open flat-rack above deck under a clean Bill of lading deprived the carrier of the benefit of the package limitation.

D.I. Engineering Corp. v. Nippon Express USA (Illinois), Inc. v. Westwood Shipping Lines, 96 Civ. 6843 (Aug. 25, 2000) (McKenna, J.).

ONE BILL; NO CARMACK; BYE BYE JURISDICTION. . . .

A container of Tommy Hilfiger clothing was hijacked from a truck as it

left the railroad's facility in Croxton, New Jersey. The consignee and subrogated underwriter brought suit against the trucking company, the railroad, and a security service. Defendants moved to dismiss for lack of subject matter jurisdiction.

The complaint was initially filed as within the court's federal question jurisdiction under the Carmack Amendment; however, in the course of discovery, it was determined that the domestic rail portion of the shipment (Los Angeles to New York) was not covered by a separate Bill of lading. The Carmack Amendment applies to the domestic portions of shipments from foreign countries so long as the domestic portion is covered by a separate Bill of lading.

After the commencement of the action, plaintiffs amended the complaint to assert direct claims against the third-party defendant security service. As both the plaintiff and the security service were New York corporations, the court noted the alternative of diversity for federal jurisdiction was moot.

On the basis that Carmack Amendment did not apply, plaintiffs conceded that the court lacked original subject matter jurisdiction; however, requested the court to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1367.

The Second Circuit has instructed that remaining state claims should be dismissed where all federal claims had been dismissed prior to trial; however, the court could retain jurisdiction if the federal claim was dismissed "late in the action, after there has been substantial expenditure in time, effort and money in preparing the dependent claims."

Plaintiffs argued that it would be wasteful for the court to dismiss the case, noting that it had been filed over one and one half years ago, that discovery had been conducted for one year, including eight depositions taken and three appearances before the court.

The court did not accept this argument, stating the case was not at a late stage in its proceeding. While the parties conducted discovery for over a year, that discovery could prove useful in any future state proceedings. The court noted summary judgment motions loomed on the horizon and, while other courts in the district exercised supplemental jurisdiction after dismissing all federal claims, at the very least, they had reached the merits of those cases.

The court granted the motion to dismiss for lack of subject matter jurisdiction.

Tommy Hilfiger USA, Inc. v. Commonwealth Trucking, Inc., No. 98 Civ 5841 (September 7, 2000) (Keenan, J.)

THE QUALITY OF MERCY IS NOT STRAINED; IT'S TRASHED. . .

A shipment of starch components was delivered to a vessel to be shipped from Kaohsiung to Portland, Maine. The shipper contracted with the charterer (who became defunct). During loading, some of the bagged cargo got wet because the hatches were open. The officer on watch knew the bags could be damaged by rain and was on watch for bad weather for that reason.

The cargo was surveyed and discussions were held concerning the unloading of the suspect bags to allow proper testing and evaluation. In spite of these discussions, the Master decided not to unload the cargo and sailed. Subsequent to sailing, the cargo was also shifted in anticipation of loading a shipment of chrome ore which was destined for Montreal, Canada. While at sea, near the Panama Canal, the destination of the vessel was changed from Portland, Maine, to Montreal, Canada to offload the chrome ore. The altered route added a significant number of miles and days to the trip and, because of the change in course, the ship encountered a hurricane and had to alter course even farther.

After arrival at Portland, the bags of starch were discharged and high levels of mold and clumps were noted in the cargo. Because of high bacteria counts and unacceptable viscosity levels, the product was sold overseas for animal use at a substantially reduced price.

The court found there was evidence, in addition to the clean bill of lading, to substantiate delivery in good condition when turned over to the carrier. As to delivery in Portland, there was evidence that starch, once becoming wet, will become adulterated over time because of microbiological growth. Defendants argued that there should be no liability until it was shown that the starch in each bag was contaminated. The court rejected this assertion, noting the prohibitive costs to test each bag, even if this was possible. The court commented that the bags could have been surveyed and bad separated from good at the load port in Thailand and this was not done because the ship's captain chose not to do it.

Having found a prima facie case, the court found the carrier took several unnecessary risks and could have easily prevented the wetting incidents had proper precautions been taken.

As to mitigation, an argument was made that even if some of the bags had biological contamination, those bags could have been blended with good material and the average amount of contamination would then have been acceptable. The court found that such an assertion violates the Code of Federal Regulations and "borders on being unconscionable" given the intended use of the material for human consumption. In a footnote, the court stated: "During trial, I asked [the expert] whether he would say that food with the typhoid virus could be blended and used for human consumption, he answered that it could. It is obvious to me that this man hardly has a deep compassion for the general public."

The court went on to find that selling the starch for feed was the best course of action.

A limitation of $500 per bag was asserted; however, the court found the vessel unreasonably deviated to Montreal, Canada before discharging the starch in Portland, Maine. Therefore, the limited liability protection was not available. By changing course to Montreal instead of calling at Portland first, the vessel added miles to the voyage.

Noting the circumstances of bacterial contamination, the court found delay in time would cause increased bacterial growth and more damage to the product. The court found defendants fully liable for the damages caused.

National Starch and Chemical Company v. N/V MONCHEGORSK, 97 Civ. 1448 (S.D.N.Y. August 7, 2000) (Duffy, K.T.).

(Newsletter editor's note: This matter is on appeal to the Circuit Court of Appeals for the Second Circuit.)

WHAT DOES IS PROFIT A MAN . . . .

The plaintiff consignee contracted with an NVOCC for transportation of shoes from Brazil to Columbus, Ohio. When the container arrived at Columbus, it was empty. The consignee sued both the NVOCC and the actual carrier, each of whom had issued bills of lading.

As a result of a pre-trial conference, plaintiff served an Itemized

Settlement Demand which included, among other damages, a claim for "lost profits," and a claim for "marketing, administration, and processing costs." The NVOCC filed a motion for partial summary judgment, seeking a ruling that the plaintiff could not recover for these alleged damages.

With respect to the lost profits claim, the NVOCC argued that language in the bills of lading purporting to limit liability to invoice value, plus freight and insurance if paid should bar recovery; that it was not a carrier subject to COGSA; and that the shoes were "fungible goods in bulk" and lost profits could not be recovered and that the claim for lost profits was speculative and plaintiff had not mitigated damages.

As to the limitation of liability argument, the court found that the NVOCC was indeed a carrier, having issued a contract of carriage (the bill of lading), rejecting an argument that the defendant was merely a freight forwarder.

Having concluded that the NVOCC was a "carrier," the court found the bill of lading provisions violated COGSA as lessening a carrier's liability. As the court found the defendant to be a "carrier," COGSA applied rather than state law.

The court went on to state that COGSA permits the recovery of lost profits where there is sufficient evidence to support "actual damages" which can include lost profits where the goods in question are unable to be replaced. The court found plaintiff had presented testimony sufficient to show that the shoes were not able to be replaced and that the plaintiff had lost profits as a result of the failure to deliver the shoes.

The court summarily rejected the "presumably fungible" argument noting that no authority had been submitted on this point and no evidence had been shown that the shoes could have been replaced.

As to lost marketing and processing costs, the court agreed that any damage award would be reduced by such costs, as were avoided, as a result of the failure of the shoes to be delivered: plaintiff would be entitled to recover administrative and overhead costs, that it could prove to a reasonable certainty it would have offset, if the shoes had arrived and/or, that it incurred as a result of the failure of delivery, minus any costs it avoided as a result of such failure.

Shonac Corp. v. Maersk, Inc., No. C2-99-870 (S.D. OHIO, March 30, 2001) (Sargus, Jr., J.).

HURRICANE TIDAL SURGE COMES ASHORE; CARGO CLAIM GOES OUT WITH IT. . . .

Reels of papers stowed in containers had been discharged at the Alabama State Docks and were held there pending on-carriage for delivery. Hurricane Georges made landfall in the area and the reels of paper were damaged by tidal surge flooding. The plaintiff subrogee underwriter brought suit for the damaged reels in two actions which were consolidated.

The principle issue before the court was whether the defense of "Act of God" was available to defendants. In a detailed analysis, which included fact specific references to evidence, the court found that hurricanes, such as Georges, are considered in law to be an "Act of God." At the same time, it found that defendants would not be relieved from liability through "Act of God" until it was determined whether the damage arose through want of proper foresight and prudence, and to relieve themselves from responsibility, it was incumbent upon them to prove that due diligence and proper skill were used to avoid the damage and that it was unavoidable:

> ... Indeed, the federal courts "weathered" experience with this defense has produced one crucial principle: if a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the hurricane, but fails to do so, then the defendant is responsible for the loss; however, if there were insufficient warnings or insufficient means available to the defendant to protect the cargo from the "Act of God," then they are not responsible for the loss.

Turning to the evidence, the court first looked at the aspect of notice of warning or flooding. In a searching analysis of the testimony, the court found the defendants did not have any actual knowledge and/or notice of flooding from hurricanes ever occurring in the area, in order to take the precautions which the plaintiff asserted they should have.

The court then turned to whether the defendants could have been made aware of a flooding danger. Plaintiffs argued that a "Stormcheck" service should have alerted defendants. The court described a faxed bulletin as somewhat cryptic, referring only to a storm surge over coastal Alabama as anticipated. The court noted the particular pronouncement was at odds with the National Hurricane Center's own advisories in Miami. In a footnote, the court stated that for plaintiffs to prevail on the strength of this alleged "warning" they had to prove the defendant carrier should have been a customer of the service and that inherent in the argument was a corollary argument that

an organization such as the carrier was not entitled to rely on National Hurricane Center advisories, but instead must subscribe to a private source, and if there is more than one, then the most reliable one. The court found plaintiffs to have failed to meet that burden and stated the defendants were not obligated to subscribe to a particular commercial service.

> ... Defendants cannot be held liable because what was known and/or predicted of this hurricane simply did not warrant a decision to move the containers from the State Docks. Given the timing and content of the predictions and the logistical realities involved, the damage which was sustained simply could not have been prevented by reasonable foresight and care. The Defendants were not negligent in their protection of and/or handling of the cargo by failing to move the cargo because they did not have sufficient notice of the specific weather conditions which could be expected in this particular area in Mobile.

In light of the evidence, the court found defendants acted reasonably and with due diligence.

> ... instead of eyes locked on hindsight, this Court must stand with eyes directed towards what the Defendants knew at the time, to understand that the flooding which subsequently occurred and the hurricane's path was not sufficiently appreciable or foreseeable, to call for extraordinary precautions entailing substantial expenses.

The court found plaintiffs not entitled to recover because the damage was caused by an "Act of God," and not due to any negligence on the part of the defendants.

Skandia Ins. Co., Ltd. v. Star Shipping AS, d/b/a Atlanticargo, No. 99-0284-CB-L (U.S.D.C., S.D. Ala. April 5, 2001.) (Butler, Jr., J.)

SOMETIMES YOU GET WHAT YOU PAY FOR. . . .

A shipment of steel bars was booked to be transported by rail from Texas to Pennsylvania. The steel bars allegedly failed to arrive and the plaintiffs submitted a claim to the railroad. The railroad declined the plaintiff's claim and, close to two years after receiving that written notice of rejection, the plaintiff filed suit with respect to the alleged non-delivery.

Defendant moved for summary judgment on the basis that the claim was

time-barred and plaintiff cross moved to transfer venue to Texas.

With respect to defendant's motion, the court found the shipment was subject to a one-year provision in the railroad carrier's circular which had been referred to in the freight invoice and the rate charge was calculated based on the rate in the exempt circular.

The plaintiff was offered the option of shipping its goods pursuant to the Carmack Amendment, which would have given plaintiff two years after declination in which to file suit. Instead, the rate charged and accepted by the plaintiff was a cheaper rate quotation which considered a one-year limitation as opposed to the two-year filing period provided by the Carmack Amendment.

Finding the plaintiff had failed to establish a triable issue of fact, the court granted summary judgment in favor of defendant on the basis that the matter was time-barred.

As to plaintiff's motion to transfer, the court denied the motion as moot; however, went on to note the motion would still be denied, as a motion to transfer venue is not ordinarily granted at the request of the party who chose the forum in the first place.

Ferrostaal, Inc. v. Union Pacific Railroad Co., 99 Civ. 10497 (S.D.N.Y. July 5, 2000) (Schwartz, J.).

THE BILLETS TURN UP AND ONCE MORE UNTO THE BREACH. . .

Having been dismissed from its New York action, the plaintiff initiated a suit alleging conversion in the District Court for the Eastern District of Texas. The steel billets which were not delivered had been left unaccounted for in the railroad's shipping yard in Fort Worth, Texas. Eventually, the billets were sold by soliciting bids. One of the railroad's claims adjusters was responsible for selling the unidentified billets. The plaintiff sued this individual for his actions, claiming they constituted conversion.

The court noted that before the conversion lawsuit was filed in Texas, the plaintiff had initiated a similar lawsuit against the railroad in the Southern District of New York. The plaintiff then brought an action against the employee individually, despite the fact that both parties seemed to agree that he was a railroad employee and that he was acting in the normal scope of his employment.

The court noted the outcome of the suit brought in the Southern District of New York as being time-barred and turned to the claim for conversion.

The court found the Carmack Amendment preempted state law breaches of contract and tort claims. Quoting from a 5th Circuit decision in Moffit v. Bekins Van Lines Co., 6 F. 3d 305 (5th Cir. 1993), the court stated "such a holding could only lead to the morass that existed before the Carmack Amendment. Therefore, we find the district court correctly held that federal law, via the Carmack Amendment, preempts the Moffits' state law claims. To hold otherwise would only defeat the purpose of the statute, which was to create uniformity out of disparity."

The court found the Carmack Amendment preempted the plaintiff's claim against the individual defendant. There had been no showing that he was acting outside the scope of his employment. The court held plaintiff should not be allowed to circumvent the Carmack Amendment by naming an individual employee as its chosen defendant.

The court went on to consider the impact of the decision of the District Court of the Southern District of New York.

The court found both causes of action related to actions that were taken by the individual which were under the normal scope of his employment. Plaintiff's first lawsuit was for non-delivery to steel billets under the Carmack Amendment. Plaintiff's second lawsuit for state-law conversion was preempted by the Carmack Amendment. Because the District Court for the Southern District of New York had previously held plaintiff's cause of action under the Carmack Amendment was time- barred, the court found it should no longer entertain the plaintiff's claim.

Ferrostaal, Inc. v. Don Seale, 6:00 cv 212 (E.D. Tex., Tyler Division March 12, 2001) (Stagger, J.).

"A DAMAGE TO CARGO CLAIM OF A SOMEWHAT UNUSUAL NATURE". . . .

A cargo of ethylene was being loaded aboard a vessel and was contaminated by a previous cargo of butadinene. The owners admitted their vessel was unfit to carry the cargo in question, having failed in their duty to exercise due diligence to clean or purge the vessel's tanks and lines of the previous cargo. The court noted the breach must have been particularly gross since, according to the owner's own expert cargo surveyor, the extent of the contamination observed during the initial stage of loading was likely to have

exceeded anything which the attending independent surveyor then acting for the cargo interests had previously experienced. Building on this, the owners argued that the grossness of the contamination then observed supported their contention that the bulk of the loss should be regarded as having been caused by the cargo interests' own decision to continue loading. Thus, the owners argued that while the vessel was unfit to take the cargo, the decision to continue to loading should be characterized as reckless or foolhardy and they should not be liable for their admitted breach for contamination of the balance of the parcel thereafter loaded.

In a 43-page opinion, the court noted the master of the vessel appeared to have played virtually no part in the loading process. The court noted it did not have the benefit of oral evidence from any of those who were or should have been most immediately involved, cargo interests calling only one witness with owners calling no witnesses and in particularly not calling the master.

Dealing with arguments presented on behalf of owners, the court stated the ship owner could not abdicate responsibility under the circumstances. The reality was that through a failure to observe basic tanker practice there was present in the vessel's tanks and lines at the beginning of loading a large quantity of contaminant which derived from a previous cargo. The master should have taken whatever steps were necessary and acted. "If the only manner in which the vessel could be made fit to receive further cargo was by removal of the cargo already loaded, it was the Master's duty to ensure that all parties were made aware of that fact so that it could be dealt with appropriately."

The court concluded that it could not regard the decision to continue as being the effective cause of the full cargo. The decision was not sufficiently aberrant as to wholly supplant the unfitness of the vessel as the effective cause of the contamination.

As to quantum, the claimants argued the measure of their loss should be the difference from what they would have earned had the cargo been sold and what they achieved on a distress sale. The court stated the correct measure would be the difference between sound arrived value and actual value, based on the footing that normally compensation would reflect the cost of going into the market in order to buy a substitute cargo which would in turn enable the injured party to achieve whatever price might be obtainable under his forward contract , assuming that the be higher.

The initial contract (BP) was entered into before any relevant contract to which the owners were party. The contract price was calculated by references to prices in a publication commonly used in the market. The average price spot quoted in this publication at the relevant time was less than the initial contract price (some $136 less). The court found compensation to be calculated on the relevant spot price less what was achieved on the distress sale.

Vinmar International Ltd. v. Theresa Navigation S.A., No. 1997 Folio 1721 (High Court of Justice, Queens Bench Division, Commercial Court March 6, 2001) (Tomlinson).

STRICT PRODUCTS THEORY GOES UP IN SMOKE

An explosion on board a vessel in a containerized shipment of Thioreau Dioxide ("TDO") caused severe damage to other shipments stowed in the same vicinity and to the vessel itself.

The subrogated insurers of a cargo of men's coats commenced an action against the vessel, its owner, time charterer and a number of slot charterers and NVOCC's involved with the shipment. In a related action, the shipowner sued the shipper and freight forwarders of the offending TDO cargo. Judge Miriam G. Cedarbaum consolidated these cases for trial and thereafter issued findings of fact and conclusions of law.

The court ruled that at the time of the incident, TDO was not officially recognized as a hazardous cargo and thus not listed in the International Maritime Dangerous Goods ("IMDG") Code. The available industry literature at the time did not alert those handling the product of the likelihood that decomposition of TDO would cause an exothermic reaction.

Faced with the Fire Statute defense under COGSA, and the absence of proof of carrier negligence, the cargo claimants joined forces with the shipowner and focused the prosecution of its claims against the shipper and freight forwarder of the TDO under a theory of strict products liability. The shipowners asserted that the shipper and freight forwarders were guilty of failing to warn about the inherent dangers of TDO. In addition, the cargo interests asserted that the shipper of the TDO owed an absolute duty under general maritime law that the TDO was not hazardous.

The court rejected the plaintiffs' strict product liability theory on the grounds they failed to prove the existence of a product defect or that such defect caused the damage. The court also found that the plaintiffs could not

recover because they were not "users or consumers of the defective product."

Judge Cedarbaum also dismissed plaintiffs' theory in respect of the shippers' duty to warn about the inherent dangers of TDO. The court found that none of the research available at the time of shipment was indicated that an explosion was likely during the transport of TDO.

The court also held that there was no absolute warranty on the part of the shipper that its cargo is not hazardous. This absolute warranty, to the extent it existed under common law, was cut down and modified legislatively with the enactment of COGSA, Section 1304(6) of which requires proof of "[an] act, fault or neglect of shipper" before liability may be imposed. Judge Cedarbaum held that a shipper is "chargeable only with the knowledge that it is actually or constructively within its possession" and that plaintiffs failed to prove that the shipper (or its freight forwarder "knew or should have known" that TDO could decompose exothermically.

Insurance Co. of North America a/s/o Burlington Coat Factory v. M/V TOKYO SENATOR, 2001 WL 23893 (S.D.N.Y. March 9, 2001)

CLAIMANT RUNS HAZARD OF HAZARD EXCLUSION

In an action factually related to the TOKYO SENATOR, supra, one of the NVOCC's sued its liability insurer to recover cleanup costs and fines imposed and the costs of defending a lawsuit for damage arising out of the carriage of two shipments of toxic chemicals, including the TDO carried on the TOKYO SENATOR.

The defendant insurer refused to defend or indemnify its insured on the grounds that the policy of insurance excluded toxic pollutants from coverage and had a one-year statute of limitations. The policy styled in "International Transit Liability Insurance Policy" covered certain risks attendant on the insured's business as an NVOCC. As is typical of most insurance policies, the Policy at issue contained numerous exclusions which operated to deny coverage for certain risks. The relevant exclusion, entitled "Hazardous Materials / Pollution / Contamination" provided as follows:

> We will not cover any claims for environmental damage, pollution, or contamination of any kind however caused, including but not limited to: claims arising out of accidental, sudden or gradual, foreseeable or unforeseeable, intentional or unintentional occurrences.
>
> We will not cover any claims arising out of any activity, transac-

> tion, incident or occurrence involving any explosives; pressurized gases; nuclear parts, fuels, materials or devices; hazardous, radioactive, toxic; . . . or flammable materials; any weapons or armaments; or any means of biological or chemical warfare.
>
> Further, we will not cover claims arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants in any stage or storage, handling or transportation; . . . whether accidental, sudden or gradual, foreseeable or unforeseeable, intentional or unintentional.
>
> Pollutants mean but are not limited to: any solid, liquid, gaseous, thermal, radioactive, sonic, magnetic, electric or organic irritant; contaminant; or anything which causes or contributes to damage, injury, adulteration, or disease. This includes, but is not limited to smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste.

In addition, the Policy contained a clause which precluded the assured from commencing a lawsuit against the insurer after one (1) year from the date of the incident giving rise to the putative duty to defend.

In mid-May of 1995,the insured first notified the insurers of the insurers of the underlying losses when it, itself, was served with summonses and complaints in connection with two separate but related actions one filed in the Eastern District of New York, the other pending in the Southern District of New York. The Insurers promptly responded on June 1, 1995, stating that following a review of the complaints, the insurers were not obligated to provide the insured coverage based upon the hazardous materials / pollution exclusion. Almost five years later in February of 2000, the insured brought a declaratory judgment action against the insurers to declare that coverage existed. Insurers asserted a counter-claim seeking a declaratory judgment that the policy did not afford coverage.

Judge Gerard E. Lynch, on motion and cross motion for summary judgment, held that the Policy was not intended to provided the insured with coverage given the broadly-worded hazardous materials / pollution exclusion.

The Policy excludes: “Any claims arising out of any activity, transaction, incidence or occurrence involving@ materials that are “hazardous” or “toxic.” Since the court found that there was no duty to defend or indemnify on the part of the insurer, it stated that it was unnecessary to rule on the statute of limitations question. The court also considered the insurers’ appli-

cation for attorneys' fees and costs under 28 U.S.C. §1927, but stated that such sanctions were not warranted in this case.

Zen Continental Co., Inc. v. Intercargo Ins. Co., 2001 U.S. Dist. LEXIS 2999 (S.D.N.Y., March 21, 2001).

CLOTHIER'S CARGO COVERAGE COLLAPSES DUE TO LACK OF COOPERATION, AMONG OTHER THINGS

Plaintiffs were a manufacturer of military apparel, and its affiliate who arranged for the purchase of yarn and its conversion into finished material. They sued to recover for goods damaged when the roof of a warehouse in which finished material was stored, collapsed. The warehouseman declared bankruptcy and the warehouse was demolished a number of months after its roof collapse. Plaintiffs claimed against the warehouseman's commercial property insurance policy as a third-party beneficiary. Plaintiffs also claimed under two other insurance policies; one which only covered the manufacturer for property loss at the warehouse and, the other—an open marine cargo policy with a warehouse endorsement which named both plaintiffs as insureds.

Defendant insurance companies moved for summary judgment. The court granted summary judgment to all three defendants, albeit on slightly different grounds. With respect to the warehouseman's insurer, the court held that the plaintiffs lacked standing and that they failed to qualify as intended third-party beneficiaries under that policy because the policy specifically excluded coverage for "stock and supplies of others."

With respect to the policy which named only the manufacturers as an insured, the court held that there was no coverage because at the time of the roof collapse because the fabric in the warehouse was owned by the manufacturer's affiliate and not the manufacturer. The court dismissed plaintiffs' claim under its cargo policy since the policy's warehouse endorsement only provided coverage for "imported goods and merchandise . . . while temporarily stored in warehouses approved by this Company in writing." The evidence submitted in support of the motion indicated that the goods were not imported but rather had been manufactured in by the affiliate Pennsylvania.

Because the court found there was no coverage, it stated that it was not necessary to determine whether timely notice of claim had been given to the insurers. However, the court stated, as dicta, that it would have dismissed plaintiffs' case for their failure to provide timely notice of the claim since it was undisputed that plaintiffs only notified its own broker of their loss and the broker did not provide notice of loss to insurers within a reasonable period of time. In addition, the court indicated that it would have ruled in favor of the defendant insurers on the issue of their failure to cooperate with the insurers in proving their loss. The undisputed evidence showed that plaintiffs not only failed to properly retrieve the goods from the warehouse

after the loss but they discarded the goods as trash, thus depriving the insurers the opportunity to inspect the damage and assess the extent of the loss.

Isratex, Inc., et al. v. Strousberg Dyeing and Finishing Co., No. 108138/95 (N.Y. Sup. Ct. Feb.13, 2001) (Abdus-Salaam, S.).

COMPUTER CHIPS CAUGHT UP IN COMPLEX TREATY RELATIONS

In a recent decision that may have far reaching implications, the Second Circuit decided that since the United States signed the Warsaw Convention and South Korea only signed the Hague Protocol, that these countries were not in treaty relations with respect to international transportation of cargo by air.

The shipper delivered 17 parcels of computer chips to the air carrier for shipment from Seoul to the consignee in San Jose, California. The air carrier's air waybill provided for shipment on a non-stop flight from Seoul to San Francisco, but due to an excess of goods to be shipped, the carrier instead transported the parcels on a flight to Los Angeles. The parcels were then trucked to San Francisco. Two of the 17 parcels, weighing 35.3 kilograms and valued at $583,00.00, were missing upon arrival at San Francisco. The subrogated cargo insurer claimed subject matter jurisdiction under 28 U.S.C. § 1331. Although the United States adhered only to the original Warsaw Convention and South Korea adhered only to the Warsaw Convention as amended at the Hague, both parties agreed that the Warsaw Convention governed the dispute.

The district court applied only those portions of the Warsaw Convention to which the United States and South Korea both had agreed in adhering to two different versions of the treaty, thus, in essence, creating a truncated version of the Warsaw Convention. The district court held that the Warsaw Convention's liability limitations were applicable, and the air carrier's liability was limited to $706.00 by the truncated treaty formed by the common portions of the two versions.

On June 8, 2000, the Second Circuit reversed the district court's decision, holding that the actions of the United States and South Korea did not create treaty relations with regard to international carriage of goods by air. The court determined that the United States and South Korea were not in treaty relations with regard to the international carriage of goods by air and, therefore, the dispute did not arise under a treaty of the United States, thereby

depriving the district court of subject matter treaty jurisdiction.

The case was remanded to the district court to determine whether there was another basis for subject matter jurisdiction. The cargo insurer has moved in the district court to dismiss the air carrier's affirmative defense of limitation of liability under the air waybill and tariff. A Petition for a Writ of Certiorari has been filed with the United States Supreme Court.

Chubb & Son, Inc. v. Asiana Airlines, 214 F3d 301 (2nd Cir. 2000).

11TH CIRCUIT ENTERS "MURKY WATERS" OF COGSA AND PACKS UP CLOTHING SHIPMENTS....

Containerized shipments of clothing were lost overboard. One plaintiff shipped its products in a "big pack," akin to a pallet, slotted at the bottom so it could be picked up by a forklift and partially enclosed in corrugated cardboard with a base and cover made of plastic. Inside the big pack, were bundles of boys pants and the like wrapped in paper and sorted by style.

A second shipment consisted of assembled suit jackets which were hung from beams on nylon ropes and shipped in extra-tall containers. The pressed suits were enclosed in plastic bags and each garment-on-hanger container could hold between 4,500 and 5,500 hangers.

Both cargo plaintiffs appealed from the district court's decision holding the big pack to be the package for limitation purposes and the container to be the package with respect to the shipment of suit jackets on hangers.

The Eleventh Circuit noted the documentation, particularly the cargo manifest and the bill of lading, indicated 39 big packs and stated nothing about the smaller "dozens" or bundles inside each big pack. The court found little difficulty in affirming the limitation based upon the 39 big packs.

With respect to the garment-on-hanger container, the court stated it initially approached any attempt to define a container as a COGSA package with great reluctance: "While the "number of packages" column is plainly our starting point in determining these issues, the analysis does not end there. . . . " "[W]hen a bill of lading refers to both containers and other units susceptible of being COGSA packages, it is inherently ambiguous."

While reviewing relevant case law, the court ultimately noted the evidence presented that each garment-on-hanger container is a recognized ship-

ping unit was inconclusive. Precedent has clearly required that the number of packages that are declared must be indicated in the package column of the bill of lading and the shipper's own documents as the next most reliable source of information should give some clear indication that more than one package is being shipped.

