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REMARKS ON THE SILVER OAR AND THE ADMIRALTY HISTORY OF THE COURT

By Charles S. Haight, Jr., United States District Judge

Chief Judge Preska, judicial colleagues, distinguished co-celebrants of this anniversary:[1]

If we could be transported in time back to the first Tuesday of November, 1789, and attend the first session of this Court before Judge Duane, and at its conclusion we left Judge Duane's courtroom, possibly a more modest space than this one, and ventured out into the streets and among the buildings of lower Manhattan as they existed in 1789, the world would seem to be a completely different place from what it is now.

But if on November 3, 1789 we left Judge Duane's courtroom, went to a Manhattan Island pier, and boarded a ship which cast off her lines, set sail, and steered a 90 degree course toward Europe, then in several hours the surrounding world would seem to be just the same then as it is now, as the land disappears astern and we find ourselves on the vast and trackless Atlantic Ocean, our property and lives dependent upon the seaworthiness of the vessel carrying us and the skill of the mariners directing her navigation.

Then, just as now, human fortunes were governed by the general maritime law, also called admiralty. When this Court began 225 years ago, there were, just as now, admiralty courts, admiralty judges, and admiralty

[1] The 225th Anniversary of the United States District Court for the Southern District of New York.

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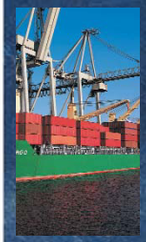


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Managing Editor's Introductory Note

In this edition, we have the privilege of publishing the comments of The Honorable Charles S. Haight, Jr. on the November 4, 2014 celebration of the 225th anniversary of the establishment of The United States District Court for the Southern District of New York. The Southern District is well known as one of the premiere admiralty courts in the United States, with a significant number of admiralty cases filed there each year. That Court is known not only for the number of cases filed, but also for the significance of the decisions rendered by its jurists. Judge Haight is among those recognized as one of the premier admiralty jurists among them, and we are pleased to have his permission to share his remarks on the admiralty history of that Court.

We also are happy to publish what we hope will become a regular column by one of our editors, Graydon S. Staring. Gray explores and provides cogent comments on the vicissitudes of the puzzling and often inconsistent decisions addressing what is, and is not, within admiralty jurisdiction.

We follow with an informative analysis of the effects of the 2011 amendment to the removal statute, 28 U.S.C. Section 1441, which may (or may not) develop into an interesting practice area on removing admiralty cases from state court. One is reminded of the practice developing around Rule B attachments of EFTs. . . .

We also present our regular columns "Window on Washington" and Recent Developments. We conclude with a book review by our regular contributor and former Chief Editor, Dr. Frank L. Wiswall. In this review, Frank takes us out of the usual area of maritime practice into mysteries in Tudor England at the time of Henry VIII. There is a reason for this departure, explained in the final paragraph of the review.

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

Robert J. Zapf

Remarks on the Silver Oar and the Admiralty History of the Court

By Charles S. Haight, Jr., United States District Judge

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lawyers. In an opinion in 1815, Justice Story wrote: "The admiralty is a court of very high antiquity, with a strong probability of its existence in the reign of Richard the First, since the Laws of Oleron, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the law of the admiralty." Justice Story might have noted that maritime laws were also traceable to the ancient Rhodians and Phoenecians, well before Richard the First's reign in the 12th century. So it is not surprising that when this Court opened for business 225 years ago, it was largely limited in its jurisdiction to maritime cases, and remained so for the next hundred years, a century which, as Judge Rakoff pointed out in his recent review of a history of the Court, saw the expansion of the nation's maritime commerce and its increased concentration in the Port of New York. While today the judges of the Court deal with issues of civil and criminal law that Judge Duane could never have dreamt of, maritime cases continue to be an important percentage of those filed. In 1999, when Chief Judge Charles Brieant addressed the centennial celebration of The Maritime Law Association of the United States, he reported that in 1998, 748 maritime cases were filed in the Southern District of New York, 7% of the civil cases filed.

In its earliest days, Addison Browne was this Court's first great admiralty judge. There have been others. In 1909, District Judge Learned Hand came to the Court and remained until 1924, when he left to do something else somewhere else. The fascination of admiralty law has the power to attract previously untutored converts, as District Judge Hand's career illustrates. Professor Gerald Gunther's biography of Learned Hand describes Hand's achievement of becoming "the nation's most eminent" admiralty judge as "remarkable because he came to the bench without any background in maritime law." "Nor," Gunther writes, "except for occasional childhood ventures on a small sailboat near an uncle's hotel in New London, Connecticut, did he have any exposure to seafaring skills to help him adjudicate controversies over accidents on navigable waters. Yet Hand quickly mastered the intricacies. The best illustration of his skills are found in his decisions in numerous ship-collision cases."

Had he still been with us, District Judge Hand might have brought those skills to bear when in 1956 the passenger ships *Andrea Doria* and *Stockholm*, each on a voyage between New York and Europe, collided in the Atlantic. The shipowners, Italian Line and Swedish America Line, sued each other in this Court. The consolidated case was assigned to District Judge Lawrence Walsh, who appointed four special masters to preside over six weeks of depositions in this City, at the conclusion of which the universe of involved marine insurers got together in London and settled the entire case and all third-party claims. Judge Walsh signed the order closing all the cases before any trial, to the relief of the shipowners and their insurers, and the discomfiture of the entire admiralty bar of this Court. One can never predict when a federal district court will be transformed into an admiralty court by a disaster at sea.

Each district judge sitting here today is an admiralty judge, or by the spinning of the assignment wheel will become one. We inherit the mantles of Addison Browne and Learned Hand, not through specialized judicial merit or shiphandling skill, but because it is our responsibility. And the responsibility endures. Since there will always be ships carrying passengers and cargoes, there will always be admiralty and maritime cases in this Court. Ships, passenger and cargoes have changed from those during the Court's earlier days. Ships are larger - the newest container ships are so long and so broad that they cannot fit in any United States port and can only trade between European and Oriental ports. Cargoes today are carried in containers above deck on container ships, rather than being loaded into and discharged from the holds of smaller vessels by stevedores. Passengers today are more likely to be successful people embarking in comfort from New York on cruise ships, rather than sailing in the straightened circumstances of steerage to New York from Europe, hoping to succeed in a new country.

These changes are wrought by the evolving nature of the international shipping industry.

The legal problems generated by the complexities of that industry also evolve. Judges of this Court become versed in the mysteries of the traditional maritime

remedy of attachment as utilized in an age of electronic transfer of funds; we adjudicate the rights and responsibilities of parties to global maritime contracts of charterparty and the arbitration clauses in them; we draw the sometimes elusive lines of admiralty jurisdiction over commercial disputes; we divine the meaning of incomprehensible policies of marine insurance; and we try a case without a jury if it falls within the admiralty jurisdiction.

But whatever changes in industry practice may be reflected in contemporary maritime law, the admiralty judges of today, like their predecessors 225 years ago, will fashion and apply the rule of law to the human consequences when a peril of the sea becomes a reality. The ships of today may be immense and largely automated, but officers and mates still stand watches, on the bridge or in the engine room; the age-old responsibilities of a seaman lookout have not been entirely supplanted by radar; the navigation rules of the road still constitute mankind's effort to avoid or reduce the risk of collision; fire at sea retains its ancient terror; the world's coastlines are alert to the risk of widespread pollution by oil from a stricken tank vessel; marine salvors maintain a watchful presence; loss of or damage to cargo, injury to or death of a crew member or passenger on board a ship, remain commonplace occurrences. Admiralty cases will always arise from time to time because, unlike temporal practices that maritime industries may alter, the perils of the sea are eternal. "Protect me, Lord," goes the traditional mariner's prayer, "for Thy sea is so great and my boat is so small." That prayer resonates today, even though some boats are so large they cannot fit into any American port, because however large or automated a ship may be, the world's oceans, which cover two-thirds of the planet and seem to be covering more each day, are greater still, and their fury, when aroused, is not deterred by human technology. Of necessity, this Court has always been a great admiralty court. It will remain so.

I close these remarks with the observation that the eternal nature of perils of the seas, and the antiquity of admiralty law, combine to explain the object that was produced and paraded at the beginning of this ceremony: the Silver Oar of the Admiralty. This oar was crafted in about 1725 by Charles LeRoux, a noted Colonial silversmith. It served as the symbol of authority of the Vice-Admiralty Court of the Province of New York, a colonial court created by the English Governor General in 1678. After the American Revolution the oar passed into private ownership, but it was obtained and presented to this Court in 1941 by a group of admiralty lawyers headed by Charles Burlingham.

Traditionally, when a Judge of the Court was sitting in an admiralty case, the marshal or bailiff would precede the Judge into the courtroom, bearing a silver oar and waving it over the Judge until he was seated. The oar was then placed in a cradle below the Judge's bench, where it rested throughout the session of the Court. We have not performed that ritual in this Court for many years, but in 1999 Sir David Steel, a Judge of the High Court of Admiralty in Great Britain, told our Maritime Law Association on the occasion of its centenary that a great silver oar sat in his court whenever he was hearing an admiralty civil action. That oar was made in about 1660, following the restoration of the monarchy in the form of King Charles II. There is nothing new about the concept of admiralty law. It is appropriate that this Court's Silver Oar of the Admiralty be displayed during this ceremony, which recalls among other subjects this Court's history as an admiralty court. The fife and drum music is stilled. The pageantry is finished. The Oar of the Admiralty lies before us. I invite you to consider the shape and the stillness of the Admiralty Oar: the beauty of its utilitarian simplicity. The oar has never changed. You sit in your ship, grasp the oar's handle, place its blade in the water, pull, and the ship moves through the water: so humankind has been progressing over the waters since the beginning of recorded time. There is something eternal about the oar. It is wholly fitting that this oar is a symbol of the law of the sea, and of this Court, sitting as an admiralty court *en banc* for these few moments on a November afternoon. For the sea itself is eternally fascinating, and so are ships and those who go down to the sea in ships, who by their daring or distress, courage or cowardice, foresight or foolishness, triumphs or tragedies of navigation, give employment to admiralty judges and lawyers, thereby generating that equally fascinating body of law that we call admiralty.

Chief Judge, I have completed my voyage. I am grateful for this opportunity to return to my home port.

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Charles S. Haight, Jr. is a federal judge on the United States District Court for the Southern District of New York. He joined the court in 1976 after being nominated by President Gerald Ford.

An Irreverent Account of Admiralty Tort Jurisdiction

By Graydon S. Staring

Introduction

Grousing about the inanity of one law or another is a wholesome, frequent, and valuable exercise in a democracy. In our federation, 50 law-making States and powerful and prolific federal law-making engines ensure no shortage of material for it. Among them, the federal government, however, is peculiarly situated on account of its responsibility for the admiralty, a field in which much of the law is not made by Congress, but is ancient and customary and is announced by the courts as they apply it, with ultimate national authority resting in the Supreme Court.

