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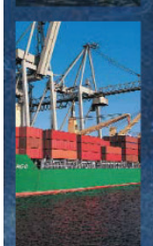


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Revisiting the Seaman's Manslaughter Statute After the *P/V Conception* Tragedy

By: Kenderick Jordan*

Introduction

Since the inception of 18 U.S.C. § 1115 and its predecessor, commonly known as the Seaman's Manslaughter Statute (the "Statute"), many seafarers and shoreside personnel having duties to perform connected to management and navigation of a vessel have been subject to the lenient standard of simple negligence for the unintentional death of passengers or crew aboard vessels. As of the date of this article, there have been at least thirty-two indictments against ship's officers, pilots, owners, and vessel management employees pursuant the Statute.[1] With the most recent indictment of the captain of the *P/V Conception*, in the U.S. District Court for the Central District of California, ship's officers, vessel owners and operators should revisit their own responsibilities pertaining to the safety of a vessel's passengers and crew.

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[1] *United States v. Mitlof*, 165 F. Supp. 2d 558, 570 n.1 (S.D.N.Y. 2001) (as of the decision in *Mitlof*, there were twenty-two (22) reported prosecutions or convictions under the Seaman's Manslaughter Statute or its predecessor). Additionally, there have been seven (7) reported prosecutions or convictions pursuant the Statute, and at least two (2) cases with charges pending, or under appeal, against ship's officers and/or ship management. *See United States v. Boylan*; *United States v. McKee, et al.*

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Managing Editor's Introductory Note

In this edition, we present an article on the Seaman Manslaughter Statute, 18 U.S.C. § 1115, by Kenderick Jordan. Kenderick provides an historical overview and analysis of the cases applying the Statute to seafarers and shoreside personnel having duties to perform connected to management and navigation of a vessel. Kenderick points out that, although this is a criminal statute, simple negligence alone is sufficient to trigger exposure to culpability under the Statute. He suggests that ship's officers, vessel owners and operators should revisit their own responsibilities pertaining to the safety of a vessel's passengers and crew.

Next, in his regular column, Window on Washington, Bryant Gardner reports on legislative, regulatory, international, and private efforts to address greenhouse gas emissions and the goal of de-carbonizing the shipping industry. More broadly, he also reports on efforts by companies making claims and disclosures related to environmental, social, and governance (ESG) compliance, some of which have only a passing relationship with actual compliance, and regulators' efforts to reign in fanciful claims. Bryant concludes that "[t]he sustainability movement is upon us and its waves will soon break on our shores."

We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Revisiting the Seaman's Manslaughter Statute After the *P/V Conception* Tragedy

By Kenderick Jordan

(Continued from page 177)

On September 2, 2019, the dive boat *P/V Conception* was off the coast of Santa Barbara, California when the vessel caught fire, killing thirty-three (33) passengers and one (1) crew member. The captain was indicted for misconduct and negligence of a ship's officer's duty under the Statute, namely, not having a night roving fire watch.

The Statute states:

> Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.
>
> When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully[2] caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1115. In addition to potential imprisonment, individuals are also subject to fines not to exceed $250,000, and corporations not to exceed $500,000.[3]

As such, any person employed on or for a vessel with authoritative duties over the operation of the vessel – or employed for the operations or navigation of the vessel – may be subject to prosecution under 18 U.S.C. § 1115 if their negligence in carrying out the mission of the ship causes death.[4] This statute extends to the owners and management of vessels, as well.[5]

History

In response to the vast increase of casualties aboard steamships in the early 1800's, the United States codified a criminal remedy for negligence resulting in death aboard steamships. On July 7, 1838, the United States enacted the Seaman's Manslaughter Statute "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam."[6] The purpose of the act was to "prevent the constant recurrence of the serious accidents then prevailing in the navigation of the waters of the United States by vessels using steam."[7]

However, the legislation passed was not initially effective in preventing steamship casualties. "In the period 1841-48, there were some seventy marine explosions that killed about 624 persons."[8] Congress began investigating the actual construction and inspection of boilers and steam plants seeking testimony from the Commissioner of Patents for recommendations on how to prevent boiler explosions.[9] Subsequently, Congress passed the Act on August 30, 1852, which created the Steamboat Inspection Service within the Department of the Treasury.[10] This newly created agency had the power to appoint inspectors of steam plants, rather than having U.S. District Court Judges appoint inspectors with minimal qualifications under the Act of 1838.[11]

Again, in 1871, Congress revised the language of the Statute to include the prosecution of inspectors and

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2 It should be noted that courts have held there is a higher standard for corporate executives – "knowingly and willfully" allowing for the negligence. *United States v. Ryan*, 364 F. Supp. 2d 338 (E.D.N.Y. 2005).

3 18 U.S.C. § 3561 (b) and (c).

4 *United States v. Kaluza*, 780 F.3d 647 (5th Cir. 2015).

5 *United States v. Allied Towing Corp.*, 602 F.2d 612, 613 (4th Cir. 1979) (holding that the Double Jeopardy Clause of the Fifth Amendment was not violated when a company knowingly allowed a violation of United States Coast Guard regulations).

6 *United States v. Holmes*, 104 F. 884, 885 (C.C.N.D. 1900).

7 *Id.*

8 *United States v. Ryan*, 365 F. Supp. 2d 338, 344 (E.D.N.Y. 2005) (quoting John G. Burke, *Bursting Boilers and the Federal Power*, in *Technology & History* 119 (Stephen H. Cutcliffe and Terry S. Reynolds eds., 1997)).

9 S. Rep. Exec. Doc. No. 18, at 1 (1848).

10 Act of August 30, 1852, ch.106, 10 Stat. 61 (1852).

11 *Id.*; *see also*, *Ryan*, 365 F. Supp. 2d at 344-45.

public officers under the Statute for "fraud, misconduct, or violation of any law."[12] The Statute largely exists today as it did when it was first enacted, being recodified to its current location and form in 1948. However, its use has evolved over time to include the advances in technology on vessels, and ensure the proper inspection and testing the vessel's equipment.

In its current version, the Statute applies to ship's officers, pilots and other persons employed; owners, charterers, inspectors or other public officers; and corporate executives and officers.[13] With regards to ship's officers, pilots and other persons employed, the United States has indicted captains, chief officers, engineers, pilots, and wheelsmen,[14] but courts have stopped short of allowing prosecution of every worker on board for criminal liability under the Statute.[15] Nevertheless, inspectors of vessels and public officers are also open to culpability under the Statute if, by their negligence, they fail in their duty to properly certify a vessel for safe navigation.[16]

Application and Jurisdictional Limitations

While the Statute has been used broadly to indict persons employed on a vessel having duties to perform connected to management and navigation, it still has its jurisdictional limits. In an unreported order and opinion by the U.S. District Court for the Western District of Missouri, *United States v. McKee, et al.*, the United States indicted the captain of a duck boat, which operated on Table Rock Lake in Branson, Missouri, as well as the general manager and operations supervisor of the company that operated the vessel.[17] The United States alleged that the captain and management employees disregarded weather reports that forecasted severe storms over the Table Rock Lake. While on the lake, the vessel was caught in a storm with winds reported up to 65 miles per hour. As a result of the storm, the vessel took on water and ultimately capsized, killing seventeen (17) passengers and one (1) crew member. The criminal defendants moved to dismiss the government's charges, stating that Table Rock Lake was not a navigable waterway within the jurisdiction of the admiralty court. The court agreed and dismissed the charges against the defendants for lack of jurisdiction. The court reasoned that the Statute, and its historical revisions and legislative history warrant reviewing the court's power to hear the case under general admiralty jurisdiction. The court held that Table Rock Lake is not navigable as "[t]he lake has not been susceptible of use for commercial shipping and in fact has been used exclusively for recreational activities."[18] The court in *McKee* citied to previous Eight Circuit case law which held the Table Rock Lake was non-navigable. In citing the Eighth Circuit's "navigability in fact," test, the *McKee* court continued to hold that the Table Rock Lake could not be used as an "interstate highway of commerce."

The actual application of the statute is also limited by the type of operation of the vessel – commercial or recreational. By its plain language, the Statute only applies to persons employed having duties to perform connected to management and navigation of vessels in commerce.[19] This is further evident by Congress's authority to enact the Statute by its commerce governance power. Consequently, *United States v. La Brecque* addressed the very reach and purpose of the statute with respect to "all captains."[20] In *La Brecque*, the court held that a captain of a non-commercial vessel could not be convicted under the Statute because it was intended for employees of commercial vessels and their management. "Thus, although the defendant is a captain, he is the captain of a non-commercial pleasure vessel. Section 1115 only reaches commercial vessels. Accordingly, the defendant may not be prosecuted under Section 1115 as a captain of a vessel." The court also held that no other person under the statute, not involved in commerce, may be prosecuted under the statute.[21] Upon the plain language of the statute, and

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12 *Id.* at 345.

13 18 U.S.C. § 1115.

14 *See United States v. Oba*, 317 Fed. App'x. 698, 2009 U.S. App. LEXIS 4705 (9th Cir. March 9, 2009) (captain); *United States v. Thurston*, 362 F.3d 1319 (11th Cir. 2004) (chief mate); *United States v. Abbott*, 89 F.2d 166 (2d Cir. 1936) (chief engineer); *United States v. Warner*, 28 F. Cas. 404, 4 McLean, 463, 1848 U.S. App. LEXIS 469, 6 West. Law J. 255 (C.C.D. Ohio 1848) (wheelsman).

15 *See United States v. Kaluza*, 780 F.3d 647, 662-64 (5th Cir. 2015) (holding that two petroleum engineers aboard a drilling rig were not within the definition of "other person employed," as their function aboard was not for marine operations).

16 *Van Schaick v. United States*, 159 F. 847 (2d Cir. 1908).

17 *United States v. McKee*, Case No. 18-CR-05043-01/03-MDH, Doc. No. 104 (W.D. Mo. Dec. 3, 2020).

18 *Id.* (quoting *Edards v. Hurtel*, 717 F.2d 1204, 1205 (8th Cir. 1983).

19 *United States v. La Brecque*, 419 F. Supp. 430, 435 (D. N.J. 1976).

20 *Id.* at 435-36.

21 *Id.* at 437, n.8.

the holding in *La Brecque*, the application of the statute only applies to commercial situations.[22,23]

It should come as no surprise that, when read together with *Le Brecque*, the Statute should apply to bareboat charters that are completely commercial in nature – i.e., vessels being used for trade and established commercial passenger-for-hire purposes. However, there is a modern trend for owners of recreational vessels to "bareboat charter" or "rent out" their boat to others in an attempt to offset the costs of owning a vessel. This has become an increasing area of interest for the United States Coast Guard ("USCG"). In recent years, the USCG has been cracking down on recreational boat owners illegally operating as a vessel for-hire. The USCG has considered a passenger "for-hire" if someone has given "consideration … as a condition of carriage of the vessel."[24] The main issues that USCG has been faced with in combating illegal recreational chartering operations are bareboat chartering recreational boats as a passenger-for-hire vessel without proper USCG credentialing, or being operated by someone without a valid USCG license.[25]

But, does the Statute apply to purely recreational charters, whether done legally or illegally? Because the Statute only applies to commercial ventures, where exactly does a commercial venture begin and end in the context of a recreational vessel owner who bareboat charters out his or her vessel? Is it considered a commercial transaction only between the recreational vessel owner and the charterer? Or, does the commercial transaction extend throughout the bareboat charterer's purely recreational use of the vessel? Would the charterer be subject to this duty under the Statute operating the vessel for solely recreational purposes?

Negligence Standard

As the Statute's language for criminal culpability has remained unchanged, courts have remained true to precedent setting forth the negligence standard. Cases, as far back as 1848, recognized the plain language of the statute, that any "misconduct, negligence, or inattention" on a vessel, causing death, constitutes manslaughter, and that no criminal intent was required.[26] The same standard of negligence under the statute still holds true today.[27] "The term 'negligence' is defined as a breach of duty … A breach of duty is defined as an omission to perform some duty, or it is a violation of some rule or standard of care, which is made to govern and control one in the discharge of some duty."[28] Simple negligence under the Statute is a major departure from the Statute's sister section for federal manslaughter, 18 U.S.C. § 1112. Under federal manslaughter, a person is guilty of manslaughter for the unlawful killing under a "heat of passion" or acting "grossly negligent."[29,30,31]

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22 *Id.* at 437. *But see Hoopengarner v. United States*, 270 F.2d 465 (6th Cir. 1959) (affirming the conviction of a pleasure craft operator that recklessly killed another boater; however, the issue of the Statute's applicability to pleasure crafts was not raised by the defendant).

23 *See Sisson v. Ruby*, 497 U.S. 358 (1990) (holding that a fire at a marina satisfies the admiralty jurisdictional test for disrupting maritime commerce). The act of paying a captain, even for charters, would seem inherently maritime in nature and satisfy any commerce concerns under the Statute. *Sisson*, read together with *La Brecque*, seemingly implies that a captain that was paid to pilot a vessel would be subject to the Statute.

24 46 U.S.C. § 2101(30).