The court noted that the shipper had ten years experience in the shipping business and would be hard pressed to argue it did not understand the significance of correctly completing all the declaration forms and bills to avoid a COGSA limitation.

With respect to both plaintiffs, the court in a footnote noted that additional freight charges could have been paid to opt out of the COGSA limitation: "Not paying the additional amount implies a conscious decision to adhere to COGSA's limited liability. In fact, both Fishman and MacClenny chose not to opt out of COGSA's limitation but instead transferred the risk of loss greater than the COGSA limitation from themselves to their insurer."

The court also considered an argument that the district court should have followed a decision in the same district court on the basis of intra-court comity. The circuit court noted that, unlike circuit court panels where one panel will not overrule another, district courts are not held to the same standard. While the decision of fellow judges are persuasive, they are not binding authority.

The circuit court affirmed the district court's applications of the package limitation.

Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co., Ltd., 240 F.3rd 956 (2001) (11th Cir. Jan. 31, 2001).

UNFRIENDLY PERSUASION. . . .

The United States sued for loss and damage to shipments of foodstuffs to various ports in Africa. Clean bills of lading were issued for each shipment after the cargo was stowed; however, survey reports indicated several problems when discharged in Africa. Some parts of the cargo were received in a damaged and unusual condition and some parts of the cargo were not received at all. The total claimed was $203,317.87. The district court entered judgment in favor of the United States for the limited sum of $7,300.08, the amount of damage which defendants admitted occurred prior to discharge.

The 5th Circuit Court of Appeals considered the shifting burdens and accompanying presumptions of liability set up by COGSA. The court noted the shipper had established a prima facie case of loss or damage. Clean bills of lading had been issued and the reports of survey at the ports of discharge indicated loss or damage upon discharge.

A shipper's prima facie case creates a presumption of liability and, at that point, the burden of proof shifts to the carrier to prove it exercised due diligence to prevent the loss or damage or that the loss or damage was the result of one of the "uncontrollable causes of loss" enumerated in COGSA.

If the carrier successfully rebuts the shipper's prima facie case, the presumption of liability vanishes and the burden returns to the shipper to show that carrier negligence was at least a concurrent cause of the loss or damage. If the shipper establishes carrier negligence as at least a concurrent cause, then the burden shifts once again to the carrier, who must establish what portions of the loss were caused by other factors. If the carrier is unable to prove the appropriate apportionment of fault, it then becomes liable to the full extent of the shipper's loss.

The circuit court reviewed the district court's application of this "burden shifting paradigm and other legal issues de novo."

The court found little difficulty in determining that the shipper had established a prima facie case. It then went on to consider whether the carriers had rebutted the prima facie case by showing that the facts and circumstances surrounding the loss fell within one of the statutory exemptions of COGSA or demonstrated that the carrier exercised due diligence.

> . . . There is considerable controversy, and even an intra-circuit conflict, as to whether the carrier's rebuttal burden with respect to most of those exceptions is one of production or persuasion.
>
> The first sixteen of the seventeen statutory exceptions to carrier liability set out at 46 U.S.C. § 1304(2) merely provide that the carrier is not liable for losses or damages caused by one of the listed causes. In this group are included losses attributable to such things as an act of God, id. § 1304(2) (d), an act of war, id. § 1304(2) (e), and the primary exception at issue in this case, a shipper's own improper packaging, id. § 1304(2) (n). The seventeenth exception, § 1304(2) (q), is a catch-all exception, which states that the carrier is not liable for losses or damages resulting from "any other cause

> arising without the actual fault and privity of the carrier" or its agents. That subsection goes on, however, to provide that, with respect to § 1304(2) (q), "the burden of proof shall be on the person claiming benefit of this exception" to show that the carrier's fault or neglect did not contribute to the loss or damage. Id. § 1304(2) (q). Thus, the exception codified at § 1304(2) (q) expressly requires that the carrier prove the applicability of the exception, while the remaining statutory exceptions are silent on the point.

The court noted some 5th Circuit Panels implicitly place a heightened burden of proof under the "q" clause and permitted a more lenient burden under the exceptions which precede it. Some panels required a carrier under § 1304(2) (q) to bear not just the burden of going forward with evidence, but also the burden of persuasion. They also noted other courts have, in similar fashion, placed the mere burden of production on a carrier when the catch-all provision ("q") was not involved. Under these authorities, once the shipper had proved his prima facie case, the carrier, claiming an exception under §§ 1304(2) (a)−(p) would bear merely a burden of production with respect to establishing the application one of these exceptions. Where, however, the "q" clause was involved, the carrier would bear the ultimate burden of persuasion as well.

The court then traced the history of decisions on the issue and noted that the earliest 5th Circuit decision at least implicitly reached a different conclusion. Referring to Waterman S. S. Corp. v. United States Smelting, 155 F.2d 687 (1946), the court noted that a carrier seeking to avoid liability on the theory of perils of the sea or latent defects, bore both "the burden of going forward" to demonstrate the applicability of the exception and "the risk of non-persuasion."

The court noted that there did not appear at this time any consensus among the circuits or even in the 5th Circuit, concerning which COGSA party bears the burden of persuasion (and the risk of non-persuasion) with respect to the enumerated exemptions set forth in §1304(2) (a)−(p), once the shipper makes out a prima facie case.

The court then turned to the defenses raised by the carriers, principally insufficiency of packaging. The court found it was not compelled to decide whether the carriers' rebuttable burden with respect to this defense was one of production or persuasion as it found the carriers failed to produce competent evidence to meet either standard with respect to this defense. It found that

there had to be more than the offer of mere speculation as to the cause of loss or damaged cargo. The carriers had relied solely upon survey reports prepared at discharge and while the reports documented the quantity and compromised quality of lost or damaged cargo with some precision, three of five survey reports failed to provide even a speculative assessment with regard to the cause of the missing and damaged cargo. Thus it found there was a failure to offer any probative evidence whatsoever with respect to the insufficiency of packaging defense as it relates to those three shipments. As to the other reports, they included a list of five causes which might have contributed in some way to the loss. The court found the reports to include speculation and insufficient to satisfy the carrier's burden on rebuttal, without regard to whether that burden was one of production or persuasion. The court also found the record established negligence was at least a concurrent cause and the carriers bore the burden of establishing which portion was not attributable to such negligence. No evidence was submitted on this point and the plaintiff was therefore entitled to recover for the particular damages involved.

The carriers had also raised the catch-all exception with respect to damages to the shipments which were alleged to have occurred through careless discharge, pilferage, either from the vessel or from the docks and environs during discharge. As to stevedore negligence, the court found the carriers bore, not only the burden of production but the burden of persuasion under § 1304(2) (q).

The court found the carriers had failed to rebut the prima facie case presented and, even if they had carried such burden, it had been established that at least some of the loss and damage was attributable to the carriers' negligence. The carriers had failed to respond with evidence as to what portion of the claimed loss or damage was attributable to another concurrent cause.

The court vacated the judgment below and rendered judgment in favor of The United States in the amount of damages claimed plus pre-judgment interest.

The United States of America v. Ocean Bulk Ships, Inc., No. 00-20117 (5th Cir. April 10, 2001).

Newsletter Editors' comment: It is only appropriate to give proper recognition to those who contributed to this newsletter by forwarding cases for con-

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* This report was submitted by G. William Birkhead, Chairman of the Committee on Fisheries.

sideration. The participants to be commended include David Mazaroli, Michael Marks Cohen, Bob Phillips, Susan Dorgan, Patricia Mino, Laslo Kormendi and Felicia Sandringham.

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* This report was submitted by Mary Elisa Reeves, who is Chairperson of the Committee on Limitation of Liability.

FORMAL REPORT OF THE COMMITTEE ON FISHERIES*

The committee last met in May of 2000, at which time we discussed the new regulations pertaining to the American Fisheries Act which becomes effective on October 1, 2001. The amended regulations developed as mandated by the passage of P.L. 105–277 were published as a final rule in Federal Register, Vol. 65, No. 236 of December 7, 2000. The regulations change the citizenship requirements and certain mortgage restrictions for fishing vessels. Fishing vessels of 100 and more feet in length will be administered by the Maritime Administration, while fishing vessels of less than 100 feet will be administered by the Coast Guard. The new restrictions are set forth in 46 CFR § 67.21(f)(1)-(5).

The First Circuit Court of Appeals recently decided an issue of first impression which may have far reaching ramifications regarding admiralty procedural practice under the Supplemental Rules, as well as uniformity issues. In Gowen, Inc. v. F/V QUALITY ONE, 2001 WL 293208 (1st Cir. 2001), the First Circuit held that abstract fishing rights are appurtenances of a vessel subject to the maritime liens against the vessel. The case was an appeal from the decision of the U.S. District Court of Maine, reported at 2000 AMC 2225 (D.Me. 2000), wherein the court reasoned that abstract fishing rights were analogous to tangible equipment and other appurtenances which add value to the vessel and are necessary for the accomplishment of the vessel's mission.

However the court's rationale may be interpreted as granting a maritime lien against the fishing rights which, arguably, could be enforced pursuant to an in rem proceeding against the fishing rights. Presumably, the National Marine Fisheries Service would be served with process as the entity in control or possession of this "intangible property," as set forth in Supplemental Rule C(3). By doing so, a lien holder could deprive a fishing vessel of its fishing rights and, effectively, tie up the vessel without ever having it seized by the marshal. There are also concerns whether a maritime lien would follow the fishing rights to another vessel to which the rights are transferred.

The court's holding also raises uniformity concerns in light of its stated rationale that the fishing rights are appurtenances because they are necessary for the accomplishment of the vessel's mission. Because the fishing rights are only necessary in a particular geographical region and for a particular species, their definition as an appurtenance would be contingent upon the location of the vessel. In other words, what may be an appurtenance in Cape Cod Bay may not be an appurtenance in the Gulf of Mexico. These issues will be discussed during the committee's meeting on May 3, 2001.

Report by the Committee on Limitation of Liability*

On February 21, 2001, the U.S. Supreme Court issued its Opinion reversing the Eighth Circuit in Lewis v. Lewis & Clark Marine, Inc. The Court held that although a vessel owner need not confess liability in order to seek limitation, the Limitation Act and Supplemental Admiralty Rules adopted by the Supreme Court do not create a free-standing right to exoneration in circumstances where limitation of liability is not at issue. Secondly, the Court found that plaintiff's failure to demand a jury trial in his state court action did not deprive him of his right to proceed in state court. In other words, the Court found that a plaintiff's right to a jury trial was not the only common law remedy saved by the savings to suitors clause. The Court therefore found that if a single claimant makes the appropriate stipulations, the limitation action should be dismissed or stayed so that the claimant can pursue his remedy in state court, even in the absence of a jury demand. The full Opinion can be found at 121 S. Ct. 993 (2001).

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, SPRING 2001

Editors: George N. Proios
Gene B. George
Joshua S. Force

I. NEWS AND INFORMATION

Knudsen Speaks on Hull Policy

On April 6, 2001, Committee Chairman Jean E. Knudsen addressed the Tulane Admiralty Law Institute in New Orleans, Louisiana, on the topic: "Marine Insurance Today: The Hull Policy: Thoughts from the Claims World." With her kind permission, we reprint that very well-received speech:

Why would anyone in their right mind show up for a symposium the on hull clauses, of all things, in of all places New Orleans? Here are my top ten possible answers to this quandary:

10) You were thrown out of your hotel and need a place to sleep off a hangover;

9) You are practicing sensory deprivation, so you can be a contestant on Survivor;

8) You are a survivor – of Pat O'Brien's that is;

7) You thought this was going to be yet another cocktail reception;

6) You're a first year associate and you want to appear interested;

5) You misread the agenda and you're too embarrassed to leave;

4) On the whole, this beats root canal;

3) It is part of your community service sentence;

2) You were expecting a screening of the new video: SWIMSUITS OF THE MLA;

1) You have a 10:00 a.m. tee off at New Orleans Country Club and thought you'd better put in a polite appearance.

Bad jokes and the early hour notwithstanding, we're here because Tulane provides this valued opportunity for us to leave our traditional market affiliations in the office to come together to discuss legal and related issues of interest to us and to our respective clients and employers.

It provides me with a welcome opportunity to share my unique perspective with all of you. I speak today, not as a lawyer, but as someone who has spent a considerable career dealing with a wide array of marine claims. I have dealt with enough admiralty lawyers in my time to learn quite a bit about your "rarified" profession. At the same time, I have always been supremely conscious of the financial and business imperatives of my employer, MOAC, a major player in the marine insurance business.

In a very real sense ours is an ancient craft. Important aspects of marine coverage were forged centuries ago and continue to be vital to today's insurance market. These concepts were long ago enshrined in standardized clauses and statutory works, such as the British Marine Insurance Act. The standardization of these coverages has not only been a powerful factor in the wide availability of generally affordable marine coverages, but has been no less an influential factor in speeding the consideration, adjustment and payment of marine claims. Without an efficient and cost effective mechanism to handle the claims that arise in the everyday course of oceanic commerce, the commercial world would have a very different shape than the one we know today.

I have spent an entire career adjusting and paying marine claims (please don't ask what an "entire" career is – suffice to say the first claims I worked on involved the NINA, The PINTA and the SANTA MARIA!)

I prize the elements of clarity and certainty; they are important to the routine adjusting and processing of marine claims. These elements extend, as well, to the recovery and subrogation process. Confidence in the ability to achieve a meaningful recovery from parties at fault plays a much overlooked and important part of the whole claims process. Thus standardized terms are not only important for coverage availability and placement purposes, but for adjusting and claims purposes as well.

Of course, we don't live in a static world. In order for this system to work and be responsive to changes in the market, it is necessary to make the occasional course correction. On the other hand, too many course corrections undercut the familiarity with, and the widespread acceptance of, familiar forms of coverage. If the industry fails to make the necessary adjustments,

our traditional notions of insurance coverage may erode with the risk that they will ultimately become irrelevant.

When, then, is it timely to reexamine marine coverages, and the hull clauses in particular? The answer must be a considered one, for it is not simply a topic that one lists for review at some standard interval, like every ten years or 100 years or some measure in between. Whether a rewrite or revision exercise is timely is ultimately driven by developments in three sectors of our industry. These include technological trends in the shipping business itself, business developments in the marine insurance world and the impact of court decisions on the hull coverages.

It is my view that events drawn from all three sectors confirm that a review of traditional forms of hull coverage is quite timely. It was at one of the earliest of these events that, in 1966, the Tulane Law School devoted the entire proceeding to a review of the hull clauses then in use in the American market. Since that time we have witnessed a major reissuance of the hull clauses (in 1977). Already under way at that time was a huge physical change to the shipping business. Paramount in this regard was the birth and subsequent boundless growth of containerized commerce and the amazing quest to find energy offshore and in depths and distances formerly unimaginable.

Not only do we have hulls and hull risks largely unknown at that seminal gathering in 1966, but we have also borne witness to the growth in the hulls of conventional vessels. Thus in addition to specialized vessels built for energy exploration and production, we have tankers four times the size of the largest of their sort to ply the Seven Seas. We are witnessing a similarly dramatic growth in the size of cellular container ships. Not all the dramatic technological developments have been related to tonnage. Communications and electronics have removed the guesswork from latitude and longitude. Satellite tracking systems will someday soon allow for the widespread deployment of collision avoidance systems.

Technology aside, there are developments in the marine insurance market also to be considered. As a practical matter, these developments may also impart market forces that must be reflected in standardized policy wordings. Many days it seems as though there are exactly two insurance brokers left in the world. Propelled by fierce competition for large accounts, the brokers are pressing their “value added capabilities” to win coverage concessions from underwriters. These concessions may be in the form of brokers’ customized wordings that either vary standard provisions or change the overall shape of the coverage itself.

From an insured's standpoint this may be good news, at least early on. There is a potential cost to be borne though, and this could revisit the market in the guise of premium increases. While this prospect is less menacing in a weak market, it could have much more dramatic implications as rates firm.

The increasing fashion of joining P&I and hull cover is another interesting development. Just how this might impact hull terms is hard to say. This trend does not exist in a vacuum though, and together with other developments, it is inevitable that changes to the hull forms, as now we know them, will follow.

I am, of course, an outsider to the practice of law. I am, however, sufficiently involved with your profession to know what a profound impact the courts can have on insurance coverage matters, what with eleven judicial circuits and numerous trial districts – not to mention the potential for British decisions to influence our world.

There are many legal developments concerning the hull clauses and my paper goes into some detail on various legal issues, which I hope you will find to be of interest. The following are three items which stand out among the topics reviewed in my paper:

There have been different interpretations of the perils clause in hull policies by various courts. One case which stands out is the International Ship Repair v. St. Paul Fire & Marine decision, in which the U. S. District Court in Florida, Tampa Division, reviewed the circumstances surrounding the total loss by sinking of a floating drydock, call the "CHL2" during a voyage from Portland, Maine to Tampa, Florida, under the terms of the insured's hull policy, form 107. The insurer sought to have the policy declared null and void ab initio. It argued the drydock was unseaworthy at the inception of the policy.

The court applied Florida law and held the insurance policy to be an "all-risk policy," rather than a "named perils" policy in light of the policy wording "other causes of whatsoever nature and all other perils, losses, and misfortunes." The court further stated that even though the policy did not specifically have "all risks" wording, the form does cover every loss that may happen except by fraudulent acts of the insured.

The language in the AIHC form differs from that quoted in the policy involved in the International Ship Repair litigation. The case could poten-

[1] (1997) 1 Lloyd's Rep 360

tially have serious ramifications for all named perils, hull and machinery policies. Should this case be treated as an aberrant decision and ignored in any review of hull clauses? The potential for divergent views of concepts central to marine underwriting, as suggested by these case, should be factored into any balanced review of existing clauses.

In view of the diversity of decisions among the circuits concerning the application of an implied warranty of seaworthiness in a time hull policy, it is extremely important that consideration be given to including in the policy an express Warranty of Seaworthiness and that compliance with the ISM Code be mandated by the AIHC wording. International Safety Management, known as "ISM," is a critical issue and the responsibilities of insureds to comply with this law's requirements should be clearly specified in writing. This is in the best interest not only of vessel owners, charterers, cargo owners, and underwriters, but also of the crews on these ships, who depend upon the seaworthiness of the vessels to which they entrust their lives.

Also, it is very important from a claims viewpoint to be able to determine whether a warranty, express or implied, will be interpreted as a warranty and not held to be an exclusion. The legal outcome of a case may very well hinge upon the courts' interpretation of such language, particularly when a court holds state, not federal, law to be applicable.

On January 18, 2001, The House of Lords handed down a decision in the case of Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd, commonly referred to as the Star Sea. In its decision, the court considered the meaning of privity under the Marine Insurance Act, Section 39 (5), and the extent of the duty of "utmost good faith" (Sec. 17 of the Act) in the context of claims under marine insurance contracts.

The potential importance of this decision reflects, in part, the practice of United States admiralty courts to look to English decisions for guidance in the field of marine insurance. In addition, many underwriters in the United States participate on hull slips written with the leading underwriters in the U. K. in which the policies have English law and jurisdiction clauses.

The Star Sea, a reefer vessel loaded with fresh produce, sustained fire damage while on a voyage from Nicaragua to Belgium. The fire was accidentally started during a welding operation. The court of first instance found the vessel to be unseaworthy, as the fire was not completely extinguished when not all the CO2 canisters were discharged and the engine room was not properly sealed due to defective funnel dampers. The court held the unseaworthy conditions to be within the privity of the vessel owners. Subsequently

the vessel became a constructive total loss with an insured value of $3.2 million. If the fire had been put out promptly, the particular average damages would have been $1.7 million.

An appeal was filed by the Underwriters, seeking a reversal of the primary court's decision, which had awarded the assured a partial loss of $1.7 million. A cross-appeal was filed by the assured to recover the full policy proceeds, based upon a CTL. The Court of Appeal[1] reversed the finding of Judge Tuckey, which defeated the defense under Section 39 (5), did not find the vessel owner was privy to the unseaworthy conditions and awarded the assured the full policy proceeds of $3.2 million. The court held the duty of good faith ended when the claim was rejected. This decision was in turn appealed to the House of Lords.

The privity defense, which involves both knowledge and consent, is interconnected with the issue of utmost good faith. Did the vessel owners knowingly permit the Star Sea to sail in an unseaworthy condition? The court held that the actions of the assured may have been negligent, even grossly negligent, but the facts presented did not support a finding that they had knowledge of the unseaworthy conditions of the vessel when she sailed on her fateful final voyage.

In the appeal to the House of Lords the argument was made that the assured had "blind eye knowledge" of this vessel's unseaworthy conditions. The House of Lords decision distinguished between the duty of disclosure of information by the assured to the insurer when the contract is executed and once litigation commences. The House of Lords affirmed the Court of Appeal's ruling in the assured's favor.

This decision is particularly interesting as there are very few cases litigated on this issue of privity on the part of a vessel owner with respect to unseaworthy conditions in a ship, in which insurers seek to avoid hull policy coverage. This decision will undoubtedly be analyzed and discussed within the marine insurance industry on both sides of the Atlantic.

Conclusion

It is important for marine insurance professionals to be well versed in maritime law so that we may have a better understanding of how marine insurance policies may be interpreted by the courts. We look to the courts for clarity and guidance when issues of policy coverage arise.

There are times when we are faced with non-routine claims in which we must be able to evaluate the strengths and weaknesses of various positions, which may involve interpreting key phrases such a “privity” or “seaworthiness.” We depend upon such elements as clarity and certainty in these claim decisions, because they provide an established frame of reference that must be addressed by all parties to a claim. The facts of each individual case, together with an evaluation of policy language within the context of the definitions of key provisions, as they have been defined by the admiralty courts, must all come together in the resolution of claims.

The AIHC 1977 form (which is currently the standard used) has served the marine insurance industry well. As with most products, improvements can always be made. The dearth of cases addressing the 1977 AIHC form is a good indication that the meaning of the majority of the clauses is well understood. The jurisdictional issues of Wilburn Boat and the ongoing interpretations of the meaning of “utmost good faith” will continue to be present in litigation involving marine insurance issues and will provide a rich source of future litigation.

It is in the best interests of the marine insurance industry for all interests, including vessel owners, insurance executives, and brokers/agents, to work together to produce a uniform policy which will be readily acceptable in the world market.

The success of our business future depends upon the interest and willingness of individuals to work together to meet the demands of the Hull marketplace in the New Millennium.

II. Recent Cases of Interest

Insurer Not Required to Defend or Indemnify Insured Against Suit Alleging Intentional Pollution

M/G Transport Services v. Water Quality Ins. Syndicate, 234 F.3d 974, 2001 AMC 701 (6th Cir. 2000)

Action by insured subcontractor seeking declaration that insurer breached duty to defend and indemnify insured in action under False Claims Act. Affirming grant of summary judgment for insurer, Court of Appeals holds insurer was not obligated to provide a defense or indemnity.

Applying Ohio law, court holds that insurer has duty to defend whenever a complaint states a covered claim, or potentially or arguably does so. In

determining whether a claim is covered, insurance contract must be examined in its entirety.

Section of marine policy covering amounts paid by reason of or with respect to liability to the United States under the Clean Water Act did not cover private plaintiff's qui tam action pleaded under the False Claims Act. Policy coverage for "sudden and accidental" or "sudden and unintentional" pollution did not extend to complaint alleging that insured had a "policy and regular practice" of polluting waterways. Policy exclusion for "willful negligence or willful misconduct" barred coverage for complaint alleging policy and regular practice of polluting.

Broker Not Liable for Failure to Obtain Coverage That Was Never Requested

XM Intl., Inc. v. China Ocean Shipping Co., 121 F.Supp. 2d 301, 2001 AMC 477 (S. D. N.Y. 2000)

In action against broker and insurers arising from shipment of galvanized nails allegedly damaged in transit from China to U. S., court holds that policy requirement that nails be "packed in boxes, cartons, pallets and containers" unambiguously called for cargo to be shipped in containers. Under New York law, absent specific request for coverage of break bulk shipments, broker could not be held liable for failure to procure additional insurance; nor was there evidence that broker could have procured insurance for break bulk shipments of nails. Under New York law, broker does not have a continuing duty to advise insured to obtain additional insurance, and cannot be held negligent where the coverage sought could not have been procured prior to occurrence of the insured event.

Court Enforces Letter of Undertaking Surety Bond Requirement

Chiquita Intl. Ltd. v. Liverpool and London S. S. P & I Assn. Ltd., 124 F. Supp. 2d 158, 2001 AMC 839 (S. D. N.Y. 2000)

Action by cargo damage claimant seeking specific performance of provision of P & I club's letter of undertaking permitting claimant to require that surety bond be filed. Granting claimant's motion for summary judgment, court holds that under unambiguous terms of letter of undertaking, claimant could demand that bond be filed. Supplemental Admiralty Rule E, providing that court will decide whether particular form of security is sufficient, did not apply where parties had already stipulated in letter of undertaking, issued to avoid arrest of vessel, that bond would be filed upon demand by claimant.

Fact that claimant's demand for issuance of bond pursuant to letter of undertaking was made to pressure P & I club to resolve underlying claim for cargo damage did not alter language of the letter of undertaking permitting demand for bond, and did not rise to the "level of inequity or bad faith which would invalidate the equitable remedy of specific performance."

Casualty Outside Yacht Policy Navigation Limits Not Covered

La Reunion Francaise v. Christy, 122 F.Supp. 2d 1325, 1999 AMC 2499 (M.D. Fla. 1999)

Action by marine insurer against insured and her husband seeking declaration of rights under yacht policy. On insurer's motion for summary judgment, court holds that failure to disclose husband's 12-year old conviction for possession of marijuana and conspiracy to distribute did not void policy, where application only requested information regarding violations in previous five years.

Applying federal maritime law, court holds that navigational limitation warranty in policy providing coverage for "Atlantic and Mediterranean" did not cover loss of vessel off Jamaica, even if policy had contained Caribbean coverage endorsement, where insured had received premium reduction based on representation that she would not take vessel on planned voyage, but instead keep it in Florida marina.

Newsletter Editors' Note: Items for future issues may be submitted to George N. Proios, Lyons, Skoufalos, Proios & Flood, 1350 Broadway, New York, NY 10018; Gene B. George, Ray, Robinson, Carle & Davies P.L.L., 1650 The East Ohio Building, 1717 East 9th Street, Cleveland, OH 44114; Joshua S. Force, Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C., Twenty-Eight Floor, 909 Poydras Street, New Orleans, Louisiana 70112-1033

COMMITTEE ON MARITIME ARBITRATION
Newsletter No. 19, April 20, 2001

Editors: Armand M. Paré, Jr.
Keith W. Heard

1. Challenging the Enforceability of An Arbitration Clause on the Grounds of Arbitration Costs

In Green Tree Financial Corp. v. Randolph, 531 U.S. ___, 148 L.Ed. 2d 373 (Dec. 11, 2000), the Supreme Court considered whether the possibility that the plaintiff below would be exposed to "steep" costs and expenses if required to arbitrate was a sufficient basis to allow a plaintiff asserting violation of federal statutory rights to proceed in court, rather than in arbitration.

The plaintiff/borrower's mobile home financing agreement with various financial institutions required that the borrower buy insurance protecting the lenders from the cost of her default and provided that all disputes under the contract would be subject to arbitration. The borrower later sued the lenders, on her own behalf and on behalf of a similarly situated class, for allegedly violating the Truth in Lending Act and the Equal Credit Opportunity Act. The district court granted the lenders' motion to compel arbitration and dismissed the borrower's claim with prejudice. The Eleventh Circuit reversed the district court, ruling that the arbitration agreement was unenforceable because it posed a risk that the borrower's ability to vindicate her federal statutory rights would be undone by "steep" arbitration costs.

Reversing the Eleventh Circuit, the Supreme Court ruled that the agreement to arbitrate was not unenforceable simply because it said nothing about arbitration costs, and therefore failed to provide the borrower protection from the potentially substantial costs of pursuing her federal statutory rights in arbitration. Although the Court recognized that the existence of large arbitration costs could well preclude a litigant, like the borrower here, from effectively vindicating her statutory rights in arbitration, the record did not show that the borrower would actually bear such costs if she went to arbitration. In other words, the borrower's concerns were prospective, rather than actual. The arbitration agreement's silence on the subject was insufficient to render it unenforceable. The Court found that invalidating the agreement would undermine the liberal federal policy favoring arbitration and would conflict with the Court's holdings that the party resisting arbitration bears the burden of proving that Congress intended to preclude arbitration of the statutory claims at issue. A party seeking to invalidate an arbitration agreement on

the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs, which the borrower in this case did not do. Four dissenting justices would have vacated the Eleventh Circuit's decision and would have remanded for further consideration of the economic accessibility of the arbitral forum to the borrower.