Admiralty lawyers will know this but for others I will briefly describe the system of admiralty law. It is a field springing from "Admiralty," itself a body of political and military powers possessed by sovereigns in control of their domestic ("territorial") waters and rights in the ("high") seas beyond. Contests and agreements over two millenniums have produced in it a body of international custom. With no legislature, it depends for conformity on acquiescence by maritime nations. While it is recognized to be a feature of customary international law, each nation organizes its operation domestically according its own situation and institutions.[1] The judicial functions of admiralty were assigned in full by the Constitution to the federal courts.[2]

A useful commercial and legal regime ought to be spread as wide as its usefulness, with as few artificial and irrelevant barriers as possible. The admiralty jurisdiction is invoked in many tort claims that arise on, in, or over the waters beyond State jurisdiction, and involve activities peculiar to those circumstances. An all-too-frequent defense to such a claim is that admiralty has no jurisdiction over it because of one or another of the ancient conventions arising out of historic disputes over fees among rival courts. A jurisdictional decision by the Supreme Court (from which there is no appeal) may properly be regarded as the equivalent of a jurisdictional act of Congress.

There are published critical standards for the scope, clarity, and objectivity of such enactments and some are no doubt scrutinized for those qualities in their making. In too many instances, the Court's decrees granting contested jurisdiction go little if any farther than to accept the particular object, condition, or action at issue, without any governing principle, and so lead to wasted judicial time, delay, and litigation expense.

It would be only good sense for the Court to recognize the statutory character of its grants and express them if possible in principles broader than the name of some grievous act or object; and for those who practice before it to present thoughtful views of the principle advanced. The American experience has been overall ignorance of principle, with occasional flashes of expedient insight.

"The Complexity of Jurisdictional Clarity"

This is a large subject. An article by Professor Scott Dodson, entitled The Complexity of Jurisdictional Clarity,[3] is an impressive survey and analysis of the numerous American grants of jurisdiction. They are sometimes simple and direct and more often vague, subjective in reliance on the judgment (or guess) of the litigant, and therefore fraught with surprises. The author cites and shares many of the published judicial views of the great importance of clarity in jurisdictional description and describes the *justifiable* exceptions that must be allowed in some cases to accommodate changing conditions and the uncertainties of conceptual boundaries by resort to reasonableness. No such uncertainties exist in the geographical boundaries and features historically used to describe the admiralty jurisdiction.

Indeed, in a field of complexities, Dodson finds the admiralty nonsense easy to correct, before moving on to complex situations:

> Another useful example is the test for admiralty tort jurisdiction. The traditional

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[1] *See, e.g.*, 2 Hugo Grotius, On the Law of War and Peace, bk. II, ch. III, §§ XIII, XIV, XV & nn., pp. 212-16 (Francis W. Kelsey *et al.* trans. Oxford 1925) (citing ancient sources); Thomas Wemyss Fulton, The Sovereignty of the Sea 555-66 (Edinburgh & London 1911) (territorial seas according to Bynkershoek, Puffendorf, Vattel and others); Henry Wheaton, Elements of International Law §§ 106, 113, 124, 192-194 (8th ed. with Dana notes, Boston 1866) (enforcement on high seas; territorial seas).

[2] Const., Art. III, sec. 2.

[3] 97 Va. L. Rev. 1 (2011).

> test for such jurisdiction asked only whether the tort occurred on navigable waters. [Citing Story.] Congress subsequently codified that rule in the Extension of Admiralty Jurisdiction Act. The Court nevertheless interpreted this grant to require "that the wrong bear a significant relationship to traditional maritime activity." This interpretation led to the following two-part test for admiralty jurisdiction: "whether the incident has 'a potentially disruptive impact on maritime commerce,' " and "whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " As Justice Thomas again has noted, such a standard is "[v]ague and obscure," resulting in "wasteful litigation." (Footnotes omitted.)[4]

Early American Controversy

Justices favoring both broad and narrow readings of the jurisdiction sat on the Supreme Court in the early years (and perhaps not long ago as well).[5] Justice Daniel, who sat from 1841 to 1860, and seldom agreed with his colleagues,[6] was described by his biographer as "one of the most extreme anti-business and pro-state's rights men ever to sit on that Court."[7] He fought a losing campaign of vehement dissents, not always alone, to retain the English restriction to tidewater in both tort and contract cases, even seven years after the issue had been conclusively decided otherwise in *The Genesee Chief.*

He was a leader for years among a number of bigots; the following are examples of his style in dissent, mischievous however somewhat amusing today:

> * * * My convictions pledge me to an unyielding condemnation of pretensions once denominated, by a distinguished member of this court, "the silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions"; and still more inflexibly of the fearful and tremendous assumptions of power now openly proclaimed for tribunals pronounced by the venerable Hale, by Coke, and by Blackstone, and by the authorities avouched for their opinions, to have been merely tolerated by, and always subordinate to, the authority of the common law - an usurpation licensed to overturn the most inveterate principles of that law. * * *
>
> Under this new regime, the hand of federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these watercourses, which is not liable to be arrested on its way to the next market town by the *high admiralty power*, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles.

Canadian Development: A Contrast in Perception and Action[8]

The two North American nations, both federal, unquestionably hold today their full sovereign powers, prerogatives, and immunities of admiralty. Both derive their legal systems by colonization from Britain (each with a province of French descent). In both, the admiralty's judicial function has been constitutionally placed in their federal courts, as distinguished from provincial or state courts. Although undeniably equivalent today,

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[4] *Id*. at 12-13.

[5] *See* Justice Powell, joined by Rehnquist and O'Connor, in Foremost Insurance Co. v. Richardson, 457 U.S. 668, 679, 1982 AMC 2253, 2261 (1982), in dissent deploring the erosion of States' rights, etc. in entertaining a collision of pleasure craft in admiralty.

[6] E. Lee Shepard, *Peter Vivian Daniel*, in Oxford Companion to the Supreme Court of the United States 216 (1992).

[7] John P. Frank, Justice Daniel Dissenting, Preface (1964).

[8] Information on the Canadian development is from an article by the President of the Canadian Maritime Law Association, John G. O'Connor, *Expanding Admiralty Jurisdiction in Canada's Federal Courts*, 44 J. Mar. L & Comm. 291 (2013).

their sovereign admiralties have been devolved upon them in different times and circumstances.

In 1776, the liberated British Colonies each acquired its own admiralty, that is, the maritime powers and immunities incident to its sovereignty. In 1789, under the Admiralty Clause of the new Constitution, the United States acquired from the States all of their admiralty functions, except some local functions, but without exception the judicial jurisdiction of admiralty, and shortly by act of Congress, lodged that jurisdiction and functions in our federal courts with the Constitutional words,[9] "all Cases of admiralty and maritime jurisdiction."[10]

The development of Canada's admiralty was incidental to the growth of its national sovereignty in steps marked by British statutory grants starting in 1891, with the transition from vice admiralty courts. The steps were based on reference to English law, as it appears that the authority of her federal courts required British statutory authority. At each stage, the question of jurisdiction required the parsing of several English and Canadian statutes beginning in 1891 and culminating in 1970 with a new Federal Court Act containing what Mr. O'Connor tells us is Parliament's only definition of Canadian maritime law, a provision that suggests the difficulty of construing the several imperial and Canadian acts:

> "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of Parliament.

He construes this in the light of recent decisions, as I read him, to the sensible, territorial conclusion that the jurisdiction extends to legal incidents and relationships arising at sea, so as to comprise even what are termed "maritime sales" in which title to property passes at sea, as in the case of sales of vessels, already so recognized.

Thus Canada, by proper attention, has achieved full admiralty jurisdiction only by a series of limited grants beginning in 1891 from vice admiralties, while the United States Supreme Court, starting from the same position with a full constitutional grant more than two centuries ago, is still bumbling about as to what it consists of and devising for it new, irrational, and unworkable demands to unlock it, such as commercial service, "traditional" maritime activity, and potential disruption of maritime commerce.

How should a great seafaring and trading nation explain such stumbling illogic?

Subjectivity: Initial Vacillation to Experimental Confusion in 200 Years Glimpses of Clarity

After some probing of boundaries, the Court broke through the defined limits of navigable waters in order to sustain an act of Congress extending admiralty jurisdiction to the Great Lakes and their related waters. This was significant in principle but directly affected only inland waters, apparently from stress on vessel casualties in avenues of commerce.[11] It is interesting that the same act created the Saving-to-Suitors Clause and the Court remarked of it that: "[i]t secures to the parties the trial by jury as a matter of right in the admiralty courts.... And [erroneously] it thus effectually removes the great and leading objection, always heretofore made to the admiralty jurisdiction."[12] The old issue was very much alive in 1851.

In 1866 the Court, considering the liability for a fire that spread from a moored vessel to her wharf, announced the rule of *The Plymouth*, of splendid clarity and practical breadth, for admiralty jurisdiction of marine torts. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."[13] While that ruling was still in full force and unchallenged, Congress enacted it into statute,[14] first reciting the existing recognized scope, "all cases of damage or injury, to person or property, caused by a vessel on navigable water," and

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[9] U.S. Const. art. III, § 2.

[10] Act of Sept. 24, 1789, ch. 20, 1 Stat. 76, § 9.

[11] Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 1999 AMC 2092 (1851).

[12] *Id*., at 459, 1999 AMC at 2103. (The allowance of jury trial applied only to cases under the Great Lakes Act.)

[13] The Plymouth, 70 U.S. (3 Wall.) 20, 1999 AMC 2403 (1865).

[14] 46 U.S.C. § 740.

then extending it by the words, "notwithstanding that such damage or injury be done or consummated on land."[15] Two courts of appeals have recognized in the Extension Act a Congressional enactment of the *Plymouth* rule, at least where a vessel was involved,[16] but the Supreme Court has not done so, although it has affirmed the act's constitutionality as respects damage on land.

From apparently unanimous virtue, as we shall see, the Court has regressed to a pattern of puzzlement, stalemate, or slothful neglect.

Confusion Reigns

Commerce—*Foremost Insurance*

In the 1960s a vast increase in pleasure craft fueled an outbreak of judicial and academic interest in removing them from the exclusive dignity of the admiralty by limiting it to "commercial" vessels, and much foolishness was uttered to that end. It was a non-starter for several reasons; navigation was itself commerce; the distinction of pleasure and commercial craft was discovered to be elusive; and the nonsensical implication of launching thousands of vessels into the same waters under different rules and systems of law was recognized. The necessity of commerce as an element of admiralty jurisdiction was ultimately rejected in a case of a collision between two pleasure boats,[17] but then the Court added "the potential disruptive effect of a collision" as a makeweight and a footnote observation that it wouldn't be so in every case—altogether a dog's breakfast.

Traditional maritime aviation—*Executive Jet*

A limited opportunity for clarifying the boundaries of admiralty jurisdiction was presented in the *Executive Jet* case in 1972 where a passenger plane taking off from a coastal airport struck a flock of gulls rising off the runway and sank offshore. The Supreme Court framed a new rule of jurisdiction, explicitly intended only for aviation casualties in domestic flights, requiring a "significant relationship to traditional maritime activity" by stating "claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary."[18] This was an utterly gratuitous invention to decide a case already controlled by its 1928 decision that falling into the water as a result of negligence ashore is not cognizable in admiralty. To dispose of *The Plymouth*, the Court delivered some lines of astonishing chop-logic, stating and expanding on the assertion that "the Court has never explicitly held that a maritime locality is the sole test of admiralty tort jurisdiction." Of course not; but if not the sole test, it was long understood to be adequate.