25 Namely, charters of uninspected vessels that exceed the passenger limitations set forth in 46 U.S.C. § 2101(51).

26 *Warner*, 28 F. Cas. 404 (1848); *see also United States v. Farnham*, 2 Blatchf. 528, 25 F. Cas. 1042, 1044, F. Cas. No. 15071, 1853 U.S. App. LEXIS 776 (S.D.N.Y.1853); *United States v. Collyer*, 25 F. Cas. 554, 578, 1855 U.S. App. LEXIS 695 (S.D.N.Y. 1855); *United States v. Keller*, 19 F. 633, 638 (D. W. Va. 1884); *Van Schaick*, 159 F. at 850 (2d Cir. 1908).

27 *United States v. O'Keefe*, 426 F.3d 274, 278 (5th Cir. 2005).

28 *Id.*

29 18 U.S.C. § 1112; *United States v. Pardee*, 368 F.2d 368, 374 (4th Cir. 1966) (stating that there is no general federal criminal common law, however, "Federal crimes being exclusively dependent upon statutes of the United State – certainly the statute's terms, when known to and often derived from common law, are referable to it for interpretation … 'Gross negligence' is to be defined as exacting proof of a wanton or reckless disregard for human life.").

30 *See United States v. Thurston*, 362 F.3d 1319 (11th Cir. 2004). In *Thurston*, the defendant was originally charged under the Statute for simple negligence. *Id.* at 1322. The Defendant moved the trial court to dismiss the indictment, claiming that the United States must plead gross negligence under the Statute. *Id.* The trial court denied the defendant's motion to dismiss, stating that only simple negligence was needed under the Statute. *Id.* The defendant asked the trial court to reconsider its denial of the motion to dismiss. *Id.* After reconsideration, the trial court concluded that gross negligence was an essential element under the Statute. *Id.* at 1321-22. The United States reindicted the defendant, alleging the defendant acted grossly negligent. *Id.* at 1322. The trial court then denied the defendant's motion to dismiss on the basis of double jeopardy. *Id.* The defendant appealed the trial court's decision. *Id.* Although the *trial court* in *Thurston* held that gross negligence was required under the Statute, the Eleventh Circuit only addressed the issue of double jeopardy – not the gross negligence standard under the Statute. Subsequently, the Eleventh Circuit cleared up any doubt holding that the Statute only required simple negligence in *United States v. Alvarez,* 809 Fed. Appx. 562, 569, 2020 U.S. App. LEXIS 10839 (11th Cir. April 7, 2020).

31 However, the United States Appeals Court for the Sixth Circuit has allowed for any heightened negligence standard in *Hoopengarner*, 270 F.2d at 467.

In fact, the court in *United States v. O'Keefe* analyzed the specific distinction between the negligence standards under 18 U.S.C. § 1112 (General Manslaughter) and 18 U.S.C. § 1115 (Seaman's Manslaughter).[32] In *O'Keefe*, the defendant-captain of the *M/V Mary Ann* was indicted on a charge of misconduct or negligence by a ship's officer, causing death, pursuant the Statute.[33] The vessel was operating on the Mississippi River and capsized, resulting in the drowning of a passenger on board.[34] Immediately following the accident, the defendant was instructed to take a drug test, which revealed the captain was under the influence of cocaine.[35] During trial, the defendant requested that the jury be instructed that in order for him to be found guilty under the Statute, the government must prove he was "grossly negligent" instead of simple negligence.[36] The trial court refused the defendant's request, and a jury found the defendant guilty of criminal negligence under the Statute.[37] The defendant appealed the jury instruction, and the U.S. Court of Appeals for the Fifth Circuit held that the trial court did not abuse its discretion in rejecting the defendant's jury instruction request.[38] The court pointed out that the there is a clear difference in the plain meaning of § 1112 and § 1115.[39] While neither statute requires malice, the long historical interpretation of § 1115 and its predecessor statute have made clear "that any degree of negligence is sufficient to meet the culpability threshold."[40]

With the application of the simple negligence standard pursuant to the Statute, the United States seemingly has broad discretion when it comes to prosecuting violations of the Statute. For example, the United States has indicted captains, mates and engineers for failing to have U.S. Coast Guard licenses;[41] failing to ensure the vessel was properly equipped with firefighting equipment and life preservers that were ready for immediate use;[42] failing to divert course pursuant U.S. Coast Guard weather and restricted area warnings;[43] failure to assess incoming weather and allowing a vessel to operate in excess of its Certificate of Inspection;[44] among many other allegations of misconduct and negligence, which includes any violation of statute or rule of navigation.[45] It should be noted that only the Sixth Circuit has held someone to a higher negligence standard under the Statute.[46]

However, while the simple negligence standard certainly applies in the majority of the Circuit Courts, it seems that the government has alleged or proven something more than just simple negligence. When taking a closer look at the facts surrounding the reported case law regarding the Statute, the government tends to show that the indicted person(s) had some element of knowledge or willfulness as to the negligent act – seemingly a willful disregard, even though the Statute does not require this elevated standard, i.e., willingly taking banned substances (cocaine) while performing duties aboard a vessel;[47] willfully ignoring U.S. Coast Guard warnings and reports;[48] knowingly failing to implement customary rules of navigation;[49] and willfully and knowingly engaging in an excessive rate of speed, leading to a fire.[50] One could argue that when the government indicts a person under the Statute, the government will look for something more than an act of simple negligence, because "[a]n error of judgment merely … is not sufficient to fix such misconduct or negligence upon the person against whom such error of judgment is proved."[51]

Constitutionality

The Statute's reach, however, raises a question on Congress's ability to lower the standard of criminal culpability. Does this statute infringe on a person's constitutional rights of due process or equal protection?[52] The simple negligence standard's low bar was also brought to Congress's attention in 1848. While informing Congress of the lenient boiler and steam

32 *O'Keefe*, 426 F.3d at 278.
33 *Id.* at 276.
34 *Id.*
35 *Id.*
36 *Id.* at 277.
37 *Id.*
38 *Id.* at 278.
39 *Id.*
40 *Id.*; *Alvarez*, 809 F. App'x at 569.
41 *Id.* at 564.
42 *Van Schaik*, 159 F. at 848-49.
43 *Oba*, 317 Fed. App'x. at 699-700.
44 *United States v. McKee*, Case No. 18-CR-05043-01/03-MDH, Doc. No. 104 (W.D. Mo. Dec. 3, 2020).
45 *See Indictment of Boylan*, CR 2:20-cr-00600-GW, Doc. No. 1, p.3 (C.D. Cal. Dec. 1, 2020).
46 *Hoopengarner*, 270 F.2d at 467.
47 *O'Keefe*, 426 F.3d at 276.
48 *Oba*, 317 Fed. App'x. at 699-700.
49 *Ryan*, 365 F. Supp. 2d at 340.
50 *Collyer*, 25 F. Cas. at 580.
51 *Id.* at 578.
52 While the constitutionality of the Statute has been challenged, there does not appear to be any challenges to the Statute based on Equal Protection under the Fourteenth Amendment.

plant inspection process, the Commissioner of Patents testified in reference to the Statute:

> The penalties provided in the twelfth section of the law are regarded as too harsh, and it is found that on that account they cannot be enforced. Juries cannot be induced to subject a man to the penalties of manslaughter for an act of negligence to which they find it impossible to attach the degree of guilt which so severe a sentence would seem to imply.[53]

However, U.S. courts still hold simple negligence is all that is required to find someone guilty of manslaughter aboard a vessel.[54]

In *United States v. Alvarez*, the defendant challenged his sentence under the Statute, arguing that Congress unconstitutionally criminalized negligence.[55] The court addressed the Statute's history, language, and purpose when reviewing the constitutionality of the Statute.[56] The court held that it was well within the power of Congress to criminalize negligence, and, relying on Eleventh Circuit precedent, explained that courts will give Congress "the strong presumption of validity" to their ability to enact statutes.[57] The court further stated that the United States Supreme Court has long held that Congress, by unambiguously codifying the culpability requirement, may criminalize negligence for the benefit of the public when the mere negligence may be dangerous to others.[58] As to the defendant's challenges to the Statute's violation of his presumption of innocence, the court stated, "[n]or would we have any basis to hold that § 1115 alters the government's burden to prove a defendant's negligence beyond a reasonable doubt or disturbs a defendant's presumption of innocence or right to be compelled to testify."[59]

Additionally, the Seaman's Manslaughter Statute is not the only federal statute that imposes a simple negligence standard for criminal culpability. In fact, 33 U.S.C. § 1319(c)(1) (the "Clean Water Act") criminalizes simple negligence for the violation of many of the Clean Water Act's subparts. The Ninth Circuit directly addressed the constitutionality of criminalizing negligence under the Clean Water Act in *United States v. Hanousek*.[60]

In *Hanousek*, the defendant was charged with negligently discharging oil into a navigable waterway under 33 U.S.C. § 1319(c)(1)(A).[61] The defendant challenged his conviction as the language of the Clean Water Act only required ordinary negligence, thus, violating his due process rights.[62] The court upheld the defendant's conviction, and stated that the language of 33 U.S.C. § 1319(c)(1) was unambiguous, and the plain meaning of negligence applies to the criminal statute.[63] As to the due process concerns, the court held that when legislation is passed for the public welfare, Congress "may render criminal 'a type of conduct that a reasonable person should *know* is subject to stringent public regulation and may seriously threaten the community's health or safety.'"[64] Interestingly, the court found that the defendant "*knew*" that the type of work being done involved the operation of dangerous equipment, and that was enough to satisfy the language of the Supreme Court in *Liparota v. United States*, when addressing due process under regulations for the public welfare.[65]

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53 S. Rep. Exec. Doc. No. 18, at 29 (1848).

54 *Alvarez,* 809 Fed. Appx. at 568; *see also O'Keefe*, 426 F.3d at 279 ("After evaluating § 1115, we hold that its terms are unambiguous and therefore must be given their plain meaning.").

55 *United States v. Alvarez,* 809 Fed. Appx. 562, 564, 2020 U.S. App. LEXIS 10839 (11th Cir. April 7, 2020).

56 *Id.* at 567-69.

57 *Id.* at 568 (quoting *United States v. Lebowitz*, 676 F.3d 1000, 1012 (11th Cir. 2012)).

58 *Id.* (citing *United States v. Balint*, 258 U.S. 250, 252-53 (1922)); *see also O'Keefe*, 426 F.3d at 278 n.1 (noting the importance of the Statute and its relation to the well-being of passengers, "[o]n the other hand, § 1115 applies only to commercial vessels whose operators and owners, historically speaking, 'daily have the lives of thousand (*sic*) of helpless humans (*sic*) beings in their keeping.'").

59 *Alvarez*, 809 F. App'x at 567 n.1. *See also*, *Collyer*, 25 F. Cas. At 576-78 (stating that the government must prove beyond a reasonable doubt that the negligence was the direct cause of the deaths). *But see, People v. Hao Quan Ye*, 55 Misc. 3d 1214(A), 57 N.Y.S.3d 676, 2017 N.Y. Misc. LEXIS 1574, 2017 NY Slip Op 50580(U) (N.Y. Crim. Ct. 2017) (holding that a statute was unconstitutional on its face for applying an ordinary negligence standard sufficient for culpability, "… utilizing a civil tort liability standard of ordinary negligence in a criminal case violates defendant's rights to due process and his right to be presumed innocent by criminalizing conduct based upon what a 'reasonable person' may think or do, irrespective of the subjective intent ('guilty mind') of the person being charged.") (citing *Elonis v. United States*, 575 U.S. 723 (2015)).

60 *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1998).

61 *Id.* at 1119.

62 *Id.* at 1118.

63 *Id.* at 1121.

64 *Id.* (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985)).

65 *Id.*at 1122.

The logic of upholding the constitutionality of the Statute as one of public welfare parallels *Hanousek*. However, it should also be noted that the Supreme Court denied defendant's petition for writ of certiorari in *Hanousek v. United States*, with Justices Thomas and O'Connor dissenting to the denial of certiorari.[66] In his dissent, Justice Thomas took issue with defining every part of the Clean Water Act as public welfare legislation, and questioned that the public welfare doctrine applied to "persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities."[67]

Justice Thomas's dissent may be illustrative of how the Statute should be viewed presently, as opposed to the view at the time of the Statute's inception in 1836. Looking at the legislative history of the Statute, it was enacted to combat mass casualties as a result of boiler explosions. While it is clear that the Statute was public welfare legislation at the time of its passage, boiler explosions and catastrophic plant failures resulting in death do not pose the same threat today as they did when the Statute was first enacted. It can be argued that operations on vessels today are much safer than the 1800's, thus, the risk to public welfare does not rise to the level that would allow for the criminalization of simple negligence. Courts have held that the negligence standard of the Statute is constitutional, but it seems questionable when applied to a crime as serious as manslaughter. The past need of the Statute, as one of public welfare, may need to be readdressed.