2. Owner of Vessel Fixed "Subject Details" Compelled to Arbitrate Charterer's Claim of Breach in London

The Second Circuit's February 15, 2001 decision in U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd., 2001 U.S. App. LEXIS 2247 (2d Cir. 2001), is a timely reminder of a significant difference between the approaches used in New York and London in determining whether a vessel owner and a charterer have made a binding charter party contract.

Guangzhou Zhen Hua Shipping Co. Ltd. ("Zhen Hua") is a state-owned corporation organized under the laws of the People's Republic of China with its principal office in Guangzhou. U.S. Titan, Inc. ("Titan") is a Texas corporation with its principal office in Pelham, New York. In August 1995 Zhen Hua, as owner of the M/T BIN HE, commenced negotiations with Titan for a six months, option twelve months, time charter of the vessel. These negotiations were conducted through two brokerage companies, both located in Connecticut. On September 26, 1995 the negotiations resulted in a fixture of main terms of a time charter based on the SHELLTIME 4 form (providing for London arbitration), subject to charter party details, satisfactory inspection of the vessel in drydock, release of the vessel from another charter and approval by Titan's board of directors.

Subsequently, a dispute arose as to whether Titan had accepted the inspection of the vessel, one of the subjects. The parties discussed arbitrating the issue of whether there was a binding charter party but did not reach any agreement. Titan then filed suit in the U.S. District Court for the Southern District of New York under §4 of the U.S. Arbitration Act ("FAA"), requesting the court to determine whether there was a binding charter party and then direct Zhen Hua to proceed with arbitration in London, as provided in the SHELLTIME 4 form. Zhen Hua opposed this request, contending among other things that the court did not have subject matter jurisdiction (because it was entitled to sovereign immunity), did not have personal jurisdiction over it, should enforce an alleged ad hoc arbitration agreement to arbitrate the issue of contract formation and stay Titan's proceeding pursuant to §3 of the FAA and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). The district court held in Titan's

favor, finding that there was a binding charter party and granting the petition to compel London arbitration. See 16 F. Supp.2d 326 (S.D.N.Y. l998). Zhen Hua appealed.

Starting from the premise that, under the FAA, whether a party is bound by an arbitration clause is determined under federal law, which comprises generally accepted principles of contract law, the Second Circuit Court of Appeals concluded that the district court's findings that the parties did not reach an "ad hoc" agreement to arbitrate the contract formation issue and that they had reached agreement on a binding charter party were not clearly erroneous. In this connection the court rejected Zhen Hua's contention that an agreement to main terms "subject details" was merely an acknowledgment of an intention to continue negotiations, as in England, and refused its invitation to overrule Great Circle Lines, Ltd. v. Matheson & Co., 681 F.2d 121 (2d Cir. 1982), the Second Circuit precedent upon which the district court had relied, stating:

> Unpopular though it may be, Great Circle Lines is binding precedent, and we 'will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court' [citations omitted].

The Second Circuit also concluded that Zhen Hua was not immune from suit in the U.S. under the Foreign Sovereign Immunities Act ("FSIA"). While Zhen Hua qualified as a "foreign state" under the FSIA because it was a state owned corporation, it also came within the arbitration exception to the FSIA's grant of jurisdictional immunity set out in 28 U.S.C. §1605(a)(6)(B):

> A foreign state shall not be immune from the jurisdiction of the United States . . . in any case . . . in which the action is brought . . . to enforce an agreement made by the foreign state . . . to submit to arbitration. . . . if the agreement . . . is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

As both the U.S. and China were parties to the Convention, the district court thus had jurisdiction to determine whether the parties had formed an agreement to arbitrate which vitiated Zhen Hua's immunity and had so determined.

Further the Second Circuit found that there was personal jurisdiction over Zhen Hua because Titan's claim arose out of Zhen Hua's contacts with

the forum, namely its negotiating a charter party with a U.S. corporation located in New York through brokers located in Connecticut. In short, Zhen Hua had "purposefully availed" itself of the privilege of doing business in the forum and could foresee "being 'haled into court' there."

Finally, venue in the Southern District of New York was proper because Zhen Hua had directed communications to New York, albeit through brokers located in Connecticut.

3. New York Restraining Orders, Injunctions and Attachments in Aid of London Arbitrations

A decision by the Court of Appeals for the Second Circuit has clarified the position concerning the availability to a charterer of possible temporary restraining orders, injunctions, maritime attachments and New York state court attachments on unpaid freights in connection with claims subject to arbitration in London. In Contichem LPG v. Parsons Shipping Co., 229 F.3d 426 (2d Cir. 2000), the Court of Appeals for the Second Circuit addressed the rights of the charterer, which still owed freight, to obtain a temporary restraining order on freights to be paid to an intermediary New York bank and to then levy process of maritime attachment, state court attachment and a preliminary injunction on the freights purportedly restrained at the intermediary bank.

The district court, after initially granting an order, on an ex parte basis, for a temporary restraining order on the funds (which had not at the time of the order been sent to the intermediary bank) and an order for a maritime attachment and a hearing for awarding state court remedies, later, on motion of the shipowner, vacated the restraining order and maritime attachment and denied all state court relief. The Court of Appeals addressed the charterer's various challenges to this ruling, eventually affirming the decision of the lower court.

The Court of Appeals first held that the lower court's decision to vacate the temporary restraining order was not an appealable order. It further held, based on a recent U.S. Supreme Court ruling, that, under federal law, a preliminary injunction was not available prior to judgment in a case where a money judgment was sought.

The Court of Appeals then addressed the state court remedies. New York State law provides for the obtaining of "an order of attachment or for a preliminary injunction in connection with an arbitrable controversy." Rule

7502(c) of the New York Civil Practice Law and Rules. The Court of Appeals held, however, on the basis of the statutory language and the legislative history, that this remedy is only available in aid of a "domestic" arbitration to be conducted in New York.

Finally, the Court of Appeals considered whether the district court had properly exercised its discretion in vacating the maritime attachment after it had ruled that the temporary restraining order had, in effect, improperly restrained the funds at the intermediary bank which had enabled the later service of process of maritime attachment. Here the Court of Appeals held that, under its prior decision in Reibor Int'l Ltd. v. Cargo Carriers (KACZ-Co.) Ltd., 759 F.2d 262, 268 (2d Cir. 1985), a maritime attachment should only be effective as to funds on hand at the time the process of maritime attachment is levied, and not to funds acquired thereafter. Finding that "Reibor governs here," the Court of Appeals determined that the charterer had "improperly attempted to circumvent the rule against attachment of property not yet in Unibank's [the intermediary bank's] possession." Because of this, the Court of Appeals ruled it was "well within the district court's discretion" to vacate the maritime attachment which had only been possible by virtue of the temporary restraining order.

4. Scope of Arbitration Agreement

NeuroSource, Inc. v. Jefferson University Physicians, 2001 U.S. Dist. LEXIS 1811 (E.D. Pa. Feb. 14, 2001), involved a dispute between the defendant medical group and plaintiff, NeuroSource, a neuromedical management and practice development company, over the former's termination of the service agreement between the parties and the latter's claims for breach of contract, defamation and for an injunction against an arbitration initiated by defendant. Defendant moved to stay the lawsuit filed by NeuroSource, pending arbitration. Although the agreement between the parties contained an arbitration clause, it also provided that several types of claims were excluded from arbitration, including claims concerning the conditions under which either party could terminate the agreement. NeuroSource argued that the medical group's claims arose under various exclusions to the arbitration provision and, alternatively, that the medical group failed to comply with the agreement's condition precedent to arbitration.

Although defendant's claims seemed to arise under the contractual provision detailing the conditions under which a party could terminate the agreement, the court concluded that it could not say "with positive assurance" that defendant's claims arose under that provision of the agreement

and, as such, would be exempt from arbitration. The agreement also excluded from arbitration claims relating to the disclosure of confidential and proprietary information. NeuroSource argued that this provision broadly covered any misappropriation of defendant's business opportunities, such as encouraging defendant's employees to resign from the company, one of the allegations defendant made against NeuroSource. The court rejected this argument, however, concluding that the agreement did not define confidential information to include tangible human capital such as staff physicians.

NeuroSource also argued that defendant could not arbitrate its claims because the contract required the parties to "meet and confer" to resolve disputes prior to submitting them to arbitration. NeuroSource submitted the declaration of its president that defendant had refused his request for such a meeting. However, the court agreed with defendant's argument that compliance with conditions precedent "is a matter of procedural arbitrability that must be submitted to the arbitrator rather than decided by this Court." The court also concluded that NeuroSource could not evade arbitration of its claims by inclusion of a count in the complaint seeking an injunction against arbitration of defendant's claims, even though the arbitration clause exempted from arbitration "claims by NeuroSource for injunctive or equitable relief." The court remarked that the request for an injunction was "the functional equivalent of a motion to stay arbitration" that could not be used to circumvent arbitration of otherwise arbitrable claims. The court determined that all claims presented by both parties in the litigation were subject to arbitration.

5. Relationship Between Rule 14(c) Impleader and the FAA

In Texaco Exploration and Production Co. v. AmClyde Engineered Products Co., 2001 U.S. App. Lexis 2889 (5th Cir., Feb. 28, 2001), the Fifth Circuit ruled that the statutory right to enforce contractual arbitration provided for in the FAA overrides the policy of liberal joinder in maritime cases allowed by the Federal Rules of Civil Procedure.

After an accident during construction of plaintiff's offshore facility, plaintiff sued various defendants but not the crane operator because of an arbitration clause in the contract between them. However, the defendant crane manufacturer impleaded the operator under Federal Rule of Civil Procedure 14(c) ("Rule" or "F.R.C.P."). Plaintiff moved to strike the joinder and the third-party defendant moved for partial summary judgment against plaintiff, who opposed the motion on the grounds that §3 of the FAA required the district court to stay the proceedings between plaintiff and the third-party

defendant. The district court denied plaintiff's motion to strike and its request to stay, and granted the third-party defendant's motion for partial summary judgment.

On appeal, the Fifth Circuit reversed and remanded for entry of a stay pending arbitration. The third-party defendant contended, and the district court accepted, that Rule 14(c) "trumps" §3 of the FAA, preventing enforcement of the arbitration clause. However, the Court of Appeals concluded there was "no real conflict" between Rule 14(c) and the FAA, and that a conflict would arise only if Rule 14(c) is allowed to thwart enforcement of the arbitration agreement pursuant to the district court's order. Id. at *8. Reviewing the policy reasons supporting its decision, the Fifth Circuit observed that "to carve out a Rule 14(c) exception to the FAA could severely undermine maritime arbitration clauses, inspiring abuse and opportunistic behavior, as third parties are allowed or encouraged to do what the parties to a contract themselves are not: to put aside a mandatory arbitration provision and force litigation." Id. at *9–10. The Court of Appeals concluded that the district court erred in refusing to stay the dispute between plaintiff and third-party defendant pending arbitration.

6. Vessel Sharing Agreement Found to be a "Personal Contract" and Hence Not Subject to a U.S. Limitation of Liability Proceeding and Arbitration Under the Agreement Could Go Forward

The Court of Appeals for the Second Circuit has recently addressed whether a vessel sharing agreement among a vessel operator and various slot charterers is a "personal contract" and what the consequences of that are under U.S. limitation law and an arbitration clause in the vessel sharing agreement.

The case of Mediterranean Shipping Co. v. POL-Atlantic, 229 F.3d 397 (2d Cir. 2000) arose from the sinking of the MSC CARLA. Mediterranean Shipping ("MSC"), the bareboat charterer and operator of the vessel, commenced a limitation of liability proceeding in New York which, in general, creates a single forum for the assertion of all claims arising against the party filing for limitation. Slot charterers, POL-Atlantic ("POL") and Atlantic Container Line AB ("ACL"), which had entered into a Vessel Sharing Agreement ("VSA") with MSC for the MSC CARLA, filed a separate suit against MSC and then moved to consolidate it with the Limitation Proceeding. MSC moved in the district court to stay POL's and ACL's actions pending arbitration in London under an arbitration clause in the VSA. The district court denied the motion for arbitration on the theory that the

Limitation Proceeding and judicial economy required that all claims remain in that court. This decision was then appealed.

The Court of Appeals for the Second Circuit ruled that the VSA was a "personal contract" made by MSC because in that contract MSC had warranted the seaworthiness of the vessel. Although the definition of a "personal contract" is elusive, it is generally deemed to be any contract executed by an owner itself or its officers which contains a warranty of seaworthiness. A bill of lading, by contrast, is not considered a "personal contract" because it is not typically executed by an owner or its officers. The Court of Appeals went on to reaffirm that a claim arising under a "personal contract" could not be limited in a Limitation Proceeding in derogation of the owner's "personal contract" to make the vessel seaworthy. Hence, MSC was not entitled to limit the claims asserted by POL and ACL under the VSA. The Court of Appeals then concluded that since there was no overarching limitation policy applicable to POL's and ACL's claim under the VSA, there was no reason why those claims should not be subject to a stay in favor of arbitration in London. The Court of Appeals remanded the case to the District Court to stay the claims of POL and ACL pending arbitration in London so long as the District Court was satisfied that a binding agreement to arbitrate had been made.

7. Consolidation of Arbitration Proceedings

Connecticut General Life Ins. Co. v. Sun Life Assur. Co., 210 F.3d 771 (7th Cir. 2000), presented the issue of when does a district court have the power to order the consolidation of arbitration proceedings before a single panel of arbitrators. The case involved a reinsurance dispute between retrocedents, who required reinsurance cover, and retrocessionaires, who provided the cover. The retrocedents were represented by one company, who served as their manager. The contract contained an arbitration clause pursuant to which two retrocessionaires served a demand for arbitration on the manager and the retrocedents. Four of the retrocedents filed their own demands, each seeking a separate arbitration between itself and each of the two retrocessionaires. In response to motions to compel filed by the retrocedents, the district court denied the retrocessionaires' request for a single arbitration and granted the retrocedents' motions for separate arbitration.

On appeal, the Seventh Circuit reversed the district court and held that the retrocessionaires were entitled to consolidation of the various arbitrations into one proceeding. The Court of Appeals acknowledged the line of cases holding that a district court cannot grant a motion to consolidate unless the contract on which the arbitration is founded expressly authorizes consolida-

tion. However, the court found that the arbitration clause in the case before it "neither clearly permits nor clearly forbids consolidation." Id. at 774. The court determined that ambiguity in the arbitration clause, which treated the retrocessionaires as a single party but not the retrocedents, could best be resolved "by interpreting the contract to allow the [retrocessionaires] to demand a single arbitration." Id. at 776.

8. Arbitrator's Subpoena Power

In the Matter of Arbitration between Security Life Ins. Co. of America and Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000), involved various issues relating to a panel's issuance of a subpoena duces tecum et testificandum in a reinsurance arbitration. When a reinsurer who contended it was not a party to the arbitration refused to respond to the subpoena, the primary underwriter petitioned the district court where the arbitration was pending to compel compliance with the subpoena or, alternatively, to compel the reinsurer to participate in the arbitration proceedings.

The reinsurer argued that a subpoena under Section 7 of the Federal Arbitration Act could not be served outside the relevant judicial district at a place more than 100 miles from the site of the arbitration, relying on FRCP 45(b)(2). A magistrate in the district court concluded that, under Rule 45(a)(3)(B), the primary's attorney could be directed to issue and sign the subpoena on behalf of the court for the district in which a response was compelled by the subpoena. The magistrate directed the primary's attorney to issue a subpoena to the reinsurer, who appealed the ruling.

The Court of Appeals held that, although not spelled out in §7 of the FAA, an arbitration panel has the power to subpoena relevant documents for review by a party prior to an arbitration hearing, not just at the hearing itself. This power exists, said the court, whether or not the reinsurer is ultimately determined to be a party to the arbitration. In addition, the district court was not required to make an independent assessment of the materiality of the information sought by the requesting party (in this case, the primary underwriter) before acting to compel compliance with the panel's subpoena. The materiality of the documents requested was an issue for the arbitrators. Finally, the Court of Appeals held that the 100-mile rule found in Rule 45(b)(2) did not limit the panel's ability to issue, and the district court's ability to enforce the documents subpoena. "This is because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel," said the court. 228 F.3d at 872. The court did not consider the issue whether the 100-mile rule applied to the tes-

timony aspect of the subpoena. Stating that the issue was "thorny," the court concluded that it did not have to reach it since a witness had in fact testified in response to the subpoena.

The court in In re Arbitration Between Douglas Brazell and American Color Graphics, Inc., 2000 U.S. Dist. LEXIS 4482 (S.D.N.Y. April 7, 2000), reached the same conclusion on certain issues as the court in Security Life v. Duncanson & Holt. *Brazell* involved a dispute between a company and its former employee over entitlement to certain benefits, and allegations by the company that the employee had breached certain clauses of the employment agreement between them. The company obtained a documents subpoena from the arbitrator and served it on a competitor with whom the former employee allegedly had dealings. The competitor argued that the arbitrator did not have the power to require that documents be produced outside the context of a hearing but, relying on prior authority, the court concluded that this authority was implicit in §7 of the FAA. The court also ruled that the arbitrator's determination that the documents were relevant should not be disturbed, although it limited production to the files of the individuals who constituted the competitor's "senior management."

In Liberty Securities Corp. v. Fetcho, 114 F. Supp. 2d 1319 (S.D. Fla. 2000), a brokerage firm attempted to vacate the award in a securities arbitration by arguing that the arbitrators exceeded their powers by issuing a subpoena for the broker, a Pennsylvania resident, to testify at a hearing in Florida. The court rejected this argument, noting that the securities firm itself raised the issue by asking that the Panel allow the broker to be deposed rather than appear live for the hearing. In any event, the court concluded that the arbitrators' ruling was not the type of conduct prohibited by §10(a)(4) of the FAA, which permitted vacatur where "the arbitrators exceeded their powers."

9. Arbitrator's Discovery and Procedural Rulings

In In the Matter of the Arbitration between Metalex Corp. and Sunline Shipping Co., 2000 U.S. Dist. LEXIS 17462 (S.D.N.Y. December 6, 2000), an arbitration award decided under the short form rules of the Society of Maritime Arbitrators, Inc. ("SMA") came under attack. The underlying issue in the arbitration had concerned the method of calculating laytime. Laytime had been set in the charter at the rate of 500 tons per day for loading and 900 tons per day for discharging. The specific issue was whether the tonnages for the laytime calculations should be based on the amount of cargo actually loaded, as claimed by the owner, or the estimated amounts of cargo that were planned to be loaded, as urged by the charterer. The arbitrator ruled that lay-

time should be calculated on the smaller, actual quantity loaded, which led to higher demurrage.

In challenging the award, the charterer raised two points. First, it complained about the denial of its discovery requests for the "complete voyage and brokers' files . . . including voyage estimates and projections" and "log extracts for the voyage in question and the complete ship to shore, shore to ship communication file and all communications between owner and its agent during the voyage." The arbitrator had denied these requests as "excessive and unwarranted."

The court first noted that the SMA rules did not require that the arbitrator compel such discovery. In fact, it noted the rules only required production of such "evidence as the [arbitrator] may deem necessary to an understanding and determination of the dispute." It further noted that under relevant case law an arbitrator has the same discretion with respect to discovery that it has with respect to the admissibility of evidence. As to this, the court noted the "arbitrator is the judge of the admissibility and relevance of evidence" and the "courts will not reverse his evidentiary decisions unless they deprive a party of a fundamentally fair hearing." As a necessary step in proving this, a party must show that the "erroneous evidentiary ruling . . . influenced the arbitration's outcome." The court determined that the arbitrator's discovery ruling had no effect on the outcome since the charterer had not shown that "any of the documents it requested would have affected the arbitrator's decision regarding either the method of calculating the allowed laytime, or the weight of the cargo actually loaded."

Charterer also complained that the arbitrator was guilty of "misconduct" under the FAA for failing to rule on the charterer's request to put in additional submissions in response to those which the owner had submitted over the charterer's objection. Here, the court reiterated that "the arbitrator is the judge of the admissibility and relevance of the evidence." The court then made a similar ruling concerning this as it had with the discovery issue and found that the charterer had failed to explain why submissions which had been objected to and to which no reply had been specifically allowed had a "significant impact on the arbitration's outcome." It, therefore, affirmed the award of the arbitrator.

10. Refusal to Adjourn Hearing

In Ottawa Office Integration Inc. v. FTF Business Systems, Inc., 2001 U.S. Dist. LEXIS 1679 (S.D.N.Y. Feb. 22, 2001), plaintiff moved to confirm

and defendants moved to vacate two arbitration awards, one for compensatory damages and the other for legal fees. Defendants contended that the sole arbitrator committed misconduct when he denied their request for an adjournment based on the ill health of their primary witness. The arbitrator granted an adjournment of the original hearing dates due to the witness' alleged illness, conditioned on submission of detailed medical information and waiver of the physician-patient privilege if any further requests for adjournments were made. The day before the adjourned hearing was to begin, with plaintiff's witnesses already in New York from Canada, defendants requested an indefinite adjournment based on the witness' medical condition without providing the medical records required by the arbitrator's prior order. The arbitrator denied the renewed request for an adjournment due to defendants' failure to give proper notice, the lack of credible medical evidence and the fact that letters submitted from a doctor were vague in describing the witness' asserted inability to testify. Nevertheless, the arbitrator agreed to leave the record open for several months for submission of the witness' testimony, provided a physician's affidavit and relevant medical records were provided by a date certain. During the hearing, defendants produced only one witness, who testified that she spoke on the telephone with the missing witness about work-related matters a few times each day.

Reviewing the legal standard, the court noted that if a "reasonable basis" exists for the arbitrator's considered decision not to grant a postponement, the court should be reluctant to interfere with the award. The court concluded that, in this case, the arbitrator had a reasonable basis for denying defendants' request to adjourn the hearing. Specifically, the hearing had already been adjourned before, plaintiff's witnesses had traveled from Canada to attend the hearing, the request was for an unspecified amount of time and credible evidence of the witness's purported ill health was lacking. The court ruled that, under the circumstances, the arbitrator could reasonably conclude that the request for an adjournment was not based on the witness' poor health but rather was an attempt "to delay the hearings unnecessarily." The court denied the motion to vacate the awards.

11. Subject Matter Jurisdiction on Motion to Vacate

In Greenberg v. Bear, Stearns & Co., 220 F.3d 22 (2d Cir. 2000), the Second Circuit considered when federal subject matter jurisdiction may exist in connection with proceedings to vacate an arbitration award. The petitioner, an investor, alleged fraud and market manipulation against a clearing broker who provided certain services to the investor's primary broker. The arbitrators dismissed all claims against the clearing broker and the investor

moved to vacate the award on the grounds it violated public policy and manifestly disregarded the law.

Considering the district court's jurisdiction over the case, the Court of Appeals observed that the fact that the arbitration concerned issues of federal law did not, on its own, give the district court subject matter jurisdiction to review the award, nor did federal question jurisdiction arise simply because the petitioner sought relief under the FAA. There must be an independent basis of jurisdiction before district courts can entertain petitions to vacate. The Second Circuit determined that subject matter jurisdiction may exist if the ultimate disposition of the matter by the federal court "necessarily depends on resolution of a substantial question of federal law." Id. at 26. The court held that where, as in the case before it, "the petitioner complains principally and in good faith that the award was rendered in manifest disregard of federal law, a substantial federal question is presented and the federal courts have jurisdiction to entertain the petition. Id. at 27. The court cautioned, however, that the alleged manifest disregard of federal law must form "a key part" of the petitioner's complaint about the award in order to support federal jurisdiction. Id.

Turning to the merits, the Second Circuit affirmed the district court's decision that petitioner had failed to demonstrate that the award was rendered in manifest disregard of federal securities law or New York state law.

12. Arbitration Award Vacated as to Corporate Parent of Charterer

In In the Matter of Arbitration between Promotora de Navegacion, S.A. and Sea Containers Ltd., 2000 U.S. Dist. LEXIS 16167 (S.D.N.Y. November 8, 2000), the court dealt with cross-motions to confirm and vacate an award. First, it found that the award should not have run against the parent of the charterers named in the relevant charter parties. In reaching this conclusion, it found that the arbitration clause did not specifically name the parent company. It further noted that a non-signatory may be bound by an arbitration award "if in the course of the arbitration proceeding, or in its dealings with parties to the arbitration, its conduct demonstrates an intent to arbitrate the submitted dispute." The court found the record before it too ambiguous to reach such a result and that the "law requires certainty to reach such a conclusion. Finally, the court refused to consider, or the motion to confirm, arguments concerning why the parent should be liable on "alter ego" theories of liability for the subsidiaries debts. In reaching this conclusion, the court noted that no such arguments nor relevant evidence had been submitted to the arbitrators. It further noted that any such claim could be made in a sepa-

rate proceeding before a court of competent jurisdiction but it was not a proper subject for a motion to confirm an award.

The court also refused to vacate the award of consequential damages on the grounds of manifest disregard of the law. In reaching this conclusion, the court noted that the Panel had specifically cited applicable law, had correctly stated its importance and had reached a reasonable legal conclusion based on the evidence.

13. Manifest Disregard

In Green v. Progressive Asset Management, Inc., 2000 Westlaw 1229755 (S.D.N.Y. Aug. 29, 2000), a securities arbitration, the court denied petitioner's motion to vacate the award based on manifest disregard of the law or evidence. The court rejected petitioner's argument that its prior opinion in Daily News, L.P. v. Newspaper & Mail Deliverers' Union, 1999 U.S. Dist. LEXIS 19024 (S.D.N.Y. December 2, 1999), discussed in Newsletter No. 18, had somehow broadened the scope of judicial review of arbitration awards since the Second Circuit's decision in Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998). The court concluded that "Daily News applies Halligan without expanding its holding." 2000 Westlaw 1229755, *2. The court refused to vacate the award because petitioner failed to supply the court with the full record in the arbitration, leaving the court unable to exclude the possibility that the award was in fact supported by evidence the petitioner had not supplied.

Possehl, Inc. v. Shanghai Hia Xing Shipping, 2001 U.S. Dist. LEXIS 2169 (S.D.N.Y. March 7, 2001), involved an attempt to vacate an award denying a claim for cargo damage on the grounds of manifest disregard of the law. The facts before the arbitrators indicated that the damage occurred when the cargo was being loaded on the vessel. The cargo claimants argued that, since the carrier had a non-delegable duty to carefully load and discharge cargo under COGSA, liability for the damage must fall on the carrier. The claimants argued that the arbitrators' failure to assess liability on this basis was a manifest disregard of the law. The court pointed out that, although the law does not allow a shipowner to contract out of the liability arising out of the duty to carefully load and discharge the cargo, COGSA provided affirmative defenses which could be asserted by the carrier once the cargo claimants had established a prima facie case. The non-delegable aspect of the carrier's duties did not render the COGSA defenses unavailable. The panel majority ruled that the facts established an "act of shipper" defense since the cargo shipper had loaded and stowed the vessel, resulting in an award in favor of the carrier.

The court wrote that "the panel majority applied the relevant law, i.e., COGSA, and concluded that [the carrier] Shanghai had met its evidentiary burden under that law. Whether or not the panel's determination that Shanghai met its burden was correct is not a matter for this court to decide. Even if that determination were factually or legally erroneous, such error would not constitute manifest disregard for clearly applicable law."

The court also rejected the cargo claimants' argument that the panel majority manifestly disregarded the law regarding segregation of cargo damages, as stated in Schnell v. The VALLESCURA, 293 U.S. 296 (1934). The court noted that, in order for the segregation rule to apply, once the carrier established an affirmative defense, the burden shifted back to the cargo claimants to show that the carrier's negligence contributed to the damage. The court noted that the panel majority's conclusion that the cargo damage was the "unavoidable consequence" of the actions of the shipper's stevedores could only mean that the two arbitrators found that the claimants had not met their burden of showing carrier negligence. Although the court allowed that there might be some ambiguity in the panel majority's analysis, the panel had not manifestly disregarded clearly applicable law and the award was confirmed.

14. Undue Means and Manifest Disregard

In Liberty Securities Corp. v. Fetcho, 114 F. Supp. 2d 1319 (S.D. Fla. 2000), the plaintiff securities firm sought vacatur on several grounds, including an argument that the award was procured through "undue means" in violation of §10(a) of the FAA. The conduct at issue consisted of defendant's submission to the arbitrators of a business card that described a broker as an employee of the securities firm. The firm alleged that the investor had intentionally misled the Panel as to how she received the card. However, the court noted that all of the evidence and arguments concerning the business card had been presented to the Panel during the arbitration. The court wrote that "vacatur is precluded where the arbitrators had before them all material information relating to the alleged undue means." Id. at 1322.