Maritime tradition aloft and adrift—*Sisson*

In the next 18 years, a number of lower courts treated the rubric of tradition as not limited to aviation. In the *Sisson* case, arising from a fire in a marina spreading to moored boats, the Court looked back fondly at the rule of tradition and adopted it for all maritime torts. Not content with that, the Court added the test of disruption of commerce, a flash of makeweight afterthought from *Foremost*, intended now to be a new boundary warning. There are so many ways and means of disruption that it was rapidly developed by counsel in the lower courts as a beacon of invitation. Here are a couple of notable examples of "disruption of maritime commerce": a seaman who suffered a head injury on board a vessel and murdered his grandmother on shore;[19] and a corporation charged with wrongfully securing the arrest of a vessel in port, surely a "traditional" maritime activity, and thereby "disrupting" maritime commerce by denying the sea its presence.[20]

Futility

Many lawyers, judges, and parties would surely be pleased with a clearer and more economical approach to defining admiralty tort jurisdiction, as eliminating original doubt about a given claim. It is, moreover, not as though the purposive approach has led to uniformity. In an article published in 2006, I examined 134 opinions in American Maritime Cases indexed under "Traditional Maritime Activity" and "Effect on Commerce"

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[15] *See* further analysis in Graydon S. Staring, *A Return to Objectivity in Admiralty Tort Jurisdiction?* 4 Benedict's Mar. Bull. 94, 101-02 (Second Quarter 2006).

[16] Moye v. Henderson, 496 F.2d 973, 979, 1974 AMC 2661, 2669 (8th Cir. 1974); Tagliere v. Harrah's Illinois Corp., 445 F.3d 1012, 1015, 2006 AMC 1290, 1294 (7th Cir. 2006).

[17] Foremost Insurance Co. v. Richardson, 457 U.S. 668, 1982 AMC 2253 (1982).

[18] Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 268, 1973 AMC 1, 15-16 (1973).

[19] Crear v. Omega Protein, Inc., 2002 AMC 2587 (E.D. La. 2002).

[20] Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 2006 AMC 383 (3rd Cir. 2006), *rev'd on other grounds*, 549 U.S. 422, 2007 AMC 609 (2007).

from 1991 (the year after *Sisson*) through 2006. In some, the issue was jurisdiction itself, and in others, the choice of maritime or State law. In reviewing them, after discarding those considered irrelevant or unclear, 78 trial court and 46 appellate dispositions remained, in which holdings or positive dicta (not mere references) were counted. Of all those opinions, 114 upheld admiralty jurisdiction and 21 finally denied it.[21] In preparing this column, I similarly reviewed opinions from 2007 to date and, of 70 relevant, 55 chose admiralty and 15 denied it.

Among the denials in both periods surveyed are several where the connection with navigable water or navigation was attenuated and some that are scarcely reconcilable with others, as might be expected from such subjective tests.[22] These numbers and inconsistencies suggest: first, that there is much initial uncertainty about satisfying these subjective tests and therefore about the available jurisdiction and applicable law; and second, that their elimination would have little effect on the jurisdictional results. The decisions also reflect not only inconsistencies within themselves but inscrutable distinctions from earlier ones of great authority that are still followed in the circuits as mandatory, without reference to the newer tests.

The courts must sometimes devise new tests to sift out frivolous or inconsequential claims of admiralty jurisdiction. But the tests being used, which have no historic foundation in the origin of federal allocation of the constitutional power, are not justified by their impact on its exercise and their inconvenient, costly, and capricious subjectivity for lawyers, parties, and judges. The application of these tests depends greatly on the imagination of counsel and the courts' appreciation of it rather than on legal or technical learning.

Conclusion-*Cui Bono?*

Cui bono? Who indeed benefits from these nonsensical vagaries: neither plaintiffs nor defendants, workers nor employers, industries nor consumers, judges nor scribbling jurists. And surely not a lawyer who suspects that the jurisdiction of his case depends on how the judge ate, drank, or slept last night.

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Graydon S. Staring earned his A.B. at Hamilton College, served in the Navy in WWII, and earned his J.D. at the University of California, Berkeley. He practiced in the Justice Department and then for about 40 years in the San Francisco firm Lillick & Charles, in courts of the Ninth Circuit and the Supreme Court, specializing in admiralty, marine insurance, major arbitrations, and ultimately reinsurance. From 1957 through 2013, he has published many articles in his fields, and in 1992 published "Law of Reinsurance," the first modern and most comprehensive American text on the subject, and annually updated it.

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[21] *See* for details Graydon S. Staring, A*dmiralty Jurisdiction of Torts and Crimes and the Failed Search for its Purposes*, 38 J. Mar. L. & Comm. 433, 478-480 (2007).

[22] *Compare* Sinclair v. Soniform, Inc., 935 F.2d 599, 1991 AMC 2341 (3rd Cir. 1991) (recreational scuba diving; jurisdiction) *with* Delgado v. Reef Resort Limited, 364 F.3d 642, 2004 AMC 1109 (5th Cir. 2004) (recreational scuba diving; no scubas, please, were traditional) *and* Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1993 AMC 855 (9th Cir. 1993) (recreational non-scuba diving; no jurisdiction); *compare* H2O Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 1997 AMC 390 (9th Cir. 1996) (no jurisdiction of CO poisoning on houseboat when moored to shore because no potential to disrupt) and Lewis v. Sea Ray Boats, Inc., 65 P.3d 245, 2003 AMC 815 (Nev. 2003) (same) with Houseboat Starship II, Limitation Proceedings, 2006 AMC 1335 (M.D. Tenn. 2005) (distinguished on ground poisoning occurred after beginning of cruise); *see also* Staring, *supra*, 463 notes 141, 142.

Maritime Removal of Cases Under 28 U.S.C. Section 1441

By Rebecca Hamra

The impact of the 2011 amendments to the removal statue (28 U.S.C. § 1441), continues to reverberate across the US maritime community. Prior to the amendments, the Supreme Court had held that maritime claims, for which federal courts have original jurisdiction under 28 U.S.C. Section 1333, are not considered to "arise under" the Constitution, treaties or laws of the United States for purposes of federal question or removal jurisdiction.[1] After the amendments, some cases in 2013 from the Southern District of Texas were held removable under the new version of the statute. However, the trend appears to be reversing itself.

By way of background, federal courts have original jurisdiction over admiralty cases pursuant to Section 1333. Additionally, Section 1441 permits a defendant to remove an admiralty case to federal court because it is one over which the federal court has original jurisdiction. Section 1333 also contains a "savings to suitors" clause, which grants concurrent jurisdiction to state courts to hear general maritime law claims. This gives a plaintiff the choice between state or federal court. In admiralty cases, this meant that if the case was brought in state court and at least one of the parties served as defendant was a citizen of the state in which the action was brought, removal of the case by the defendant to federal court was not possible due to the "savings to suitors" clause.[2]

In December 2011, 28 U.S.C. Section 1441 was amended by Congress. The amendments deleted language from the former version of Section 1441 that courts had historically relied on to limit the removal of maritime claims. The current version of the statute no longer makes a distinction between claims "arising under the Constitution, treaties or laws of the United States" and "other such actions[s]." Instead Section 1441(b) now refers only to removals based on diversity jurisdiction.

There are several reasons for maritime defendants to remove cases to federal court based on admiralty jurisdiction. For example, in a maritime case in federal court there is no right to a jury trial absent another jurisdictional basis, discovery in federal court is usually more controlled, federal judges are more likely to consider dispositive motions, and overall federal courts tend to resolve cases more quickly. Maritime defendants saw the 2011 amendments as an opportunity to gain an advantage for their cases.

In 2013, three cases were brought in the 5th Circuit that allowed the removal of general maritime law claims. The first was *Ryan v. Hercules Offshore, Inc.*[3] In *Ryan*, Judge Gray Miller of the Southern District of Texas held that under the amended removal statute, a defendant could remove general maritime law claims from state to federal court absent diversity or another basis for federal jurisdiction. The claim involved a worker who died during drilling operations off the coast of Nigeria. Claims were brought under the Death on the High Seas Act, general maritime law and the *Sieracki* seaman doctrine. Judge Miller denied the plaintiff's motion to remand deeming all the claims to be "admiralty claims over which a federal district court has original jurisdiction and the revised removal statute does not limit the removal of these claims."[4] Thus, the federal court refused to remand the removed case back to the Texas state court from which it came.

A few months later, the court in *Wells v. Abe's Boat Rentals*[5] also denied plaintiff's motion to remand a claim under the Outer Continental Shelf Lands Act (OSCLA) and under general maritime law. Building on the *Ryan* decision, Judge Lee Rosenthal held that general maritime claims, with the exception of Jones Act claims, are properly removable under the revised statute. In *Wells*, the plaintiff was injured while moving cargo from a vessel to a fixed platform off the coast of Louisiana. Plaintiff brought a Jones Act claim and negligence claims under general maritime law. Defendants supported their motion to remove by arguing that the negligence claims were removable under OCSLA. Defendants also argued that the claims

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[1] *See* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[2] *See In re* Dutile, 935 F.2d 61, 1991 AMC 2979 (5th Cir. 1991).

[3] Ryan v. Hercules Offshore, Inc., 945 F. Supp. 2d 772 (S.D. Tex. 2013).

[4] *Id*. at 779.

[5] Wells v. Abe's Boat Rentals, 2013 U.S. Dist. LEXIS 85534 (S.D. Tex. June 18, 2013).

were removable even if OCSLA did not apply and substantive maritime law controlled due to the amendment to Section 1441. The Court held that the OCSCLA claims were properly removed, but severed and remanded the Jones Act claims back to state court. Judge Rosenthal noted that even if the claims did not fall under OCSLA, and instead general maritime law applied, the claims were properly removed as the language of Section 1441 no longer prevents the removal of general maritime claims where no diversity between the parties exists.

Ryan and *Wells* were both used to support the third case in 2013, *Bridges v. Phillips 66 Co.*[6] Brought in the Middle District of Louisiana, the plaintiff's claims included general maritime law claims involving alleged asbestos exposure on drilling rigs in the 1970s and 1980s. While *Bridges* was a report and recommendation (R&R) from a federal magistrate judge, the opinion was adopted by the district judge. The *Bridges* case involved general maritime claims against one group of defendants and Jones Act claims against another groups of defendants. The magistrate's R&R noted that even though the general maritime law claims were removable under *Ryan* and *Wells*, the Jones Act claims were statutorily non-removable under 46 U.S.C. Section 30104 and 28 U.S.C. Section 1445(a). The R&R held it premature to consider severance and remand of the non-removable Jones Act claims from the general maritime law claims, as the R&R was not a ruling on the plaintiff's motion to remand.

In light of the *Ryan*, *Wells* and *Bridges* decisions, 2014 held a great deal of promise for maritime defendants attempting to remove their general maritime law claims to federal court. At the time and particularly in the 5th Circuit, it seemed as though a general maritime law claim brought in state court, including cases for maintenance and cure, unseaworthiness, personal injury to a non-seaman, etc., could be removed to federal court as long as the action was timely removed. However, 2014 saw the majority of lower courts declining to follow this line of decisions. In fact, since January 2014 there have been at least 26 cases in which the removal of general maritime law claims has been denied. Aside from the district courts in the 5th Circuit, the author is not aware of any other court that has allowed the removal of general maritime law claims. This includes claims in the 9th, 6th, and 11th Circuits.[7]

The courts that have denied removal of general maritime law claims have noted the longstanding precedent that federal courts do not have admiralty jurisdiction over maritime claims filed in state court pursuant to the saving-to-suitors exception to original admiralty jurisdiction. The idea that the amendments were intended to have this effect, according to the current majority view,

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[6] Bridges v. Phillips 66 Co., No. 13-477, 2013 U.S. Dist. LEXIS 164146 (M.D. La. Nov. 19, 2013), *adopting* 2013 U.S. Dist. LEXIS 164542, *12-13 (M.D. La. Sept. 27, 2013).