Conclusion

After a thorough reading of the Statute and associated reported cases, a person may be indicted under the Statute, if: (1) they are personnel with authoritative duties that relate to the management or navigation of a vessel; (2) the vessel is operating on a navigable waterway; and (3) the vessel is engaged in commercial activity. As of now, the Statute is in full force and effect, and federal courts have upheld its constitutionality. There is a serious concern that the U.S. Department of Justice is becoming more likely to use the Statute in marine casualties causing fatalities than in its previous use of the Statute from 1836 to 2001. While there appears to be an uptick in the number of reported cases interpreting the Statute, the government has been more active in indicting ship's personnel and managing staff ashore for knowingly and willfully ignoring customary navigation rules and advisories.

A ship's captain, and all officers with authority over the vessel's operation, have a duty to carry out their responsibilities with vigilance and prudence. It is incumbent on the ship's captain to ensure a vessel is seaworthy, even while the vessel is at the dock before the vessel gets underway. The ship captain's responsibilities, which are entrenched in the long history of tradition and maritime law, include the safety of the passengers and crew of the vessel. It is also imperative that all officers properly inspect the vessel's machinery, systems, and lifesaving equipment to confirm their proper operation and integrity, most importantly for the safety of the vessel, crew and passengers, but also to shield themselves from criminal culpability.

Vessel operating companies may want to revisit their implementation and maintenance of vessel safety management systems, shipboard operations and checklists. An increased scrutiny of current company policies and increased internal standards to ensure compliance with all maritime rules, crew competence standards, and regulatory standards may be in the best interest of ship's officers, shoreside management personnel and owners to protect their crew and passengers, and hopefully avoid another disaster like the one aboard the *P/V Conception*, and the potential for criminal culpability.

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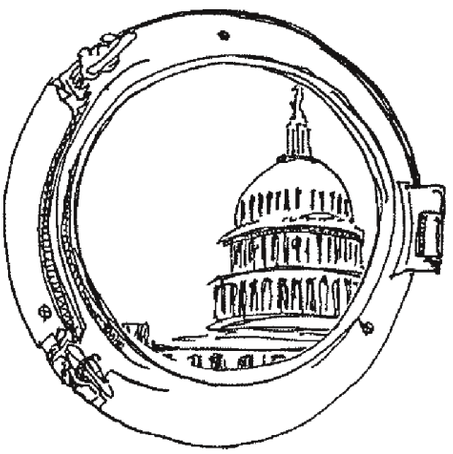
66 *Hanousek v. United States*, 528 U.S. 1102 (2000).

67 *Id.* at 1104.

Window on Washington



Green Wave

By Bryant E. Gardner*

Green shipping and the decarbonization of the industry have been coming for a long time. When Democrats took control of both houses of Congress and the White House earlier this year, it was no surprise that global warming and climate change concerns began sprouting up all around the beltway. Early executive actions, congressional hearings, and legislative proposals all took on a verdant hue, and the maritime industry has not escaped notice. With container shipping capacity extremely tight, supply chains stretched to the breaking point, and record industry profits, policymakers in Washington are looking at new rules and new ways to enforce old rules to decarbonize shipping.

House Lawmakers Look Toward A Carbon-Free Maritime Industry

Earlier this year, the House Committee on Transportation and Infrastructure, Coast Guard and Maritime Transportation Subcommittee held a hearing on a "Carbon-Free Maritime Industry".[1] At the outset of the hearing, the Chairman of the full Committee on Transportation and Infrastructure Rep. Peter DeFazio (D-OR) reported that he has tasked every subcommittee to look at ways to reduce carbon emissions within its jurisdiction, and stated that ocean shipping accounts for 3% of global carbon emissions today, increasing to 10% without significant changes. Subcommittee Chairman Salud Carbajal (D-CA) noted the International Maritime Organization (IMO) goal of reducing carbon dioxide emissions 50% before 2050, and expressed hope that American industry would be able to innovate and lead the way into new energy technologies, creating green jobs at home and eliminating carbon emissions from vessels entirely.

Hearing witnesses presented contrasting views. A witness from the nonprofit research group International Council on Clean Transportation (ICCT) stated that meeting the IMO goal of a 50% reduction in greenhouse gas (GHG) emissions by 2050 relative to 2008 levels will require net zero emission deep sea ships on the water no later than 2030. The witness opined that the technologies to achieve this will include battery-electric ships for near-port operations and short sea routes, hydrogen pressured or cryogenic fuel cells, and ammonia as a hydrogen carrier. He also suggested that wind propulsion and hull air lubrication may be deployed to aid in the competitiveness of zero-carbon fuels. However, the ICCT witness cautioned against reliance on liquefied natural gas (LNG) because of

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[1] *Carbon-Free Maritime Industry: Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the House Committee on Transportation*, 117th Cong. (2021).

methane released during upstream LNG production and from the engine itself downstream, which may make LNG worse for the climate than conventional fuels when accounting for full life-cycle emissions. He also cautioned against reliance upon biofuels because of limited supply, the need to generate them from limited waste, and deforestation concerns.

The ICCT witness suggested that the U.S. Government take action to encourage the development and deployment of zero-emission vessels and fuels along with supporting port and electrification infrastructure, using the Jones Act fleet as a protected market launch platform for new technologies. He also suggested that the development of these technologies in the U.S. would position U.S. businesses to compete for the global deep sea vessel fueling market, contrasted with conventional bunkering hubs often located in overseas ports such as Singapore. Lastly, he advised the Committee that the U.S. should work with key trading partners, including China, Mexico, the European Union (EU), and Canada, to establish zero-emission vessel corridors and associated infrastructure, in addition to the zero-emission vessel cabotage trades proposal.

Striking a similar tone, a witness from the U.S.-based naval architecture firm Glosten called for significant new Federal investments led by the U.S. Department of Energy (DOE) and the U.S. Maritime Administration (MARAD). Also focusing on the domestic Jones Act fleet, the witness suggested that the DOE and MARAD together develop a strategic plan and timeline for achieving low GHG vessel technologies. First, he proposed significant new DOE funding of port infrastructure for electric vessel fueling and alternative fuel bunkering. Second, he proposed MARAD lead and fund collaborative technology development consortia among government, academia, vessel operators, and vessel developers such as Glosten, which was recently awarded a grant by the Federal Transit Administration to design an all-electric passenger ferry in cooperation with MARAD.

The World Shipping Council (WSC), which represents major container carriers in international liner service, also testified before the Subcommittee. WSC offered a marked channel forward to decarbonization through proposals pending before the IMO. Specifically, the industry has proposed to establish an International Maritime Research and Development Board (IMRB) and International Maritime Research Fund (IMRF) under IMO oversight to develop and fund the research work needed to create the technology needed for ships to use low and zero-carbon fuels. Industry advanced the IMRF/IMRB proposal in December 2019, further expanded and detailed in 2021, and it is slated for consideration by the IMO Marine Environment Protection Committee (MEPC) in Fall 2021.

Although meeting the IMO's 2030 GHG goal of increasing overall fleet efficiency by 40% is achievable by operational and design modifications to the current fleet based on fossil fuels, WSC asserted that achieving the 2050 IMO goal of a 50% absolute reduction in emissions will require new fuels and related propulsion, fuel storage, and fuel infrastructure systems not yet in existence. None of the current candidate fuels available today can power large ships in trans-oceanic routes, indicated WSC. Even the rosiest forecasts admit that battery solutions do not work at those ranges. Hydrogen, ammonia, and other fuels have been identified as potential replacements for fossil fuels, but present safety, storage, handling, and production challenges that must be overcome before they are practically available. Overcoming those challenges, or finding other alternatives technologies not yet conceived, will require a well funded, centralized research effort.

To meet the 2050 goal on time, the WSC stated that action must be taken immediately to set the standards for new builds today with a useful life extending 20-25 years. Furthermore, the industry is keen on ensuring that there is a level playing field for all with shared low-carbon fuel technology, shared international standards, and shared research and development costs allocated by a mandatory charge on each ton of vessel GHG emissions, expected to generate approximately $500 million per year over a 10-year period—or $5-$6 billion of industry funding. The WSC indicated that nation-based initiatives or regional initiatives are likely to lead to slower development, patch-work methods, and patch-work rules which may further delay development of the needed technologies and make compliance more challenging. For example, WSC noted that in the absence of prompt forward movement by IMO, the EU has begun unilaterally seeking to extend its own Emissions Trading System (ETS) to the global shipping sector by imposing extraterritorial GHG rules on the last voyage leg into the EU and last voyage legal out of the EU for all vessels calling EU ports. While some observers have suggested the EU's move is intended to spur IMO's progress, the threat is real and another reason to expeditiously move toward a global standard.

U.S. Enforcers Clamping Down on Sustainability Disclosures, Greenwashing

In Washington, it has become fashionable to paint every new policy idea as a green one, in hopes of giving it more appeal to the Democratically controlled legislative and executive branches— even in cases of proposals that are not really that green to begin with. Companies have also

ventured out on this limb with marketing and investment materials, sometimes without sufficiently verifying and vetting the truth of environmental and sustainability claims made, and always amid varying interpretations of what disclosures are appropriate. Regulators have taken note, and are now beginning to clamp down on claims and disclosures related to environmental, social, and governance (ESG) compliance.

On May 20, 2021, President Biden issued an Executive Order calling for a comprehensive government-wide strategy aimed at climate-change financial risks.[2] The Order will require enhanced reporting and disclosure obligations regarding climate risks and expanding scrutiny of those subject to the Order. It will also require new sustainability disclosures by Federal contractors. The Securities and Exchange Commission (SEC) announced the creation of a Climate and ESG Task Force within the Division of Enforcement, and solicited comments regarding new disclosure rules. Senator Elizabeth Warren (D-MA) and Representative Sean Casten (D-IL), who have introduced the Climate Risk Disclosure Act of 2021,[3] submitted comments calling for new climate-related disclosures tracking those which would be required under the Act, including governance structures to identify climate risks, actions being taken to address climate risks, and likely financial impacts. A dozen Democratic State Attorneys General submitted comments encouraging the SEC to "mandate that both public and private companies provide specific, standardized climate-related disclosures as part of their securities filings."[4] Furthermore, they opined that "a majority of public companies are failing to publicly reckon with the likely impact of climate change on their businesses."[5] By contrast, comments submitted by a group of 16 Republican State Attorneys General questioned the SEC's authority to require expanded ESG disclosures and called on the SEC to "remain focused on its historic mission and role rather than seeking to expand its congressional mandate into unrelated social matters—particularly where companies are showing themselves adept to provide the type of information that customers and investors actually demand in this area."[6]

Senator Rubio (R-FL), introduced the "Mind Your Own Business Act of 2021"[7] which would empower shareholders to sue corporations and their executives if their business strategies deviate from fiduciary duties to maximize investor returns in pursuit of "'woke' social policy actions."[8] The SEC has announced it expects to issue proposed new disclosure rules in late 2021.

Regulators are moving forward with legal action on climate-related ESG without waiting for new rules. Connecticut, Delaware, Minnesota, Massachusetts, New York, and the District of Columbia have all commenced legal action against corporate defendants alleging failures to disclose climate-related risks in violation of existing laws, including consumer protection, fraud, and unfair trade acts.[9] Last summer, the Federal Trade Commission issued a final report on its settlement with Volkswagen stating that the automaker had repaid a total of more than $9.5 billion to car buyers from the company's deceptive "clean diesel" advertising.[10] Shortly thereafter, the SEC announced that Fiat Chrysler agreed to settle charges it made misleading disclosures about its emissions control systems under a $9.5 million civil penalty.[11]

Private litigants have also commenced actions pursuing companies for alleged "greenwashing" of their businesses through false sustainability and decarbonization claims. Greenpeace and other environmental groups recently filed a complaint against Chevron before the Federal Trade Commission alleging deceptive advertisements overstating the energy company's investment in renewable energy and commitment to reducing fossil fuel pollution.[12] Moreover, plaintiffs filed a class action

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2 Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

3 S. 1217, 117th Cong. (April 19, 2021); H.R. 2570, 117th Cong. (April 15, 2021).

4 Letter from R. Bonta, Attorney General, State of California et al. to Hon. Gary Gensler, Chair, Securities and Exchange Commission (June 14, 2021).

5 *Id.*

6 Letter from P. Morrissey, Attorney General, State of West Virginia et al. to Hon. Gary Gensler, Chair, Securities and Exchange Commission (June 14, 2021).

7 S. 2829, 117th Cong. (Sept. 23, 2021).

8 *Id.*

9 *State of Connecticut v. Exxon Mobil Corp.*, Docket No. HHDCV206132568S (Conn. Super. Ct. Sept. 14, 2020); *State of Delaware v. BP Am., Inc. et al.*, Docket No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020); *Dist. of Columbia v. Exxon Mobil Corps., et al.*, 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020); *State of Minnesota v. Am. Petroleum Institute et al.*, Docket No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020); *Commonwealth of Massachusetts v. ExxonMobil Corp.*, Docket No. 1984CV03333 (Mass. Super. Ct. Oct. 24, 2019); *People of the State of New York v. Exxon Mobil Corp*., Docket No. 452044/2018 (N.Y. Sup. Ct. Oct. 24, 2019).

10 Federal Trade Commission, *In Final Summary, FTC Reports Volkswagen Repaid More than $9.5 billion to Car Buyers Who Were Deceived by "Clean Diesel" Ad Campaign* (July 27, 2020).