The court also refused to vacate the award on the grounds that the securities firm was prejudiced by the denial of its request to postpone the hearing. The court noted that an award may be vacated for this reason "only if Plaintiff can show that no reasonable ground existed for the denial," id., and the Panel had in fact cited a sufficient basis for its refusal to adjourn.

Finally, the court rejected plaintiff's arguments that the Panel had failed to render a definite award and exhibited manifest disregard of the law. The

court rejected the first argument, which was based on the award's reference to only one section of a Pennsylvania statute on which the defendant investor had relied, with the court pointing out that (a) the Panel was not required to explain the reasons for the award and (b) the award made no reference to any particular theory of liability, raising the possibility that the Panel may not have relied on the statute at all. With respect to the second argument, case law in the eleventh circuit required that the party urging a manifest disregard vacatur must show that the Panel was encouraged to disregard the law and that it did not reject such a plea. The court noted that plaintiff offered no evidence that defendant's attorney encouraged the Panel to disregard the law, with plaintiff instead relying on the outcome of the arbitration as proof that the Panel ignored the law, which is not allowed by case law in the eleventh circuit.

15. Award Deemed "Irrational" and "Fundamentally Unfair" by District Court Reinstated on Appeal

In Hoffman v. Cargill, Inc., 236 F.2d 458 (8th Cir. 2001), the Court of Appeals reversed a district court order vacating the award in a grain arbitration. The district court had ruled that the award was irrational and in manifest disregard of the law. The Court of Appeals agreed that an award could be vacated for these reasons but ruled that the record in the case did not sustain the conclusion that the arbitrators "acted irrationally or identified applicable law and then ignored it." Id. at 462. According to the Court of Appeals, "the district court simply disagreed with the arbitrators' analysis of the facts." Id. The district court also vacated the award on the grounds that the proceedings before the National Grain and Feed Association ("NGFA") were "fundamentally unfair." Terming this a "newly minted precept," id., the Court of Appeals pointed out that it had never recognized "fundamental fairness" as a basis for vacating an arbitration award. The court stated that, if such a standard exists, "it must apply to arbitration schemes so deeply flawed as to preclude the possibility of a fair outcome," id. at 463, which it concluded was not true of the NGFA procedures in this case. The Court of Appeals remanded the case with instructions that the award be confirmed in favor of the grain purchaser. (The district court's ruling was discussed in Newsletter No. 18 of the Committee on Arbitration (April 11, 2000).)

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COMMITTEE ON RECREATIONAL BOATING
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Editor: Frank P. DeGiulio

CALHOUN v. YAMAHA IV: Third Circuit Holds That Federal Maritime Law Governs Liability Standards

In June, 2000, the Third Circuit Court of Appeals issued the most recent decision in the decade old litigation arising from Natalie Calhoun's tragic death in a jet ski accident in Puerto Rico waters. Calhoun v. Yamaha Motor Corporation, U.S.A., 216 F.3d 338, 2000 A.M.C. 1865 (3rd Cir. 2000).

In July, 1989, twelve year old Natalie Calhoun, a Pennsylvania resident vacationing with her family in Puerto Rico, was killed when a rented jet ski that she was operating collided with an anchored pleasure boat near Palmas Del Mar. Her parents filed a products liability action against the jet ski manufacturer under the Pennsylvania Wrongful Death and Survival Statutes in the U.S. District Court for the Eastern District of Pennsylvania, and sought compensatory damages for loss of earnings, support, services and society, as well as funeral expenses and punitive damages. The Calhouns have consistently argued for the application of state law to both the damages and liability aspects of the case.

The most recent opinion by the Third Circuit involved a certified interlocutory appeal from the 1999 decision, Calhoun v. Yamaha Motor Corporation, 40 F.Supp.2d 288, 1999 AMC 1777 (E.D.Pa. 1999), reported in 8 Boating Briefs No. 1 (Mar.L.Ass'n. 1999). The district court's opinion followed the U.S. Supreme Court's decision in the case, Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 1996 AMC 305 (1996), in which the Court held that state law governs the damages and remedies available for the death of a non-seafarer in state territorial waters. See 5 Boating Briefs No. 1 (Mar.L.Ass'n. 1996). The case was then remanded to the district court for further consideration of whether the law of Pennsylvania or Puerto Rico should govern the scope of recoverable damages.

On remand, the district court first considered the issue of whether the law of Pennsylvania or Puerto Rico should apply to define the damages available for Natalie's death. The district court determined that federal choice of law rules should guide the analysis since the action fell within the court's admiralty and maritime jurisdiction. Applying this analysis the dis-

trict court first concluded that the law of Puerto Rico, the situs of the accident, applied to the Calhoun's punitive damages claim. The court then granted summary judgment in favor of Yamaha because punitive damages are not recoverable under Puerto Rico law and dismissed the Calhoun's punitive damages claim. Further, the court found that the law of Pennsylvania should apply to define the scope of available compensatory damages for Natalie's death.

In addition to its choice of law analysis and findings regarding applicable state law remedies and damages, the district court found that state substantive law, rather than federal maritime law, should govern the liability standards in the case of the death of a non-seafarer in state waters. In the closing footnote of its opinion in the case, the Supreme Court in Calhoun had said as follows:

> The Court of Appeal also left open, as do we the source — federal or state — of the standards governing liability, as distinguished from the rules on remedies. We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful-death cases in which state law has held sway.

The district court interpreted this comment as a directive to decide whether substantive federal maritime law or state law should define the standards governing liability of the parties. The district court determined that Puerto Rican substantive law should supply the operative standards of liability.

The Calhouns had consistently argued throughout the litigation that state substantive law rather than federal maritime law should govern the standards of liability as well as damages. The issue is potentially significant to the ultimate outcome of the case because if federal maritime law applies, the principle of pure comparative fault will permit the defendants to introduce evidence of Natalie's own negligence to reduce recoverable damages under the Supreme Court's decision in United States v. Reliable Transfer Co., 421 U.S. 397, 95 S.Ct. 1708 (1975). Conversely, under Pennsylvania law contributory and comparative negligence are not defenses to a strict products liability claim and Yamaha would be barred from introducing evidence of Natalie's negligence.

The district court certified its findings to the Third Circuit Court of Appeals. On appeal, the Third Circuit affirmed the district court's decision with respect to the applicability of Puerto Rico and Pennsylvania law to

determine the scope of recoverable damages but reversed the district court's finding that state law should also control the standards of liability.

In reviewing the district court's finding that Pennsylvania law should govern the Calhoun's claim for compensatory damages and that the law of Puerto Rico should govern their claim for punitive damages, the Third Circuit initially considered whether the district court had properly applied federal maritime choice of law rules in light of the Supreme Court's holding in the case that state law governs damages arising from the death of a non-seafarer in territorial waters. Noting that the appropriate choice of law rules are controlled by the basis of the court's subject matter jurisdiction, the Third Circuit analyzed whether the circumstances of the accident brought the case within federal admiralty jurisdiction under the Supreme Court's decisions in Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct. 2654 (1982) and Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892 (1990). Concluding that the circumstances of Natalie Calhoun's accident were "virtually identical to the accident that occurred in Richardson," the circuit court held that admiralty jurisdiction was present and that the district court properly applied the federal maritime choice of law rules enunciated in Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921 (1953).

In affirming the district court's finding that the Calhoun's recoverable damages were governed in part by the law of Puerto Rico and in part by the law of Pennsylvania the Third Circuit approved the district court's use of the doctrine of "depeÁage," the use of the law of different states to resolve different issues in the same case. The court rejected the Calhoun's argument that the situs of the accident was merely fortuitous and that Puerto Rico's interest in applying its law should therefore be given little or no weight in the choice of law analysis. In so doing, the court distinguished prior decisions involving air crashes, holding that unlike circumstances where a mechanical failure or human error might result in a crash anywhere along an interstate route, "Natalie intentionally traveled to Puerto Rico and intentionally operated the Wavejammer in Puerto Rico's territorial waters."

The Third Circuit, noting that the purpose of punitive damages is to punish and deter future conduct, held that the district court had properly concluded that the law of Puerto Rico, the situs of the accident, should apply to the Calhoun's punitive damages claim. Because the accident occurred in Puerto Rico's territorial waters, the court held that Puerto Rico's interest in regulating activities within its waters dominates any interest that Pennsylvania might have in this respect.

Conversely, the court held that Pennsylvania law should govern compensatory damages. Noting that the Calhouns were residents of Pennsylvania and had virtually no connection to Puerto Rico, the court held that Pennsylvania's interest in obtaining compensation for its citizens dominated any interest that Puerto Rico might have with regard to this aspect of the claim.

After affirming that portion of the district court's opinion regarding the applicability of state law to the Calhoun's damage claims, the Third Circuit considered whether the district court had erred in its conclusion that the substantive law of Puerto Rico, rather than federal maritime law, should govern the standards of liability. The Third Circuit reversed this aspect of the district court's decision and held that federal maritime law provides the standards of liability in an admiralty action for the death of a non-seafarer in territorial waters brought pursuant to state wrongful death or survival statutes.

According to the Third Circuit, resolution of the issue of whether federal maritime law or state law should provide the standard of liability in the case of a death of a non-seafarer in state territorial waters depends on whether the Supreme Court's 1959 decision in The TUNGUS v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503 (1959) remains good law in light of the court's subsequent decision in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772 (1970). In The TUNGUS, the Supreme Court held that no federal common law cause of action existed for a wrongful death in territorial waters based on its own prior decision in The HARRISBURG, 119 U.S. 199, 7 S.Ct. 140 (1886). Accordingly, The TUNGUS, and other cases decided contemporaneously by the Supreme Court, held that when such an action was brought the court was required to apply state law with respect to all substantive and procedural issues. In its 1970 decision in Moragne, the Supreme Court overruled The HARRISBURG and created a federal cause of action under the federal common law for the wrongful death of seamen in territorial waters. However, the Moragne decision did not expressly overrule The TUNGUS and related decisions.

The district court in Calhoun based its decision that state law governs liability arising form the death of non-seafarers in territorial waters on the holding in The TUNGUS, concluding that "in this circuit, The Tungus, with all its Harrisburg-era warts, remains good law with respect to the proposition that ërights of non-seamen killed in state territorial waters depend on state wrongful death statute [sic]'." 40 F.Supp.2d at 295.

However, the Third Circuit disagreed, concluding that the specific holding of The TUNGUS — that all facets of state law must be applied when a plaintiff utilizes a state wrongful death remedy to recover for a death in territorial waters—was effectively overruled by Moragne. Further explaining its reasoning, the court held that The TUNGUS remained good law only insofar as it stands for the proposition that state law may provide a procedure or remedy by which a plaintiff may bring a action for wrongful death in territorial waters, a proposition consistent with the Supreme Court's holding in Calhoun.

The Third Circuit also based its holding that federal maritime law must govern liability arising from the death of a non-seafarer in territorial waters on the need for uniformity in federal maritime law. Reviewing Supreme Court decisions supporting the need for uniformity, the Third Circuit noted that adoption of the district court's finding would require the application of the substantive liability law of the state where the accident occurred, thereby eliminating national uniformity in liability standards for maritime accidents.

RELEASE HELD TO BAR WRONGFUL DEATH CLAIM IN DIVING ACCIDENT

The Eleventh Circuit Court of Appeals held that a written release signed by the deceased prior to a diving trip is effective to bar a wrongful death action against the dive boat operators under state law. Schultz v. Florida Keys Diving Center, Inc., 224 F.3d 1269 (11th Cir. 2000).

Patricia Schultz drowned during a diving trip in Florida waters. On the day before the trip Schultz signed a document releasing the dive operators from liability for all claims, including claims arising from their own negligence or gross negligence. While diving, Schultz and her husband surfaced a significant distance from the dive boat and were unable to swim back to the boat. Patricia Schultz became unconscious and drowned before being picked up by the boat. Schultz's estate commenced a wrongful death action against the dive instructors and the dive boat owners in Florida federal court invoking diversity jurisdiction.

We have previously reported state and federal court decisions involving the validity of similar releases under maritime law: Matter of Pacific Adventures, Inc, 5 F.Supp.2d 874, 1998 AMC 2857 (D.Hi. 1998) (release invalid under Limitation Act) reported in 8 Boating Briefs No. 1 (Mar. L. Ass'n. 1999); Borden v. Phillips, 752 So.2d 69 (Fla.1st DCA 2000) (federal maritime law inapplicable; release valid under state law) reported in 9

Boating Briefs No. 1 (Mar. L. Ass'n. 2000); Waggoner v. Nags Head Water Sports, Inc., 141 F.3d 1162, 1998 AMC 2158 (4th Cir. 1998) (release valid under federal maritime law or state law) reported in 7 Boating Briefs No. 1 (Mar. L. Ass'n. 1998).

In Schultz the decedent's estate argued that the release was rendered invalid and unenforceable either by the provisions of the Limitation of Liability Act, 46 U.S.C. § 183c, or under federal maritime law. Section 183c of the Limitation Act provides that

> [i]t shall be unlawful for the...owner of any vessel transporting passengers between ports of the United States... to insert in any...contract or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master or agent from liability...for such loss or injury, or (2) purporting in such event to lessen, weaken or avoid the right of any claimant to a trial...on the question of liability for such loss or injury....All such provisions or limitations contained in any such...contract...are declared to be against public policy and shall be null and void and of no effect.

In Shultz, the district court had granted summary judgment in favor of the defendants and found that although the accident giving rise to the claim was within federal admiralty jurisdiction, §183c of the Limitation Act did not invalidate the release signed by Schultz which was otherwise valid and enforceable under Florida state law. The estate appealed.

On appeal the Eleventh Circuit affirmed the trial court's decision. The circuit court initially considered the applicability of §183 of the Limitation of Liability Act. The court held that the Act was inapplicable because the dive boat was not "transporting passengers" within the meaning of the Act and the legislative history revealed no intention by Congress to invalidate releases for scuba diving excursions.

The Eleventh Circuit then addressed the estate's alternative argument that the release was invalid under general principles of federal maritime law. Although upholding the validity of the release under state law, the district court had found that the accident satisfied the test for admiralty jurisdiction and that federal maritime law was therefore applicable.

The Eleventh Circuit observed that most of the decisions in which diving accidents have been held to fall within admiralty jurisdiction involved injuries related to the operation or management of dive boats. The court

specifically distinguished the decision in Matter of Pacific Adventures, Inc., 5 F.Supp.2d 874, 1998 AMC 2857 (D.Haw. 1998), in which it was held that §183c of the Limitation Act invalidated a similar release signed by a dive participant. Pacific Adventures involved a claim by a dive participant who was injured when her leg became entangled in a boat's propellor. The district court for Hawaii found that the plaintiff's accident fell within admiralty jurisdiction and that the plaintiff's status as a passenger had not ended even though she was injured while diving. The Eleventh Circuit noted that Patricia Schultz's drowning related only to the act of scuba diving and was unrelated to the operation of the dive boat itself.

Although the Eleventh Circuit questioned whether Schultz's accident would support admiralty jurisdiction and indicated that the issue was in its view "not free from doubt," the court stated that no established principle of federal maritime law would invalidate the release signed by Schultz. Specifically, the court held that to the extent that principles of federal maritime law limit the enforceability of releases in certain circumstances, those principles are limited to the context of common carriers and are, therefore, inapplicable in the case of a diving excursion boat.

Based on its holding that the release was not invalidated by the application of the Limitation Act or any principle of federal maritime law, the Eleventh Circuit concluded that the district court had properly applied Florida state law as the law governing the validity of the release.

FEDERAL MARITIME LAW APPLIES REGARDLESS OF ASSERTED BASIS OF JURISDICTION

In 1998 Jeanne Kulesza suffered serious permanent injuries when she was thrown from a twenty foot sport fishing boat on which she was a passenger. Kulesza was thrown overboard when the captain's chair that she was holding onto allegedly came off the post to which it was attached. Kulesza fell from the stern and her arm was severed by the boat's propeller.

Kulesza brought suit against the builder, Scout Boats, Inc., and the manufacturers and suppliers of the captain's chair and its component parts, in federal court in the eastern district of Pennsylvania. In her Complaint, Kulesza alleged subject matter jurisdiction based solely on diversity of citizenship and demanded a jury trial. Only one of the defendants raised the applicability of federal maritime law in its answer.

Prior to trial a dispute arose concerning the applicable law. The issue was put to the court in the form of a motion and submitted to a federal mag-

istrate judge for decision. The choice of law issue is decided in Kulesza v. Scout Boats, Inc., 2000 WL 1201457 (E.D.Pa. Aug. 8, 2000).

Three of the defendants argued that New York substantive law governed the dispute because the plaintiff alleged diversity of citizenship as the sole basis for subject matter jurisdiction. The plaintiff and the boat builder argued that federal maritime law applies regardless of the alleged basis for jurisdiction. According to the court, the choice of law issue was of vital importance to the litigants. First, several of the defendants raised the affirmative defense of assumption of the risk, a defense permitted under New York State law but not generally available under federal maritime law. Second, federal maritime law applies the principle of joint and several liability among joint tortfeasors while under New York law a party that is less than fifty percent at fault cannot be held jointly liable for economic losses.

The magistrate judge, citing the Supreme Court's decision in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) and numerous circuit and district court opinions, concluded that under the "reverse-Erie Doctrine...once a claim falls within the bounds of admiralty jurisdiction, substantive admiralty law applies to govern the claim, regardless of whether or not admiralty jurisdiction was actually invoked in the complaint." The magistrate judge went on to conclude that the tort in question satisfied the test for admiralty jurisdiction and, therefore, federal maritime law governs the claims and defenses.

The court's decision is consistent with black letter law and the overwhelming majority of reported decisions in which the specific issue has been addressed. However, the Kulesza decision is significant due to a the existence of a disturbing contrary opinion issued by the Third Circuit Court of Appeals in Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69 (3rd Cir. 1996), which the Kulesza court might have considered to be controlling precedent.

Fedorczyk involved a cruise passenger's claim for personal injuries allegedly sustained in a slip and fall incident on board one of the defendant's vessels. The plaintiff originally sued in state court and the defendant removed the case. Not surprisingly, the state court complaint made no mention of admiralty jurisdiction. Although recognizing that the claim was an "admiralty tort" which could have been brought pursuant to the court's admiralty jurisdiction, the Third Circuit held that if a complaint does not identify the claim as an admiralty and maritime claim, substantive admiralty law will not be applied regardless of whether the claims would otherwise support admiralty jurisdiction. The Third Circuit specifically rejected the "reverse-

Erie doctrine," holding that in the circumstances it would apply state choice of law rules and state substantive law to the dispute.

Although noting that the Third Circuit's decision in Fedorczyk had not been overruled, the Kulesza court rejected both the holding and the reasoning of the decision. To distinguish the case, the magistrate concluded that the appellate court's discussion was mere dicta, and therefore non-binding, because the decision itself stated that the parties had agreed that New Jersey state substantive law rather than federal maritime law should be applied.

The magistrate judge also concluded that the Fedorczyk decision is in direct conflict with the policy of promoting uniformity in admiralty law:

> ...the Fedorczyk reasoning would permit a plaintiff to elect the application of either state or admiralty substantive law, depending on which one was more favorable to him or her, simply by bringing the case either under diversity jurisdiction or admiralty jurisdiction. Such freedom of choice would, in turn, result in plaintiffs with identical maritime tort claims being judged under varying standards of liability, thereby destroying the very uniformity which the framers set out to create.

FIFTH CIRCUIT JOINS ELEVENTH CIRCUIT IN HOLDING THAT PROPELLOR GUARD STATE LAW CLAIMS ARE PREEMPTED BY FEDERAL LAW

In a recent opinion the Fifth Circuit Court of Appeals joined the Eleventh Circuit in holding that personal injury claims based on the alleged failure to equip a recreational boat with a propellor guard are impliedly preempted by Coast Guard regulatory action taken under the authority of the Federal Boat Safety Act, 46 U.S.C. §§ 4301–4311 ("FBSA"). Lady v. Neal Glaser Marine, Inc., 2000 WL 1405075 (5th Cir., Sept. 26, 2000).

Steven Lady was injured in 1995 when the jet ski which he was operating collided with a pleasure boat manufactured by Outboard Marine Corporation. Lady fell from his jet ski and came in contact with the pleasure boat's unguarded propellor. He sustained permanent injuries, including the loss of one leg. Lady brought suit in federal court against the manufacturer and distributor of the pleasure boat, alleging that his injuries were caused by the defendants' failure to design and equip the boat with a propellor guard. In his suit Lady advanced causes of action based on negligence, breach of warranty and products liability under state law.

In Lewis v. Brunwick Corp., 107 F.3d 1494 (11th Cir. 1997), the Eleventh Circuit previously held that the FBSA could not be interpreted as expressly preempting the plaintiff's common law claims based on the alleged failure to equip a boat with a propellor guard due the existence of the Act's "savings clause." The "savings clause" provides that compliance with the Act or regulations issued thereunder "does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g). However, the Eleventh Circuit held that although the plaintiff's claims were not expressly preempted, the Coast Guard's decision that propellor guards should not be required resulted in implied preemption of state law, including common law claims. Specifically, the Eleventh Circuit held that implied preemption of state law may occur where a federal agency makes a determination that a particular subject should not be the subject of regulation. (See 6 Boating Briefs No. 1 (Mar. L. Ass'n. 1997).

The plaintiff in Lewis petitioned the Supreme Court for certiorari on the issue of implied preemption. The Supreme Court granted the petition in November, 1997. 522 U.S. 978, 118 S.Ct. 439 (1997). Briefs were filed and the case was argued before the Supreme Court (The text of the oral argument is available at 1998 WL 106133). Interestingly, the United States filed an amicus brief supporting the plaintiff's appeal and urging the court to hold that the plaintiff's state law claims were not expressly or impliedly preempted by federal law or regulation. The parties in Lewis settled the case before the Supreme Court issued its opinion and the appeal was dismissed. 523 U.S. 1113, 118 S.Ct. 1793 (1998). (See 7 Boating Briefs No. 1 (Mar. L. Ass'n. 1998).

The federal district court placed the Lady v. Neal Glaser action on the suspense docket pending the outcome of the Supreme Court appeal in Lewis. The case was reactivated when the Supreme Court appeal was dismissed. Thereafter the district court granted summary judgment in favor of Outboard Marine Corporation on the ground that the plaintiff's state law claims were preempted by federal law. Lady v. Outboard Marine Corp., 66 F.Supp.2d 818 (S.D.Mo. 1999). The plaintiff appealed.

On appeal the Fifth Circuit affirmed the district court's decision in Lady and held that "although the FBSA and the Coast Guard's regulatory decisions do not expressly preempt Lady's tort claims, implied conflict preemption does preclude his action against OMC, because a state rule requiring propeller guards on recreational vessels would frustrate the Coast Guard's decision that recreational boats should not be required to be equipped with pro-

pellor guards." The Fifth Circuit's rationale and holding are entirely consistent with the Eleventh Circuit's decision in Lewis.

In reaching its holding, the Fifth Circuit in Lady initially considered the plaintiff's argument that the preemption analysis should begin with a presumption against federal preemption of state common law claims where the claims concern matters of safety and health. Relying on the Supreme Court's decision in United States v. Locke, 529 U.S. 89, 120 S.Ct. 1135 (2000), the circuit court rejected the plaintiff's argument and held that a presumption against preemption should not be applied where there is a history of significant federal regulatory presence in the area in question. The court concluded that the regulation of vessels in general and pleasure craft in particular is an area traditionally regulated by the federal government and, accordingly, no presumption could be applied as urged by Lady.

The Fifth Circuit relied heavily on the Supreme Court's decision in Locke in support of its conclusion that the Coast Guard's consideration and rejection of a propellor guard requirement impliedly preempted state law claims on the issue. In Locke the Supreme Court held that implied federal preemption exists "when compliance with both federal and state law is impossible, or when the state law stands as an obstacle to the completion and execution of the full purpose and objective of Congress." The Fifth Circuit held that implied preemption existed in the case of propeller guards because the Coast Guard had purposefully adopted a flexible approach to the subject based on a finding that imposition of a propeller guard requirement would be "substantively inappropriate."

With regard to the general subject of implied preemption in the recreational boating area the Fifth Circuit specifically held as follows:

> [w]here the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.

REPAIR YARD NOT LIABLE FOR DAMAGE TO YACHT; OWNER NOT ENTITLED TO RECOVER FOR LOSS OF USE

In 1994 the pleasure yacht Shango was placed in a floating dry dock owned and operated by Master Marine, Inc. for the purpose of conducting

repairs to the boat's bow thruster. Extensive damage in the form of debonding of internal stiffeners and bulkheads from the fiberglass hull was discovered four days after the boat was placed in the dry dock.

The yacht owner filed a claim with its hull underwriters at Lloyd's who paid in excess of $800,000. Lloyd's underwriters and the owner commenced an action against the ship yard in federal court alleging that the damage was caused by the manner in which the yacht was placed in the dry dock. Underwriters sought to recover amounts paid out under the hull policy for physical damage to the yacht. The yacht owner asserted its own claim for damages in the amount of $3 million for alleged loss of charter hire. The plaintiffs advanced theories of common law negligence and breach of a bailment contract by the ship yard. The case was tried and the court entered findings of fact and conclusions of law which are the subject of the reported decision in Frichelle Ltd. v. Master Marine, Inc., 99 F.Supp.2d 1337, 2000 AMC 2329 (S.D.Ala. 2000).

Based on the evidence submitted at trial the district court entered findings of fact in which it concluded that limited debonding of structural members had existed prior to the dry docking and that this condition rendered the vessel unseaworthy. The court also found that the ship yard was not made aware of this pre-existing condition by the owner and that the yard had no reason to anticipate the need to take extra or additional precautions, given that the purpose of the dry docking was limited to the repair of the bow thruster. According to the court, the evidence established that employees of the owner remained aboard the boat in dry dock and that the yard did not have unfettered access to the vessel. In connection with the owner's loss of hire claim the court found that the boat had been chartered only once in eight years prior to the incident and that the repairs carried out were not necessarily indicative of an intent to charter the vessel following the repairs.

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* Niels F. Johnsen Professor of Maritime Law and Director, Tulane Maritime Law Center. The author wishes to acknowledge and express his appreciation to Justine Cotsoradis, J.D., candidate for LL.M. in Admiralty (Tulane) May 2001, for her assistance in the preparation of this Article.

[1] Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1384 (1999) [hereinafter Force, *Essay*].

[2] *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

[3] The provisions of the New York Workers' Compensation Law at issue provided:

> Sec. 2. Application.—Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous

At trial the ship yard argued that no maritime bailment can exist unless the bailee assumes complete and exclusive possession and control of the vessel based on the Fifth Circuit's decision in T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585 (5th Cir. 1983). The district court, citing Stegemann v. Miami Beach Boat Slips, 213 F.2d 561 (5th Cir. 1954), rejected the shipyard's argument and held that lack of exclusive possession and control by a bailee does not automatically defeat a maritime bailment but, instead, simply modifies and limits the obligations of the bailee. However, the Frichelle court held that the plaintiffs were unable to establish a prima facie case of negligence by the yard as bailee because they could not prove that the boat was delivered to the yard in good order and condition.

The district court in Frichelle also held that the plaintiffs failed to carry their burden of proof on the common law negligence theory because the evidence established that the yard exercised reasonable care in the manner in which the boat was dry docked. In this regard, the court concluded that the yard had no actual knowledge or reason to believe that any additional or special precautions were required due to the boat's pre-existing condition. Although the court concluded that the yard was not liable for the alleged damages to the yacht based on the evidence and theories advanced by the plaintiffs, the court also addressed and rejected the yacht owners' claim for

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> Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company. * * *
>
> Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.
>
> Sec. 114. Interstate Commerce.—The provision of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees.

Jensen v. Southern Pac. Co., 109 N.E. 600, 601 (N.Y. 1915).

[4] *Jensen*, 244 U.S. at 212.

[5] *Id.* at 216.

[6] *Id.* at 217.

loss of use as a matter of law. Relying in part on the Eleventh Circuit's decision in Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc., 206 F.3d 1373 (11th Cir., 2000), the Frischelle court held that the yacht owner had not satisfied the requisite standard of proof "that profits had actually or may reasonably supposed to have been lost" applicable when an owner of a pleasure boat seeks loss of use damages. See 9 Boating Briefs No. 1 (Mar. L. Ass'n. 2000) for a discussion of the Central State Transit decision.

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[7] Force, *Essay*, *supra* note 1, at 1388.

[8] *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251 (8th Cir. 1980); *Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 2d 832 (S.D. Tex. 1999). The problem of intoxicated gamblers who become involved in automobile accidents after leaving riverboat casinos is not inconsequential. *See* Joseph T. Hallinan, *At Riverboat Casinos, The Free Drinks Come with a Tragic Toll*, WALL ST. J., Oct. 23, 2000, at A1.

[9] La. C.C. Art. 2315 provides, *inter alia*: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. Damages may include loss of consortium, service and society . . . ."