[7] Fourth Circuit: *See* Cassidy v. Murray, No. GLR-14-1204, 2014 U.S. Dist. Lexis 100761 (D. Md., July 24, 2014).

Fifth Circuit: *See* Parker v. US Envtl. Servs., LLC, 2014 U.S. Dist. LEXIS 175866, 14-15 (S.D. Tex. Dec. 19, 2014); Yavorsky v. Felice Navigation, 2014 U.S. Dist. LEXIS 158039 (E.D. La. Nov. 7, 2014); Dyche v. US Envtl. Servs., LLC, 2014 U.S. Dist. LEXIS 155670 (E.D. Tex. Oct. 29, 2014); Bartel v. Alcoa S.S. Co 2014 U.S. Dist. LEXIS 152168 (M.D. La. Oct. 2, 2014); Bartel v. Cent. Gulf Lines, Inc., 2014 U.S. Dist. LEXIS 150196 (M.D. La. Oct. 1, 2014); Day v. Alcoa Steamship Co., Inc., No. 14-317-BAJ-SCR, 2014 U.S. Dist. LEXIS 139059 (M.D. La, Sep. 30, 2014); Marvin v. American Export Lines, Inc., No. 3:14-CV-00316-BAJ-SCR, 2014 U.S. Dist. LEXIS 139365 (M.D. La, Sep. 30, 2014); Bisso Marine Co., Inc. v. Techcrane Int'l LLC, 2014 U.S. Dist. LEXIS 126478 (E.D. La. Sept. 10, 2014); Riley v. LLOG Exploration Co. LLC, 2014 U.S. Dist. LEXIS 120163 (E.D. La. Aug. 28, 2014); Henry J. Ellender Heirs, LLC v. Exxon Mobil Corp., 2014 U.S. Dist. LEXIS 119055 (E.D. La. Aug. 26, 2014); Gregoire v. Enter. Marine Servs., LLC, 2014 U.S. Dist. LEXIS 108286 (E.D. La. Aug. 6, 2014); Grasshopper Oysters, Inc. v. Great Lakes Dredge & Dock, LLC, 2014 U.S. Dist. LEXIS 103284 (E.D. La. July 29, 2014); Porter v. Great Am. Ins. Co., 2014 U.S. Dist. LEXIS 94629 (W.D. La. July 9, 2014); Figueroa v. Marine Inspection Servs., 2014 U.S. Dist. LEXIS 89211 (S.D. Tex. July 1, 2014); Alexander v. Seago Consulting, 2014 U.S. Dist. LEXIS 91368 (S.D. Tex. June 23, 2014); Gabriles v. Chevron USA, Inc., 2014 U.S. Dist. LEXIS 77674 (W.D. La. June 6, 2014); Perrier v. Shell Oil Co., 2014 U.S. Dist. LEXIS 70374 (E.D. La. May 22, 2014); Tilley v. American Tugs, Inc., No. 13-6104, 2014 U.S. Dist. LEXIS 95478 (E.D. La. May 16, 2014); Freeman v. Phillips 66 Co., Nos. 14-311, 14-624, 2014 U.S. Dist. LEXIS 48357 (E.D. La. Apr. 8, 2014); Rogers v. BBC Chartering Am., LLC, 2014 U.S. Dist. LEXIS 30104 (S.D. Tex. Mar. 3, 2014); Barry v. Shell Oil Co., No. 13-6133, 2014 U.S. Dist. LEXIS 23657 (E.D. La. Feb. 25, 2014).

Sixth Circuit: *See In re* Foss Maritime Co., 2014 U.S. Dist. LEXIS 87516 (W.D. Ky. June 27, 2014).

Ninth Circuit: Bartman v. Burrece, 2014 U.S. Dist. LEXIS 114101 (D. Alaska Aug. 18, 2014); Coronel v. AK Victory, 1 F. Supp. 3d 1175, 2014 AMC 954 (W.D. Wash. Feb. 2014).

Eleventh Circuit: Pierce v. Parker Towing Co., Inc., 25 F. Supp. 3d 1372 (S.D. Ala. June 9, 2014).

appears to be "too radical to be acceptable."[8] Courts have noted that the amendments were not meant to change the original statute's meaning but to clarify the language.[9] Most recently, Judge Keith Ellison in the Southern District of Texas stated that "where the language of a statute is far from clear, as it is here, the Court would be remiss to disregard the notable absence of any Congressional intent to enact a change in maritime jurisdiction."[10]

Nevertheless, there have been five cases in the 5th Circuit in 2014 that have allowed removal for general maritime law claims,[11] and one in the 6th Circuit.[12] Also, courts in the 5th Circuit have allowed removal of OCSLA claims as recently as October of 2014.[13]

Given the conflict that the amendments have caused, the logical step would be for an appellate court to directly address whether the current version of the removal statute allows removal of purely maritime claims falling under Section 1333. However, it remains to be seen whether this issue will make it to a circuit court of appeals. Since an order remanding a case is not a final judgment and not immediately appealable, the only avenue appears to be by way of interlocutory appeal from an order refusing remand. Until the right set of circumstances occurs for an appeal to be heard on the merits of the removal petition, we can expect the case law, especially in the 5th Circuit, to continue to grow.

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[8] David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 38 Tul. Mar. L.J. 419, 477-78 (2014) (*cited in* Harrold v. Liberty Ins. Underwriters, 2014 U.S. Dist. LEXIS 158320 (M.D. La. Nov. 6, 2014) *and* Bartel v. Alcoa S.S. Co., 2014 U.S. Dist. LEXIS 168798 (M.D. La. Nov. 6, 2014)).

[9] Barker v. Hercules Offshore, Inc., 713 F.3d 208, 223 (5th Cir. 2013).

[10] Parker v. US Envtl. Servs., LLC, 2014 U.S. Dist. LEXIS 175866, *14-15 (S.D. Tex. Dec. 19, 2014).

[11] *See* Exxon Mobil Corp. v. Starr Indem. & Liablity Co., 2014 U.S. Dist. Lexis 82434 (S.D. Tex. 2014); Provost v. Offshore Serv. Vessels, LLC, No. 14-89-SDD-SCR, 2014 U.S. Dist. LEXIS 77635 (E.D. La. June 4, 2014); Garza v. Phillips 66 Co., No. 13-742-SDD-SCR, 2014 U.S. Dist. LEXIS 45542 (M.D. La. Apr. 1, 2014); Harrold v. Liberty Ins. Underwriters, Inc., No. 13-762-JJB-SCR, 2014 U.S. Dist. LEXIS 20897 (M.D. La. Feb. 20, 2014); Carrigan v. M/V AMC Ambassador, No. H-13-03208, 2014 U.S. Dist. LEXIS 12484 (S.D. Tex. Jan. 31, 2014).

[12] Kentucky v. Altany, No. 5:12-CV-00021-TBR, 2014 U.S. Dist. Lexis 87516 (W.D. Ky, June 27, 2014).

[13] *See* Perise v. Eni Petroleum, U.S. L.L.C., No. 14-99-SDD-RLB, 2014 U.S. Dist. LEXIS 141039 (M.D. La. Oct. 1, 2014); Ronquille v. Aminoil Inc., No. 14-164, 2014 U.S. Dist. LEXIS 123224 (E.D. La. Sept. 4, 2014); Hubbard v. Laborde Marine, L.L.C., No. 13-5956, 2014 U.S. Dist. LEXIS 74748 (E.D. La. June 2, 2014); *In re* Deepwater Horizon, 745 F.3d 157 (5th Cir. Feb. 2014); Landerman v. Tarpon Operating & Dev., L.L.C., 19 F. Supp. 3d 678 (E.D. La. May 1, 2014) (allowing the removal of OCSLA claim but severing and denying the removal of the Jones Act claim). *See also* Caitlin Baroni, Recent Developments in Maritime Law: A Survey of Recent Jurisprudence on the Removal of Maritime Claims from State to Federal Court, http://www.tulanemaritimejournal.org/wp-content/uploads/2014/11/Removal-Infographic-2.jpg (last visited January 21, 2015) (providing a graphical depiction of recent admiralty cases addressing removal).

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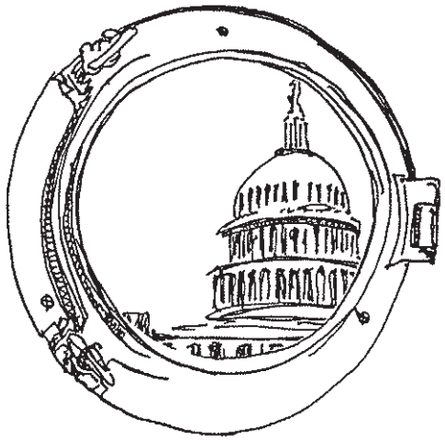

TRIMMING THE TREE ON CAPITOL HILL

By Bryant E. Gardner

Just before the close of the 113th Congress and almost on the eve of Christmas, Congress passed the Coast Guard and National Defense Authorization bills for fiscal year 2015. These two pieces of hopefully annual legislation, and the Coast Guard bill in particular, have frequently attracted a variety of maritime-related legislative provisions in need of a vehicle, leading some commentators to quip that they have become "Christmas tree bills" ornamented with legislative add-ons.

This year was no different. Seeing these two bills as the only likely pieces of legislation with a decent chance of becoming law before the end of the session and the 2014 holiday recess, various interest groups tacked their provisions onto the legislation. While some maritime interests received presents in time for the holidays, others are more apt to see lumps of coal in these bills. But, as House Appropriations Chairman Hal Rogers and Senate Appropriations Chairwoman Barbara Mikulski observed in a recent joint statement, "While not everyone got everything they wanted, such compromises must be made in a divided government."[1]

I. Howard Coble Coast Guard and Maritime Transportation Act of 2014

After over a year of deliberations and amendments, Congress passed the Howard Coble Coast Guard and Maritime Transportation Act of 2014 ("CGMTA" or the "Act") on December 12, 2014, and President Barack Obama signed the bill into law on December 18, 2014 just in time for the holidays and the end of the 113th Congress.[2] Besides authorizing funding for the Coast Guard during fiscal year 2015, the legislation contains a number of important provisions affecting the maritime industry.

Gassing Up the U.S. Fleet. The Act contains a provision fiercely championed by Congressman Garamendi (D-CA), ranking member of the Coast Guard and Maritime Transportation Subcommittee of the House Transportation and Infrastructure Committee that is intended to harness natural gas exports to promote and expand opportunities for the U.S. Flag commercial fleet. Under existing provisions of law, the U.S. Maritime Administration ("MARAD") has authority to prioritize licenses under the Deepwater Port Act of 1974 for

[1] Rep. Hal Rogers & Sen. Barbara Mikulski, Rogers-Mikulski Joint Statement on Omnibus Agreement (Dec. 9, 2014), *available at* http://haldogers.house.gov.