11 Securities and Exchange Commission, *Fiat Chrysler Agrees to Pay $9.5 Million Penalty for Disclosure Violations* (Sept. 28, 2020).

12 R. Schleeter, Greenpeace, *Greenpeace jointly files FTC complaint against Chevron* (Mar. 16, 2021).

in the United States District Court for the Southern District of New York alleging that Oatley, a vegan milk maker, misled consumers about its green credentials, causing shares to tumble by 7%.[13] Management will face challenges from both sides of the issue. Tracing the concepts outlined in Senator Rubio's "Mind Your Own Business Act of 2021," private litigants are also sharpening their pencils in preparation for actions against companies allegedly pursuing social goals at the expense of fiduciary duties to maximize investor returns under state law.

Retail and institutional investors such as Blackrock, Inc., have also doubled-down on the ESG movement and committed to increase sustainable investing. Recently, Blackrock suggested ESG investing will become a $1 trillion category by 2030.[14] Commentators from Deloitte predict that ESG-mandated assets in the U.S. will grow at triple the rate of non-ESG assets and will comprise half of all professionally managed assets by 2025.[15] Morningstar, among others, offers a suite of ESG products intended to assist investors with selection of sustainable and socially conscious ventures.[16] ESG investor ratings differ in their emphasis on whether the evaluated company is one an investor might consider for ethical reasons, versus whether the company has substantial financial or structural risk arising out of a changing ESG and sustainability landscape. Moreover, this Spring the SEC issued a "risk alert" warning that in many cases investment portfolio practices are not keeping up with ESG claims and investment advisers' internal controls to track ESG compliance are often inadequate.[17]

Private capital flows, increased disclosure rules, mounting enforcement efforts, and new litigation risks all point towards additional ESG disclosures. But hand in glove with such disclosures are the risks of navigating the different interpretations advanced by regulators, investors, environmental groups, and the courts amid accusations of "greenwashing" and violations of securities disclosure rules, fiduciary duties to investors, and consumer protection rules. The maritime industry, particularly tanker operators, offshore service providers, and others dependent upon traditional fossil fuels as part of their business model and not just for bunkers, should take note and review their current ESG disclosure policies. The sustainability movement is upon us and its waves will soon break on our shores.

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[13] *Bentley v. Oatly Group AB*, No. 1:21-cv-06485 (S.D.N.Y. July 30, 2021).

[14] L. Gurdus, *ESG investing to reach $1 trillion by 2030, says head of iShares Americas as carbon transition funds launch*, CNBC (May 8, 2021), https://www.cnbc.com/2021/05/09/esg-investing-to-reach-1-trillion-by-2030-head-of-ishares-americas.html.

[15] S. Collins & K. Sullivan, *Advancing environmental, social, and governance investing* (Feb. 20, 2020), https://www2.deloitte.com/us/en/insights/industry/financial-services/esg-investing-performance.html.

[16] *See* https://www.morningstar.com/products/esg-investing.

[17] Securities and Exchange Commission, *The Division of Examination's Review of ESG Investing* (April 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf.

Recent Developments

Arbitration

Pacelli v. Vane Line Bunkering, Inc., 2021 U.S. Dist. LEXIS 133033 (S.D.N.Y. July 16, 2021) (Cronan)

Holding: The court declined to overturn an arbitration award to a tankerman on a barge based on manifest disregard of the law or for evident partiality based on disclosures because the tankerman had heard of the conflict prior to arbitration and failed to object.

Daniel Pacelli was a tankerman for the Vane Brothers working on a barge in New York Harbor. Pancelli was injured when he slipped on the icy deck of a barge during a nor'easter. Pacelli brought a JAMS arbitration action against the brothers, which assigned an arbitrator and disclosed that the arbitrator had no prior or open cases with any of the parties but did have one open case involving counsel for the vessel owner.

After the arbitration hearing, the arbitrator disclosed he was an owner panelist of JAMS. Upon learning this information, Pacelli did not object at that time, but eight months later, once the arbitrator had issued an award of $986,750 in damages, Pacelli petitioned to vacate the award.

Pacelli argued that the arbitrator acted in "manifest disregard of the law" and there was "evident partiality . . . in the arbitrator." Pacelli argued the arbitrator's partial ownership of JAMS and JAMS's business relations were alone enough to establish evident partiality. Judge Cronan held that Pacelli could not meet the "high hurdle" that an award may not be vacated for manifest disregard of the law if there is a "barely colorable justification" for the outcome.

Judge Cronan disagreed with Pacelli's argument that he failed to object to the disclosure that was made because he did not want to antagonize the arbitrator. Further, Pacelli failed to show the arbitrator's ownership in JAMS was material or connected to the ultimate outcome.

The court declined to modify the award and Pacelli's petition to vacate the arbitration was denied.

Submitted by SPB

Asbestos

Barrosse v. Huntington Ingalls Inc., et al., 2021 U.S. Dist. LEXIS 182939 (E.D. La. Sept. 24, 2021)

Decedent filed suit for alleged asbestos exposure that occurred between 1969 and 1979 while working for defendant Avondale Shipyards. Following decedent's death, his spouse and children amended the claim to assert a survival action and claimed they were injured through exposure to asbestos on decedent's work clothes. Plaintiffs disclaimed any rights under the Longshore and Harbor Workers' Compensation Act. Avondale moved for summary judgment seeking dismissal of plaintiffs' claims as barred by the LHWCA, which Avondale argued preempted any state law claims.

The first issue for the court to determine was the applicable version of the LHWCA. Avondale argued that the post-1972 amendments applied because decedent's mesothelioma was not manifest until 2020. Plaintiffs argued that the pre-1972 version of LHWCA applied because exposure occurred before 1972. The court found that Fifth Circuit precedent required that it apply the manifestation rule meaning that the version of the statute in effect in 2020 would apply to the claim.

Applying the post-1972 amendments to the LHWCA, the court concluded that decedent could have brought a claim for benefits under the LHWCA against Avondale because he met both the status and situs requirements. Decedent worked on vessels under construction at the time of his exposure and was, thus, a "harbor worker" under the LHWCA. The court further found that any exposure plaintiff had after leaving the Avondale premises occurred as a result of his work at Avondale, thus making his off-site exposure subject to the LHWCA.

The court then considered whether the LHWCA preempts state tort law claims. Although plaintiff was in "a twilight zone" and could have asserted claims for Louisiana workers' compensation benefits, the same did not hold true for state tort claw claims. The court concluded that state tort law claims were preempted by the LHWCA and that plaintiffs' exclusive remedy was for workers' compensation benefits.

The court also rejected plaintiffs' argument that retroactive application of the LHWCA was unconstitutional. The court found that Congress could retroactively expand the extent of the LHWCA's coverage to asbestos exposure cases. Application of the manifestation rule was appropriate and protected workers by allowing them to seek compensation benefits. Thus, the court granted Avondale's motion for summary judgment and dismissed all claims against Avondale.

Submitted by KMM

Gay v. A.O. Smith Corp., 2021 U.S. Dist. LEXIS 119013, 119065 (W.D. Pa. June 25, 2021) (Stickman)

Holding: The District court held Pennsylvania substantive law applied because, although some of his exposures occurred on a Navy submarine, "a court may apply state law if it does not conflict with federal admiralty law."

Plaintiff-Allisa Gay brought claim alleging Decedent Carl Gay developed mesothelioma from exposure to Defendant-A.O. Smith Corporation, *et al.*'s asbestos-containing products. Gay also argued Pennsylvania law would apply to the action.

Judge Stickman held Pennsylvania law applied because "a court may apply state law if it does not conflict with federal admiralty law." The judge also applies the "substantial factor" test and concluded that the evidence was insufficient to establish that the decedents were exposed to asbestos from the defendant's products.

The District Court granted summary judgment in favor of the Defendants.

Submitted by SPB

In re Asbestos Products Liability Litigation (No. VI), DeVries v. General Electric Co., 2021 U.S. Dist. LEXIS 127023 (E.D. Pa. July 8, 2021) (Robreno)

Holding: The Court held the Supreme Court precedent *Air & Liquid v. DeVries* which established a two-prong test called the "bare metal defense" applied. The Court held the family of a Navy sailor failed to satisfy the requirement of the bare metal defense that the turbines required the incorporation of asbestos insulation.

Plaintiffs, the beneficiaries of John DeVries, contend that DeVries was exposed to asbestos while in the United States Navy between 1957 and 1960 while serving on the U.S.S. TURNER, a Gearing class destroyer. The beneficiaries allege DeVries was exposed to asbestos dust from insulation attached to the turbines which had been delivered by GE to the shipyard "bare metal," which led to his asbestos-related injury.

The District Court previously granted summary judgment in favor of GE and CBS after finding that they were not liable in light of the "bare metal defense," holding that a manufacturer was not liable for injuries caused by asbestos parts not supplied by that manufacturer.

The Supreme Court remanded the case after announcing the rest for the bar metal defense under maritime law *Air & Liquid v. DeVries*, and Judge Robreno applied the newly formulated test. The first prong of the test enunciated by the Supreme Court is whether the "product requires incorporation of the part" which makes "the integrated product . . . dangerous for its intended uses." The Plaintiffs were unable to show that the turbines required asbestos insulation, that GE and CBS had reason to believe these hypothetical turbines were dangerous, and where they had no reason to believe the turbines' users would realize that danger. Therefore, the Plaintiffs were unable to fulfill the first prong of the test.

Because the Plaintiffs failed to meet the first prong of the bare metal test, the Court granted summary judgment in favor of GE and CBS.

Submitted by SPB

Mann v. A.O. Smith Corp. (In re Asbestos Products Liability Litigation (No. VI)), 2021 U.S. Dist. LEXIS 111559 (E.D. Pa. June 15, 2021) (Goldberg)

Holding: The District Court held maritime law was applicable, reasoning "it is well established that a lawsuit arising from alleged asbestos exposure while working aboard a Naval ship, whether at sea or at drydock, is governed by maritime law."

Richard Nybeck originally filed a personal injury action against multiple defendants asserting claims for alleged harmful, occupational exposure to asbestos and his development of lung cancer. Plaintiff-Barbara Mann, Personal Representative of the Estate of Richard Nybeck, was substituted as plaintiff upon Nybeck's passing.

Mann claimed Nybeck's exposure to asbestos occurred aboard the battleship *USS New Jersey* and the exposure was a substantial factor in causing Nybeck's lung cancer. Mann alleged Pennsylvania law applied, while Defendant-Buffalo alleged maritime law applied.

Judge Goldberg decided that alleged asbestos exposure while working aboard a Naval ship is governed by maritime law and decided a two-factor test must be met in order for the Plaintiff to succeed: showing 1) that the plaintiff was exposed to the defendant's product, and 2) that the product was a substantial factor in causing the plaintiff's injury.

The District Court held there was insufficient evidence for any reasonable jury to determine that Nybeck was exposed to Buffalo asbestos-ridden products such that they were a substantial factor in his development of lung cancer. The District Court granted summary judgment in favor of Buffalo.

Submitted by SPB

Choice of Law

RMI Holdings v. Aspen Am. Ins. Co., 2021 U.S. App. LEXIS 20926 (11th Cir. July 15, 2021)

RMI Holdings (RMI), a Georgia corporation, insured its vessel the *Leelanau* with Aspen American Insurance Company (Aspen), a Texas insurer headquartered in Connecticut. Offshore Risk Management (ORM), a Florida LLC, represented RMI as the broker who secured the insurance policy. The *Leelanau* was damaged by a hurricane while moored in a Florida port. RMI filed an insurance claim on the vessel and Aspen denied coverage.

RMI filed suit in the United States District Court for the Northern District of Florida against Aspen for breach of the insurance policy and other claims against ORM and USI Insurance Services LLC, RMI's agent for the renewal of the insurance policy which had an office in Florida. Aspen asserted a counterclaim against RMI seeking a declaration that its policy did not cover the vessel damages. All parties other than USI moved for summary judgment. The district court determined that Florida law applied by using the Second Restatement's most significant relationship test, granted summary judgment for RMI and, under Florida law, held that RMI was entitled to attorney fees. Aspen appealed.

The United States Court of Appeals for the Eleventh Circuit, reviewing the district court's determination on choice-of-law *de novo*, upheld the ruling. The Eleventh Circuit also applied the Second Restatement's most significant relationship test and considered the five factors in Section 188 of the Restatement. Applying these factors, the Court found that the majority of the factors favored the application of Florida law. As the most important contacts were that the contract was negotiated in Florida, finalized by delivery to a Florida insurance broker, the parties expected the *Leelanau* would be moored in Florida, and Aspen calculated its rates based on the risk being in Florida, the Eleventh Circuit affirmed the district court's grant of summary judgment and supplemental order awarding attorney fees.

Submitted by JAY

COGSA

MOL (America), Inc. v. Hepta Run, Inc., 2021 U.S. Dist. LEXIS 155032 (S.D. Tex. Aug. 17, 2021) (Hughes)

Holding: Judge declined to apply COGSA in international shipments; COGSA (with its package limit) did not preempt state law and bailment claims for damage after discharge from vessel.