DECONSTRUCTING JENSEN: ADMIRALTY AND FEDERALISM IN THE TWENTY FIRST CENTURY

by
Robert Force*

This Article is part of a work in progress. At the Tulane Admiralty Law Institute a few years ago, I mentioned that there is recent scholarship that challenges the legitimacy of the general maritime law. "General maritime law" is the term of art that courts and maritime lawyers apply to the substantive rules of maritime law that have been formulated by courts to resolve issues that fall within the admiralty and maritime jurisdiction of the federal courts. I have since written a modest rebuttal to these attacks and have offered my defense of the general maritime law. In doing so, I have observed that, in my opinion, the problem is not with the general maritime law per se. The problem is that

> [T]he Supreme Court has failed to develop well-calibrated rules delimiting admiralty jurisdiction that sufficiently balance national and local interests. In the same vein, the Court has failed to develop conflicts of laws rules, which are particularly essential in cases which fall only marginally within federal admiralty jurisdiction. This criticism is best illustrated by the infamous, much maligned Southern Pacific Co. v. Jensen.[1]

The Jensen[2] case involved the following facts. Mr. Jensen worked for the Southern Pacific Co., which, in addition to operating a railroad, owned and operated a vessel. Jensen was employed as a longshoreman. On the day in question, his job was to drive an electric truck into the vessel where it was loaded with lumber and from there he drove onto a gangway that led to the pier where the lumber was deposited. As he exited the vessel, he forgot to lower his head which struck the vessel resulting in his death. His widow and

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[10] In fact, the gamblers were given vouchers that could be used to obtain food or drink. In practice, many gamblers used their vouchers to obtain alcoholic beverages. *See Young*, 47 F. Supp. 2d at 836–37.

[11] *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). Under the test applied in *Grubart*, a party seeking to invoke admiralty jurisdiction:

> over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or [applying the Admiralty Extension Act, 46 U.S.C. app. § 740 (1994)] whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must "assess the general features of

children filed a claim for worker's compensation under a New York statute.[3] The state courts affirmed the award. The United States Supreme Court agreed to decide if the New York statute "conflicts with the general maritime law . . . ."[4] In doing so, it formulated several criteria for determining when state law may not displace the general maritime law. The Jensen criteria are stated in the following quotation from the case:

> And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[5]

A bare majority of the Court, without actually applying these criteria to the case, concluded that the state statute made an unwarranted inroad on the uniformity of maritime law, and, as such, could not constitutionally be applied to provide a remedy to a maritime worker or his family where the

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the type of incident involved," to determine whether the incident has "a potentially disruptive impact on maritime commerce." Second, a court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."

Id. at 534 (citations omitted).

[12] 46 U.S.C. app. § 740 (1994).

[13] LA. REV. STAT. ANN. § 9:2800.1 (West 1997). In particular, the Louisiana Anti-Dram Shop statute provides:

> A. The legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.
> B. Notwithstanding any other law to the contrary, no person holding a permit under either Chapter 1 or Chapter 2 of Title 26 of the Louisiana Revised Statutes of 1950, nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages of either high or low alcoholic content to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served.

Id. (footnote omitted).

Also reflective of Louisiana's policy toward the problem of drunk driving is La. C.C. Art. 2315.4 which imposes punitive damages on defendants "whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries." LA. CIV. CODE ANN. art. 2315.4 (West 2000). Thus, Mr. Smith, the intoxicated driver defendant in the hypothetical, would be subject to punitive damages under Louisiana law.

worker was killed while working on navigable waters.[6]

In the article previously referred to that provides a defense of the general maritime law, I concluded by asking: "Should not the Supreme Court develop more workable choice of law rules in deciding whether admiralty courts should apply state law where state interests are important and there is no corresponding benefit to national interests?"[7] This is the question my lecture will address tonight.

Hypothetical Part I

This hypothetical is not the result of a law professor's over-active imagination. Such cases do exist.[8] Assume the following: Mr. Smith spent an evening on a gambling boat, the LUCKY CAJUN, where he gambled, lost a lot of money and drank a lot of alcoholic beverages. After the boat returned to its berth, Mr. Smith disembarked and got into his car which was parked in a lot provided by Gaming, Inc., the owner of the LUCKY CAJUN. Mr. Smith drove out of the lot, and on his way home his car struck another car. The accident occurred approximately 1/2 hour after he disembarked from the LUCKY CAJUN. The accident site was approximately 10 miles from the wharf where the LUCKY CAJUN was berthed. Mr. Jones and Ms. Brown were passengers in the vehicle that was struck by Mr. Smith's auto. Both Jones and Brown suffered severe personal injuries. Mr. Smith failed a sobriety test administered by a police officer who investigated the accident. Subsequently, Mr. Smith was convicted of driving under the influence of alcohol and reckless driving.

Mr. Jones filed an in personam action against Mr. Smith and Gaming, Inc. and an action in rem against the LUCKY CAJUN in the United States District Court for the Western District of Louisiana. Ms. Brown filed an action in personam against Mr. Smith and Gaming, Inc. in the Fourteenth Judicial District Court of the State of Louisiana, Parish of Calcasieu. In each action, the injured plaintiff was joined by his or her spouse who asserted a claim for loss of consortium under Louisiana law.[9] Mr. Smith, Mr. and Mrs. Jones and Mr. and Mrs. Brown are citizens of the State of Louisiana.

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[14] 244 U.S. 205, 216 (1917). *See supra* text accompanying note 5 describing the *Jensen* criteria.

[15] 516 U.S. 199 (1996).

[16] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) ("We must conclude that there is no recovery for loss of society in a general maritime action for wrongful death of a Jones Act seaman."); *see also Lollie v. Brown Marine Servs. Inc.*, 995 F.2d 1565 (11th Cir. 1993); *Friedman v. Cunard Line Ltd.*, 996 F. Supp. 303, 309 (S.D.N.Y. 1998).

Gaming, Inc. is a Louisiana Corporation with its principal and only place of business in Louisiana.

No party demanded a jury trial, and each case was tried to the respective court. Each court made similar findings on the essential facts. First, Mr. Smith drove while under the influence of alcohol and was negligent in the manner in which he drove his car. Neither the driver of the other vehicle nor the plaintiff passengers were contributorily negligent. Second, Mr. Smith's negligence was the proximate cause of plaintiff's injury. Third, Mr. Smith had not consumed any alcohol in the 24 hours before he boarded the LUCKY CAJUN, and he did not consume any alcohol after he disembarked from the vessel. All of the alcohol consumed by Mr. Smith in the period of time immediately preceding the accident was consumed on board the LUCKY CAJUN and was given to Mr. Smith by personnel of the LUCKY CAJUN free of charge in conformity with company policy.[10] Fourth, the amount of alcohol consumed by Mr. Smith and his conduct were such that personnel on the vessel either were aware that he was intoxicated or they should have been aware of that fact. Fifth, Gaming, Inc. provides a parking lot to accommodate the vehicles of its patrons in an area immediately adjacent to the wharf where the LUCKY CAJUN was berthed. The management of Gaming, Inc. knew that a majority of the patrons of the LUCKY CAJUN drove to the vessel in their own vehicles. Sixth, Gaming, Inc. executives were on notice that several other auto accidents had occurred previously involving drivers who had become intoxicated on the LUCKY CAJUN.

In the federal district court action, the trial judge found that the LUCKY CAJUN sailed on a portion of Lake Charles, a waterway that was solely within the state of Louisiana; the vessel never left the state of Louisiana; Lake Charles was connected to a river system which ultimately flowed into the Gulf of Mexico; commercial vessels could and did navigate from Lake Charles through the rivers into the Gulf of Mexico; the LUCKY CAJUN sailed on a regular basis and engaged in shoreside gambling infrequently, i.e., only when the weather prevented her from sailing; the LUCKY CAJUN was a vessel subject to U.S. Coast Guard regulations. Consequently the court concluded that it had admiralty jurisdiction over the matter before it. In its jurisdictional analysis, the court used the approach of the Grubart[11] case. It found that Lake Charles was a navigable body of water, and that Gaming, Inc., through the negligence of its employees on board the LUCKY CAJUN,

[18] I say ironically because it is usually the maritime industry that urges that state law be preempted by a uniform rule of federal maritime law.

negligently contributed to Mr. Smith's intoxication under circumstances whereby it was reasonably foreseeable that he would be driving a vehicle in an impaired condition. Therefore, the company's negligence contributed to the accident. The court invoked the Admiralty Extension Act[12] and concluded that the accident on land was, in part, proximately caused by the negligence of a vessel on navigable waters. The court further found that allowing a passenger to become drunk on a vessel in navigable waters could present a threat to maritime commerce because a drunken passenger might become unruly and interfere with the navigation of the vessel thereby imperiling the LUCKY CAJUN and other vessels in the vicinity, and that serving beverages, including alcoholic beverages, to passengers is a traditional maritime activity.

In both actions, defendant Gaming, Inc. pleaded the Louisiana Anti-Dram Shop statute[13] that essentially precludes a dram shop from being held liable for the torts committed by its patrons. The federal court, in the Jones case found that the gambling boat was a "dram shop," but, applying criteria set forth in Southern Pacific Co. v. Jensen,[14] it concluded that state law was not applicable. It held that the general maritime law of negligence extended liability to Gaming, Inc. It found that a uniform standard of liability was compelled under the Jensen rule, and that it would be inappropriate for the liability of owners and operators of vessels on navigable waters to be subject to the vagaries of the various state laws on dram shop liability. Additionally, the court rejected Mrs. Jones plea to extend the holding of the Supreme Court in Yamaha Motor Corp. v. Calhoun[15] to maritime personal injury cases and disallowed the claim for loss of consortium under Louisiana law. Again, the court based it holding on Jensen and the uniform rule that loss of consortium is not recoverable in a maritime personal injury action.[16]

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[19] Lizabeth L. Burrell, *Application of State Law to Maritime Claims: Is There a Better Guide Than Southern Pacific Co. v. Jensen?*, 21 TUL. MAR. L.J. 53, 57 (1996).

[20] *Id.* (citing Brief of the Maritime Law Association of the United States, as *Amicus Curiae*, in Support of the Petition for a Writ of Certiorari, American Dredging Co. v. Miller, 510 U.S. 443 (1994) (No. 91–1950)).

[21] Burrell, *supra* note 19, at 58 (citing By-Laws of the Maritime Law Association of the United States § 702.3 (1995–96)).

[22] *Id.* at 80.

[23] The Admiralty Clause is that provision in Article III of the Constitution that defines the Judicial Power of the United States as including jurisdiction over "admiralty and maritime cases." U.S. CONST. art. III, § 2.

[24] David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 35 (1997).

In the Brown case, the state district court agreed that the case was properly before it under the saving to suitors clause.[17] It also applied Jensen. However, relying on other post-Jensen cases that found state law applicable even under the Jensen criteria, the state judge concluded that uniformity in regard to the dram shop issue was not required. It found that maritime law did not apply to automobile accidents. The matter was essentially local and the legislature of the State of Louisiana had enunciated a clear policy in this regard. It granted summary judgment in favor of Gaming, Inc. based on the Louisiana Anti-Dram Shop statute. In dictum, the court intimated that had it not been for the Anti-Dram Shop statute, it would have found for the plaintiffs on the liability issue, and, furthermore, if it had found for the plaintiffs, it would have permitted recovery for loss of consortium.

Both lower court decisions were appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed the federal district court decision, and, ultimately, the Louisiana Supreme Court affirmed the decision of the state district court. The United States Supreme Court granted certiorari in both cases and consolidated them for argument. The grant of certiorari specifically requested the parties to address "the continued utility and vitality of the rule announced in Southern Pacific v. Jensen."

What, if anything should the Supreme Court do about Jensen? Obviously, the lawyers for the litigants in the respective cases know what they would like the Court to do. Ironically,[18] counsel representing the vessel

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[25] Id. at 4.

[26] *See* Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L & COM. 249 (1993); Robert Force, *The Curse of* Miles v. Apex Marine Corp.*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 747, 787 (1995); Force, *Essay*, *supra* note 1, at 1378–84; Jonathan M. Gutoff, *Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking*, 70 TUL. L. REV. 2169 (1996); Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 381–82 (2000); John D. Kimball, *Miles: "This Much and No More . . .*," 25 J. MAR. L. & COM. 319, 320 (1994).

[27] Bederman, *supra* note 24, at 4.

[28] Bederman, *supra* note 24, at 35.

[29] Bederman, *supra* note 24, at 32–35.

[30] In referring to *Jensen*, one commentator observed:

> Uniformity of our maritime law was only their major premise. The minor premise is very likely an erroneous one. It may be good advocacy, but certainly it is not always sound political sense to seek to destroy indiscriminately every premise that has led to an undesirable conclusion. The premise of uniformity may have much to commend it in other applications. Injuries to workmen are not all of maritime law.

owner and the vessel will argue that Jensen should not trump the application of Louisiana's Anti-Dram Shop rule. They will assert that there is no congressional statute on dram shop liability or non-liability, and that dram shop liability is a matter of local concern. States have a special interest in regulating the dispensing of alcoholic beverages within the state and in the regulation of drunken automobile drivers and those who supply them with alcoholic beverages. Furthermore, the rules relating to dram shop liability did not originate in maritime law and have no unique or indispensable application to maritime matters. In contrast, counsel for plaintiff will argue that the issue is not about dram shop liability rules at all. The real issue is whether or not there should be a uniform, national regulation of the conduct and liability of those who operate vessels on the navigable waters of the U.S.

Adding further irony both lawyers will have to change position on the loss of consortium issue. Counsel for the plaintiff spouse will argue that if, pursuant to Yamaha, a state remedy allowing recovery for loss of consortium may be invoked in a maritime death case involving a non-seafarer decedent where the death occurs in state waters, there is no reason in law or policy why it should not be similarly available in cases where, through the miracle of modern medicine, an injured non-seafarer survives. The response of defense counsel is likewise predictable. Maritime law has always provided a uniform remedy in maritime personal injury actions. There has never been a need to supplement this remedy with state law. The rule permitting recovery of damages under state law in death cases should be regarded as sui generis

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Austin T. Wright, *Uniformity in the Maritime Law of the United States (I)*, 73 U. PA. L. REV. 123, 125 (1925) [hereinafter Wright, *Uniformity (I)*]. The same commentator later went on to add:

> Always with the reservation that its minor premise may be unsound—that granting the doctrine of uniformity, it should not necessarily be so applied as to override local workmen's compensation acts at least in some cases,—the *Jensen* case falls into line. It was a new step so far as concerns the announcement of its major premise in relation to the state's power to enforce its own law in the exercise of concurrent jurisdiction, but except upon deductions drawn from the peculiar death act cases it was a step in continuation of previous steps already taken by the Supreme Court.

Austin T. Wright, *Uniformity in the Maritime Law of the United States (II)*, 73 U. PA. L. REV. 223, 249–50 (1925) [hereinafter Wright, *Uniformity (II)*].

[31] *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

[32] *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

[33] *Sisson v. Ruby*, 497 U.S. 358 (1990).

[34] *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

[35] David W. Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, 21 TUL. MAR. L.J. 81 (1996) [hereinafter Robertson, *Applicability of State Law*].

and should not be extended. Maritime law does not provide recovery for loss of consortium.

The question I pose, however, is not addressed to counsel in my hypothetical case. The question is addressed to the lawyers in the audience who are members of the Maritime Law Association of the United States (MLA). What position, if any, should the MLA take? To many of you, perhaps most of you, the question may be very easy to answer. That answer is a simple and resounding response that the Court should reaffirm the Jensen rule in every particular. The reason underlying this answer presumably stems from the MLA's historical position on "uniformity". Lizabeth Burrell, in her article on Jensen tells us that one of the purposes of the MLA, as stated in its Articles of Association, is "to advance reforms in the Maritime Law of the United States, . . ., to promote uniformity in its enactment and interpretation, ..."[19] Later, quoting from an amicus brief, she reminds us that the:

> MLA believes uniformity in maritime law, both national and international, is of great importance. * * * . . .[I]n 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees that "nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved in maritime commerce but from that of the public as well."[20]

The MLA's criteria for determining when the Association should file an amicus brief include "Whether or not the outcome would adversely affect uniformity."[21] Finally, Ms. Burrell, speaking for herself and not as spokeswoman for the MLA, concludes:

> Jensen still appears to supply the only test for determining when the uniformity can be sacrificed without producing a degree of unpredictability that damages all maritime interests.[22]

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[36] *Jensen*, 244 U.S. at 216.

[37] *Id.* at 216, 237–48. Professor Friedell, current author of 1 BENEDICT ON ADMIRALTY, has collected those cases where federal law has trumped state law, STEVEN F. FRIEDELL, 1 BENEDICT ON ADMIRALTY § 112 (7th rev. ed. 2000), and those where state law was permitted to displace federal law, *id.* § 113.

[38] *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994).

[39] RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL COURT SYSTEM 61–62 (4th ed. Supp. 2000).

Support can be found for this commitment to uniformity in the academic community. Professor David Bederman has written: that "the Admiralty Clause[23] was a constitutional command for uniformity in the maritime law, irrespective of whether it was made by Congress or the courts."[24] In one of his articles on "uniformity" he makes the case for the following propositions:

(1) The Admiralty Clause empowers federal courts to formulate rules of maritime law.[25] In this respect he has substantial support.[26]

(2) Where either Congress or the courts have created rules of maritime law, state courts are not free to ignore federal law. In other words federal maritime law preempts contrary state law.[27]

(3) Under the "implied preemption" doctrine or the "dormant Admiralty Clause," as Professor Bederman prefers to call it, states may not legislate on maritime matters within the scope of the Admiralty Clause even if Congress has not legislated in the area.[28]

(4) Congress may not delegate legislative authority to the states with regard to matters that lie within the Admiralty Clause, because to do so would violate the constitutional mandate that there be a uniform, federal maritime law.[29]

Now, I offer you the "Force Heresy". I submit that the pursuit of "uniformity" is more complex than may appear, and it is the purpose of this Article to persuade lawyers and the MLA to reassess Jensen and the quest for uniformity. I do not suggest abandoning the goal of uniformity, but simply that the MLA provide courts with a more refined test for determining when and whether national interests are such that they can best be served only if the matter before the court is subjected to a uniform, federal rule.[30]

Hypothetical Part II

Associate Justice Holmes of the U.S. Supreme Court believes strongly in the constitutional structure of the federal system. He knows absolutely nothing about maritime law or the maritime industry, never having taken a course in Admiralty and having specialized in Securities law in private practice. In reflecting on the cases involving the Joneses and Browns against Gaming, Inc., he muses aloud to his law clerk that he doesn't understand why an automobile accident in Louisiana involving only citizens of Louisiana should be in federal court. But more perplexing, he wonders why this dispute shouldn't be resolved under Louisiana law. His law clerk has supplied him

with the quartet of admiralty jurisdiction cases, Executive Jet,[31] Foremost,[32] Sisson[33] and, the most recent, Grubart.[34] Justice Holmes has read Jensen, but his private reaction is confusion. He cannot understand how, in the absence of preemptive Congressional legislation, the Jensen court could preclude the application of a state workers' compensation law to the beneficiaries of a longshoreman simply because the employee was killed while working on navigable waters.

Justice Holmes has also read Professor David Robertson's analysis[35] of all of the Supreme Court's post-Jensen cases. He has read many of the cases cited therein and has been unable to formulate any theory or criteria to apply to the Jones and Brown cases. He is struck by the fact that, although the post-Jensen Supreme Court cases pay lip service to the Jensen criteria, they likewise acknowledge not only the difficulty of applying them but also the absence of any consistent and meaningful rationale. He is struck by the admission in the Jensen Opinion that:

> [I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied.[36]

The Jensen Court itself cites numerous instances where state law had been upheld, and a more detailed list is provided in Justice Pitney's dissenting Opinion.[37] More recently, in American Dredging Co. v. Miller, the Court also acknowledges that:

> It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence or indeed is even entirely consistent within our admiralty jurisprudence. * * * Happily, it is unnecessary to wrestle with that difficulty today.[38]

Justice Holmes concludes that the Jensen criteria are unhelpful, unclear and, in general, unsatisfactory.

The law clerk with whom the Justice conversed had graduated from a highly regarded law school where she was privileged to take a Federal Courts course with one of the leading authorities on the U.S. judicial system. The text for the course was Hart & Weschler's, The Federal Courts and the Federal System,[39] a leading casebook in the area. The law clerk remembered her Professor stated that decisions of the federal courts that formulate rules

of substantive law in admiralty cases (referred to by admiralty lawyers as the general maritime law) are the preeminent example of "federal common law." The Professor also commented that the authority of federal courts to formulate such rules is controversial, and she referred interested students to pages 61–62 of the 2000 Supplement to their casebook. At page 61 of the supplement the authors instruct:

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> (6) Contemporary Debate about the Sources of Law in Admiralty. Recent commentary has disputed the justification for and proper scope of federal lawmaking in admiralty. Young, Preemption at Sea, 67 GEO. WASH. L. REV. 273 (1999), contends that admiralty jurisdiction was established primarily to reach a limited set of cases—crimes on the high seas, prize cases, and revenue cases. He acknowledges that from the outset the jurisdiction extended more broadly to private commercial disputes—a contention forcefully advanced by Gutoff, Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto, 30 J. MAR. L. & COM. 361 (1999). But Young contends that a primary purpose of the broader jurisdiction was to ensure fair treatment of foreigners, as under the diversity-of-citizenship and alien-as-party clauses of Article III. Insofar as federal jurisdiction may have been expected to promote uniformity, Young contends that it was to do so through application not of genuine federal common law (in the post-Erie sense) but rather of "general common maritime law"—a supranational body of law analogous to the general common law of Swift v. Tyson. Unlike the spurious common law of Swift, however, admiralty law came to be seen in the Jensen and Chelentis cases (Fourth Edition p. 797) as "real federal law, applicable in state court and preempting state law—a development that Young believes to be at odds with the thrust of Erie and with the limits on federal common lawmaking that are recognized today.[a]
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> a. For an earlier analysis similar in outlook to Young's, see Clark, Federal Common Law: A Structural Reinterpretation, 144 U. PA. L. REV. 1245, 1332–60 (1996).
>
> Surveying modern cases, Young finds that states have significant regulatory interests in maritime matters that ought not to be routinely displaced by politically unaccountable federal judges. He also contends that maritime commerce does not require uniform rules today any more than do other forms of commerce, which are governed by the laws of

the different states. Young also notes that although the federal common law of admiralty retains a role for state law, the Supreme Court's shifting formulations have failed to provide a clear dividing line between federal and state authority.[b] The application of federal law, unless called for by a federal statute, should be reserved, he argues, for cases that fall outside state competence (e.g., outside territorial waters) or that implicate a compelling federal interest (e.g., the conduct of foreign affairs). He acknowledges that the regime he proposes might also lack sharp clarity in distinguishing federal from state spheres but claims that it would at least respect basic constitutional principles. As to the objection that "states would be free to impose a crazy-quilt of restrictions that would bring maritime commerce to a virtual halt," Young replies, "[t]wo reasons that does not happen in other areas of interstate or international commerce are, first, Congress's power to impose uniformity by statute, and, second, the Constitution's prohibition on measures that discriminate against or unduly burden commerce between the states or with other nations" (p. 349).

b. He describes as unsatisfactory the tests that permit state law to (1) provide remedies but not rights (Chelentis, Fourth Edition p. 797), (2) fill gaps in federal maritime law (Western Fuel Co. v. Garcia, Fourth Edition p. 800), (3) regulate matters maritime but local (id.), (4) govern where state interests outweigh federal interests (Kossick v. United Fruit Co., Fourth Edition p. 798), or (5) govern procedure but not substance (American Dredging Co. v. Miller, Fourth Edition pp. 800–01 note 10).

Responding to Young's argument, Professor Force questions whether Erie necessarily supplies the proper framework for analyzing maritime matters. Force argues, inter alia, that (1) admiralty law reflects a valuable evolution over time, one that has previously considered and rejected the Erie-based objection; (2) the original understanding of the admiralty jurisdiction embraced private law cases, and from early on private cases, whether brought in state or federal court were treated as governed by a single body of judge-made law; (3) the grant of admiralty jurisdiction is sui generis, based as it is on a particular subject matter, and that grant must be taken to extend beyond cases involving foreigners (which are embraced by the party-based clauses) or asserting claims under federal statutes (which are embraced by the arising under jurisdic-

[40] *Jensen*, 244 U.S. at 216.
[41] *Am. Dredging*, 510 U.S. at 449–50.

tion); (4) admiralty law often involves international matters, and uniformity in such matters is an international objective; (5) any effort today to de-federalize admiralty law would generate chaos, for as to many maritime matters there is no existing state law that could be substituted; (6) the creation of a body of federal admiralty law is consistent with the original wording of the Rules of Decision Act, whose obligation to apply state law extended only to "trials at Common law" and not to admiralty; and (7) admiralty jurisprudence leaves considerable room for the application of state law. See Force, An Essay on Federal Common Law and Admiralty, 43 ST. LOUIS U. L. REV. 1349 (1999). In another response, Professor Friedell echoes many of these points; he adds that Congress, in enacting the Admiralty Extension Act of 1948 (which extends admiralty jurisdiction to injuries on land caused by vessels on navigable waters), was operating on the assumption that federal admiralty law, not state law, governs cases within the admiralty jurisdiction. See Friedell, The Diverse Nature of Admiralty Jurisdiction, 43 ST. LOUIS U. L. REV. 1389 (1999).

The authors of the casebook express no opinion on the merits of the dispute.

The Justice's appetite has been whetted, and he instructs his clerk to get all of these articles. After reading them, the judge is persuaded that the analysis by Professor Young is more compelling than that made by Professor Force and that Young's assertion that the scope of the general maritime law must be radically restricted is correct and that Professor Force who asserts a contrary position is wrong. In other words, Justice Holmes concludes that judicial lawmaking in admiralty has gone far beyond that which was originally contemplated and even further beyond what is needed. He is convinced that Jensen was wrongly decided, and that the drafters of the Constitution would be appalled that the Supreme Court invalidated the application of a state law on the scant authority of the grant of federal jurisdiction in the Admiralty Clause. He then instructs his law clerk to prepare a memo deconstructing Jensen.

The law clerk prepared the memo which then was edited substantially by

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[42] *Sisson v. Ruby*, 497 U.S. 358, 362–64 (1990) (concluding that a fire aboard a pleasure craft is within the admiralty jurisdiction because of its *potential*, not actual impact on maritime commerce); *see also Grubart*, 513 U.S. at 538–39 ("Following *Sisson*, the 'general features' of the incident . . . may be described as damage by a vessel in navigation to an underwater structure. So characterized there is little question that this is the kind of incident that has a 'potentially disruptive impact on maritime commerce.'").

[43] Robertson, *Applicability of State Law*, *supra* note 35, at 89.

Justice Holmes himself. In preparation for oral argument, he circulated to the other members of the Court the articles and his memo which he titled "Deconstructing Jensen" . None of the other members of the Court ever had a course in Admiralty, although they all had courses in Federal Courts. No member of the Court had ever been involved in an admiralty case in private practice. The only exposure of the Justices to maritime law had been on the bench, and those experiences had been very limited. As you will learn, Justice Holmes's Memorandum will become an important factor in the resolution of the Jones's and Brown's cases.

Deconstructing Jensen

1. Jensen and the cases on which it relied and the subsequent cases which embellished its holding have incorrectly interpreted the constitutional provision giving federal courts jurisdiction over admiralty and maritime cases.

That jurisdictional provision is not a short-hand grant of carte blanch authority to formulate a catalog of rules of law applicable to water transport. As a matter of constitutional policy, uniformity is required only where states are not competent to provide applicable rules or where the interests of international comity so require. [The Memorandum then summarized the research and analysis that appear in Young, Preemption at Sea, 67 GEO. WASH. L. REV. 263 (1999); Clark, Federal Common Law: A Structural Reinterpretation, 144 U. PA. L. REV. 1245, 1332–60 (1996); Casto, The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers and Pirates, 37 AM. J. LEG. HIST. 117 (1993). The Memorandum continues.]

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[44] *Id.* at 89–90. For an earlier extensive discussion of *Jensen* and the choice-of-law problem, see DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM (1970).

[45] These theories include: "maritime but local," "the gap theory," interest analysis, the personal injury plaintiff benefits theory, and the state statutes less likely than decisional law to be displaced. David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 338–46 (1995) [hereinafter Robertson, *Displacement*]; *see also* Burrell, *supra* note 19, at 63–78; Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 294–301 (1999).

[46] Robertson, *Applicability of State Law*, *supra* note 35, at 95.

[47] *Id.* at 96.

[48] *Id.* at 88; *see also* David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158, 208–20.