[2] Pub. L. No. 113-281, 128 Stat. 3022 (2014) ("CGMTA").

facilities that import LNG on U.S.-flag vessels.[3] However, recent developments in U.S. "tight" oil production (such as "fracking") have generated a surfeit of LNG, such that many terminals are now being rejiggered to facilitate the export of LNG from the United States.[4] Congressman Garamendi's provision amends the MARAD promotional authority to prioritize licenses for facilities that utilize U.S.-flag exports as well as imports of LNG.[5] The Act also requires that the Government Accountability Office submit a report to Congress within one year of enactment detailing the number of jobs that would be created for each year in 2015-2025 if LNG exported from the U.S. were required to be carried in U.S. flag vessels.[6] The reporting requirement was a compromise, following withdrawal of an amendment proposed by Congressman Garamendi which would have phased in a requirement that all LNG exports be on U.S.-built, U.S.-crewed ships under the U.S. flag. "Natural gas is a strategic national asset that has helped spur a revival of American manufacturing. When done thoughtfully, limited exports provide an excellent opportunity for creating American jobs in building and manning LNG ships," said Congressman Garamendi, "What is needed is a law that requires that LNG is exported on U.S. built ships, flagged in America and crewed by American sailors."[7]

Following up on Maritime Administrator Paul "Chip" Jaenichen's National Maritime Strategy symposia in 2014, the Act also directs the development of a National Maritime Strategy aimed at revitalizing the deep water internationally trading U.S. flag fleet.[8] The Act directs the Coast Guard and Maritime Administration to identify regulations that reduce the competitiveness of U.S.-flag vessels in the foreign trades, and address the impact of reduced cargo flow due to reductions in United States Armed Forces personnel overseas. Additionally, it calls for recommendations to make U.S.-flag vessels more competitive in the international trades, ensure compliance with cargo preference laws,[9] increase third-party (class) inspection and certification, and increase short sea shipping and shipbuilding in the U.S. Lastly, the Act requires the Coast Guard to enter into an arrangement with the National Academy of Sciences to conduct an assessment of regulation of U.S.-flag vessels, including a review of departures from International Maritime Organization Standards employed by most open registries.[10]

Abandoned Seafarers Fund. Over the last 10 years, the Coast Guard and Department of Justice have developed an aptitude for the so-called "magic pipe" cases prosecuting environmental crimes in connection with vessel operational waste discharges using the False Statements Act, the Act to Prevent Pollution from Ships ("APPS") (the domestic MARPOL enactment), and a host of other criminal and environmental laws. In connection with these cases, the authorities have often found it necessary or convenient to retain in the U.S., as witnesses or defendants, alien crewmembers serving aboard foreign-flag vessels who might otherwise not be available to U.S. law enforcement. However, obtaining and funding their support during sometimes extended periods of investigation has been at times a thorny issue, and the authorities have tended to rely upon voluntary agreements of support by vessel owners or operators, or other work-arounds. Therefore, since 2007 the Coast Guard has pushed for the establishment of a seafarer's fund to support seafarer witnesses and secure Coast Guard access to them during investigations.

Section 320 of the CGMTA incorporates new provisions of law designed to fund and accommodate such seafarers while they remain in the United States, incorporating provisions from competing House and Senate proposals. The new law sets up a new $5 million Treasury account called the "Abandoned Seafarers Fund" to provide support for seafarers involved in an investigation or who have been abandoned in the United States by a vessel owner or operator, or to reimburse a vessel owner or operator that advanced seafarer support funds during an investigation but who was not ultimately convicted. Funds expended from the Abandoned Seafarers Fund are recoverable from the

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[3] Coast Guard and Maritime Transportation Act of 2006, Pub. L. No. 109-241, § 304(a), 120 Stat. 516, 527 (2006) (codified in part at 33 U.S.C. § 1503(i)).

[4] *See generally* Bryant E. Gardner, "Fracking Maritime Policy," 11 BENEDICT'S MAR. BULL. 141 (Third Quarter 2013).

[5] CGMTA § 307.

[6] *Id.* § 308.

[7] In Coast Guard Bill Markup, Ranking Member Garamendi Fights for U.S. Jobs, Revival of Maritime Industry & Cruise Ship Passenger Bill of Rights, *available at* http://www.garamendi.org (last visited Dec. 23, 2014).

[8] CGMTA § 603.

[9] Cargo preference laws require that, when the U.S. Government ships or finances shipments of cargo, at least a portion of that cargo is carried by U.S.-flag vessels.

[10] CGMTA § 605.

responsible vessel owners and operators, and the account may also be funded by fines recovered from APPS violators. Owners and operators failing to comply with demands to reimburse the Fund for costs incurred will be subject to *in rem* vessel arrest and revocation of vessel departure clearances required by 46 U.S.C. § 60105. Although the Senate provision would have imposed a 25% surcharge on any shipowner or operator who does not voluntarily provide seafarer support costs during the pendency of an investigation, that provision did not survive into the final enactment.

Small Shipyards Assistance. The House bill included a provision enacted in the final law which extends the popular small shipyards assistance program through 2017.[11] Under the program, MARAD is authorized to provide up to $25 million in grants for capital improvements and $5 million in training grants annually at qualifying shipyards, with Federal funds capped at 75% of the total cost of the project being funded.[12] The legislation directs MARAD to take into account the "economic circumstances and conditions of maritime communities;" which projects will be effective in fostering "efficiency, competitive operations, and quality ship construction repair, and reconfiguration;" and the likelihood that projects will foster employee skills and productivity when awarding the grants.[13]

OSV Class Inspection & Regulatory Review. Another House provision which survived into the final law reduces the regulatory burden upon U.S.-flag offshore supply vessels by permitting them to rely upon third party classification society inspections in lieu of U.S. Coast Guard inspections.[14] More specifically, the delegation, which requires a request of the owner or operator, would permit the society to conduct "any vessel inspection and examination function carried out by the [Coast Guard], including the issuance of certificates of inspection and all other related documents." The provision also requires a report within two years of enactment detailing the number of vessels for which the delegation was made, resultant savings to the Coast Guard, and any impacts upon the operational safety of vessels for which such delegations were made. Additionally, the Act requires the Coast Guard to report to the congressional committees having jurisdiction any proposed safety and environmental management system requirements for offshore supply vessels, including cost estimates and the purported justifications for such requirements, and further prohibits the imposition of such new regulatory requirements earlier than six months following such report.[15]

Articalia. The Act also includes a new provision reforming the system of payments and compensation among nations for international ice patrols in the North Atlantic.[16] Existing legislation permitted the President to (a) enter into agreements with other maritime nations to operate an ice patrol in the North Atlantic for purposes of observing ice conditions and rendering assistance to vessels operating there, and (b) agree upon payments among such nations as compensation for maintaining such services.[17] The new provision, which originated in the House, provides that any such payments will be returned to the Coast Guard's operating budget, and further provides that data collected by the Coast Guard ice patrol shall not be disseminated to foreign-flag vessels from nations which have not contributed to the cost of maintaining the service, effective 2017. The amendment would therefore force the ice patrol operational cost onto the shoulders of flag states, and away from the United States and other neighboring area maritime nations in the North Atlantic. Under the original House proposal, the Coast Guard would have been prohibited from providing the service if during the prior fiscal year it did not receive payments sufficient to compensate it for the share of the service supplied to non-U.S.-flag vessels.[18] The Act also includes provisions encouraging international cooperation with respect to the development of Arctic navigational aids, spill response, Arctic maritime domain awareness, and Arctic forward operating facilities.[19] Lastly, the Act also wades back into the Great Icebreaker Debate,[20] shepherding the maintenance of the Coast Guard's dwindling

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[11] CGMTA § 303.

[12] 46 U.S.C. § 54101.

[13] *Id.* § 54101(b).

[14] CGMTA § 315.

[15] CGMTA § 322.

[16] CGMTA § 314.

[17] 46 U.S.C. § 80301.

[18] H.R. 4005, 113th Cong. § 302 (2014).

[19] CGMTA §§ 501-504.

[20] *See* Bryant E. Gardner, "Pirates, Adventures in the Arctic, and More: A Peak at the 11th Hour Maritime Legislation of the 112th Congress," 10 Benedict's Mar. Bull. 170 (Fourth Quarter 2012).

ice breaking capability and directing the development of a plan to get the service back on track.[21]

Off the Hook. CGMTA also extends through 2017 the moratorium upon the Environmental Protection Agency's imposition of permitting requirements with respect to discharges incident to the normal operation of small vessels (under 79 feet) and fishing vessels.[22] Notably, the House bill would have made the exemption permanent.[23] Although the EPA had published its Small Vessel General Permit on September 10, 2014 with an effective date of December 19, 2014 in anticipation of the December 18, 2014 expiration of the existing moratorium, the Act relieves small and fishing vessel operators from compliance with the program, although ballast water discharges still require permit coverage.[24]

Cruise Ship Safety. Senator Jay Rockefeller (D-WV), Chairman of the Senate Committee on Commerce, Science, and Transportation, has championed cruise ship consumer safety in the wake of several high-profile incidents. These include sexual assault and the February 2013 fire aboard the CARNIVAL TRIUMPH that left passengers stranded for days aboard the 2,754 passenger ship, adrift and without power, resulting in a rapid deterioration of conditions on board. Although the Chairman faced stiff resistance from the cruise industry, and the dispute threatened to derail the Coast Guard bill (which historically relies upon a unanimous consent procedure and therefore must be relatively non-controversial), Section 321 of the Act does impose new disclosure requirements making available to cruise consumers information regarding on-board incidents. Specifically, all complaints of crimes—even if not proven and regardless of the investigative status of the incident—must be disclosed, and the information must be sortable by cruise line, which must be identified by name. The provision was one of several included in the Cruise Passenger Protection Act which cruise safety advocates had sought to tack onto the CGMTA.

Changes on North Capitol Street. The CGMTA also included two small but significant changes impacting the Federal Maritime Commission and the administration of the Shipping Act of 1984. Historically, complainants in the FMC were *entitled* to recover attorneys' fees where reparations are otherwise awarded.[25] Section 402 of the Act now makes the award of attorneys' fees discretionary, uncouples the award of attorneys' fees from the award of reparations, and further provides that they may be awarded to either prevailing party. Thus, a complainant seeking only a cease and desist order might now be able to recover fees, but if unsuccessful, the respondent may be able to recover fees. The provision is said to have been developed by port interests who have been looking at ways to curtail the increasing prevalence of Shipping Act complaints lodged against them by tenants and other users. Additionally, the Act includes new provisions limiting the terms of Commissioners. Although terms are currently limited to five years with each term beginning one year apart, Commissioners are permitted to serve an unlimited number of terms and to continue serving until a successor is appointed. The Act now limits Commissioners to two five-year terms, and prohibits them from serving more than one year following the end of the Commissioner's term pending appointment of a replacement. Finally, the Act imposes new statutory limitations upon a Commissioner's financial interest in entities regulated by the Commission, or upon other business, vocation, or employment during service to the Commission.

Close Calls

As is often the case, a number of substantive provisions were stripped out of the bill during negotiations between the House and Senate at the eleventh hour, including provisions that would have restored key cargo taken away from the U.S.-flag national defense sealift base in 2012 and curtailed access to the U.S. justice system by foreign seafarers.

Cargo Preference Restoration & Enforcement. The House bill included language which would have helped clarify existing authorities establishing MARAD as the supreme authority with respect to the implementation and enforcement of U.S.-flag cargo

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[21] CGMTA §§ 505-506.

[22] CGMTA § 602.

[23] H.R. 4005 § 501.

[24] *See* Environmental Protection Agency, Small Vessel General Permit, *available at* http://water.epa.gov/polwaste/npdes/vessels/Small-Vessel-General-Permit.cfm (last visited Dec. 23, 2014); Environmental Protection Agency, Final National Pollution Discharge Elimination System (NPDES) Small Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels Less Than 79 Feet, 79 Fed. Reg. 53,702 (Sept. 10, 2014).