Nike, Inc. hired Mitsui O.S.K. Lines, Ltd., to ship its sportswear from factories overseas to the U.S. Nike shipped four containers through Mitsui's agent in America, MOL, Inc.

MOL sent the four containers from Vietnam on its ship, the MOL COMMITMENT, which arrived in Los Angeles. From there the BNSF Railway Company carried the containers from the ship to Texas. MOL hired Hepta Run, Inc. a trucking company to move the containers from the train to the Academy store in Katy, but all four contains were stolen.

Mitsui brought the action against Hepta Run for breach of bailment and moved for summary judgment. Hepta Run responded by claiming the package limitation from the Carriage of Goods by Sea Act ("COGSA") that was allegedly applicable to Hepta Run under the Himalaya Clause in Mitsui's bill of lading and the US Clause Paramount that made COGSA applicable throughout the contract of carriage. Hepta Run argued that its liability was limited to $2000, ($500 for each of the containers).

Judge Hughes held that Mitsui's state law and bailments claims were not preempted by COGSA and Hepta Run failed to exercise requisite care in storing the containers, they were left in an open air lot without security offices or alarms. Therefore, Judge Hughes awarded judgment to Mitsui in the amount of $1,346,920.82.

Submitted by SPB

Woods Hole Oceanographic Institution v. ATS Specialized, Inc., No. 17-12301 (D. Mass. Aug. 20, 2021) (Gorton)

**Undersigned counsel represented a party in the matter.*

Holding: The court decided COGSA did not apply to a truck fire prior to the ocean carriage because there was no bill of lading in place and there was no documentation of the parties agreeing to the application of COGSA.

The Australian National Maritime Museum arranged for the transportation of Woods Hole Oceanographic Institution's submarine, the DEEPSEA CHALLENGER, to the Australian Museum for a two-year loan of the submarine. Ocean carrier Wallenius agreed to donate the ocean carriage of the submarine from Baltimore, and ATS Specializes was engaged to transport the submarine via tractor-trailer from Woods Hole, Massachusetts to the Port of Baltimore.

During the transport, the rear wheel of the trailer caught fire during the inland carriage, and the fire spread to the submarine, causing substantial damage. Woods Hole brought this action against ATS, which asserted that the suit was untimely based on the one-year limitation in the Carriage of Goods by Sea Act since WHOI filed this lawsuit more than two years after the fire.

The fire occurred before the ocean carriage, therefore no bill of lading had been issued by Wallenius and Wallenius never issued any waybill because the submarine caught fire before reaching the Port. Nor was any documentation containing contractual language expressly extending the application of COGSA ever agreed to. Judge Gorton held the shipment was outside the scope of COGSA, and therefore was not barred by the limitation period in COGSA.

Submitted by SPB

Cruise Lines

Yusko v. NCL (Bah.), Ltd., 4 F.4th 1164 (11th Cir. 2021)

Plaintiff Joann Yusko (Yusko) sued Defendant NCL (Bahamas) Ltd. in the United States District Court for the Southern District of Florida for injuries she sustained while a passenger aboard a cruise ship owned by NCL. Yusko was injured on the cruise ship when she danced with a crewmember in an event sponsored on the cruise. NCL moved for summary judgment. The district court granted NCL's summary judgment motion and held that a shipowner is not liable to a passenger under general maritime law unless it had actual or constructive notice of the risk-creating condition that led to her injury under the ruling of the United States Court of Appeals for the Eleventh Circuit in *Keefe v. Bahama Cruise Line, Inc.,* 867 F.2d 1318 (11th Cir. 1989). Yusko appealed.

The Eleventh Circuit reversed the district court's grant of summary judgment and remanded the case for further proceedings. The Court held that the district court applied the wrong standard in applying the holding in *Keefe*. While the Court had required in *Keefe* and in other maritime cases that the shipowner have actual or constructive notice of the risk-creating condition that caused an injury, those cases addressed the direct liability of the shipowner, not a tort claim based on vicarious liability. Yusko's tort claim was based on vicarious liability and the Eleventh Circuit never meant the notice requirement in *Keefe* to apply to maritime negligence claims proceeding under a theory of vicarious liability. The Court noted that while *Keefe* and other cases cited by NCL involved dancing on a cruise ship, Yusko's complaint alleged vicarious liability (unlike those cases) and thus the district court should not have applied the notice requirement it did in granting summary judgment in favor of NCL.

Submitted by JAY

Forum Selection Clause

In re Hapag-Lloyd Aktiengesellschaft, 2021 U.S. Dist. LEXIS 123150 (S.D.N.Y. June 30, 2021) (Lehrburger)

Holding: Court declined to enforce forum-selection clauses in bills of lading as they would lessen the carrier's liability under COGSA.

This case arose out of a fire on a containership, the M/V YANTIAN EXPRESS, during its transatlantic journey from Sri Lanka to New York. After damage to a number of containers on board, the owner and operator of the vessel, Hapag-Lloyd brought this limitation action in the United States District Court for the Southern District of New York seeking exoneration from or limitation of liability pursuant to 46 U.S.C. §§ 30511. Ocean Network, a vessel-owning common carrier, entered into service contracts and bills of lading with most of its customers for the carriage of its customers' cargoes. The bills of lading contained a Singapore forum-selection clause and the service contracts contained a New York arbitration clause.

Following the incident, various cargo interest brought claims against Hapag, ONE and Yang Ming for damage,

loss or delay arising from the fire and salvage efforts; and for reimbursement for any amounts the cargo interests might be called upon to pay for general average or salvage. Ocean Network moved to dismiss the third-party complaints based on the forum-selection clauses.

Magistrate Judge Lehrburger concluded that the clause was mandatory and binding on the cargo claimants as it included the language "must be brought." However, Magistrate Judge Lehrburger recognized if the clause were enforced, the court in Singapore would apply the limitation of liability in the 1976 Limitation Convention that would limit the recovery to an amount substantially less than the recovery under the Carriage of Goods by Sea Act (COGSA). Magistrate Judge Lehrburger recommended that Ocean Network's motion to dismiss the third-party actions be denied.

In making his decision, Magistrate Judge Lehrburger considered the argument that the forum-selection clauses should not be enforced because it would frustrate the purpose of the Limitation Act to resolve all issues in a single proceeding. He did not conclude that the complexity of the limitation proceedings was sufficient to render the clauses unenforceable.

Magistrate Judge Lehrburger did not have to address whether there was a conflict in the forum selections as the claimants had not sought to enforce the arbitration agreement and the clauses in the bills of lading were unenforceable.

Submitted by SPB

Turner v. Costa Crociere S.P.A., 9 F.4th 1341 (11th Cir. 2021)

Plaintiff Paul Turner (Turner) sued Defendants Costa Crociere S.P.A. and Costa Cruise Lines, Inc. in the United States District Court for the Southern District of Florida seeking damages for himself and a putative class under general maritime law on various grounds, including negligence, intentional affliction of emotional distress, and misleading advertisement. Turner and other passengers aboard Defendants' cruise ship were exposed to, and contracted, COVID-19. Turner's passage ticket contained a *forum non conveniens* clause that provided that all claims associated with the cruise be litigated by an Italian court. Defendants moved to dismiss Turner's claim in the Southern District on *forum non conveniens* grounds. The district court granted Defendants' motion as the forum selection cluse was enforceable, did not contravene public policy, was not fundamentally unfair, and the *forum non conveniens* clause favored dismissal. Turner appealed the ruling.

The United States Court of Appeals for the Eleventh Circuit upheld the district court's dismissal and held that the passage ticket clause was enforceable under general maritime law as such clauses are presumptively valid and Turner failed to make a strong showing that the enforcement would be unfair or unreasonable. While Turner alleged enforcement of the clause would be fundamentally unfair to require the class members to travel to Italy during COVID times, Defendants produced evidence that the plaintiffs would not necessarily need to appear in person. The Court also rejected Turner's claim that the district court failed to apply the proper analysis; the lower court properly applied the modified approach set forth in *Atlantic Marine Constr. Co., v. United States Dist. Court.,* 571 U.S. 49 (2013) in analyzing the forum selection clause. Therefore, the Eleventh Circuit upheld the district court's dismissal of the case.

Submitted by SMM

Jones Act

Witbart v. Mandara, 2021 U.S. App. LEXIS 29285 (11th Cir. Sept. 28, 2021)

This action arose when Appellant brought an action against Appellee under the Jones Act and General Maritime Law alleging failure to provide maintenance and cure for the condition in her neck and spine.

After the bench trial, the district court found that: (1) Appellant had a serious, debilitating medical condition that predated her employment with Appellee; (2) Appellant intentionally misrepresented and concealed her preexisting condition from Appellee before her initial and subsequent employment contracts; (3) the undisclosed condition was material to Appellee's decision to hire Appellant; and (4) there was a causal connection between the withheld condition and the condition Appellant complained of in her lawsuit.

Appellant argued that the district court erred in not applying *Vaughan v. Atkinson*, 369 U.S. 527 (1962), to this case. Appellant claimed that *Vaughan* requires courts hearing maintenance cases to construe disputed medical evidence in the seaman's favor. The United States Court of Appeals for the Eleventh Circuit found this to be an incorrect reading of the case. *Vaughan* resolved an ambiguity in favor of a seaman regarding the amount of maintenance and cure owed by the shipowner. *Vaughan* did not state that all ambiguities, or even evidentiary ambiguities, were to be resolved in every seaman's favor.

The Eleventh Circuit affirmed the district court's final judgment in favor of Appellee.

Submitted by SMM

LHWCA

Fetter v. Maersk Line Ltd., No. 20-1426 (3d Cir. July 15, 2021) (Jordan)

Holding: Circuit Court Judge Jordan affirmed the district court's decision finding the exclusive remedy of day engineer who performed repair and maintenance work on ships in port was the LHWCA and not the Jones Act.

Appellant Jason Fetter was injured while removing a stuck injector on the main engine of the M/V MAERSK MONTANA, owned by Maersk Line, Ltd. Fetter appealed the entry of summary judgment in favor of Appellees Maersk Line, Limited and 2MC Mobile & Mechanical Repair, LLC on his negligence and Jones Act claims.

Maersk hired temporary "day engineers" to perform repairs and maintenance when ships were called to port in Newark, New Jersey, and Maersk hired the engineers through its collective bargaining agreement with the seafarer's union, the Marine Engineers Beneficial Association. Pursuant to the collective bargaining agreement, Union billed Maersk for the day engineers' wages and Maersk paid the wages directly to the Union.

The MAERSK MONTANA's captain requested five Union day engineers to perform repair and maintenance tasks while the ship was at port. A 3MC employee, Greg Higgs, supervised the engineers. Fetter, a member of the Union, bid on and received one of the day engineer jobs aboard the MONTANA with the understanding the work was for one day and that he would not sail with the vessel.

As a result of Fetter's injury, he filed a common-law negligence suit against Maersk in the state court in Houston, Texas and Maersk removed the matter to The United States District Court for the Southern District of Texas, which was then transferred to the United States District Court for the District of New Jersey. Fetter then added a Jones Act claim against Maersk Line and added 3MC as a defendant.

The defendants moved for summary judgment, arguing Fetter was not a Jones Act seaman and that his negligence claims were barred by the exclusivity provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA").

Judge Hayden granted the motion and Fetter appealed the United States Court of Appeals for the Third Circuit. The Third Circuit addressed whether Fetter was a borrowed servant of Maersk Line, whether Griggs was a borrowed servant, thus barring Fetter from bringing a negligence claim against 3MC under LHWCA, and whether Fetter was a "seaman" for the purposes of the Jones Act. To determine if a borrowed servant relationship existed, the court applied the Ruiz factors enunciated by the United States Court of Appeals for the Fifth Circuit: 1) whether the borrowing employer was responsible for the borrowed employee's working conditions and 2) whether the employment was of such duration that the borrowed employee could be presumed to have acquiesced in the risks of his new employment.

The court found no reasonable juror could find that Fetter was not Maersk's borrowed servant as Maersk retained ultimate control over the Fetter, and thus, Fetter was barred from bringing a common law tort claim against Maersk. The court also decided Higgs was a borrowed servant of Maersk's, thus barring Fetter from suing 3MC for negligence. And finally, the court decided because Fetter was not regularly exposed to the perils of the sea during his employment, he was not a seaman covered by the Jones Act.

Submitted by SPB

Limitation of Liability

Freedom Unlimited v. Taylor Lane Yacht & Ship, LLC, 2021 U.S. App. LEXIS 24524 (11th Cir. Aug. 17, 2021)

This action arose when a crew member aboard the M/Y FREEDOM ("Vessel") was severely injured when a cable from the crane, owned and operated by Appellee, failed in the area where the crew member was working. Appellant was the owner of the Vessel and had a contract with Appellee to perform maintenance on the Vessel.

The injured crew member filed suit against Appellant and Appellee in state court. Appellant filed a limitation of liability action in federal district court and stipulated the value of the Vessel to be $29,893,000. The crew member filed a claim in the limitation action for Jones Act negligence and unseaworthiness. Appellee also filed a claim seeking contribution and indemnity from

Appellant arguing that although the contract with Appellant was unsigned, it was an implied contract.