[49] *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

2. The Jensen criteria are meaningless and provide no guidance to the Supreme Court, lower federal courts or to state courts.

In Jensen, after acknowledging that the general maritime law may, in certain circumstances, be changed by a state statute and commenting on the difficulty in determining when it is appropriate to do so, the Court then articulated its view of the criteria that should be used in making that determination.

> And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[40]

The first criterion is reasonably clear. It merely states the rule of Congressional preemption.

The second criterion, however, is less clear for it is difficult to know exactly what are the "characteristic features of the general maritime law" or what state variant "works material prejudice" to them. Under the view expressed by Justice Scalia in the majority Opinion in American Dredging Co. v. Miller,[41] if the particular rule did not originate in maritime law and does not have exclusive application in maritime law, then it is not a "characteristic feature of the general maritime law." Although I disagree strongly with this extraordinarily narrow view, to the extent it represents the Court's view, it has rendered this aspect of the Jensen criteria virtually irrelevant. There are precious few rules that have originated in admiralty cases or that have exclusive application in admiralty cases.

This then leaves the third criterion that focuses on the "harmony and uniformity" of the general maritime law. The scope of this criterion is somewhat narrowed because it refers not merely to harmony of the general maritime law in the abstract but to harmony of the general maritime law "in its international and interstate relations." It is not clear what this means. Does it mean that state law may not be applied if its application could under any circumstances affect the result in a case involving international or interstate

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[50] *Id.* at 446–57.
[51] *Miller*, 510 U.S. at 458–59 (Stevens, J., concurring).
[52] *Id.* at 459 (Kennedy, J., dissenting).
[53] *Calhoun v. Yamaha Motor Corp.*, 516 U.S. 199, 209–16 (1996).

maritime transport, or does it mean only that the state rule cannot be applied in actual cases involving international or interstate maritime transport? For example, suppose, in Jensen, the shipping company operated only between two ports in the state of New York. Would the Court have concluded that the New York statute did not affect the general maritime law in its international or interstate relations, or would the Court have found that because injuries sustained on navigable waters could have an impact on international and interstate commerce and, as such, are subject to the general maritime law, the New York statute may not be applied? In other words, would the displacement of state law follow the approach used in determining the "nexus" prong of admiralty tort jurisdiction where the jurisdictional inquiry is made at an intermediate level of abstraction and the emphasis is on the potential impact that the tort might have had (fire on a vessel that could disrupt commerce), rather than on what actually occurred (fire on a pleasure craft that did not disrupt commerce)?[42] Another difficulty is presented by the fact that state law is displaced only where that law "interferes with the "proper harmony" of the general maritime law in its international and interstate relations. What is "proper"? That term is purely subjective and provides no guidance to courts.

Corroboration for the conclusion that Jensen has not provided appropriate guidance to the courts is found in Professor David Robertson's analysis of the Supreme Court's "fifty-three significant decisions" beginning with Jensen "in which state law and federal maritime law came into conflict."[43] Professor Robertson states:

> In twenty-nine of those, state law triumphed over the competing claims of federal maritime law. The other twenty-four held that federal maritime law displaced state law. . . . [T]he Court's opinions do not give intelligible reasons, just conclusions. Thus, one must look at the aggregated results in the hope of discerning useful patterns. When viewed as a whole, this body of jurisprudence discloses few useful patterns.[44]

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[54] *Compare Miller*, 510 U.S. at 448–53 (purportedly applying the *Jensen* criteria and allowing application of Louisiana's *forum non conveniens* law), *with id.* at 463–69 (Kennedy, J., dissenting) (purportedly applying *Jensen* and concluding that Louisiana law was trumped by federal law).

[55] *See supra* note 30.

[56] *S. Pac. Co. v. Jensen*, 244 U.S. 205, 217 (1917).

[57] Actually it was three companies because its primary business was railroading.

Professor Robertson reaches two conclusions from his study. First, all of the five standard theories[45] that have been formulated to rationalize choice-of-law decisions "are untenable".[46] Second, "the recent trend is moving steadily in the direction of upholding state law."[47]

Over a course of fifty-three cases, the Court has had an opportunity to develop a coherent body of law out of the Jensen criteria, and it has failed to do so. If Jensen doesn't work because it has failed to provide a principled and meaningful basis for deciding when state law may be applied in admiralty cases, it should either be modified or overruled and another approach formulated.

Additional corroboration for the conclusion that the Jensen criteria have not provided principled guidelines for the courts is reflected in the lack of respect for Jensen expressed by subsequent members of the court. A host of references disparaging Jensen has been collected by Professor Robertson prompting him to conclude that: "Jensen, while not yet overruled, has been subjected to a steady barrage of criticism by the U.S. Supreme Court."[48]

Recent cases reflect Jensen's lack of authority. In American Dredging Co. v. Miller,[49] a majority of the Court held that Louisiana courts could apply a Louisiana statute precluding dismissal of a maritime claim on grounds of forum non conveniens rather than the federal admiralty rule on forum non conveniens. Although the majority purports to pay lip service to the Jensen criteria, a fair reading of the Opinion by Justice Scalia clearly reveals that it was the characterization of the state law as "procedural" and the fact that its application was not "outcome determinative" (because federal substantive law would apply regardless of the forum) that were the controlling factors in deciding the case.[50] Justice Stevens, in his concurring Opinion, characterized Jensen as "untrustworthy as a guide" and its criteria as "unhelpful abstractness."[51] Justice Kennedy, in his dissenting Opinion cites Jensen once, but does not apply the Jensen criteria.[52] Instead, he formulates a different approach, one that in many respects is similar to the approach I will suggest later. Essentially, he focuses on the importance of the federal forum non con-

[58] *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 253–54 (1972) ("Determination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong."). In *Executive Jet*, the Court amended the strict locality test. To qualify as a maritime tort, and thus fall within the admiralty jurisdiction, the Court required the wrong have a maritime locale *and* also a maritime nexus—"a significant relationship to traditional maritime activity." *Id.* at 268.

veniens rule to international and interstate commerce and to comity. He then contrasts those national interests with the relatively marginal state interest. On balance, he finds that the national interest in a uniform rule of forum non conveniens should prevail.

In Calhoun v. Yamaha Motor Corp.,[53] where the Court concluded that state wrongful death remedies were available in a case that fell within admiralty jurisdiction, Jensen was not a factor in the Court's analysis. In this choice-of-law case where the defendant and numerous amici had urged the Court to use the general maritime law of wrongful death to preempt state wrongful death laws, not only were the Jensen criteria not applied, the Jensen case was not even cited. It is doubtful that the Court's disregard for Jensen is accidental. One may conclude that the Court derived no guidance from Jensen.

Thus, although Jensen has not been expressly overruled by the Court, it has been so undermined that its value as precedent has been eroded. In light of the constant criticism by various Justices, the present Court should have no reluctance in reexamining it, modifying it or even overruling it.

3. Not only is Jensen unhelpful, but also it is so amorphous that it can be readily invoked to support virtually any conclusion in virtually any case.

This is evident in the American Dredging case where both the majority and dissenting opinions purport to rely on Jensen (although neither really does) to support diametrically opposed conclusions.[54] Furthermore, this weakness can be illustrated by applying the Jensen criteria to the facts of the Jensen case itself, an analysis the Jensen Court neglected to make. Ironically, such application seems to lead to a result contrary to that reached by the Jensen majority.[55]

As a preliminary matter, the credibility of Jensen is impaired because the

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[59] E. Merrick Dodd, Jr., *The New Doctrine of the Supremacy of Admiralty over the Common Law*, 21 COLUM. L. REV. 647, 659–60 (1921); Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 703 (1963).

[60] The Admiralty Extension Act, passed in 1948, extended admiralty jurisdiction to damages on land caused by vessels on navigable waters. Act of June 19, 1948, c. 526, 62 Stat. 496 (codified at 46 U.S.C. app. § 740 (1994)).

[61] Act of Mar. 4, 1927, c. 509, § 1, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901–950 (1994)).

majority was incorrect in one of its basic factual assumptions, to wit, upholding the New York statute would subject a maritime employer to multiple state laws. The Court in Jensen stated:

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be the destruction of the very uniformity in respect to maritime matters that the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.[56]

By that statement, the majority revealed its ignorance about the maritime industry and how it operates. The Jensen majority portrayed the situation as one in which a shipowner whose vessel travels from state to state could be confronted with multiple and differing workers' compensation schemes and be subjected to great uncertainty in its obligations to its employees. Nothing was further from the truth. In Jensen, Southern Pacific decided to be its own stevedore. In a maritime context, it was two companies.[57] It was a shipping company because it owned and operated a vessel, and it was a stevedoring company because it utilized its own employees to work as longshoremen loading and unloading its vessel. Typically, vessel owners who contracted with stevedores to load or unload their vessels were not subject to workers' compensation liability for injuries to longshoremen. In such cases, the stevedore-employer, an independent contractor, would be liable for the compensation payments, not the owner of the vessel on which the employee was injured or killed. Stevedores are locally based, and they would be liable under the New York law for injuries to their employees.

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[62] 33 U.S.C. § 905(a) (1994) (providing that Longshore Act liability of an employer "shall be exclusive and in place of all other liability"). *Davis v. Dep't of Labor*, 317 U.S. 249, 256 (1942) (citing 33 U.S.C. § 905); *Continental Casualty Co. v. Lawson*, 64 F.2d 802, 805 (5th Cir. 1933) ("State compensation laws and this compensation law of Congress are mutually exclusive of each other.").

[63] In order to narrow the *Jensen* doctrine the Court identified some workers as "maritime yet 'local in character,' and thus amenable to relief under state law." *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (citing *W. Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922)).

[64] *Davis*, 317 U.S. at 256.

[65] Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. § 903(a) (1994)).

[66] *See supra* notes 41, 49–50 and accompanying text.

Thus, in terms of burdening international or interstate commerce, the statute did not place the burden on shipowners but on stevedores. Shipowners whose vessels moved from state to state and who engaged the services of local stevedores would not be burdened with different requirements because these vessel owners were not subject to the state compensation laws which covered only local workers. Likewise, stevedores would not be burdened by non-uniform state laws because stevedoring operations do not move from place to place like vessels. Theirs is a local, land-based business. It was fortuitous that Southern Pacific was covered under the New York law, but that was only because they elected to become a land-based, local stevedore. It is important to note that the New York statute and other similar state statutes did not involve the possibility of subjecting maritime employers to the requirements of different states. Both the services rendered to ships and the employees who performed those services were land-based in a particular port.

Furthermore, Jensen didn't necessarily invalidate the New York law even as to stevedores. It merely held that an employer could not be held liable to pay compensation under the statute where a worker is injured or killed on navigable waters. Jensen should not be viewed as removing from the "maritime" industry the burden of paying workers' compensation benefits just because Southern Pacific, Jensen's employer, owned the ship on which he had been working. Southern Pacific was still liable as a local stevedore under the statute for injuries to its workers that occurred on land. The burden to pay compensation for injuries that occurred in New York, however, was now subject to an exception where an employee was injured on navigable waters. Southern Pacific by obtaining commercial insurance or by self-insuring would still have to cover its employees in the event they were injured on land.

Under the "locality" test that, at that time, served as the basis for admiralty tort jurisdiction.[58] Jensen would have had no action in maritime tort if he had been injured on the land even through the fault of his employer. If Jensen had been injured on the land, his action, in tort or for compensation,

[67] *See supra* note 52 and accompanying text.

[68] In *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943), the Court held that a state unemployment insurance tax imposed on maritime employers was constitutional. Justice Black wrote for the unanimous Court:

> We are now asked to apply the *Jensen* doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty

would have been under New York law.[59] In those circumstances, there would have been no conflict with admiralty jurisdiction or the general maritime law. Federal courts could not exercise admiralty jurisdiction over personal injuries that occurred on land.[60] The Court perceived a conflict between state law and the general maritime law only because Jensen was killed while working on navigable waters. Although, the Jensen Court did refer to the employment contract as being a maritime contract, it characterized the injury as being a "maritime injury." The characterization of the injury as a being a "maritime injury" was correct because Jensen was injured on navigable waters, the sine qua non for admiralty tort jurisdiction at that time. Notwithstanding the exception created in Jensen, stevedores were still subject to the New York statute.

If anything, the Jensen decision led directly to the imposition of additional burdens on stevedores. When Congress finally enacted the federal Longshoremen's and Harbor Workers' Compensation Act of 1927,[61] it provided workers' compensation benefits for workers injured on navigable waters. Longshoremen work both on land and on navigable waters. Often their work requires them to go from land to ship and from ship back to land as in Jensen's case. Stevedores became subject to two different legal regimes with regard to their employees. The state compensation regime applied to land-based injuries and the federal regime to injuries occurring on navigable waters. If the court had upheld the New York statute, employers would have been subject to only a single statute and would not have been subject to different rules relating to the right to compensation and levels of compensation benefits. Rather than achieve uniformity, the decision imposed on every stevedore non-uniform compensation systems.

> uniformity. The effect on admiralty of an unemployment insurance program is so markedly different from the effect which it was feared might follow from workmen's compensation legislation that we find no reason to expand the *Jensen* doctrine into this new area. Indeed, the *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws.

Id. (footnote omitted); *see* Currie, *supra* note 48, at 201; Edwin D. Dickinson & William S. Andrews, Jr., *A Decade of Admiralty in the Supreme Court of the United States*, 36 CAL. L. REV. 169, 217–18 (1948).

[69] Currie, *supra* note 48, at 189; William H. Theis, *United States Admiralty Law as an Enclave of Federal Common Law*, 23 TUL. MAR. L.J. 73, 93 (1998).

[70] *Compare The Harrisburg*, 119 U.S. 199 (1886) (excluding the existence of a wrongful death action in general maritime law), *with The Hamilton*, 207 U.S. 398 (1907) (permitting recovery for death on navigable waters under a state statute)

[71] Theis, *supra* note 69, at 93.

Furthermore, in terms of transaction costs, Jensen created an additional burden on stevedores. The state and federal compensation schemes were mutually exclusive.[62] In gray areas, where it was not clear whether an employee was injured on land or on navigable waters, it might be necessary to litigate the matter to determine which regime applied. To ease this burden the courts created the doctrines of "maritime but local"[63] and the "twilight zone."[64] In fact, there was such confusion in the area that ultimately Congress had to amend the federal compensation statute to extend coverage to maritime workers who were injured on land, that is, in areas adjoining navigable waters.[65]

Let us now apply the Jensen criteria to the Jensen facts. First, there was no federal statute with which the New York law conflicted. There was no federal statute at all. Therefore, congressional preemption could not have been a basis for displacing state law.

Second, the state workers' compensation statute did not work "material prejudice to the "characteristic features of maritime law." In order to find that the New York statute worked "material prejudice to the characteristic features of maritime law," it is first necessary to identify a "characteristic feature of maritime law" and to compare it with the state law to see if it was in conflict with the federal rule. With respect to tort liability for personal injuries, the general maritime law required a showing of fault. The New York statute provided for compensation without fault. Nevertheless, under the approach adopted in Justice Scalia's majority Opinion in American Dredging, a "characteristic feature" of maritime law is one that either originated in maritime law or had some exclusive application in maritime law.[66] The fault-based rule of recovery applied in maritime personal injury cases did not originate and was not exclusively applied in admiralty cases. Certainly, fault was the basis for tort liability under the common law as it is today in most states. Under Justice Scalia's unduly restrictive approach to the "characteristic features" criterion, the New York statute should not have been displaced.

Even if one follows the view expressed in Justice Kennedy's dissent,

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[72] *Compare Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973) (holding that a state may, through the application of state law, take the lead in cleaning up oil spills on its own shores and recoup the costs from the vessels concerned), *with Kossick v. United Fruit Co.*, 365 U.S. 731 (1960) (holding that New York has little interest in seeing its statute of frauds applied to a seaman's contract with a shipowner, whereas seamen, who enter such contracts all over the world, have an interest in seeing a uniform maritime law applied).

[73] N.Y. WORK. COMP. LAW § 2 (McKinney 1918).

which I believe to be the better approach, there was no federal rule, statutory or in the general maritime law, that precluded a state from creating a "compensation" scheme for workers who sustained employment-related injuries without the fault of their employers.[67] Therefore, even if one gives a broader meaning to the concern for the "characteristic features" of the general maritime law, the requirement of "fault" as a predicate to liability, was not a characteristic feature of maritime law. In fact, the contrary was true. In the employment context, seamen who were injured or became ill in the service of their ships were entitled to maintenance and cure from their employer as well as wages until the end of the voyage, regardless of employer fault. In this sense, maintenance and cure is similar to workers' compensation. If the general maritime law extended a no-fault remedy to a group of transient workers (seamen), why couldn't New York provide an analogous remedy to a local, land-based group of workers (longshoremen)?

Finally, there is the "uniformity" criterion. As pointed out above, the Court assumed incorrectly that exposing shipowners to different workers' compensation liability regimes as their vessels sailed from state to state would create non-uniformity in the law and threaten the harmony of the general maritime law. It has already been shown that workers' compensation laws would not include the crew of ships that moved from port to port. The law covered local, land-based employers of local, land-based employees.

Admittedly, the obligation to pay workers' compensation could make the stevedoring business more expensive, and that cost could have been passed on to shipowners in the form of higher stevedore charges. If states had different workers' compensation schemes with some being more costly than others, shipowners might pay higher stevedore costs in some states than in others. But this point is totally irrelevant to Jensen, and it is not what Jensen is all about. Any non-discriminatory local tax imposed on stevedores, ship suppliers, ship repairers, etc., would have the same effect. Yet, no one would suggest that, under Jensen, stevedores are exempt from paying lawfully imposed local taxes.[68]

To compound matters, the Jensen Court offered no principled explana-

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[74] 45 U.S.C. §§ 51–60 (1994).
[75] *The Osceola*, 189 U.S. 158, 168–75 (1903).
[76] Stolz, *supra* note 59, at 703.

tion as to why certain state wrongful death remedies were available in admiralty but others were not.[69] The Court had previously held that an admiralty court could apply a state wrongful death law in cases where deaths occurred on navigable waters, notwithstanding the fact that the general maritime law would not permit recovery.[70] State wrongful death laws were far from uniform at this time. Why should state laws that provide dependents with death benefits under workers' compensation laws be treated differently? In fact, the Court attempted no explanation at all.

Finally, the Court gave no weight to the fact that the New York statute furthered uniformity in that it gave to longshoremen a remedy similar to that already provided by the general maritime law to seamen.[71] The Court did not address the fact that that the New York statute promoted uniformity by providing the same remedy for maritime workers injured in New York, regardless of whether they were injured on the land or on navigable waters. The Court did not take into account the fact that the New York statute promoted uniformity in extending to longshoremen the same compensation benefits that were available to the other seventy-nine categories of New York land-based workers engaged in hazardous employment. The only uniformity about which the court seemed to be concerned was the uniformity of not making stevedores liable to their employees for injuries on navigable waters in the absence of fault.

In sum, the Court never explained how the New York statute made some aspect of the general maritime law non-uniform or demonstrated how that non-uniformity would undermine the "general maritime law in its international or interstate relations." The Jensen Court never applied the criteria it articulated to the situation before it; if it had, it may have reached a different result. The fact that the application of Jensen strongly supports a conclusion contrary to that reached in Jensen undermines the efficacy of the Jensen rule. Jensen never explains why it is important to some national interest for longshoremen injured in California waters to be under the same workers' compensation scheme as workers injured in New York waters, or stevedores in California to be under the same obligations as stevedores in New York.

4. The Jensen criteria leave no room for assessing the importance of state

[77] *See supra* note 63 and accompanying text.
[78] *Se supra* note 64 and accompanying text.

law in promoting or protecting state interests They do not even attempt to weigh the local interest against the benefits of uniformity, that is, against the national benefit that supposedly results from uniformity.[72]

Jensen purported to promote uniformity that inheres in the general maritime law, not as an end in itself but in its effect on international and interstate relations. As stated above, the Court never showed how the New York statute undermined uniformity in the general maritime law in its international or interstate relations. The era in which Jensen was decided was the era in which state compensation laws were being enacted in many states. Surely the Court could not have been unaware of the movement to provide workers with some minimal compensation for job-related injuries and to shift to industry part of the loss that resulted from industrial accidents. The New York statute under attack in Jensen applied to workers involved in dangerous employment. The statute did not single out shipping, but was part of a larger scheme.[73] No one can deny that states had a legitimate interest in imposing liability for compensation benefits on employers whose employees were injured or killed in the course of their employment. Jensen completely disregards the economic interest of the state that, in the absence of workers' compensation, might have to bear some of the financial burden for providing for disabled workers and their families.

The Jensen majority overlooked the fact that although the loading and unloading of ships are crucial to international and interstate maritime commerce, it is also a local activity carried out completely within a state. Furthermore, the work force is a local, land-based workforce, dependent for its protection on the state. Congress had not enacted a federal maritime employees compensation scheme, nor was it in the process of doing so. It had enacted the Federal Employers' Liability Act,[74] but that applied to railroad workers. The courts had not formulated rules providing compensation to

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[79] In 1998 three authors compiled a list of those states imposing dram shop liability. They found that thirty-six states had dram shop statutes that served as a basis for liability. In another eight states, dram shop liability was imposed through the common law. FRANK A. SLOAN ET AL, DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY 120 (2000).

[80] U.S. CONST. amend. XXI (repealing the Prohibition Amendment and prohibiting the use of intoxicating liquors in violation of the laws of any State).

[81] Some critics have questioned the reality of this "uniformity." *See, e.g.*, Robert Force, *Post-*Calhoun *Remedies for Death and Injury in Maritime Cases, Whither Goest Thou?*, 21 TUL. MAR. L.J. 8 (1996); Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103 (1996).

maritime workers except for maintenance and cure.[75] But even that remedy was available only to seamen and not to other maritime workers. Thus, the situation in Jensen was one in which there was a national interest because the compensation scheme applied to stevedores whose employees loaded and unloaded ships. Undeniably, there was also a state interest because the activities in question were carried out solely within a state, the employees were land-based and the industrial accidents within the state had important economic implications for the state and its employee citizens. The weakness of Jensen is not only in its failure to weigh the impact of displacing state law against a corresponding benefit to some national interest that is best promoted by uniformity of law, but that it did not give any weight to the state interest at all.[76] In other words Jensen makes no attempt to accommodate state interests. It ignores federalism.

If the Court, instead of focusing on Southern Pacific as a shipowner, had focused on Southern Pacific as a local stevedoring company, it might have concluded that the burden of the workers' compensation law fell on a local employer engaged in activity that is essentially land-based and that the beneficiary of the legislation was essentially a land-based, non-mobile work force. The employer would not have been subjected to varying state laws and this was not an area where international or interstate commerce required uniformity of law. The Court in Jensen could have accommodated the state interest in a variety of ways:

1. Inasmuch as the statute applied to land-based employment, the Court could have found that the incremental extension of the statute to cover land-based employees who are injured or killed while performing part of their duties on navigable waters does not undermine admiralty jurisdiction or uniformity in admiralty law.

2. The court could have created a "maritime but local exception"[77] to its choice-of-law rules.

3. The court could have created a "twilight zone"[78] for workers whose

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[82] This is in fact what happened in *Byrd v. Byrd*, 657 F.2d 615 (4th Cir. 1981), where a federal appellate court declined to apply a state's interspousal immunity law to an action by a wife against her husband stemming from a recreational boating accident in state territorial waters. To the contrary, the court in *Byrd* actually fashioned a uniform maritime rule of law that precluded the application of state interspousal immunity laws. *Id.* at 621.

[83] *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 682 (1982) (Powell, J., dissenting); Stolz, *supra* note 59, at 663.

employment required them to walk in and out of coverage under the New York law.

4. The court could have characterized the New York law as a "gap" filler in the absence of congressional legislation.

Hypothetical Part III

Let us now return to the final segment of the hypothetical. After oral argument on the Jones and Brown cases, the Supreme Court decided to overrule Jensen. Four Justices joined in a plurality Opinion, three Justices joined in a concurring Opinion and two Justices joined in a separate concurring Opinion. The plurality Opinion, written by Justice Holmes, virtually tracked the "Deconstructing Jensen" memo that he had earlier circulated among the Justices. Three Justices, in their separate concurring Opinion would prohibit preemption of state law by the general maritime law, reserving displacement of state law only to an Act of Congress. Two Justices concurred in the result only, and their separate Opinion stated that maritime law should not be applied to automobile accidents. These Justices dissented from the overruling of Jensen and suggested a case-by case-approach.

It has been learned afterwards that one of the factors most influential in persuading 7 of the 9 Justices to overrule Jensen was the belief that maritime law had penetrated too deeply into matters far removed from the purposes underlying the Admiralty Clause, even viewing that clause broadly. Those Justices were amazed that federal courts were adjudicating personal injury

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[84] In the latest Petition for Writ of Certiorari in the *Yamaha v. Calhoun* case, among the relevant authorities cited to the Supreme Court was Young's article, *Preemption at Sea*, *supra* note 45. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Calhoun v. Yamaha Motor Corp., filed Oct. 27, 2000 (No. 00-681).

[85] It should be said that those scholars who denigrate general maritime law have no axe to grind. The only reason that there is not a greater body of literature denouncing the general maritime law is that many Federal Courts scholars are not interested in the area or find it too specialized to warrant their attention.

[86] *See* William R. Casto, *Additional Light on the Origins of Federal Admiralty Jurisdiction*, 31 J. MAR. L. & COM. 143 (2000); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Young, *supra* note 45.

[87] That was two years before the *Foremost* decision, 457 U.S. at 668, extending admiralty jurisdiction to pleasure boat casualties.

[88] *Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338 (3d Cir. 2000), *petition for cert. filed*, (U.S. Oct. 27, 2000) (No. 00-681).

[89] *Foremost*, 457 U.S. at 668.

and death actions involving recreational boaters arising out of incidents in state waters. Those cases and the issues they present do not affect interstate and foreign commerce, do not harmonize U.S. maritime law with that of other nations, or protect maritime commerce from inconsistent and prejudicial state regulation.

In the Jones case, the Supreme Court had been asked to affirm the application of a uniform rule of maritime tort law to an automobile accident involving Louisiana citizens and a Louisiana corporation authorized by the state to conduct gaming activities and dispense alcohol in Louisiana waters. The 7 Justices who voted to overrule Jensen simply could find no compelling national interest to justify the abrogation of the state Anti-Dram Shop law. As three of the concurring Justices opined, suppose the state law had imposed liability on dram shops, as most states do,[79] that knowingly served alcoholic beverages to visibly intoxicated persons. Should state policy regarding alcohol be eviscerated in the interests of uniformity? Pointing to the XXI Amendment,[80] they underscored the substantial role of the states regarding the regulation of alcohol.

The maritime bar's worst nightmare had been realized. From an era in which the Supreme Court had paid at least lip service to the goal of "uniformity of maritime law," the Court had suddenly plunged maritime law into an era of uncertainty and non-uniformity.[81]

My Concern

My concern is based on an assumption that the scenario described above could happen. As my previous publications attest, I believe strongly in the need for a general maritime law. I disagree with those who would vastly reduce its scope. On the other hand, I also disagree with those who espouse "uniformity" in every case in which a vessel and navigable waters are some-

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[90] 264 U.S. 375 (1924).

[91] *See* Bederman, *supra* note 24, at 35; Burrell, *supra* note 19, at 69.

[92] For example, the latter did not extend to torts that occurred on non-tidal waters or to those that occurred within the body of a county. Rules relating to maritime contracts also had limitations. *See Ins. Co. v. Dunham*, 78 U.S. (1 Wall) 1 (1870); *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825)' *see also* FRIEDELL, *supra* note 37, §§ 141–142, 181–182; Henry B. Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9 COLUM. L. REV. 1 (1909); Wright, *Uniformity (I)*, *supra* note 30, at 135–37. Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

how involved.

We all recognize that uniformity of maritime law is convenient, not only for lawyers and judges but also for those engaged in maritime transactions or activities. Uniformity facilitates predictability and promotes an even-handed administration of the law. Nevertheless, I submit to you that if the general maritime law and its by-product "uniformity" are to persevere, they must be principled. "Principle" and "convenience," in my opinion, are not the same thing.

I submit that uniformity in maritime law must serve some national interest, that is, an interest compatible with the grant of admiralty and maritime jurisdiction to the federal courts. In this respect, I sympathize with the imaginary majority of the Court in my hypothetical that was troubled by the appli-

[93] FRIEDELL, *supra* note 37, § 105. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), Justice Frankfurter describes the interplay of federal and state law in maritime matters:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. "In the field of maritime contracts," this Court has said, "as in that of maritime torts, the National Government has left much regulatory power in the States." Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789. Here, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.