[25] 46 U.S.C. § 41305(b).

preferences imposed upon Federal shipper agencies.[26] The House bill also would have restored civilian cargo preferences to 75% of cargo shipped, which was reduced to 50% U.S.-flag carriage in the 2012 Highway Bill known as "MAP-21."[27] However, the provisions were stripped by Senate interests allied with shipper agencies interested in padding their transportation budgets by employing open registry vessels in lieu of the U.S. taxpayers sailing aboard U.S. Merchant Marine sealift assets.[28]

Cruise Ship Seafarer Protections Upheld. Section 307 of the House bill, H.R. 4005, would have restricted foreign seafarers serving on passenger vessels from filing claims in the United States for "maintenance and cure" for damages or expenses related to personal injury, illness, or death. Section 308 would have eliminated class action provisions applicable to a suit for penalty wages due for the withholding seamen's wages. Objecting to the provisions before the House and offering amendments to strip them out of the bill, ranking member Garamendi stated "These two sections are an affront to seafarers everywhere, both here in the U.S. and abroad. By denying established legal rights to foreign seafarers, Section 307 would encourage ships to hire these workers . . . Section 308 would remove a basic protection for American mariners: a guarantee that they will be paid for their work."[29] Although Congressman Garamendi's amendment did not succeed in the House, the provisions did not survive into the final compromise with the then Democrat-held Senate.

Pertinent Appurtenances Survive Another Day. Section 301 of the House bill reprised the proposal to exempt fishing permits from the grip of maritime liens, previously discussed in *Window on Washington*.[30] As written, the provision would have legislatively overturned the admiralty rule holding that fishing rights are "appurtenances" of vessels to which a maritime lien or mortgage will attach, potentially unwinding deals or seriously undermining the security that lenders counted upon when they extended credit to fishing operators, especially where the vessel's value lies primarily in her fishing rights.[31] Although the provision did not survive the Senate, it serves as a stern reminder to maritime practitioners representing lenders that they should take a "belt and suspenders" approach, specifically naming the fishing rights as subject to the mortgage and further filing U.C.C.-1 financing statements against the permits as general intangibles. As at least one reader of *Window on Washington* has forcefully observed, there is a difference between mortgage and maritime liens. Perhaps House legislators could achieve their goal of freeing fishing permits from perceived "nuisance" liens, while maintaining the integrity of existing financings and preserving fishing industry access to capital, by clarifying that the limitation upon "appurtenances" does not curtail the reach of the mortgage lien.

II. National Defense Authorization Act of 2015

The giant $577 billion Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("NDAA")[32] signed into law on December 19, 2014 also includes several key maritime provisions. Although the law relates more broadly to military authorizations—and as a consequence is traditionally a "must pass" bill that has passed 53 years in a row making it a near sure-fire legislative vehicle—it does include several key maritime provisions impacting MARAD.

Maritime Security Program. The Maritime Security Program ("MSP") was established to ensure the availability of militarily useful U.S.-flag vessel capacity to

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[26] 46 U.S.C. § 55305; H.R. 4005 § 316.

[27] Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 100124, 126 Stat. 405 (2012).

[28] H.R. 4006 § 318.

[29] In Coast Guard Bill Markup, Ranking Member Garamendi Fights for U.S. Jobs, Revival of Maritime Industry & Cruise Ship Passenger Bill of Rights, *available at* http://www.garamendi.org. (last visited Dec. 23, 2014).

[30] H.R. 4005 § 301; *see also* Bryant E. Gardner, "Pirates, Adventures in the Arctic, and More: A Peak at the 11th Hour Maritime Legislation of the 112th Congress," 10 BENEDICT'S MAR. BULL. 170 (Fourth Quarter 2012); Bryant E. Gardner, "Fishing for Change," 10 BENEDICT'S MAR. BULL. 18 (First Quarter 2012).

[31] *See* Bryant E. Gardner, "Fishing for Change," 10 BENEDICT'S MAR. BULL. 18 (First Quarter 2012). *See also* Gowen, Inc. v. F/V QUALITY ONE, 244 F.3d 64, 2001 AMC 1478 (1st Cir. 2001); Bank of Am., NT & SA v. PENGWIN, 175 F.3d 1109, 1999 AMC 1905 (9th Cir. 1999); PNC Bank Delaware v. F/V MISS LAURA, 381 F.3d 183, 2004 AMC 2314 (3d Cir. 2004) (acknowledging doctrine but holding that lien on fishing rights did not survive loss of vessel and subsequent transfer of fishing rights to other vessel); Robert J. Zapf, *Appurtenances: What Are They And Are Fishing Permits Among Them?*, 79 TUL. L. REV. 1339 (June 2005).

[32] Pub. L. No. 113-291, 128 Stat. 3292 (2012) ("NDAA").

DOD in times of war and national emergency.[33] Successor to the Operating Differential Subsidy program eliminated in the late 1990s, MSP provides payments of $3.1 million dollars per year to each of 60 MSP enrolled vessels, in exchange for their enrollment in contingency contracts to ensure their availability when needed by DOD. Although usually non-controversial, the program was short-funded in preliminary versions of the bill before being restored to its $186 million appropriations level in the final NDAA legislation.[34] Moreover, the NDAA does not yet reflect efforts to increase or accelerate increases in MSP funding widely believed to be necessary to help offset the loss of preference cargoes as a result of the drawdowns in Iraq and Afghanistan, and the sagging humanitarian aid preference cargo trade. The future of MSP stands to be impacted by twin sealift requirements studies expected from MARAD and from the Office of the Secretary of Defense in coming months.

Domestic Maritime Industry. The U.S. cabotage coalition charged with the protection of the Jones Act[35] U.S. cabotage law, "America's Maritime Partnership," has been vigilant in recent years fending off renewed attacks on the Jones Act, including pressure to waive the Jones Act's U.S.-flag requirements with respect to withdrawals from the Strategic Petroleum Reserve, the movement of U.S. tight oil from production areas to domestic refineries, Hurricane Sandy response, and even in the face of criticism that the law prevented New Jersey residents from getting road salt last winter. The NDAA includes a generalized provision extolling the importance of the domestic maritime industry to national security.[36] Additionally, the NDAA includes a tailor-made waiver provision permitting the use of non-coastwise qualified floating dry docks used to launch or repair a vessel where the dry dock is owned or operated by a U.S. yard, but only within five nautical miles of the shipyard or an affiliate that owns or operates the dry dock.[37]

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[33] 46 U.S.C. §§ 53101–53111.

[34] NDAA § 3501.

[35] 46 U.S.C. § 55102.

[36] NDAA § 3503.

[37] *Id.* § 3502.

RECENT DEVELOPMENTS

Admiralty Jurisdiction

In re Louisiana Crawfish Producers, 2014 U.S. App. LEXIS 22221 (5th Cir. Nov. 24, 2014).

Plaintiffs, commercial fishermen in the Atchafalaya Basin in Louisiana, filed suit against a number of oil and gas companies claiming that aspects of their pipeline activities impeded water flow and navigation causing them economic harm. The suit brought claims under state law and general maritime law. The court granted a motion to dismiss certain defendants engaged only in oil and gas exploration and not dredging activities. Plaintiffs appealed these dismissals.

Plaintiffs alleged that defendants placed cement mats on sections of pipelines that impeded water flow and navigation. They also alleged that construction of a pipeline on a spoil bank impeded the water flows.

The court considered whether the standards for admiralty jurisdiction were satisfied. It easily determined that the location test was met because the allegation was that plaintiffs' harm occurred on navigable waters.

The appeal turned on the requirement of the second prong of the jurisdictional test to determine the appropriate level of generality to describe the character of the activity giving rise to the accident. Plaintiffs urged that the activity was the negligent construction resulting in obstruction of navigable waters, and defendants argued that the activity should be described as pipeline construction and repair. The court sided with the defendants. It found that plaintiffs' description was too particular and described the cause of harm. The appropriate description should look to the general conduct from which the harm arose. The court then concluded that pipeline construction and repair was not related to traditional maritime activity. Thus, plaintiffs had not shown a cause of action under maritime law against these defendants. The district court's dismissal was affirmed.

Submitted by KMM

Cruise Lines

Franza v. Caribbean Cruises, Ltd., 2014 U.S. App. LEXIS 21375 (11th Cir. Nov. 10, 2014).

The issue presented is whether a vessel can be vicariously liable for the negligence of an on-board ship's physician that led to a passenger's death, an issue the United States Fifth Circuit Court of Appeals previously answered in the negative. Plaintiff's father was a passenger on defendant's cruise ship. While the vessel was in port, her father went ashore and fell while boarding a trolley and struck his head. He went to the vessel's infirmary for treatment where he was initially seen only by a nurse employed by the cruise ship. The nurse noted abrasions on decedent's head but told decedent and his wife that he could return to his cabin. He never saw a doctor.

Decedent's condition deteriorated after he returned to the cabin, and he sought to return to the infirmary. There was a further delay in treatment while the medical staff requested payment for his treatment. Decedent was finally evaluated by a physician employed by the cruise ship. The doctor recommended transfer to an on-shore hospital, but his condition had deteriorated too far to save him. Decedent was eventually transferred back to the United States and died about one week after his fall.

Plaintiff filed suit for wrongful death under the general maritime law for negligence related to the decedent's medical treatment on the ship. She did not sue the physician or nurse individually. She alleged that the cruise line was vicariously liable through the acts of its employees or agents and alleged that the doctor and his staff were the actual or apparent agents of the vessel. Defendant moved to dismiss the suit and invoked the rule of *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), which held that a shipowner could not be held vicariously liable for a ship's employee's negligent provision of medical care to a passenger. The district court held that the *Barbetta* rule was applicable and granted the motion to dismiss. Plaintiff appealed.

The Eleventh Circuit found that allegations of an agency or employment relationship were factual issues under maritime law that could not be dismissed on a motion under Rule 12(b)(6). The court found that the issue turned on the degree of the vessel's control over its agents and that plaintiff had adequately alleged the existence of an actual or apparent agency relationship between the physician and nurse and the vessel. The court noted that the doctor and nurse wore uniforms bearing the name and logo of the vessel owner and that the vessel owner charged decedent for his treatment. It further observed that the vessel provided and stocked the infirmary where plaintiff was evaluated.

The court further refused to consider a provision in the passenger ticket contract declaring that the physician was an independent contractor. The court noted that the contract was not attached to the complaint and that mere labels in the contract were not controlling as to the true relationship between the physician and nurse.

The court then concluded that the *Barbetta* rule was outdated and inapplicable. The court observed that doctors and nurses today were not totally independent but, instead, often worked for large corporations. It further noted that the specialized skills of a medical provider would not insulate an employer from negligence and that the practice of medicine was no different from any other specialized skill for which vicarious liability existed. The court found that the question of liability turned on the degree of control of the agent by the principal and that liability should be evaluated on a case by case basis.

Further, the court rejected the conclusion in *Barbetta* that a vessel owner cannot control medical personnel because the relationship with the doctor is under the passenger's control. The court found that a person falling ill on a cruise ship had little choice but to seek relief from a physician on the ship and that passengers injured on land may be more comfortable seeking help from an on-board physician than seeking care in a foreign country. The court also concluded that the vessel owner was capable of supervising the physician when it provides access to medical care and provides infirmaries on its vessels for that purpose. Thus, the vessel owner showed some knowledge of the practice of medicine. The court then concluded that the extent of the vessel's control was a fact issue and that a mere geographical separation of the physician from the employer on land was no longer enough in modern times to exempt the vessel from liability. For these reasons, a blanket rule of immunity was untenable to the court.