The crew member filed a motion to lift the stay in federal court so he could pursue his action in state court. To permit the state court action to proceed while still preserving Appellant's rights under the Limitation Act, the crew member made six stipulations, two of which were at issue in this decision. First, he stipulated that he would wait until the Limitation Act limits were decided before seeking to enforce any judgments. Second, he stipulated that, once the court decided those limits, he would respect them, not seeking to "enforce any judgment that would require the Petitioner to pay for damages in excess of" the limitation fund.

Appellant objected to the motion to lift the stay, arguing that the injunction should not be stayed because Appellee did not file similar stipulations for its contribution claim and thus Appellee's claims for attorney's fees and costs under its implied contract theory were separate from any liability to the crew member. Because they were separate, the crew member's stipulations could not protect Appellant against excess liability. Appellant also argued that the crew member's stipulations were inadequate because this was not a single claim case and thus Appellee was required to enter into stipulations which it had not. The District Court lifted the stay and the Appellant appealed. The Eleventh Circuit affirmed the District Court's ruling.

In regard to Appellant's first argument, the Eleventh Circuit applied the personal contract doctrine in holding that the Limitation Act does not limit a ship owner's liability for the personal acts of the owners done with knowledge. The contract between Appellant and Appellee was a personal contract made with the owner's knowledge.

In regard to the second argument, the Eleventh Circuit held that because the only other claimant was Appellee and Appellee's only noncontractual claim was a claim for contribution, the crew member's stipulation that he would "not seek to enforce any judgment rendered in any state court, whether against the [shipowner] or another person or entity that would be entitled to seek indemnity or contribution from the [shipowner], by way of cross-claim or otherwise, that would expose the [shipowner] to liability in excess of [the limitation fund], until such time as [the district court] has adjudicated the [shipowner's] right to limit that liability" made this case the functional equivalent of a single claim case.

Submitted by SMM

Marine Insurance

Great Lakes Insurance SE v. Andersson, 2021 U.S. Dist. LEXIS 115267 (D. Mass. June 21, 2021) (Hillman)

Holding: The District Court upheld a choice-of-law clause in a marine insurance policy, deciding that the choice-of-law clause applies to all claims arising from the performance under the contract and subsequent coverage disputes, including bad-faith claims.

Martin Andersson, a Massachusetts citizen, purchased a marine insurance policy from Great Lakes Insurance PE for his catamaran, THE MELODY. The vessel sustained catastrophic damage when it hit a breakwater and became stranded in open water near the Port of Boca Chica in the Dominican Republic.

Plaintiff-Great Lakes Insurance SE declined to pay for the cost of the salvage or repair and sought declaratory judgment that it owed no coverage under the policy to Andersson. Great Lakes claimed it owed no coverage under the policy due to Andersson's failure to keep the vessel in seaworthy condition because the VHF radio transmitter broke, and that Andersson sailed outside the bounds of the Policy's navigational limits.

Andersson counterclaimed for breach of contract and for bad faith under Massachusetts law. Great Lakes moved to dismiss the bad faith count of the counterclaim, arguing New York law applied due to the choice-of-law clause in the policy. Andersson argued New York law applied to the contract claim, but the bad faith claim was an extra-contractual claim, and therefore Massachusetts law applied.

The District Court rejected Andersson's argument, finding the marine insurance policy's language, "any dispute arising hereunder" would be adjudicated under entrenched principles of federal admiralty law, "but where no such well-established, entrenched precedent exits, this insuring agreement is subject to the substantive laws of the State of New York" was controlling.

The District Court held New York law applies to all claims arising from the performance under the contract and subsequent coverage disputes, including bad faith claims. As a result, the District Court applied New York Law and dismissed the bad faith count of Andersson's counterclaim.

Submitted by SPB

Northwestern Selecta, Inc. v. Guardian Insurance Co., 2021 U.S. Dist. LEXIS 97991 (D.P.R. May 24, 2021) (Besosa)

Holding: The Court held the cargo policy excluded loss of cargo whose natural life expired through the passage of time, even if the delay was caused by a covered peril. The Court held the devaluation of perishable goods due to the Puerto Rican Governor's stay-at-home order did not fall within Northwestern Selecta's insurance policy which contained a Civil Authority clause since Northwestern Selecta was only indirectly impacted by the government shut down.

Northwester Selecta is a Puerto Rican importer of frozen and refrigerated foods, including cooked and sliced tentacles of giant squid/octopus. Guardian insured Northwestern Selecta's seafood imports under a Marine Cargo Stock Throughput Policy. The all-risk policy stated it was "principally but not limited to, seafood and meat of every description" from the time the subject matter became the insured's risk "until the insured's risk and/or interest finally ceased."

The policy contained a Civil Authority clause, which provided that the cargo was covered against damage or "destruction by civil or military authority for the purpose of preventing further damage or to prevent or mitigate a conflagration, pollution hazard or threat thereof provided that the damage or destruction was not caused by war, invasion, revolution, rebellion, insurrection or other hostilities or war like operations or by any risk specifically excluded in this insurance."

Prior to March 15, 2020, Northwestern Selecta imported more than a million dollars of squid/octopus and properly stored it in warehouses until it could sell it to customers. On March 15, 2020, the Governor of Puerto Rico issued an executive order with stay-at-home requirements causing customers to suspend purchases of Northwestern Selecta's inventory. As a result, $552,851.50 worth of product expired and lost its commercial value.

Guardian denied the claim on the ground it was not a loss caused by civil authority. Northwestern Selecta brought this action alleging breach of marine insurance policy.

Northwestern Selecta argued that the Civil Authority clause unambiguously applied because it had to throw away boxes of expired seafood when the government shut down the island's economy. Guardian argued that the clause only encompassed acts like embargo, confiscation, quarantine, seizure or other acts by civil authority directed at the at the cargo. Guardian argued since the stay-at-home requirements by the Governor did not apply to certain food retail and wholesale businesses, Northwestern Selecta was affected by the order indirectly, and thus not falling within the policy language.

Judge Besosa found Guardian's argument convincing. The Court held the indirect result was not a sufficient nexus for the clause to apply. Judge Besosa held that the exclusions unambiguously excluded loss of cargo that expires its natural life through the passage of time, even if the delay was caused by a covered peril. As a result, the Court granted Guardian's motion to dismiss.

Submitted by SPB

Starr Indemnity & Liability Co. v. AGCS Marine Insurance Co., 2021 U.S. Dist. LEXIS 131239 (S.D.N.Y. July 14, 2021) (Failla)

Holding: The court held a P&I carrier may not have had a duty to defend its insured, but its duty to indemnify the insured for defense costs gave the commercial marine insurer the right to pursue the P&I carrier for reimbursement of defense costs

Plaintiff Daniel Lerma filed an amended complaint alleging that he was injured while standing on a barge owned by R.E. Staite as a result of the negligent operation of a shoreside crane by employees. Starr Indemnity and AGSC Marine Insurance Company, both insurers of non-party assured Staite, disputed which of them was liable for the costs of defending Staite in Lerma's personal injury lawsuit. Starr Indemnity defended the suit until the suit was discontinued, incurring $164,053.77 in defense costs, causing Starr to then bring suit seeking the recovery of the defense costs from AGCS, and AGCS moved to dismiss the action.

Judge Failla determined California law should apply as the dispute implicated the parties' respective duties under the policy and the predominant hub of relevant activity took place in California. AGCS argued that its policy was a protection and indemnity policy that did not impose an affirmative duty to defend the insured arising out of occurrences covered under the policy, but rather required only that AGCS reimburse Staite after the fact for the costs Staite incurred in defending itself. Judge Failla agreed but noted the insurer has a duty to reimburse the costs of defense as long as the insured obtained the insurer's consent to incur defense costs.

Subsequently, Judge Failla found Star Indemnity had a right to seek reimbursement. AGCS argued that Staite's

liability did not arise out of its ownership of the barge. Judge Failla found that Starr had alleged a sufficient nexus between Lerma's injury and Staite's ownership of the vessel and Lerma sufficiently alleged negligence as part of the repair of the crane on the barge.

Judge Failla then addressed whether equitable subrogation was a proper basis for Star's Indemnity claim. Starr claimed the doctrine applied because more than one policy provided coverage for a dispute and the Starr policy acted as excess insurance to the other. Judge Failla decided that the Star Indemnity excess "other insurance" clause in the commercial marine policy provided a basis for full recovery as the Star Indemnity policy would not contribute until the AGCS policy was exhausted.

The court decided that Starr pleaded a viable claim for unjust enrichment and AGCS's motion to dismiss the claim was denied.

Submitted by SPB

Stevanna Towing, Inc. v. Atlantic Specialty Insurance Co., 2021 U.S. Dist. LEXIS 111572 (W.D. Pa. June 15, 2021) (Eddy)

Holding: The District Court held an exception to the contractual liability exclusion did not circumvent the employee exclusion from the policy.

Raymond Robinson was injured while working as deckhand on the M/V TIMOTHY JAMES and made a claim against the vessel owner, Stevanna, for injuries he sustained as a result of the accident pursuant to the Jones Act. Stevanna reported the accident to Atlantic, it's insurer. Atlantic denied coverage because the M/V TIMOTHY JAMES was not included in the schedule of vessels covered.

Stevanna brought this action seeking coverage under the policies and set forth claims for declaratory judgment with respect to its three alleged policies. Atlantic filed for summary judgment with respect to the policy.

Atlantic argued that Robinson was an employee and employee claims are excluded from the policy. Stevanna argued that Atlantic had waived the right to assert the exclusion because it had never issued a declination for the policy.

The Court decided the policy expressly excluded the employee and found that an insured contract is an agreement under which the insured assumes the tort liability of another party for bodily injury to a third person. However, the Court found the contract with Robinson did not assume the tort liability to a third party and provided no basis for avoiding the employee exclusion.

Accordingly, the Court granted Atlantic's summary judgment motion.

Submitted by SPB

Maritime Liens

G. Robert Toney & Assocs. v. M/Y Bad Boyz, 2021 U.S. Dist. LEXIS 160237 (S.D. Fla. Aug. 24, 2021)

On February 12, 2021, Plaintiff, G. Robert Toney & Associates, Inc., filed its Verified Complaint against Defendant M/Y BAD BOYZ, a 1999 Sea Ray 400 da Motor Yacht, USCG Official Number 1087936, Hull Identification Number SERF7464E999, her engines, apparel, tackle, boats, appurtenances, etc. (the "Vessel"), *in rem*, pursuant to the Commercial Instruments and Maritime Lien Act, 46 U.S.C. §§ 31301 & 31341-43. The Complaint alleged that, in October 2020, Hugo Mesias, on behalf of the Vessel's owner, HMC Investments, LLC ("HMC"), hired TowBoatUS Miami to tow the Vessel to Plaintiff's facilities for the purpose of turning the Vessel over to the mortgage holder, Bank of America. HMC knew that the Vessel would be stored at Plaintiff's facility at a rate of $3.00 per foot per day for dockage plus Hull Insurance. HMC agreed to store the Vessel at Plaintiff's facility; however, despite demands for payment, HMC failed to pay dockage and other expenses. On April 17, 2021, the United States Marshal arrested the Vessel. On June 10, 2021, Plaintiff filed its Motion for Final Default Judgment and Order Selling Vessel.

The Verified Complaint alleged a single count for a maritime lien against the Defendant Vessel, pursuant to the Commercial Instrument and Maritime Lien Act, 46 U.S.C. §§ 31301 & 31341-43. The Federal Maritime Liens Act, 46 U.S.C. §§ 31341-31343, provides that any person who "provid[es] necessaries to a vessel on the order of the owner or a person authorized by the owner" has a maritime lien and may bring a civil suit in rem to enforce it. 46 U.S.C. § 31342. In order to establish the existence of a maritime lien on a vessel, a person must: (1) provide necessaries; (2) to a vessel; (3) on the order of the owner or agent; and (4) the necessaries must be supplied at a reasonable price.

Plaintiff established the existence of a maritime lien on the Vessel. First, Plaintiff established that it provided

necessaries to the Vessel. Second, Plaintiff established that it provided the necessaries to the Vessel based upon an agreement by the Vessel's owner. The Court found that the necessaries appeared to be at a reasonable price, as the Vessel's owner agreed to the storage at the known rate.

The Court therefore granted in part Plaintiff's Motion for Final Default Judgment and Order Selling Vessel. The Court awarded Plaintiff $25,406.18 for necessaries provided to the Vessel through April 17, 2021. Plaintiff's request for post-judgment interest, costs, and expenses was denied without prejudice and with opportunity to refile. The Court found that the M/Y BAD BOYZ, a 1999 Sea Ray 400 da Motor Yacht, USCG Official Number 1087936, Hull Identification Number SERF7464E999, her engines, apparel, tackle, boats, appurtenances, etc. would be sold by the United States Marshall Service as soon as a sale can take place after the publication of Notice of Sale has been made in accordance with Local Admiralty Maritime Rules.

Submitted by JAP

Oral Contracts

In re Borghese Lane, LLC, 2021 U.S. Dist. LEXIS 134623 (W.D. Pa. July 20, 2021) (Horan)

Holding: The court held there was an enforceable oral maritime service contract between the Plaintiff and the Defendant because the oral agreement incorporated the indemnity agreement from the parties contract.