Id. at 373–75 (footnotes omitted).
More recently, the Court in *Grubart* acknowledged federal maritime law's accommodation of state law:

cation of federal admiralty law to incidents that involve only pleasure craft. Is this what the founders contemplated when they drafted and approved the Admiralty Clause? What national interest is promoted or preserved by the application of the general maritime law to determine whether the wife of the operator of a pleasure boat can recover damages from her husband for injuries she sustained as a result of his negligent operation of the boat?[82] The fact that pleasure boat operators may be subject to federally formulated rules of the road and to U.S. Coast Guard regulations has absolutely nothing to do with the choice-of-law issue as to whether federal or state law should be applied in a suit to recover damages brought by an injured recreational boater against another recreational boater.[83] If we continue to extend substantive

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Contrary to what the city suggests, exercise of federal admiralty jurisdiction does not result in automatic displacement of state law. It is true that, with admiralty jurisdiction comes the application of substantive admiralty law. But, to characterize that law, as the city apparently does, as federal rules of decision, is

> a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules. Thus, the city's proposal to synchronize the jurisdictional enquiry with the test for determining the applicable substantive law would discard a fundamental feature of admiralty law, that federal admiralty courts sometimes do apply state law.

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545–46 (1995) (citations and internal quotation marks omitted).

[94] 28 U.S.C. § 1333(1); *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (finding that the "saving to suitors" clause has been interpreted to leave "state courts competent to adjudicate maritime causes of action in proceedings *in personam*").

[95] *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852).

[96] *The Hamilton*, 207 U.S. 398 (1907); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970) ("For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful death statutes by allowing recovery whenever an applicable state statute favored such recovery.").

[97] *Sun Ship, Inc. v. Pennsylvania*, 477 U.S. 715 (1980); *see supra* notes 62–64 and accompanying text.

[98] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1–10, at 26 (2d ed. 1975).

[99] *Id.*

[100] *Id.* § 1–10, at 26–27 & n.91.

[101] *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (defining the reach of admiralty jurisdiction); *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972) (declining to extend admiralty jurisdiction where a plane crashed in navigable waters); *Transatlantic Marine Claims Agency v. Ace Shipping Corp.*, 109 F.3d 105, 109 (3d Cir. 1997) ("[I]t is clear that since the incident at issue in the instant case occurred solely on land—as a result of a train derailment having no relationship whatsoever to admiralty activity—admiralty tort jurisdiction does not lie.").

maritime law to situations that implicate no clear national interest and if we continue to displace state law in situations where, by contrast, there is a clearly discernible state interest, we may ultimately be supplying the linchpin for the undoing of the general maritime law as we know it and as we need it.

The same may be said with respect to the hypothetical. What national interest is promoted by the application of the general maritime law to the automobile accident that occurred in Louisiana? What detriment to shipping and commerce would occur if the Louisiana court or the federal court applied Louisiana law? Asked differently, what benefit to shipping and commerce would occur if the Louisiana and federal courts applied federal law? Application of a preemptive maritime rule to cases in which no national interest is served is an extravagant application of maritime law and may result in a significant restriction in the scope of the general maritime law.

The research by the law clerk for Justice Holmes in the hypothetical disclosed that there now exists a body of law review literature that undermines the very legitimacy of the general maritime law and provides the legal basis for destroying it.[84] I am concerned that there could be a backlash or overreaction by a court lacking familiarity with maritime law in a case in which the national interest is at best marginal and the state interest is strong.[85] That scenario, like my hypothetical, might actually come to pass. We all know that hard cases can make bad law.

Admiralty lawyers should not keep their heads in the sand and read only the views with which they agree. They must confront the fact that there is a respectable body of literature of relatively recent vintage that asserts a position that is almost the polar opposite of the conventional admiralty uniformity cant.[86] That literature and its potential for mischief, in my opinion, should not be ignored. You may scoff at my apprehension. I submit, however, that my hypothetical situation is not as far-fetched as some of you would like to believe. You may think that it couldn't possibly happen. But, twenty years ago,[87] would you have been willing to bet that a federal court would ever

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[102] *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).
[103] *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).
[104] Pub. L. No. 104–324, 110 Stat. 3984 (codified as 46 U.S.C. app. § 183(g) (Supp. IV 1999)).
[105] Pub. L. 106–181, 114 Stat. 131 (codified at 46 U.S.C. app § 761(b)).
[106] Pub. L. 106–181, 114 Stat. 131 (codified at 46 U.S.C. app § 762(b)).
[107] In addition, see FRIEDELL, *supra* note 37, § 113 (describing the application of state law in maritime matters).
[108] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

hold, in a death case involving a 12-year old child killed in state waters when her jet ski collided with another recreational vessel, that the general maritime law would determine whether or not her plaintiff parents had a cause of action, but that the law of Pennsylvania would determine the remedy, that is, damages for loss of society, and the law of Puerto Rico would determine whether or not plaintiffs could recover punitive damages? Yet, this is precisely what the Court of Appeals for the Third Circuit has held in the most recent decision in the Yamaha case.[88] Twenty years ago, before Foremost[89] was decided, you might even have asked, is this an admiralty case at all? The latest Yamaha decision shows that anything is possible.

The application of state law to resolve disputes, rather than federal law, will sometimes result in non-uniformity. Therefore, in any given case, if the question is asked: "should a federal court formulate a uniform rule that will preempt state law?," it begs the question to simply respond: "if it doesn't, the application of differing state laws will result in non-uniformity." If non-uniformity per se is the critical factor, that is, if uniformity itself is the only goal, the answer to the question will always be that we should have a uniform rule. This, however, is not a realistic or legally correct approach. As maritime lawyers, we all understand the benefits that could be achieved under a comprehensive and uniform system of federal maritime law. We do not, however, have a comprehensive code of maritime law, and, in my opinion, we never will. The general maritime law will never be a substitute for a comprehensive maritime code.

In espousing the uniformity cause, commentators point to statements in Panama Railroad Co. v. Johnson[90] to support their view that the Admiralty Clause signifies an intent to place the entire subject of maritime law under federal control where a uniform maritime law could evolve.[91] Nevertheless, the advantages of uniformity must be weighed against other constitutional factors such as federalism. The Admiralty Clause does not exist in a vacuum. The reality is that we live under a Constitution that has adopted the doctrine of federalism. The national government is a government of delegated powers. The Tenth Amendment admonishes that there are local matters that must be left to local solutions.

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[109] Robertson, *Applicability of State Law*, *supra* note 35, at 89–90; *see* Currie, *supra* note 48, at 164–65; *see also supra* text accompanying notes 43–47.

[110] *See, e.g.*, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994).

[111] For several other provocative and well–reasoned approaches to the choice-of-law problem, see Steven F. Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 LA. L. REV. 825 (1997), and Robertson, *Displacement*, *supra* note 45.

Drawing the line between national and local interests in the maritime area may not have been all that difficult at the time the Constitution came into effect. The "jurisdiction" over admiralty and maritime cases that the founding fathers initially gave to the federal courts was based on a narrower scope of jurisdiction than we have today.[92] It was not until many years later that the jurisdiction rules changed and the scope of admiralty jurisdiction greatly enlarged.

As the country expanded, maritime activity expanded from the Atlantic seaboard to the inland waters. As the scope of admiralty jurisdiction expanded with the growth in commerce, the line between national and local interests has become more difficult to draw. Our friends from abroad may complain that our law in the United States is unduly complex with federal law prevailing in some areas and state law in others. There are also areas where federal and state laws co-exist. The bottom line is that our system is a federal system. We take the best of it as well as the worst of it.

Maritime law, however, in one way or another, has accommodated the doctrine of federalism.[93] From the outset, the saving to suitors clause gave litigants the right to seek common law remedies in state courts.[94] The Cooley decision[95] approved state regulation of pilotage to the extent not preempted by congressional legislation. State wrongful death remedies were enforced in federal admiralty actions.[96] Workers covered by the Federal Longshore and Harbor Workers' Compensation Act may opt for state remedies in certain circumstances.[97] Furthermore, the rules whereby contracts to build vessels[98] and contracts to sell vessels[99] are not maritime contracts and the rule that similarly excludes preliminary contracts,[100] are accommodations with federalism. In the jurisdictional context, the "nexus" requirement for tort jurisdiction,[101] by restricting the broad reach of admiralty tort jurisdiction, delimits the line between national and state interests.

More recently, there have been other examples of how maritime law has accommodated the Constitutional doctrine of federalism. The Yamaha decision[102] allowed the parents of a non-seafarer to invoke state wrongful death remedies in an action in federal court despite the availability of a general maritime law remedy. The Miller decision[103] upheld the right of a state court

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[112] Peltz, *supra* note 81, at 132–34.

[113] *See* Currie, *supra* note 48, at 172–73 (discussing when protection of a national interest requires uniformity).

to ignore the federal rule on forum non conveniens and to apply a state law to the contrary. Also, Congress has amended the Limitation of Liability statute to permit the owner or operator of a vessel or the employer of a seaman who is held vicariously liable for medical malpractice to invoke any limitation of liability available to the doctor under the law of the state where the medical services were rendered.[104] Even more recently, Congress amended the Death on the High Seas Act explicitly to provide that whenever a death occurs from a commercial aviation accident on the high seas twelve miles or closer to the shore of any state, the rules "applicable under Federal, State and other appropriate law shall apply."[105] In the last situation, the amendment specifically allows recovery for loss of society.[106] These are but a few examples.[107]

It is apparent then that the question is not whether federal law should always preempt state law or whether maritime law should accommodate federalism. Those questions have already been answered. The real and difficult question, in my opinion, is, under what circumstances, should the general maritime law preempt state law. The crux of this question is, and has always been: what are the criteria for determining whether or not the general maritime law should preempt state law? I submit that if we don't answer this question in a principled and persuasive way, in a way that remains true to the Admiralty Clause, then we may be facing a new question: why shouldn't the Erie[108] rationale be applied in maritime cases? In my opinion, simply saying that application of state law would result in non-uniformity is not enough, and adding that uniformity provides convenience is not enough either.

I don't think that the dispute between those who would virtually abolish the general maritime law and those who would go so far as to adopt the "dormant Admiralty Clause" position can be resolved by examining the literal

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[114] *See, e.g., Locke v. United States,* 529 U.S. 89 (2000); *compare Miles v. Apex Marine Corp.,* 498 U.S. 19, 26 (noting that "the Jones Act pre-empts state law remedies for death or injury of a seaman"), *and Gillespie v. United States Steel Corp.,* 379 U.S. 148, 154 (stating that Congress intended the Jones Act to provide the "exclusive right of an action for the death" of a seaman and thus to preempt state death statutes), *with Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715, 719–20 (1980) (holding that Congress did not intend to preempt law with respect to workers in the twilight zone and they may be compensated under the Longshore Act or a state workers' compensation statute).

[115] 529 U.S. 89 (2000).

[116] Currie, *supra* note 48, at 203.

[117] Act of Oct. 6, 1917, c. 97, 40 Stat. 395; Act of June 10, 1922, c. 216, 42 Stat. 634.

[118] *Washington v. W. C. Dawson & Co.,* 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920).

language of Constitution itself or in its scant legislative history. I do not believe the answer can be discerned in the decisions of the Supreme Court. I do not think that the study of history will resolve the dispute. I don't think anyone will find a long lost trunk containing documents that provide the definitive explanation of why the Admiralty Clause was included in the Constitution, its intended scope and how it was to be squared with the doctrine of federalism. Even if such documents could be found, their impact on current law would be questionable.

My Proposal: Linking Uniformity to National Interests

If the Supreme Court ever decides to revisit the Jensen standards, to some extent, it will write on a clean slate. Professor Robertson has carefully reviewed the application of Jensen in all of the Supreme Court cases, and he has concluded that there is no discernable pattern to be derived from the cases.[109] Members of the Court have admitted as much.[110] It is as though each case has been decided in a vacuum that makes generalization and consistency impossible. Therefore, I will not try to pretend to see a pattern that does not exist. The lack of a pattern and the lack of fleshing out of Jensen by subsequent cases raise serious doubt as to the efficacy of the Jensen factors as meaningful guidelines for courts. In approaching what I regard as the crucial question of preemption of state law, I have a modest suggestion.[111] Instead of merely asking whether or not the application of state law in a particular situation would interfere with the uniformity of the law, I suggest that the inquiry be refined to include two additional questions:

1. In the context of the precise issue to be decided in the dispute before the court, would a uniform rule substantially promote some national interest underlying the Admiralty Clause or would non-uniformity substantially undermine some national interest inherent in the Admiralty Clause?

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[119] United Nations Convention of the Law of the Sea, Dec. 10, 1982, art. 2, 21 I.L.M. 1245 (entered into force Nov. 16, 1994); R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 60–61, 75 (3d ed. 1999). Inasmuch as this Article deals with a problem of federalism under U.S. law and not with issues of international law, there is no need to adhere to the classification of various bodies of water under international law.

[120] CHURCHILL & LOWE, *supra* note 119, at 92–100.

[121] At one time, under international law, a coastal state, such as the United States, could assert sovereignty over waters that extended seaward three miles from its coast. *Id.* at 78. Today, that has changed, and the United States has asserted sovereignty over waters that extend seaward twelve miles from its coast. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (1989) (extending the U.S. territorial sea to twelve nautical miles from the coast).

[122] CHURCHILL & LOWE, *supra* note 119, at 92–100.

[123] *Id.* at 75, 92–100.

"Substantial" means something more than minimal or marginal.

2. If uniformity would only minimally or marginally promote a national interest or non-uniformity only minimally or marginally undermine a national interest, what is the conflicting state interest and how important is the application of state law to the promotion or protection of that interest?[112]

In making the preemption decision, a court should be required to consider whether a failure to preempt state law would undermine some national interest, or whether preemption of state law by applying a uniform federal rule would advance some national interest. In other words, the inquiry should not stop with a consideration of whether the application of the state rule would result in non-uniformity of law, but in regard to the issue presented in the case at hand, the court should also consider whether or not non-uniformity of law would promote or undermine some national interest.

I suggest that we devise a choice-of-law rule tailored to one area of the law, maritime law, rather than trying to formulate a grand choice-of-law rule. Also, I suggest that the choice-of-law rule be tailored only to the choice between federal and state law. Furthermore, I suggest that "a need for uniformity" be the point of departure in the application of the rule.

The determination as to whether there is a "need" for a uniform rule, however, should not be made in a vacuum. In admiralty, it is well accepted that the Admiralty Clause was included in the Constitution to promote uniformity in maritime law (to a greater or lesser degree depending on one's view). Thus, the key to my approach is to link "uniformity" to some "national interest that the Admiralty Clause should promote or protect."[113] These may include interests that bring into play sovereign, transnational or international considerations and those that may affect commercial activities. There may be other interests as well, and the following are not intended to be all inclusive.

"National Interests"

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[124] *See, e.g.*, *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135, 1142–45 (2000).

[125] 46 U.S.C. app. §§ 761–767 (1994).

[126] *United States v. California*, 332 U.S. 19 (1947) (where the majority holds that the three-mile belt off the coast of California is owned by the state, and Justices Frankfurter and Reed dissent, finding California owns this coastal belt).

How then does a court determine whether or not the particular choice-of-law issue before it is one as to which a uniform rule is required to promote or protect some national interest that is inherent in the Admiralty Clause? What are national interests? I would start at the same point that Jensen did and determine whether or not Congress supplied the rule on the matter at issue. When Congress legislates in the maritime area, the national interest is determined by the objectives of the legislation.[114] The Court has developed criteria for determining when congressional legislation and concomitant regulations preempt state law. Those preemption criteria should be applied as the Court recently did in the Locke case (Intertanko).[115]

The preemption decision is easier where Congress has legislated. In Jensen, there was no congressional statute. The Jensen majority reasoned that if Congress had wanted to provide workers' compensation benefits to longshoremen killed or injured on navigable waters, it could have done so by enacting appropriate legislation. As Congress had not done so, presumably, it did not intend for those workers or their families to have the benefits of compensation in the absence of fault, the standard for liability under the general maritime tort law. Yet, the actions of Congress itself, in the period immediately following Jensen, admonish us to be very careful in drawing inferences from congressional silence.[116] The fact that there was no remedy under the general maritime law for non-seaman employees who were injured or killed in the absence of fault while working on navigable waters, and the fact that Congress had failed to supply one did not support the inference that Congress tacitly approved of the denial of any remedy. We know, in the aftermath of Jensen, that Congress had been relying on the states to provide a remedy for what it considered to be a local problem. We know that Congress twice tried to make state workers' compensation benefits available to maritime workers injured or killed on navigable waters.[117] Both times the Court

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[127] *Id.*

[128] *See United States v. Louisiana*, 394 U.S. 11, 14–15 & n.2 (1969); *United States v. Louisiana*, 363 U.S. 1, 20–25 (1960).

[129] *See Louisiana*, 394 U.S. at 14–15; *Louisiana*, 363 U.S. at 20–25.

[130] Act of Aug. 7, 1789, 1 Stat. 54 (providing that pilots shall be regulated in conformity with state law); *see also* 46 U.S.C. § 8501(a) (1994) (currently in effect and providing for the regulation of pilots by the states). *See generally Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

[131] *Cooley*, 53 U.S. at 311–22.

[132] 43 U.S.C. §§ 1301(a)(2), 1311–1312 (1994).

[133] *Id.* § 1333(2)(A).

[134] *Id.* §§ 2101, 2102, 2105.

[135] 46 U.S.C. app. § 767 (1994).

struck down these statutes.[118] Although, the presence of a national interest can be readily discerned or even presumed when Congress enacts rules of maritime law, the absence of legislation, that is, congressional silence, does not readily lend itself to making inferences as to what national interests are undermined by the application of state law. There are many reasons why Congress fails to enact legislation. Look at how long the MLA proposal on amendments to COGSA has been pending. Congressional silence may signify nothing more than that Congress has more important matters to address or, as in the case of compensation benefits for longshoremen, that it prefers to see a matter dealt with at the state level.

In the absence of legislation, it is submitted, therefore, that before a court articulates a substantive rule of general maritime law that is intended to preempt state law, the court should identify the national interest the preemptive rule is intended to promote. Simply saying that a federal rule promotes uniformity, in my opinion, is not enough.

The Sovereignty Dimension

In accord with international law, nations exercise "limited sovereignty" over certain waters that lie off their coasts as well as their internal waters.[119] As an incident of this "limited sovereignty," and subject to the rules of international law, nations have the power to provide rules that regulate the use of certain waters that lie off their coast and to determine the legal consequences of events and transactions that occur on those waters.[120] I will simply refer to these waters as "coastal waters."[121] This power includes the right to prescribe rules that govern all activities in those coastal waters including commercial activities.[122] The United States has strategic, environmental, safety and economic interests in these waters that have led it to adopt rules to promote and protect those interests. Beyond self-interest, there is another reason for nations to promulgate rules to apply in their coastal waters. Under and subject to international law, only the country off whose coast these waters lie is entitled to exercise "limited sovereignty" and to formulate rules applicable to those waters.[123] Thus, there is a necessity for the United States to provide rules to be applied in U.S. coastal waters to avoid a legal vacuum.

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[136] *See Toomer v. Witsell*, 344 U.S. 385, 393 (1948) (where the Court recognized that a "state has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery").

[137] *See, e.g.*, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) (where the sea off the coast of Puerto Rico is referred to as its "territorial waters").

[138] Young, *supra* note 45, at 318.

With respect to the formulations of legal regimes for coastal waters, it is important to note that historically there has been an international effort to promote uniformity in these various national laws. That uniformity movement has never been stronger than it is today. The United States has entered into and implemented various international agreements that relate not only to the high seas but also to United States waters. Also Congress has enacted legislation that applies to U.S. waters. Pursuant to this legislation, administrative agencies have promulgated regulations that apply in U.S. waters. These laws trigger the rules of congressional preemption.[124]

The United States, however, has not enacted a comprehensive code to govern activities in its waters. Thus, there are transactions and events that occur in U.S. waters for which Congress has not provided rules. For example, Congress has enacted a "Death on the High Seas Act"[125] but, except for

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[139] *Whitridge v. Dill*, 64 U.S. (23 How.) 448 (1859) (collision); *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473 (1825) (maritime tort for forcible seizure of property on the ocean); *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819) (applying the law of maritime liens); *Blaine v. The Ship Charles Carter*, 8 U.S. (4 Cranch.) 328 (1808) (determining rights of maritime lien holders with respect to creditors of the owner); *Mason v. Ship Blaireau*, 5 U.S. (2 Cranch.) 240 (1804) (salvage); *McDonough v. Dannery*, 3 U.S. (3 Dall.) 188 (1796) (salvage); *see also* Theis, *supra* note 69, at 77–80.

[140] Professor Friedell explains that the application of traditional "interest-analysis" and "interest-balancing" may be difficult in some cases. He cites as one example, *Cobb Coin Co. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1968); FRIEDELL, *supra* note 37, § 112, at 74–75. There, a federal district court invalidated aspects of a Florida law that were in conflict with rules of salvage law. As stated by the court, the Florida statute represented "a comprehensive scheme designed to acquire and preserve historic sites and property, artifacts, treasure trove, and objects of antiquity and historic value and interest to the public." *Cobb Coin Co.*, 525 F. Supp. at 200. The Florida statute did not apply to traditional salvage activities involved in saving imperiled property.

In applying the choice-of-law approach suggested in this Article, the first point to note is that at the time the case was decided, Congress had not legislated in this area. Subsequently, Congress enacted the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106 (1994), which apparently would have validated the Florida law. This absence of legislation meant that the United States had not laid claim to these wrecks, and there was no conflict between the Florida law and any Act of Congress. The subject matter was such that although the United States might have laid claim to vessels abandoned in its coastal waters, it had not seen fit to do so. No claim had been made by Spain, the original owner of the vessel; essentially Spain had abandoned the vessel. The wreck was located in state territorial waters. There was no international dimension to the dispute between the would-be salvor and the state. International commerce and interstate commerce were not involved. The only factor pointing to a "national interest" is that salvage law is uniquely maritime in flavor and is transnational in that it is recognized and applied in similar fashion by seafaring countries. Nevertheless, Professor Schoenbaum has concluded:

seamen, has not legislated with regard to injuries that occur in U.S. waters or on the high seas. Therefore, it was not only appropriate, but it was necessary for the courts to formulate a rule of general maritime law to apply in such situations. Likewise, Congress has enacted no law that deals with liability for collisions that occur in U.S. waters or the high seas, and it was appropriate and necessary for the courts to do so. It is submitted, that in these situations, a uniform rule of the general maritime law promotes an important national interest because such rules are expressions of national sovereignty and fill a vacuum in the law just as statutes and international agreements do. A uniform rule, to be applied in situations that are beyond the jurisdiction of any state, whether formulated by Congress or the courts is within the "national interests" inherent in the Admiralty Clause.

Having said this, it should be acknowledged that as waters approach the

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> The third type of case is a wreck found within state jurisdiction either in inland waters or in the territorial sea within state jurisdiction. Here the claim of the state is strong, despite a flawed lower court decision opinion to the contrary [referring to *Cobb Coin* which invalidated the Florida law to the extent that it conflicted with established rules of salvage law].
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> The right of the states to abandoned property found within these areas rests on the fact that the state has actual title to the submerged lands within its jurisdiction. A state statute asserting control over abandoned shipwrecks on such land and asserting the right to protect them for their archeological and historical value, should be given effect.

THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 14–7, at 804–05 (2d ed. 1984). If states do have a right to assert ownership in abandoned shipwrecks in state waters, then it seems that this should be the deciding factor. The relation between traditional salvage activities and the reasons underlying the law of salvage are marginal when considered in the context of treasure salvage. Treasure salvage cases are not about saving and restoring property imperiled by the sea, but about the pursuit of treasure. Salvage law is applied in some of these situations as well as the law of finds because it is convenient to do so. But treasure salvage lies at the periphery of salvage law. Neither the Salvage Convention of 1910 nor of 1989 refers to treasure salvage, and as Professor Schoenbaum suggests, in the international community, there is support for imposing conditions to assure that salvors and finders of historic shipwrecks use proper techniques to protect and preserve the wrecks. *Id*. Where the national interest is minimal, especially where Congress has not seen fit to assert a superior interest, the interest of states that claim to own the property should prevail. After all, an owner of a sunken vessel can deny another permission to salve its vessel. There seems to be no reason why it cannot impose restrictions and conditions relating to salvage operations and compensation. In this respect, the situation is analogous to contract salvage.

[141] *See, e.g.*, Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Casto*, 30 J. MAR. L & COM. 361, 397–98 (1999); Young, *supra* note 45, at 317.

coast of the various states, the interest of the respective states in events, transactions and resources in or under those waters becomes evident. There has been some debate as to whether waters lying within three miles off the coast of states are subject to "state sovereignty" except to the extent that the Constitution has given the national government specific powers with respect to those waters, such as under the Commerce power, the War power, etc.[126] The United States Supreme Court has held that the federal government and not the states has "sovereignty" over these waters.[127] Some have said that this decision has been rejected subsequently by Congress itself.[128] For purposes of this Article the issue is moot because both Congress and the courts have confirmed that, under certain circumstances, states have interests in matters that occur off their coasts.[129] Thus, in applying my suggested choice-of law analysis the complicating factor in using "sovereign interests" as a type of "national interest" is that, in the United States, sovereignty can be shared between the federal and state governments.

From as early as 1789 Congress permitted state regulation of maritime commerce by authorizing states to adopt pilotage laws to apply to ports in the United States.[130] The United States Supreme Court upheld this statute in the well-known Cooley case.[131] More recently, Congress has provided for the application of state law in certain U.S. waters. The Submerged Lands Act (as successor to the Lands Act) essentially gives the states rights in the lands under waters extending seaward three miles from their coasts.[132] The Outer Continental Shelf Lands Act also provides that state law, to the extent it is not inconsistent with federal law, applies to events and transac-

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[142] In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Court discusses the importance of admiralty and maritime law to the national sovereignty:

> [A]s to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty.

Id. at 335.

[143] *See* Stolz, *supra* note 59, at 666–99 (discussing the relationship between admiralty jurisdiction and commerce).

[144] *See, e.g.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n.6 (1995); *cf. Sisson v. Ruby*, 497 U.S. 668 (1982) (holding that admiralty jurisdiction was present, in part, because the incident at issue posed a hazard to maritime commerce); Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (finding the existence of admiralty jurisdiction because a collision of recreational boaters has a "potential impact on maritime commerce").

tions that occur on the outer-continental shelf beyond the three mile limit.[133] Likewise the Abandoned Shipwreck Act gives states title to sunken vessels embedded below state waters not only within state territorial limits but also extending seaward three miles from the coast.[134] That statute specifically abrogates the maritime law of salvage and finds in such cases. The Death on the High Seas Act does not apply to deaths that occur within three miles from shore and specifically preserves the application of state law.[135] The Yamaha case not only confirmed this view of the statute but also, in certain cases, refused to preempt state remedies in favor of the general maritime law remedies. The Supreme Court, itself has recognized a special state interest in the natural resources of the sea such as its marine life within the three mile limit.[136] The upshot of all of this is that both Congress and the courts have recognized that states have interests and state law may apply to events that occur in waters over which the United States has "sovereignty." As a matter of fact, it is common to refer to the waters that lie seaward within three miles off the coast of a state as "state territorial waters."[137] State interests are even more evident in regard to navigable waters that lie within the body of a state.

Despite the willingness of Congress to grant states certain rights with respect to both coastal waters and inland waters, and despite the willingness of courts to recognize, in certain instances, that states have special interests in waters off their coast or within their boundaries, the interests of the United States do not evaporate as vessels navigate from U.S. waters to port or as vessels navigate inland waters. On the other hand, not everything that happens on coastal and inland waters implicates national interests and does not necessarily require uniformity to protect or promote national interests. Just as Congress has been sensitive to state interests, so courts in determining whether or not to formulate a preemptive rule or to apply state law should be sensitive to state interests.

The Transnational Dimension

It seems generally agreed that, at the time the Admiralty Clause was inserted into the Constitution, the phrase "admiralty and maritime law" embraced customary rules that were applied by seafaring nations. Thus, part

[145] This does not require a court to go through the choice-of-law analysis in every case. Once courts decide that a particular type of situation implicates national interests or that there is no national interest or that the state interest is dominant, then that determination would be applied in subsequent similar cases.

[146] FRIEDELL, *supra* note 37, § 112.

of the maritime law of that time was transnational in form.[138] The rules that related to collisions on the high seas, for example, were not considered the particular, parochial province of any single nation. The same may be said today of the law of salvage, maritime liens and the rules of general average. Each nation must adopt or incorporate these rules into its own system of law as it sees fit. In part, the transnational aspect of certain rules of maritime law reflects the reality that no nation owns the high seas, and no nation may impose its law on other nations whose vessels travel the high seas. In part, transnational law reflects custom, tradition, commercial practice, necessity and convenience. It is also evolving and not fixed. Thus, where a case involves issues that lie within a sphere of what can be truly considered as transnational in character, there is an important national interest in articulating a uniform, preemptive federal rule.[139] This is particularly true where a dispute arises out of events that occur on the high seas beyond the jurisdiction of any country. It is also true when a dispute arises in an area where unique rules of maritime law have been developed and are applied by most maritime nations, as for example, salvage,[140] maritime liens, maintenance and cure and general average.