The court concluded that plaintiff had successfully pled a claim of maritime negligence by the vessel owner. Thus, it reversed the district court's rule and remanded the case.

Submitted by KMM

Jones Act

Marston v. General Elec. Co., 121 A.D.3d 1457, 995 N.Y.S.2d 646 (2014).

Jeffrey Harbison was an employee of URS Corporation assigned to perform archaeological surveys in connection with General Electric Company's dredging project on the Hudson River. In connection with this employment, Harbison was operating a vessel on the river when the vessel lost power and was swept over the Thompson Island Dam. As a result, Harbison drowned. Harbison's wife commenced an action against URS under the Jones Act. Defendants Parsons Engineering of New York, Inc. and Saratoga Safety, Inc., dredging contractors, asserted cross claims against URS for indemnity. URS moved to dismiss the Jones Act claim and the cross claims for indemnification. The Supreme Court denied the motion and granted plaintiff's motion to amend. URS appealed arguing that the plaintiff failed to state a Jones Act violation as it failed to allege that the decedent was a seaman, and, even if did properly alleged that the decedent was a seaman, affidavits submitted in connection with the motion to dismiss establish that the decedent does not qualify for seaman status under the Jones Act.

The Court held that plaintiff's failure to use the term seaman in the complaint is not fatal as the allegations of the complaint alleging that the decedent drowned while operating a URS vessel on the Hudson River in the course of his employment provided sufficient notice of the plaintiff's Jones Act claim.

The affidavits submitted by URS described the decedent's duties as a land-based archaeologist, claimed that, other than the date of his death, decedent was only on a boat in connection with the Hudson River project for three days in 2006 and six days in 2009, and noted that decedent was also assigned to other

URS projects during that time frame. The Court noted that the affidavits did not sufficiently describe whether the decedent's activities were limited to the times that he spent on the water in 2006 and 2009. As a result of the submission of affidavits, the Court converted the motion to dismiss into a motion for summary judgment. The Court denied the motion because it determined that whether or not decedent was a seaman was a factual determination and noted that depending on the nature and duration of his duties on the Hudson River project, it was possible that he converted to seaman status at the time of the incident.

Submitted by SPB

Walker v. Walker Brothers Fisheries, LLC, 2014 U.S. Dist. LEXIS 173878 (D.N.J. Dec. 17, 2014).

Plaintiff was a Captain aboard the CONSTANTINO L who was injured when his foul weather gear was caught in the winch on the Vessel. Plaintiff's leg was mangled and his leg was amputated. The Vessel was owned by Walker Brothers Fisheries, LLC of which plaintiff was a 50% owner and a managing member.

Plaintiff brought suit against the vessel owner for his injuries. Defendant moved for summary judgment on the plaintiff's Jones Act negligence and unseaworthiness claims on the basis that the primary duty doctrine precludes plaintiff from recovering as he was in control of all aspects of the company, including the equipment he claims caused the incident. The primary duty rule precludes a seaman from recovering for injuries caused by his failure to perform a duty imposed on him by his employment. The Court noted that the defendant must prove that the seaman consciously disregarded his duties in order to prevail on a primary duty defense to a Jones Act negligence claim. The Court noted that summary judgment on the Jones Act claim was inappropriate as there is a genuine issue of material fact regarding whether plaintiff consciously disregarded his duties. The Court also denied defendant's motion for summary judgment on the unseaworthiness claim on the basis that plaintiff had asserted that expert testimony would shed light on the issue.

Defendant also moved for summary judgment on the basis that the plaintiff is precluded from bringing his claims against an association of which he is a member. The Court noted that the New Jersey courts have never considered the issue, but explained that other courts have considered this issue and two views have emerged. The traditional view is that negligence of the association is imputed to the member of the LLC, and a member is barred from recovering from the LLC for personal injuries. There is also a more liberal view which focuses on the member's ability to determine the association's policy. The record demonstrates that plaintiff owned 50% of the Company, kept the books for the Company, paid the bills on behalf of the Company, arranged for the maintenance and repairs of the Company's vessels, and authorized safety improvements. Appearing to adopt the more liberal view, the Court denied summary judgment and held that the plaintiff's claim may proceed. The Court noted that the degree of plaintiff's comparative negligence, which may include his actions as a member of the LLC, is an issue for the jury to decide.

Submitted by SPB

LHWCA

Price v. Atl. Ro-Ro Carriers, 2014 U.S. Dist. LEXIS 131429 (D. Md. Sept. 18, 2014).

Plaintiff brought suit under section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et seq. ("LHWCA"). All defendants moved for partial summary judgment on the grounds that section 11-108 of the Maryland Code's Courts and Judicial Proceedings Article applied to the plaintiff's claim and limited his prospective noneconomic damages to $695,000.00. Plaintiff opposed the motion arguing that the claim arose under federal maritime law and that section 11-108 of the Maryland Code's Courts and Judicial Proceedings Article was preempted.

Section 11-108 of the Maryland Code's Courts and Judicial Proceedings Article provides a cap on noneconomic damages in personal injury suits. The Court noted that state law can supplement federal maritime law in certain circumstances, but that supplementation is not appropriate where the law: "(1) 'contravenes the essential purpose expressed by an act of Congress,' (2) 'works material prejudice to the characteristic features of the general maritime law,' or (3) 'interferes with the proper harmony and uniformity of [the general maritime] law in its international and interstate relations.' "

The Court held that while section 11-108 of the Maryland Code's Courts and Judicial Proceedings Article does not conflict with LHWCA's essential purpose, it is preempted in this case as it both materially prejudices maritime law's treatment of noneconomic damages and interferes with maritime law's uniform application because the statute conflicts with maritime law's established way of measuring noneconomic damages, the statute conflicts with the spirit of maritime law by restricting rather than expanding general maritime remedies, and the statute would conflict with the uniform application of the LHWCA.

Submitted by SPB

Tucker v. Cascade Gen. Inc., 2014 U.S. Dist. LEXIS 160265 (D. Or. Nov. 13, 2014).

The United States District Court for the District of Oregon held that the United States breached its turnover duty by not exercising ordinary care in turning over the ship's equipment.

This case involved a stevedore who was injured when a hatch cover fell through a hatch opening and struck him on the head. He brought suit against the United States (the vessel owner) and the vessel operator, for breaching the turnover duty. Testimony at trial indicated that the hatch cover was unusual because it was a custom design and could easily fall through the hatch opening. In addition to its unique design, it was covered in diamond plated aluminum, making it appear much lighter than it was. Testimony established that it was hard to discover that the hatch opening presented a dangerous condition.

The stevedore sued under the Longshore and Harbor Workers Compensation Act (33 U.S.C. § 905(b)) and for breaching the duties articulated in *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981). The statute allows recovery against a vessel owner for personal injuries caused by the negligence of the vessel. From *Scindia*, the turnover duty (one of three articulated) places two responsibilities upon the vessel owner: "First, the owner owes a duty to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that an expert stevedore can carry on stevedoring operations with reasonable safety. Second, the owner owes a duty to warn the stevedore of hazards or dangers which are known to the vessel owner or should have been known to it and are likely to be encountered by the stevedore, but not known to the stevedore. The duty to warn of hidden dangers is narrow and does not include dangers known or anticipated by, or obvious to the longshoremen if reasonably competent in the performance of his work." *Scindia*, 451 US at 167; accord *Delange v. Dutra Constr. Co. Inc.*, 183 F.3d 916, 921 (9th Cir. 1999). The "failure to eliminate an unreasonably dangerous hazard constitutes a breach of the vessel owner's turnover duty of safe condition [and to] determine whether a particular hazard is unreasonably dangerous, a court considers the totality of the circumstances, including whether the hazard was avoidable." *Thomas v. Newton Int'l. Enters*, 42 F.3d 1266, 1270-71 (9th Cir. 1994). However, the turnover duty cannot be avoided simply because the dangerous condition is obvious.

Here, the court held that because of the unique nature of the hatch design within the maritime industry, because a routine examination would not disclose the dangerous nature of the hatch, and because of its deceiving appearance, the hazards of the hatch cover were not obvious and could not easily be avoided. The court concluded there was "ample competent evidence at trial to show the hazard presented by the hatch cover was such that an expert and experienced stevedore would not be able by the reasonable exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property." The United States was held to have breached its turnover duty by not exercising ordinary care in turning over the ship's equipment.

Submitted by JAM

Limitation of Liability

Complaint of Campbell Transp. Co., 2014 U.S. Dist. LEXIS 147290 (W.D. Pa. Oct. 16, 2014).

Petitioner Campbell Transportation Co. ("CTC") brought the action pursuant to the Limitation of Liability Act, 46 U.S.C. § 30501, et seq. ("Limitation Act"), seeking exoneration from or limitation of liability for an incident in which Claimant Raymond Kirich fell onto the gunwale of one of CTC's barges while it was docked and he was engaged in unloading gravel from the barge. Claimant Raymond Kirich was not an employee of CTC at the time of the incident.

Upon filing the Petition, CTC deposited, as security, the fair market value of the barge and provided an affidavit that there was no pending freight at the time of the incident. Under the Limitation Act, a vessel owner may limit its liability to the value of the vessel and any pending freight. Pending freight is defined as the earnings of the voyage at issue.

Claimants asked the court to increase the limitation fund to include the entire value of the Transportation Agreement between CTC and Hanson Aggregates in operation at the time of the incident as pending freight. The Transportation Agreement was in effect for multiple years and Hanson would pay CTC for each barge load transported, which amount would vary depending upon the tonnage of the barge and the origin and destination of the trip. The Transportation Agreement also provided that freight was fully earned when the tow was delivered to its destination. Based upon these facts, the Court found that the Transportation Agreement consisted of separate and distinct voyages, and held that the pending freight must be limited to the particular voyage at issue and not for the entirety of the Transportation Agreement. Because the barge was already docked at the time of the incident and pursuant to the terms of the Transportation Agreement freight was fully earned on delivery, there was thus no pending freight and there was no reason to increase the limitation fund.

Submitted by SPB

Golden Gate Bridge, Highway and Transp. v. Complaint of Golden Gate Bridge, Highway and Transp. Dist., 2014 U.S. Dist. LEXIS 164904 (N.D. Cal. Nov. 24, 2014).

The United States District Court for the Northern District of California granted Plaintiff's petition to lift a default in relation to the filing of a claim in a Limitation action.

This case arose out of a collision between the Golden Gate ferry, operated by the Golden Gate Bridge, Highway and Transportation District (the "District"), and a speedboat. Litigation commenced in a separate suit, brought by the widow of a deceased speedboat passenger, against the owner of the speedboat (who was injured). Shortly after the owner was dismissed from that suit, the District filed this case, seeking exoneration from or limitation of liability under 46 U.S.C. §§ 30501-30512. The court ordered notice of the District's action for exoneration or limitation of liability be given. The time period for filing claims passed and the owner of the speedboat defaulted on his opportunity to file claims against the District.