This action arose from a breakaway of multiple barges from the Jacks Run fleet, located on the right descending bank on the Ohio River. Among several lawsuits stemming from the breakaway, Ingram filed a complaint against Borghese Lane, LLC.

Prior to the breakaway, Ingram had orally contracted with Industry Terminal and Salvage Company to provide fleeting services to Ingram on the same terms set forth in a written Harbor Service Agreement between the parties. The written terms provided for Industry Terminal to indemnify and hold Ingram harmless from all property damage, personal injury, or other liability incurred by or asserted against Ingram, excluding only those attributable to or arising solely out of the gross negligence or intentional acts of Ingram.

Ingram sought to recover for the damage to its barges, as well as expenses incurred for emergency response and recovery efforts, and removal, damage surveys, drydocking, temporary and permanent repairs, liability to third-parties, attorneys fees and expenses, and prejudgment interest. Ingram sought summary judgment as to its claim for breach of a maritime service contract against ITS.

Judge Horan concluded that there was an enforceable oral maritime service contract between Ingram and Industry Terminal and that the contract allocated responsibility for the claims to Industry Terminal. Judge Horan also concluded that the plain language of the contract confirmed that it applied regardless of fault or a determination of what or who caused the breakaway, except for exclusion for damage attributed to or arising solely out of the gross negligence or intentional acts of Ingram.

Consequently, Judge Horan granted summary judgment to Ingram as to Ingram's first and third-party claims, leaving the determination of damages and expenses for resolution after discovery.

Submitted by SPB

Practice and Procedure

American Home Assurance Co. v. M/V ONE HELSINKI, 2021 U.S. Dist. LEXIS 123501 (D. Mass. July 1, 2021)

**Undersigned counsel represented a party in this matter.*

Holding: The Court held that two companies that owned and supplied the crew for a vessel were not subject to *in personam* jurisdiction in a dock damage case in Massachusetts.

On December 5, 2017 the ONE HELSINKI arrived at Boston Harbor and mooring lines were thrown to the employees of Boston Line. The employees secured the ship to the dock in preparation for high winds that were forecasted. On December 6, 2017 the ONE HELSINKI broke free from its mooring lines and collided with the pier of the Black Falcon Terminal. Massport, the owner of the terminal, suffered property damage and other damages as a result of the incident. The Plaintiff, American Home Assurance Co. indemnified Massport and brought this subrogation action in federal court in Massachusetts against the vessel, *in rem*, and various entities *in personam*.

The owner of the vessel and the entity that supplied the crew moved to dismiss the *in personam* claims against them on the grounds that the vessel was bareboat charted, and these entities did not direct the ship to

Massachusetts or take any steps to purposefully avail themselves of the privilege of conducting activities in Massachusetts.

Judge Saris dismissed the case finding the defendant had not purposefully availed themselves and the contacts were insufficient even if the court were to consider the contacts with the United States under Rule 4(k)(2). The court dismissed the case for lack of personal jurisdiction over the two defendants.

Submitted by SPB

In re Bensch, No. 20-2268-cv (2d Cir. June 23, 2021) (Lynch)

Holding: The United States Court of Appeals for the Court held the vessel owner should have been allowed to amend the complaint as limitation complaints are subject to the *Iqbal/Twombly* pleading standard of Rule 8(a).

This case arises from a boating accident on the Niagara River in August 2018 that resulted in the death of Ahmed Abdulla Umar when he was struck by a boat owned and operated by Christopher Bensch after Umar and his daughter fell off a jet ski that he rented from Waikiki Watercraft. Umar's wife brought suit against Bensch and Waikiki alleging that Bensch operated his boat negligently and that Waikiki failed to provide adequate instruction regarding the proper operation of the jet ski. Umar's wife sought to remove the action to federal court based on the federal court's original admiralty jurisdiction.

Bensch and Waikiki filed limitation actions invoking admiralty jurisdiction and seeking exoneration from or limitation of liability. Bensch did not include much detail about the accident in his complaint, and claimants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Magistrate Judge McCarthy recommended that the motion to dismiss be granted and motion for leave to amend be denied on grounds of futility. Magistrate Judge McCarthy also recommended Bensch's second motion for leave to amend be denied on grounds of bad faith. Further Magistrate Judge McCarthy recommended that the removal based on original admiralty jurisdiction was improper and should be remanded to state court.

Bensch appealed the dismissal of his limited action and the decision denying him leave to amend, arguing that *Iqbal/Twombly* plausibility standard for assessing the sufficient of complaints under Rule 8(a), is inapplicable to maritime complaints for exoneration from or limitation of liability which are governed by the Supplemental Rules for Admiralty or Maritime Claims. Bensch relied on Judge Learned Hand's decision in *Colonial Sand*. However, Judge Hand's decision was rendered before the amendment to Rule 8 that resulted in *Iqbal/Twombly*.

The United States Court of Appeals for the Second Circuit held the allegations in the proposed Second Amended Complaint were sufficient to "nudge" the petitioner's "claims across the line from conceivable to plausible." Concluding that Bensch had not acted in bad faith in its original pleading, the Second Circuit the affirmed the judgment of the district court to the extent that it dismissed the initial complaint and denied Bensch's first motion to leave to amend but reversed the district court's decision on the motion for leave to amend on grounds of futility and bad faith.

Submitted by SPB

Mackay v. Paliotta, 2021 N.Y. App. Div. LEXIS 4470 (N.Y. Sup. Ct. App. Div. 2d Dept. July 14, 2021) (per curiam)

Holding: The Court held findings against the vessel owner in the federal limitation action were given res judicata effect in the state suit after the federal stay was lifted, but res judicata was not applicable to the claims against the marina defendant as the federal court only addressed whether the marina owner owed a duty.

The plaintiff owned and operated a marina known as the Last Chance Boat Club. The plaintiff's marina was situated nearby and to the south of another marina located on the Hudson River, known as the Tappan Zee Marina, which was owned by the defendants Audrey Schneider and Joellen Putter for Maffei Family Trust, doing business as Tappan Zee Marina ("TZM"). The defendant Chad Paliotta owned a 41-foot-long, 12-foot-wide sailboat known as the INVICTUS. In 2012, Paliotta moored the sailboat in a mooring field at TZM's marina. At some point either immediately before or during Hurricane Sandy, Paliotta's sailboat broke free from its moorings, floated in a southerly direction on the Hudson River toward the plaintiff's marina, and allided with the plaintiff's marina structures.

In August 2013, the plaintiff commenced an action against Paliotta and TZM to recover damages for the alleged injuries that the plaintiff's marina sustained as a result of the allision. In November 2013, Paliotta commenced a proceeding in the United States District Court for the Southern District of New York pursuant to the Limitation of Liability Act (46 USC § 30501),

seeking exoneration from or limitation of liability for the alleged damage caused by the sailboat to the plaintiff's marina.

The federal judge held that TZM owed a duty to Paliotta and denied limitation to Paliotta, holding that Paliotta failed to rebut the presumption of negligence for the allision. The federal judge lifted the stay, and the plaintiff then pursued Paliotta and TZM in the state action. The state judge gave res judicata effect to the finding of Paliotta's negligence but did not hold that res judicata required a finding that TZM was negligent. The appellate court agreed with both holdings, noting that the holding that TZM owed a duty to Paliotta was not the same as holding that TZM was negligent. Therefore, a trial to determine whether TZM was negligent was necessary rather than an immediate trial on damages.

Submitted by SPB

McIntosh v. Royal Caribbean Cruises, Ltd., 2021 U.S. App. LEXIS 22218 (11th Cir. July 27, 2021)

This action arose when RCL cancelled a cruise, on the day it planned to depart, due to a hurricane. RCL offered refunds to the would-be passengers. A group of the would-be passengers filed suit alleging negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. The passengers alleged that because RCL's contract provided that no refunds were available within 14 days of departure and RCL did not cancel until the day of the departure, the passengers were forced to travel to the port where they were forced to endure the hurricane suffering physical and emotional damages.

In a series of orders issued *sua sponte*, the district court ruled, among other things, that plaintiff could not aggregate their emotional distress claims to satisfy the $75,000 amount-in-controversy requirement for diversity jurisdiction under 28 U.S.C. § 1332. The Plaintiffs appealed.

The United States Court of Appeals for the Eleventh Circuit reversed the district court's decision holding that the district court failed to give the plaintiffs notice of its intent to *sua sponte* address the matter of diversity jurisdiction. Although district courts can take up the issue of subject-matter jurisdiction *sua sponte*, when it does so, it must give the parties notice and an opportunity to be heard. Failure to do so is error.

The Eleventh Circuit also held that the district court failed to consider whether any individual plaintiff had satisfied the $75,000 amount-in-controversy requirement, stating when a court conducts a facial review of a complaint to determine whether it has diversity jurisdiction, it must accept the plaintiff's factual allegations. The court can dismiss only if it is convinced "to a legal certainty" that the claims of the plaintiff in question will not exceed $75,000. When a plaintiff pleads an unspecified amount of damages, plaintiff bears the burden of proving by a preponderance of the evidence that the claim on which jurisdiction is based exceeds the jurisdictional minimum. Because the district court acted *sua sponte*, it did not give the plaintiffs an opportunity to satisfy their burden. The court also found that at least some of the plaintiffs sufficiently pled damages over $75,000.

Submitted by SMM

Poincon v. Offshore Marine Contractors, Inc., 9 F.4th 289 (5th Cir. 2021)

Poincon was a cook aboard a liftboat owned by offshore Marine. In 2015, a vessel owned by REC collided with the liftboat, and plaintiff injured her head and neck. She continued working through the pain and did not request maintenance and cure.

In 2018, Poincon was again aboard an Offshore Marine vessel when she slipped and fell while trying to clear ice from the freezer. She felt pain in her neck and back that was the same kind of pain felt after the 2015 allision. Poincon's physician felt that the 2018 fall had aggravated cervical injuries from her previous accident.

Poincon sued both Offshore Marine and REC under the Jones Act and general maritime law. She also demanded maintenance and cure from Offshore Marine. The district court severed the claims against the two defendants finding no common issues of liability. Offshore Marine then filed a third-party complaint against REC seeking contribution for maintenance and cure payments after the 2018 injury. REC moved for summary judgment on the third-party complaint. The district court granted the motion finding that the 2018 accident was not a foreseeable result of the 2015 injury and that the 2018 accident was a superseding and intervening cause cutting off any liability for maintenance and cure related to the 2015 injury. Offshore Marine appealed.

After assuring itself of appellate jurisdiction, the United States Court of Appeals for the Fifth Circuit concluded that the district court erred in interpreting the law on contribution claims. The Fifth Circuit held that a third party is liable for an employer's maintenance and cure payments if the third party's negligence caused or contributed to the injury and the need for maintenance and cure. The court found no authority for the district court's rule that the second accident relieved the third party of liability for contribution. Instead, the court found that a jury could analyze the causation issue and resolve the case.

The court further found issues of fact that precluded summary judgment in favor of REC. The court noted the similarity of pain felt by Poincon in 2018 and 2015 as well as the physician's conclusion that the 2018 injury aggravated the 2016 injury. The court found it possible that the 2018 accident would not have necessitated maintenance and cure had the 2015 collision not occurred. Therefore, the Fifth Circuit reversed summary judgment in favor of REC and remanded the case to the district court.

Submitted by KMM

Rhoads Industries, Inc. v. Shoreline Foundation, Inc., 2021 U.S. Dist. LEXIS 124066 (E.D. Pa. July 2, 2021) (Strawbridge)

Holding: The court declined to strike expert testimony in a damage claim arising from marine construction projects because the experts were largely "qualified" and that their opinions were "reliable" and "fit" the facts of the case.

The litigation arose from a situation in which Defendants were completing construction projects, which involved pile driving, in Philadelphia Navy Yard, within the vicinity of certain properties and structures leased by Rhoads, allegedly causing damage. The United States Navy then undertook a project to complete certain improvements to property adjacent to Rhoads' property. Rhoads alleges the Defendants' pile driving caused subsidence, or sinkholes to form in the areas to both the east and west of Rhoads's dry dock, causing "significant damage" to the property.

The case dealt with the admissibility of expert testimony. Magistrate Judge Strawbridge addressed motions to strike expert testimony in this case, denying the motions with two limited exceptions: declining the motions with respect to Mark Kilgore on the standard of care for engineers on maritime projects; Edward Garbin, David Wilshaw, and Benjamin Irwin as to the pile driving or other factors causing damages; James Schofield on the age, maintenance, and repair of the plaintiff's dry dock; and Wesley Grover, Greg Cowhey and Charles Boland on the damage claims. Magistrate Judge Strawbridge decided to exclude the expert testimony of John Vitzthum as the expert disclosures with respect to Vitzthum failed comply with Rule 26(a).

Magistrate Judge Strawbridge held the parties' expert witnesses were largely "qualified" and that their opinions were "reliable" and "fit" the facts of this case.