The International Dimension

Even where courts are not called upon to adjudicate disputes in the context of transnational law, there are situations where there may be a dominant or important international aspect to a case. Courts are sometimes faced with situations where foreign nations or their citizens are involved in a dispute and where only some or none of the underlying facts occurred in the United States. These situations can and do occur because the scope of admiralty jurisdiction in the United States, is very broad. In such situations, in the absence of statute, it is appropriate for federal courts to fashion rules of general maritime law to resolve such disputes. Commentators have observed that one of the purposes underlying the Admiralty Clause was the need to protect the interests of foreign litigants and to give due regard to the interests of foreign nations.[141] It is in this context that the federal admiralty doctrine of forum non conveniens is applied to enable courts to determine which of these disputes remain in the U.S. and which must be dismissed and relegated to a foreign tribunal. For those suits that remain in the U.S., the courts must decide which rules of law apply. The application of uniform rules to disputes that have an international dimension accords proper respect to

[147] Robertson, *Displacement*, *supra* note 45, at 343–44.
[148] *Id*.

international litigants and generates confidence in the U.S. judicial system.[142] Although not always the case, such disputes almost invariably grow out of activities or transactions involving maritime commerce which, as discussed below, presents its own strong case for uniformity.

The Maritime Commerce Dimension

Some maritime disputes do not fall within the sphere of transnational law or may have no international dimension. Many maritime disputes implicate only U.S. parties, U.S. law and stem from events or transactions that occurred solely within the U.S. Nevertheless, even in such cases, there may still be a clearly identifiable national interest that requires the formulation of preemptive federal rules. No one can deny that there is a relationship between the conferral of congressional authority over interstate and foreign commerce and the Admiralty Clause.[143] Interstate and foreign commerce in the era of the Constitution was virtually synonymous with waterborne commerce. It is accepted that the Commerce Clause reflects the view that the country is a single economic unit and that among the purposes of the Commerce Clause is the promotion of commerce and the prevention of interference by the states. Thus, a lack of uniformity may interfere with or burden maritime commerce as vessels move from state to state or country to country.[144] In this sense, there is a national interest in uniformity. National rules in the form of the general maritime law may be necessary to subject an industry to a single standard where the imposition of multiple standards would make it commercially burdensome for maritime commerce to operate efficiently. National rules in the form of the general maritime law may be necessary to remove provincial, discriminatory measures. In some instances, the burden of non-uniformity on the maritime industry is simply too great.

National Interests Case Specific

The determination of whether a "national interest" is implicated should be made in the context of the particular case, thus differing from the approach used in making the "nexus" inquiry in determining admiralty tort jurisdiction. In the latter situation, the jurisdictional inquiry is made at an intermediate level of abstraction. In other words, a court is not required to find that, under the facts of the case before it, there was some interference

[149] *See* Stolz, *supra* note 59, at 703 (suggesting that "if the case does not involve the [maritime] industry, and if the state's interest is substantial—as evidenced, for example by legislative action—then state law should be applied").

with traditional maritime activity, but only that in events and activities similar to the one at hand, there could have been an interference with traditional maritime activity. Under the choice-of-law approach suggested in this paper, the impact on the national interest must be determined in the context of the facts and issues before the court.[145] In other words, uniformity should not be viewed as an end in itself but as a means of protecting or promoting important national maritime interests. Thus, if there was a collision involving a vessel engaged in interstate commerce, the national interest in the protection of commerce could be implicated. By contrast, if a water skier was injured by a recreational boater, one might find it difficult to identify any national interest that would be promoted by the application of a uniform rule or any national interest that would be undermined by the application of non-uniform state law.

Not an "Interest Analysis"-"Interest Balancing" Approach

Professor Friedell has indicated that ". . . employing some form of interest analysis to resolve federal-state conflicts in admiralty can serve the desirable goals of accommodating important state concerns and of being responsive, in appropriate cases, to the will of Congress that state interests be taken into account." He tempers this view by stating that "interest analysis is not an ideal means for resolving all conflicts and must be used with caution.[146] Professor Robertson, who formerly favored an "interest analysis" approach, has now rejected it because, in the end, he finds that its subjectivity precludes it from providing meaningful guidelines to the courts.[147] There are others who are also critical.[148]

My proposal, however, is not a pure "interest analysis" or "interest balancing" approach. Under a pure "interest analysis"-"interest-balancing" approach, the court identifies competing interests and then weighs them to determine which interest prevails. To the extent that "interest analysis" involves a weighing process, decision-makers allocate the weight to be given to the respective interests as appears appropriate to them. Assigning weight to an interest might entail the same subjectivity as in the application of the Jensen factors. In other words, using "interest analysis" as the choice-of-law rule creates a risk that it may not be any better guide than the Jensen rule, and that judges may manipulate the weighing process to reach results they were inclined to reach regardless of the applicable rule. Furthermore, there are

[150] Robertson, *Displacement*, *supra* note 45, at 357.
[151] *Id.* at 363.

cases where the competing interests are of comparable weight or where the interests do not readily lend themselves to comparison. That type of "interest analysis" and "interest balancing" is not what I propose.

How Does the National Interest Approach Work?

My proposal is that in any situation where the burden of non-uniformity on a national interest as described above is substantial or the benefit of uniformity to a national interest is substantial, uniformity and preemption should trump federalism. Recall too that my definition of a "substantial" national interest is one that is not "marginal" or "minimal." In such situations there should be no weighing of the federal interest against the state interest. Likewise, where there is no competing state interest or where that interest is at best minimal or marginal, uniformity and preemption should prevail. Again there would be no weighing of the federal and state interests. However, where the national interest at best is minimal or marginal and the state interest is substantial, or where there is no national interest, the state rule should prevail.

Thus, it may be possible to structure a choice-of-law rule so as to reduce some of the subjectivity that otherwise inheres in a general "interest analysis"-"interest balancing" rule in conflicts of law. Of course, in the absence of an absolute rule that uniformity always trumps state law, there will always be some subjectivity in any choice-of law-rule. Even the seemingly mechanical procedure-substantive distinction used by Justice Scalia will not be free of subjectivity. The rule that I suggest is no exception. Identifying a national interest, may be subjective to some extent and it is not foolproof. Likewise, trying to determine whether a national interest underlying the Admiralty Clause will be substantially furthered by a uniform rule or substantially undermined by a non-uniform rule may be difficult in some cases.

Nevertheless, the question I put before you is whether or not the approach I have suggested is better than Jensen or what we are doing now. I believe it is because it provides a better analytical framework for judges to resolve conflicts between federal and state law in maritime cases. It requires

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[152] *Id.* at 365.

[153] *Id.* at 368. Support for Robertson's position can be found in Fredrick Cunningham, *Is Every County Court in the United States a Court of Admiralty?*, 53 AM. L. REV. 749 (1919), and Dodd, *supra* note 59.

[154] *See* Wright, *Uniformity (II)*, *supra* note 30 (finding that even pre-*Jensen*, state courts applied the same law as federal courts in maritime matters).

a court first to identify the federal and state rules that might be applicable to resolve the issue before them and to determine whether or not they are in conflict. In the absence of an established state rule, there is no conflict. In the absence of an established federal rule, the court must determine whether or not one should be formulated. In the end, if there is conflict, the court must decide whether to displace state law. That decision, however, does not invariably involve weighing competing interests and this is what distinguishes my proposal from the application of a general "interest analysis" rule in conflicts of laws. If a court finds that a uniform rule would substantially promote a national interest underlying the Admiralty Clause, then it should apply that rule, and if, no rule presently exists, it should formulate a rule. In such circumstances, the court should ignore any competing state interest. If a court finds that a uniform rule will not promote a national interest underlying the Admiralty Clause, it should apply state law.[149] It is only where a uniform rule would promote or protect a national interest in only some marginal or minimal degree that a weighing process would be necessary. In these situations, a strong state interest should dictate the application of the state rule. This approach can be illustrated in Jensen.

The Jensen criteria make no attempt to identify a national interest and to evaluate the importance of uniformity to that national interest. They make no concession to situations where the detriment to a national interest as a result of non-uniformity is minimal and the detriment to the state interest in not allowing the application of state law is substantial. This was the case in Jensen itself. The national interest was present only in that compensation was payable by a segment of the maritime industry that played an important role in international and interstate commerce. Although it may be more convenient to the maritime industry to have the benefit of the Federal Longshore and Harbor Workers' Compensation Act, what was the detriment to the national interest in requiring stevedores and other land-based employers of maritime workers to pay compensation under the law of the state where their place of business was located even where an employee was injured on navigable waters? The law on this subject is not customary or transnational in nature. Compensation benefits for local workers does not impinge on national sovereignty. Providing compensation for injured land-based employees from their local land-based employers does not implicate international or even interstate transactions or activities. A contrary ruling in Jensen would not

[155] *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).
[156] 46 U.S.C. app. §§ 761–767 (1994).
[157] *Id.* app. § 767.
[158] Pub. L. 106–181, 114 Stat. 131 (as codified at 46 U.S.C. app. § 762).

have subjected stevedores to the laws of different states. Admittedly stevedores may provide services to ships from various countries or states. But how do the rules on workers compensation affect those services? They don't, except to the extent that they may affect the cost of those services. The cost of stevedoring services may be affected by many local factors such as state and local taxes. Furthermore, those costs would be imposed even under a uniform federal compensation scheme. The crucial point is that, although workers' compensation laws may vary from state to state, that is, they are non-uniform, this lack of uniformity does not work to the detriment of national interests in promoting and protecting international and interstate commerce. By contrast, the interest to the state in securing compensation to injured employees or their families is evident and substantial.

Professor Robertson, who has criticized the various choice-of-law rules that have been used in admiralty cases, has proposed a choice-of-law approach of his own. This may be characterized as a two-track approach because one set of rules applies to actions in federal courts and another set applies to actions in state courts.[150] Under this approach, federal courts should not apply state law if the issue is controlled by an Act of Congress, is procedural, conflicts with the general maritime law or if it "would significantly impair the free flow of maritime commerce." State courts should not apply state law if the issue in the case is controlled by an Act of Congress or if it is controlled by a clear rule of the general maritime law. Explicit in the proposal is the proposition that state law is preempted by the general maritime law only where the federal rule is "clear" and not where it is "controversial," "unclear" or "doubtfully applicable".[151] Also, state courts are bound to follow clear federal rules propounded not only by the Supreme Court but those issued by lower federal courts as well.[152] The touchstone is clarity. He observes that a single federal decision may provide such clarity, whereas, in other situations, the law may be unclear despite the fact that there may be

[159] Applying his proposed conflicts rule to *Calhoun v. Yamaha Motor Co.*, Professor Robertson predicted that the Supreme Court would reverse the court of appeals on the basis that it should have applied the general maritime law of wrongful death to preempt state law. But, as he observes, under his proposal, if the action had been brought in state court, the state court would have been justified in applying its own law as to damages inasmuch as the Supreme Court had not spoken to the issue and there was some division in the lower federal courts. The Supreme Court did not follow his approach, and that is not the result it reached. This, in itself, is no criticism of Professor Robertson's suggested approach. Robertson, *Displacement*, *supra* note 45, at 368–72.

[160] *Green v. Industrial Helicopters Inc.*, 593 So. 2d 634 (La. 1992).

[161] Professor Robertson believes the court was wrong, because, under his approach, the federal law making a vessel liable to passengers for injuries clearly requires a showing a fault. Robertson, *Displacement*, *supra* note 45, at 375–78.

numerous decisions.

It is submitted that his approach to choice of law, like all the others, also has a subjective element. Furthermore, I believe it raises a serious constitutional issue because, in admiralty cases, state supreme courts, and, perhaps, even state legislatures would be bound by the decisions of lower federal courts. In no other area of law, not even in the area of constitutional law, is that the case.

His proposed approach is also bound to promote forum shopping. If a litigant prefers the state rule over what appears to be the federal rule in the place of suit, he would be encouraged to sue in state court and to try to persuade the state court that there is no "clear" federal rule. If the litigant preferred the federal rule in the place where suit is brought, then he would sue in federal court. Likewise, the proposal would not promote uniformity because, in identical situations, state law may apply to litigants who sue in state court and, perhaps, a different rule would apply to litigants who sue in federal court. Finally, his approach denies state courts any role in the creation of general maritime law.[153] Professor Robertson believes that state courts can only make state law; they cannot formulate rules of general maritime law. I disagree. Admittedly, no decision of a state court that purports to formulate a rule of general maritime law is binding on any federal court or on a court of any other state. But similarly, no decision of a United States District Court is binding on any federal court, not even on judges within the same judicial district. Currently, decisions of federal courts, other than the Supreme Court of the United States, are not binding precedents on state courts, although Professor Robertson would change this.

The primary basis for our difference on this point is my belief that in the early period of our history, the substantive rules applied in maritime cases were presumed to be the same whether the case was tried in federal or state court.[154] The judges of that period, federal or state, relied on the same sources. This, presumably, was why the saving to suitors proviso was expected to be workable. Federal and state courts were expected to fashion a common body of law. With the expansion of admiralty jurisdiction and the

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[162] *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

[163] The majority could have observed that the case involved only U.S. litigants, that the claim arose in the United States, it was based on U.S. law, and that there was no strong or direct impact on any national interest. It specifically declined an invitation to limit its holding to cases that are domestic in every respect; in other words, it did not suggest that perhaps a different result might appertain if the dispute had international dimensions to it.

application of maritime law to matters that could not have been contemplated when the Constitution was written, it has become impossible to retain that degree of uniformity. Nevertheless, today if a state court entertained a case arising out of a collision on the high seas that raised a novel issue of law, I would not expect the state court to feel bound to apply state law or to apply state law by analogy. I would expect a state judge to do exactly what a federal district judge would do, that is, look for analogies in collision law, search for general principles applied in collision cases, and look at how the courts of other countries have dealt with the situation, etc.

Application of the Suggested Rule

I have already applied my suggested approach to the Jensen facts, and I would now like to apply it to a few more cases. In Yamaha,[155] the issue was whether or not a general maritime rule on damages should displace state law in a wrongful death action filed by the parents of a deceased child against the manufacturer of a jet ski that the decedent was operating in state waters when it collided with another pleasure craft. The first step is to look for congressional preemption. Congress has passed a wrongful death statute but that only applies on the high seas.[156] That statute, however, expressly states that it does not affect state wrongful death statutes.[157] Therefore, not only has Congress not preempted state statutes, it has lent legitimacy to them. Furthermore, Congress has recently amended the DOHSA to specifically authorize the application of state remedies, including the recovery of non-pecuniary damages where death results from a commercial air crash in waters up to twelve miles from shore.[158]

Secondly, what national interest would be promoted by a uniform rule or what national interest would be impaired if state law applied to cases involving only recreational boaters? Of crucial importance to me is the fact that the issue in the case does not come within an area of law that impinges on national sovereignty. The federal rule is not transnational. The dispute does not implicate international concerns and it has nothing at all to do with international or interstate commerce. In fact, it has nothing to do with commerce or the transportation of goods and passengers from one place to another. The absence of these factors must have carried some weight with the Court because it focused on and stressed the fact that the decedent was a "non-seafarer," meaning that she was not in the maritime business. On the other hand,

[164] *In re Amtrak "Sunset Limited,"* 121 F.3d 1421 (11th Cir. 1997).
[165] S. REP. NO. 1593–80 (1948), *reprinted in* 1948 U.S.C. CONG. SERVS. 1898.

states have historically provided the primary relief in wrongful death actions, including maritime wrongful death actions, and, in the absence of some right of recovery against tortfeasors, states might have to assume some financial responsibility for a deceased's dependents. I conclude that there was no national interest at stake that required the protection of a uniform rule.[159] I would apply the same rule in injury cases as well.

Next, I will apply the suggested choice-of-law rule to a decision by the Louisiana Supreme Court in which that court applied a Louisiana statute in a suit brought by a passenger to recover damages for injuries sustained as result of the crash of a helicopter on the high seas.[160] The Louisiana statute provided for strict liability. I believe the court was correct.[161] This case had nothing to do with the maritime industry. It involved the aircraft industry. Admittedly, a crash on the high seas by a vehicle transporting passengers over a stretch of the sea implicates national interests. Some courts have held, in such situations, that admiralty jurisdiction is present and that substantive rules of maritime law are applicable, inasmuch as the aircraft are fulfilling a role traditionally played by ships. These courts have distinguished the Executive Jet decision where the Supreme Court held that a transcontinental flight over navigable waters did not have a sufficient connection with traditional maritime activity to come within admiralty jurisdiction.

The Louisiana court recognized that maritime law deals with the transport of goods and passengers by vessels, not transport by aircraft. Aircraft owners and their planes and helicopters are not subject to COGSA or the Harter Act, they cannot avail themselves of the Shipowners' Limitation of Liability Act, their employees are not seaman or longshoremen or harbor workers. Their aircraft are not subject to maritime liens. In other words, aircraft are not ships, and the activities of aircraft, whether they fly over water or not, are not the type of maritime commerce that prompted the need for uniformity under the Admiralty Clause. The only fact that points to maritime law is that DOHSA would have been the exclusive remedy had the passenger been killed in the crash.

All of the parties were Louisiana citizens. The company that owned and operated the helicopters was a Louisiana company. The helicopters were based and maintained in Louisiana. The flight took off from Louisiana and

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[166] As Professor Sturley has stated, "choice of law is independent of jurisdiction." Michael F. Sturley, *Was Preble Stolz Right?*, 29 J. MAR. L. & COM. 317, 322 (1998).

[167] Stolz, *supra* note 59, at 705.

was to terminate in Louisiana. If the crash had occurred in Louisiana, the statute clearly would have applied. The statute did not single out the maritime industry. It was a statute of general application. Certainly the interest of the state in protecting its citizens from injury caused by dangerous instrumentalities is not insignificant. Therefore, in the absence of a national interest linked to the Admiralty Clause that requires uniformity, I would not displace state law. If, however, plaintiff had been injured on a crew boat in the Gulf of Mexico that would be a different matter.

The American Dredging case,[162] a case that held that Louisiana courts do not have to apply the federal forum non conveniens rule, will be examined now. In this case, the majority opinion did not focus on either a national interest or a competing state interest. The issue was simply whether in a Jones Act case brought in a Louisiana state court, the Louisiana court could ignore the federal forum non conveniens rule that is applied in admiralty cases and instead apply state law which precluded dismissal on such grounds. The court first applied the Jensen tests and found that they did not preclude the application of state law. The court went to great pains to point out that forum non conveniens did not originate in admiralty and was not unique to admiralty law. The court found that the application of the state law on forum non conveniens would not interfere with the uniformity and harmony of admiralty law because the state court was obligated to apply federal admiralty law to the merits of the case. Basically, the case relied on an old rule of conflicts of law in which the forum state applies its own procedural law.[163]

By contrast the dissent recognized that the federal forum non conveniens rule plays a vital role in admiralty. It recognized the international nature of maritime commerce and that litigation was frequently initiated in the U.S. involving foreign litigants and transactions and events that arose outside of the U.S. The dissent found that a uniform rule of forum non conveniens did substantially promote national interests. The rule respects the sovereignty of foreign courts, it protects persons from vexatious litigation in an inconvenient forum and is necessary to prevent an exercise of extravagant admiralty jurisdiction. Even though the facts of this case involved only U.S. actors, a national interest in uniformity could have been found in the fact that a federal statute provided the substantive law for the case and there should not be a lack of uniformity in cases where federal law applied. Although the Jones Act tolerates some degree of forum shopping in that plaintiffs may select a federal or state forum, the interest in a convenient forum outweighs any state interest. Thus, the dissent made a strong case that uniformity was necessary to promote and protect national interests clearly contemplated by the Admiralty Clause. I agree with the approach of the dissent. It essentially uses

an approach similar to the one I have suggested.

The last "real" case I will address is the Amtrak case.[164] At the outset, I suggest that particular care in appraising national interests should be exercised in cases where admiralty jurisdiction is based on the Admiralty Extension Act because it is in these situations where the doctrine of federalism is most sensitive. The Admiralty Extension Act was intended to "extend" the benefits of maritime law to persons who suffered injury on land. It is clear, in the legislative history, that the Act was primarily motivated to extend to land-based parties the maritime tort rule of comparative fault thereby ameliorating the draconian "contributory negligence" rule which otherwise would have been a complete defense to their claim. There is nothing in the legislative history to show that by extending beneficial maritime rules to persons sustaining injury on land, Congress intended that maritime law would take away remedies that persons who suffered land-based injuries had under state law.[165] The purpose of the AEA was to provide remedies to land-based parties not to diminish remedies that they already had.

I am reluctant to say too much about the Amtrak case, because I provided consulting services to counsel for some of the litigants. In that case, the Eleventh Circuit ruled, inter alia, that passengers on a train who were killed when a railroad bridge collapsed because its support had been damaged as a result of an allision by a vessel in navigable waters could not recover punitive damages under the Alabama wrongful death law. In reaching this conclusion, the court relied on the AEA to find admiralty jurisdiction. Applying Jensen, it then disallowed the recovery of punitive damages under state law because, the state standard for recovery of punitive damages varied from the general maritime law and state law did not allow for apportionment of damages among joint tortfeasors. The state statute breached the rule of uniformity, although the holding in Yamaha would lead one to conclude that uniformity is not critical in actions based on the wrongful death of non-seafarers in state waters. Thus, a jurisdictional statute intended by Congress to enhance the position of persons injured on the land was turned on its head because the local law provided a remedy that was more generous or different from that supposedly available under maritime law. The AEA, however, was not intended to benefit shipowners; its purpose was to impose liability on shipowners. I submit that the AEA should not be applied so as to undermine state remedies. The Act brings maritime tort law ashore. It is in situations like this that state interests are clearly implicated and should not be

[168] S*ee supra* note 79 describing the prevalence of dram shop liability in the United States.

ignored.

Jurisdiction v. Choice of Law

This paper focuses on choice of law. It does address the criteria for admiralty jurisdiction.[166] One may fairly ask, why should the criteria for determining admiralty jurisdiction be different from the choice-of-law rules? Why should federal courts have admiralty jurisdiction over cases which ultimately will be resolved by the application of state law? There may be some merit in having a broad rule of jurisdiction because this would enable federal courts in cases within admiralty jurisdiction to apply the appropriate choice-of-law rule. This would allow federal courts to play a meaningful role in protecting the "uniformity" dimension of the Admiralty Clause. Professor Stolz concluded that such an approach could "be justified as some theory of 'protective jurisdiction,'" because every case will involve a question whether there is a commercial (and, therefore, federal) concern with the case." Under the approach suggested in this Article, federal courts in making the federal choice-of-law rule will decide whether or not uniformity is necessary to protect or protect a "national interest."[167] Thus, under the approach I have suggested, the term "recreational boater" is not a talisman for the application of state tort law. There may be cases where the parties include both recreational boaters and commercial interests, for example, where a jet ski collides with a commercial vessel. Such situations will require a different analysis.

The Hypothetical Put to the Test

Finally, let me address the hypothetical, not as the fictional Supreme Court did, but using the approach I have suggested. Admiralty jurisdiction is based on the Admiralty Extension Act and, as stated above, the AEA was intended to extend the liability of vessel owners. In the hypothetical, there is a federal interest in defining a standard of conduct to be observed by those who operate vessels on navigable waters. Maritime law should not only protect the maritime industry, but it should also require the maritime industry to pay its way. In using the general maritime liability rule, the latter interest is promoted because Gaming, Inc. would be held liable. Furthermore, one could argue that holding vessel owners liable for the conduct of persons who become intoxicated on their vessels promotes safety because it provides an incentive to vessel owners to prevent people from becoming intoxicated on their vessels. Intoxicated persons on vessels could become disruptive and interfere with the safe navigation of the vessel.

As to the latter argument, it is merely an extension of the view that

everything that occurs on a vessel in navigable waters might in some manner or under certain circumstances pose a threat to navigation. This view would always justify a uniform law for all vessels regardless of the activity in which the vessel is engaged and regardless of the fact that the national interest in uniformity may be speculative or minimal in a particular situation. I have already disagreed with this position in regard to pleasure craft. I think the same analysis applies to the hypothetical. There are much more direct and effective means for controlling behavior on vessels than by using a federal liability rule to displace state law. The prevention of automobile accidents by drivers who get drunk on ships is not, in my opinion, an objective of maritime law that fits comfortably within the Admiralty Clause and the uniformity it seeks to promote.

As stated above, the choice-of law-decision in AEA cases requires special care. The hypothetical does not involve an issue of the liability of Gaming, Inc. to its employees for injuries sustained in the course of employment. Such cases may turn on the applicability of federal rules relating to the remedies for seamen or persons covered by the LHWCA. The hypothetical does not involve injuries caused by a collision of the LUCKY CAJUN with another vessel or even an allision with a pier or bridge. The vessel sails only in state waters. It is not engaged in interstate or foreign commerce in the sense that it does not transport or facilitate the transportation of goods or people in interstate or foreign commerce. The transportation function itself is minimal. Except for the fact that the vessel derives a profit from the gambling activities on the vessel, the situation is more analogous to pleasure boating situations than to traditional maritime commerce. Most importantly, the hypothetical involves a vessel only in the most marginal way. At the time of the incident in question the vessel was safely berthed. The vehicle that really caused the injury was an automobile not a vessel. The operator of the automobile was not an employee of the vessel owner. The case is about an ordinary automobile accident that occurred ten miles from the water. What federal interest will be served by the application of federal law to resolve the dispute that the Joneses and Browns have with Gaming, Inc.?

On the other hand, there is an important state interest in providing rules to deal with alcohol consumption and the operation of motor vehicles. There is also an important state interest in providing rules relating to the dispensation of alcoholic beverages within the state, including state waters. Those rules may regulate the conduct of alcohol suppliers and impose liability on those who violate the rules. The gaming industry is under heavy state regulation as is the alcoholic beverage industry. I would conclude that the federal maritime interest that would be served by imposing a uniform rule of liabil-

ity on gambling ship operators whose vessels sail only in state waters for brief periods of time for automobile accidents in which their patrons are involved is marginal at best and, that the state interest in creating laws to deal with these situations is substantial. Although the application of the Louisiana Anti-Dram Shop statute in this case would result in a decision for Gaming, Inc., the result would be otherwise in the majority of states that have adopted dram shop liability rules that impose liability on the suppliers of alcohol.[168]

Previously, I stated that the Admiralty Extension Act provided maritime remedies to events that have their impact on land, and that the Act extends the liability of ship owners and operators to injury or damage that occurs on land. Does the application of my choice-of-law approach to the hypothetical which leads to the application of state law and the denial of relief to the injured parties against the shipowner contradict the purposes of the Admiralty Extension Act? I do not believe so. The Act was intended to level the playing field so that parties involved in a common incident would both be bound by the same rules of liability. Despite the fact that the Admiralty Extension Act literally fits the facts of the hypothetical, there is nothing in the language of the Act or in its legislative history from which one could conclude that it was intended to extend maritime law to automobile accidents that occur on land. I believe that the application of maritime law to the suit against Gaming, Inc. would be an extravagant application of the Admiralty Extension Act and would trivialize the Admiralty Clause. In my view the facts simply do not implicate any national interest.

Conclusion

In conclusion, I am fearful that in our quest for uniformity, we may win some battles but ultimately lose the war. As admiralty jurisdiction and maritime law encroach on matters of great local importance to states or as they move inland, political pressure is generated on Congress to temper this expansion. This is what happened with the passage of the Abandoned Shipwreck Act and the Oil Pollution Act of 1990. Furthermore, just as it would trivialize the importance of admiralty jurisdiction and the uniform general maritime law to extend jurisdiction and the application of maritime law to a “collision” between two persons swimming in navigable waters, so does the extension of admiralty law to certain incidents involving recreational boaters and automobile accidents resulting from the consumption of alcohol on local gambling ships or on so-called booze cruises. Unless we apply some brakes to the extension of admiralty law into local matters, we may undermine the integrity of the role of maritime law in furthering national interests. Unless we confine maritime law to areas where our

national interests require it, we tempt a future Supreme Court with little knowledge of maritime law and the movement for international unification to subject maritime law to the rationale of Erie.

In the end, I hope I have persuaded you that, at best, Jensen is not helpful and, at worst, that it is a bad rule. I hope that I have shown that the Maritime Law Association, through its amicus briefs, can play an important role in helping the Supreme Court formulate a better rule for determining when state law may displace the general maritime law. In this respect I challenge you to come up with a better rule than Jensen.