Submitted by SPB

Roberts v. Phila. Express Trust, 2021 U.S. Dist. LEXIS 166226 (S.D. Ga. Sept. 1, 2021)

Leonard Roberts initially filed this action in the State Court of Chatham County in Georgia after he worked as a longshoreman aboard the vessel PHILADELPHIA EXPRESS with an individual who tested positive for COVID-19. Roberts alleged that he contracted COVID-19 from that exposure on the vessel and that Defendants knew about the seaman's positive test result but did not inform Roberts of it.

Plaintiff filed his Complaint in the State Court of Chatham County on September 8, 2020, asserting a fraud and deceit claim against all three Defendants. Defendants removed the case to this Federal Court and Defendants filed a Motion to Dismiss.

Defendants argued that Plaintiff was unable to state a claim for fraud and deceit under Georgia law because, under the facts pled in the Complaint, such claim was preempted by federal law. In Response, Plaintiff maintained that he could still assert his fraud and deceit claim, but he also alternatively requested leave to amend his Complaint.

Defendants argued that Plaintiff's state law claim was preempted by the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Defendants, as the parties asserting the affirmative defense of preemption, bear the burden of adequately showing that what happened to Plaintiff qualifies as an "injury" covered by the LHWCA. In their Motion to Dismiss, Defendants did not specifically address the issue of whether Plaintiff's allegations implicated an injury as defined by the LHWCA. Accordingly, the Court could not determine whether Plaintiff's claim was preempted by the LHWCA, and, therefore, denied Defendants' Motion to Dismiss without prejudice to its being refiled.

Submitted by JAP

Robertson v. Hynson, 2021 U.S. Dist. LEXIS 141714 (D.N.J. July 29, 2021) (Kugler)

Holding: Husband of injured jet ski operator was allowed to maintain loss of consortium claim against operator of recreational vessel in collision, but the claims for loss of use and damage to the jet ski were denied

Deanna Robertson and her husband, Bryan Robertson brought this claim after Deanna Robertson, operating a jet ski, collided with Hynson's boat which was towing a tube for recreation. The collusion occurred in Avalon, New Jersey and resulted in Robertson bringing three causes of action: 1) a personal injury claim requesting

damages suffered from the collision, 2) a loss of consortium claim for the loss of wife's services, and 3) a claim for loss of use to the jet ski involved in the collision.

Hynson moved for summary judgment for the loss of consortium claim and loss of use of and damage to the jet ski. Judge Kugler noted the different approaches of the United States Supreme Court in *Miles* and *Yamaha* with respect to loss of society in maritime cases, finding the case was more similar to *Yamaha*, except for the fact Robertson was not fatally injured.

Judge Kugler dismissed the claim for the loss of use of the jet ski and the claim for physical damage to the jet ski as the plaintiffs could not provide any evidence in response to the motion for summary judgment to establish the loss of use or the cost of the physical damage of the jet ski.

Submitted by SPB

Taylor v. Royal Caribbean Cruises, Ltd., 2021 U.S. App. LEXIS 23650 (11th Cir. Aug. 10, 2021)

On May 26, 2019, Pamela Taylor was a fare-paying passenger aboard one of Royal Caribbean Cruises, Ltd.'s ("Royal Caribbean") cruise ships, the ALLURE of the Seas (the "ALLURE"), and she was severely injured when she tripped and fell while disembarking the ship via its gangway. On May 25, 2020, Taylor filed a complaint for damages against Royal Caribbean, and alleged a single count of negligence. The district court *sua sponte* issued an order striking Taylor's complaint as a shotgun pleading. Taylor filed her amended complaint and raised the following negligence claims: (1) negligent failure to warn her of the "dangerous condition of the uneven flooring" of the Allure's gangway, which she described as a ramp; (2) negligent maintenance of the gangway's flooring by Royal Caribbean's employees, agents, and/or independent contractors; and (3) negligent failure to follow various disembarkation policies and procedures.

Royal Caribbean moved to dismiss Taylor's amended complaint on the basis that Taylor failed to allege facts as to how any breach of duty as alleged in her amended complaint proximately caused her injuries, which resulted in her failure to state a claim. Royal Caribbean further argued that the negligent failure to warn count should be dismissed because Taylor failed to allege facts establishing Royal Caribbean had notice of the alleged dangerous condition. The district court granted Royal Caribbean's motion to dismiss Taylor's amended complaint. The district court found that each negligence claim in the amended complaint failed to adequately allege causation, i.e., that the breaches of duty complained of actually and proximately caused Taylor's injuries. As to the negligent failure to warn claim, the district court found that the amended complaint did not affirmatively allege that the purportedly dangerous conditions actually caused Taylor's injuries.

Pamela Taylor appealed the district court's order dismissing her amended complaint against Royal Caribbean Cruises, Ltd. On appeal, Taylor claimed that the district court erred by (1) determining that she failed to plausibly allege causation as to her three negligence claims and (2) failing to accept her factual allegations as true and evaluating all plausible inferences derived from those facts in favor of her.

At issue in this case was whether Taylor plausibly pled the causation element of any of her negligence claims. As to the negligent maintenance claim, the appellate court agreed with the district court that Taylor has failed to plausibly plead causation. Reviewing her amended complaint and accepting her allegation that Royal Caribbean breached its duty to maintain the gangway flooring as true, Taylor never identifies which one, if any, of Royal Caribbean's alleged maintenance failures—damaged treading, an unreasonably large gap in the gangway flooring, a loose screw in the flooring, or some other condition—caused the alleged unevenness of the gangway flooring. Instead, she merely alleges a possibility. Therefore, the Court found that the district court did not err in dismissing the negligent maintenance claim.

The appellate court also agreed with the district court that Taylor failed to plausibly allege causation as to her negligent failure to follow policies claim. Indeed, Taylor did not allege facts concerning which Royal Caribbean policy that was allegedly not followed caused her injuries. For example, while Taylor alleged that Royal Caribbean allowed passengers to carry excess luggage off the ship, she did not allege facts stating that she tripped and fell over luggage present on the gangway. Similarly, Taylor did not allege facts stating that her injuries were caused by too many passengers exiting the gangway that caused her to trip and fall, e.g., passengers either blocking her pathway while disembarking the gangway or pushing and shoving her due to lack of space on the gangway. Turning to the negligent failure to warn claim, the amended complaint did not provide factual detail as to how the gangway flooring was uneven and how that unevenness caused Taylor's trip and fall. Accordingly, the appellate court found that the district court did not err in dismissing Taylor's amended complaint, and affirmed its dismissal order.

Submitted by JAP

Zim American Integrated Shipping Services Co. v. Sportswear Group, LLC, 2021 U.S. Dist. LEXIS 139863 (S.D.N.Y. July 27, 2021) (Liman)

Holding: The court held a purchaser of an international shipment that received cargo under negotiable bills of lading was not bound by the detention provision in the bills of lading because the bill of lading did not specifically identify the party's role.

The Defendant, Sportswear Group, LLC purchased women's apparel from a factory in Bangladesh, and arranged sales contracts which obligated the suppliers to arrange for and pay for overseas carriage. The shippers, Zim American Integrated Shipping Services Co., fulfilled their obligations by arranging for carriage of cargo aboard a vessel owned or operated by Seth Shipping and issued bills of lading to the shippers for carriage of goods from the ocean port at Chittagong, Bangladesh to the Port of New York. The negotiable bills of lading were drawn to the "order" of the Bangladeshi shipper's bank. Upon payment by the Defendant, the shipping documents would be released to the Defendant. Sportswear paid the bank and the bills of lading were released. Sportswear then hired a truck company to pick up the apparel at the port and deliver it to Sportswear's warehouse, but the empty containers were not returned to the carrier, in violation of the provisions of the bill of lading.

Zim American Integrated Shipping Services Co. brought suit for Sportswear's failure to return the containers alleging that Sportswear knowingly and willfully failed and refused to pay the Plaintiff the full amount due for transportation and services provided. Sportswear argued there was no federal admiralty subject mattery jurisdiction, and even if such jurisdiction were to exist, the Plaintiff failed to state a claim for which relief could be granted.

Judge Liman held that the court had admiralty jurisdiction over the claim, despite Sportswear's argument that the obligation to return the containers arose out of non-maritime transportation services. Although the court had admiralty jurisdiction, Judge Liman cited New York law for the elements of a claim for breach of contract and held that the allegations in the complaint were insufficient to establish contractual privity between the carrier and Sportswear.

Judge Liman held that complaint failed to contain a well pleaded allegation of any indebtedness of the Defendant to the Plaintiff as the complaint did not itself allege that Sportswear was the shipper, consignee, holder, assignee, or endorsee of the bills or how Sportswear became such a party even though the bills of lading were negotiable. Judge Liman dismissed the claim without prejudice.

Submitted by SPB

Salvage

Cape Waterman, Inc. v. M/V AVA PEARL, 2021 U.S. Dist. LEXIS 10467 (D. Mass. June 3, 2021) (Sorokin)

Holding: The Court decided the AVA PEARL was in a salvaging situation because it appeared to be dead in the water, riding anchor until help could arrive and the mayday distress call reflected the captain believed the situation was dire. The Court decided to award SEATOW DEFENDER according to salvage law.

The AVA PEARL is a 105-foot high-speed catamaran passenger ferry valued at $5 million owned by Rhode Island Fast Ferry. On May 27, 2018, it was carrying 67 passengers on its regular route from Quonset Point, Rhode Island to Oak Bluffs, Martha's Vineyard. Upon nearing Oak Bluffs Harbor, the AVA PEARL was struck by three waves causing Captain's Bessinger's small portable heater to strike the emergency stop button for the engines. The engines disengaged and the rudders froze. Captain Bessinger tried to restart the engines but was unaware the emergency stop button had been engaged.

The vessel began drifting toward shore and Captain Bessinger decided to deploy the anchor (incorrectly) to prevent running aground. The anchor was holding, but Captain Bessinger feared the catamaran dragging. Captain Bessinger then issued a mayday distress call and the SEATOW DEFENDER and a Coast Guard Vessel arrived. The SEATOW DEFENDER attached a line to the catamaran and began towing it to the docks in Vineyard Haven Harbor three miles away. SEAWTOW DEFENDER towed the AVA PEARL for two miles, then the tug SIRIUS completed the final mile tow.

The SEATOW DEFENDER brought this action seeking a salvage award. SEATOW DEFENDER argued it should receive an award of $750,000, while Rhode Island Fast Ferry argued the range should be between $4,200 to $10,500 for the approximate cost of labor and material provided.

The Court needed to decide whether the catamaran was in a salvage situation, and if so what to award SEATOW DEFENDER. The Court decided that the AVA PEARL required salvaging as it appeared to be dead in the water, riding anchor until help could arrive and the mayday

distress call reflected the captain believed the situation was dire.

As a result, the Court then considered factors in *The Blackwall* to decide the award. Judge Sorokin awarded SEATOW DEFENDER $66,500 and apportioned 5% of that to the captain of the SEATOW DEFENDER per their contract.

Submitted by SPB

Seamen

Adams v. All Coast, L.L.C., 2021 U.S. App. LEXIS 29559 (5th Cir. Sept. 30, 2021)

Plaintiff was hired as an able-bodied seaman to work on a fleet of defendant's liftboats that service oil and gas platforms in the Gulf of Mexico. He spent his time operating a crane to move personnel and equipment between the liftboat and dock, offshore platforms, and other vessels. He filed suit under the Fair Labor Standards Act arguing that he was not a seaman and was entitled to overtime pay under the FLSA. All Coast contended that Adams was a seaman exempt from the overtime rules of the FLSA. All Coast moved for summary judgment, which was granted by the district court. On appeal, a panel of the Fifth Circuit reversed and remanded.

On a request for rehearing en banc, the court declined to rehear the case by a vote of 15 against and 2 in favor of rehearing. The court then withdrew its initial opinion and issued a new opinion. The new opinion was the same as the previous opinion although it now included the dissenting opinion of the Judges Jones and Elrod who voted in favor of rehearing.

The Fifth Circuit concluded that the key question was whether the plaintiffs were engaged in work that aided the vessel "as a means of navigation" as defined in 29 C.F.R. § 783.32. The court found that crane operators were engaged in industrial work, not navigational work and were, therefore, within the scope of the FLSA. Because the work of cranes had nothing to do with the operation of liftboats, the workers were not seamen within the scope of the FLSA.

Another group of plaintiffs who worked as cooks aboard the liftboats also challenged their right to overtime under the FLSA. The court determined that the key question was whether the cooks' primary work was spent preparing food for crew members on the liftboats when compared to time spent preparing food for non-crew members or non-exempt seaman. If the cooks spent less than 20% of their time preparing food for exempt seamen, then the exception to the FLSA would apply. Thus, the Fifth Circuit reversed summary judgment in favor of the defendant and remanded for further proceedings.

In dissent, Judge Jones, joined by Judge Elrod, noted that crane operation is "integral" to the mission, transportation, and seaworthiness of the liftboats. Judge Jones found that the panel had improperly limited seamen's tasks to sailing the vessels and had improperly analogized crane operations on a liftboat to using cranes to perform industrial work like dredging. The dissent criticized the panel as applying the text of the statute and regulations too strictly and expressed concern about the effect of the ruling on the marine industry.

Submitted by KMM

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