The instant motion was concerned the speedboat's owner's petition to lift the default. This decision is within a trial court's discretion and this court acknowledged that "admiralty is administered with equity liberality and . . . applying equitable principles, late filing is often permitted." *Tex. Gulf Sulfur Co. v. Blue Stack Towing Co.*, 313 F.2d 359, 362-63 (5th Cir. 1963). In deciding this motion, a court must "consider (1) whether the proceeding is pending and undetermined, (2) whether granting the motion will adversely affect the rights of the parties, and (3) the claimant's reasons for filing late." *Guan v. Deng (In re Deng)*, 2014 U.S. Dist. LEXIS 46997 at *8 (N.D. Cal. Apr. 3, 2014) (internal quotes omitted). Taking into account the fact that (1) the injured owner did not receive actual notice of his opportunity to file a claim because he was no longer party to litigation when the District filed its action (the court discounted the fact that an attorney representing the owner's insurance company was involved by explaining that he was instructed not to pursue additional matters and to solely represent the insurance company), (2) the owner was one of a small number of people suffering injuries from the collision, (3) much of the discovery already taken was relevant to the owner's claim, and (4) the equitable considerations of allowing his claim to proceed outweighed any negative consequences the District might suffer, the court granted the petition to lift default.

Submitted by JAM

Lexington Ins. Co. v. Langei, 2014 U.S. Dist. LEXIS 98179 (W.D. Wash. July 18, 2014).

The United States District Court for the Western District of Washington granted partial summary judgment on a limitation of liability issue but denied summary judgment on a compulsory counterclaim issue.

This case arose out of a harbor fire started by two individuals, which claimed both their yacht and their lives. The port and its insurance company instituted this action against the estates for salvage and remediation costs under various federal and state statutes. The estates argued they were entitled to a right of exoneration or limitation of liability under 46 U.S.C. §§ 30501-30512.

The estates also filed a wrongful death action in state court. The instant motion was brought by the port for partial summary judgment on limitation of liability and compulsory counterclaim grounds.

As to exoneration or limitation of liability, the estates argued their liability could not exceed the post-accident value of the destroyed yacht. *In re Glacier Bay*, 944 F.2d 577, 579 (9th Cir. 1991). However, each of the statutes at issue included an express or implied repeal of the Limitation Act. See e.g., *Puerto Rico v. M/V EMILY S. (In re Met Life Capital Corp.)*, 132 F.3d 818, 822 (1st Cir. 1997) ("the OPA has repealed the Limitation Act as to oil spill pollution claims arising under the OPA."). The court also noted that the contract between decedents and the port did not make limitation under the act possible either. *Mediterranean Shipping Co. S.A. Geneva v. POL-Atl.*, 229 F.3d 397, 403 (2nd Cir. 2000) ("personal contracts entered into by a vessel owner . . . are not subject to limitation under the Act."). The court granted the port's motion for partial summary judgment on limitation of liability, holding that the estates' liability could not be limited to the value of their lost yacht.

As for the state court wrongful death claims, the port argued the claims should have been pled as compulsory counterclaims in this suit, and so should be enjoined in state court. The estates argued that because they had yet to present their wrongful death claims to the port, as required by RCW 4.96.020 (an administrative procedure statute), they were not mature at the time they filed their answers (and so were not compulsory counterclaims). The port countered that sovereign immunity is sometimes waived as to compulsory counterclaims. See e.g., *Competitive Techs. v. Fujitsu Ltd.*, 286 F. Supp. 2d 1118, 1129 (N.D. Cal. 2003). However, the court held that this issue was irrelevant because the compulsory counterclaim statute is concerned with subsequent suits rather than concurrent suits. Furthermore, the court acknowledged that the estates could likely (with leave of the court) file an amended answer, including their counterclaims. Finally, the court noted that to bar the counterclaims in state court would in effect constitute an injunction against that pending litigation, which it could not do. *Seattle Totems Hockey Club Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855 n.5 (9th Cir. 1981) ("a federal court is barred by § 2283 from enjoining a party from proceeding in state court on a claim that should have been pleaded as a compulsory counterclaim in a prior federal suit.").

Though acknowledging the tension between "the general exclusive jurisdiction vested in federal courts to determine a vessel owner's right to exoneration or limitation of liability and the claimants' right to pursue remedies against a vessel owner in State court," the court found that none of the concursus exceptions applied here, and so denied the port's motion for partial summary judgment on the compulsory counterclaim issue.

Submitted by JAM

In re Marquette Transp. Co. Gulf Inland, LLC, 2014 U.S. Dist LEXIS 160420 (Nov. 13, 2014).

Claimant filed a Jones Act action in state court for injuries allegedly sustained while working on a vessel. The vessel owner initiated an action for limitation of liability in federal court, and the court stayed prosecution of the state court action. Claimant then moved to re-set the case as a bifurcated jury trial and sought a jury trial on his Jones Act and general maritime law claims reserving the issue of limitation to be tied to the court sitting in admiralty. The court granted the motion, finding that a bifurcated trial would not interfere with the right to seek limitation or the nature of the proceeding as a concursus.

Submitted by KMM

In re RLB Contracting, Inc., 2014 U.S. App. LEXIS 22727 (5th Cir. Dec. 3, 2014).

On July 1, 2011, RLB Contracting's dredging vessel was involved in a collision with a private fishing vessel. The occupants of the fishing boat were thrown overboard, injuring several of them and killing a minor child. The occupants of the vessel and representative of the deceased passenger contended that the dredge pipe was inadequately marked and that warnings of ongoing operations were not properly posted. Within a few weeks of the accident, counsel for the dredge owner and counsel for the passengers of the fishing vessel began exchanging a series of e-mails and letters regarding the injury. Counsel for the passengers requested information on the accident and inquired about the possibility of pre-suit mediation. Counsel for the passengers advised on June 14, 2012 that he had filed suit in state court against the owner of the dredge vessel.

On December 28, 2012, the owner of the dredge vessel filed a limitation of liability action in federal court and declared that the limit of the vessel was $750,000. The passengers asserted claims in the limitation action and then moved to dismiss it as untimely, contending that RLB had written notice of the claim more than six months before the limitation action was filed. The district court granted the motion to dismiss the limitation action. RLB appealed.

The Fifth Circuit noted that the Limitation of Liability Act required that a petition be filed within six months where a writing communicates the reasonable possibility of a claim and a reasonable possibility that the claim will exceed the value of the vessel. The court then determined that it was not necessary that a single writing communicate this information. Rather, a series of communicates in the aggregate would suffice to put a vessel owner on notice of the need to invoke the Limitation Act.

The court then reviewed the exchanges of correspondence between counsel and agreed that RLB had notice no later than June 14, 2012 that a claim was being asserted because that was the date on which it was notified that suit had been filed against it. The court then agreed that RLB had notice of a reasonable possibility of damages in excess of the vessel's value by June 14, 2012 even though a specific quantum was not noted in the letter. The court noted that the severity of the injuries in this case, including the death of a child, would have a reasonable possibility of exceeding $750,000.

As the petition for limitation was not filed until December 28, 2012, more than six months had elapsed since RLB had notice of the claim that would exceed the value of the vessel. Thus, the Fifth Circuit affirmed dismissal of the petition for limitation.

Submitted by KMM

In re Taira Lynn Limited No. 7, 2014 U.S. Dist. LEXIS 175897 (S.D. Ala. Dec. 22, 2014).

Several vessels filed petitions for limitation of liability after a fire and explosion on the Mobile River. The court set August 21, 2013 as the deadline for parties to file claims in the limitation action. Several claimants filed claims. On December 4, 2014, Andre Files sought leave to file a claim out of time and alleged that he had not previously filed a claim because his injuries were not serious and he was not aware of the deadline to file claims. He later sought medical attention for his injuries and legal advice regarding any claims he might have. He was also deposed in August 2014 about the incident and was accompanied by counsel at the deposition.

The court noted that a claimant seeking to file a late claim need only show "cause" not "good cause" for delay. However, even with a relaxed standard, the court found Files' attempted claim was too late because he was aware of a potential claim when he sought advice of counsel and was deposed in the case. Thus, the court denied Files' motion for leave to file a claim.

Submitted by KMM

Marine Insurance

New York Marine and Gen. Ins. Co. v. Cont'l Cement Co., LLC, 761 F.3d 830 (8th Cir. 2014).

Defendant Continental Cement Company was the owner of the MARK TWAIN, a barge used for transporting cement on the Mississippi River. In 2008, Defendant hired a marine engineer to survey the condition of the barge. The engineer concluded that the MARK TWAIN was in a "deteriorated state," and recommended measures "to prevent progressive flooding." Two years later, Defendant applied for a marine insurance policy from Plaintiff New York Marine and General Insurance Company. The policy's application explicitly instructed the prospective insured to "PLEASE INCLUDE RECENT SURVEYS, IF AVAILABLE." Defendant's application did not attach the 2008 survey, nor did Defendant inform Plaintiff of its existence. Plaintiff subsequently issued Defendant a marine insurance policy for the MARK TWAIN that became effective December 31, 2010.

On February 7, 2011, the MARK TWAIN sank at a dock in St. Louis. In the litigation over the cause of the sinking, Plaintiff became aware, for the first time, of the 2008 survey. Consequently, Plaintiff amended its Complaint to include a count alleging that Defendant breached it duty of utmost good faith, or *uberrimae fidei*, based on Defendants' omission of the 2008 survey. The district court allowed the affirmative defense to go to the jury, instructing them that a violation of an insured's duty of utmost good faith could void

the policy. The jury returned a verdict in favor of the Plaintiff, finding that the Defendant violated its duty of utmost good faith.

On appeal, in addition to raising procedural issues, the Defendant argued that the district court erred by applying the federal maritime doctrine of *uberrimae fidei* instead of Missouri state law.

In its decision, the Eighth Circuit first established that a dispute arising under a marine insurance contract is governed by state law "unless an established federal admiralty rule addresses the issue raised." In turn, the court found that federal admiralty law recognizes the doctrine of *uberrimae fidei* and it means that "a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option." Missouri law, on the other hand, required the additional element of fraud. In support of Defendant's position that Missouri law should apply, Defendant argued that the court should follow *Anh Thi Kieu*, the 1991 Fifth Circuit decision holding that state law applies over the doctrine of *uberrimae fidei* because the latter is "entrenched no more."

In finding for the Plaintiff, the Eighth Circuit declined to follow *Anh Thi Kieu* and held that *uberrimae fidei* is "an established rule of federal maritime law" that applies to marine insurance contracts. In doing so, the Eighth Circuit firmly and explicitly aligned itself with the Second, Third, Ninth, and Eleventh Circuits, leaving the Fifth Circuit as the lone circuit rejecting *uberrimae fidei* in favor of state law. Accordingly, the court upheld the jury's finding that Defendant breached its duty of utmost good faith by failing to notify Plaintiff of the 2008 survey and, in turn, Plaintiff lawfully voided the Defendant's insurance policy for the MARK TWAIN.

Submitted by DJC

Maritime Liens

D&M Carriers LLC v. M/V THOR SPIRIT, 2014 U.S. App. LEXIS 22097 (11th Cir. Nov. 20, 2014).

Defendant Inan Taptik purchased a yacht and arranged with Able Boat Transport to move the yacht over land from Missouri to Florida. Without notifying Taptik, Able Boat contracted with D&M Carriers to handle the transportation. D&M realized that the size of the yacht was larger than initially stated and that the transportation would be more costly. Able Boat and Taptik agreed that the cost of the transportation would increase to $38,000. D&M agreed with Able Boat that it would receive $28,000 plus the costs of any police escorts or other trucks that might be necessary for the transport.

Movement of the yacht was much slower than anticipated due to the yacht's size. The Florida department of transportation refused authority for the yacht to be transported on its highways, and the vessel was delivered by agreement of Taptik and Able Boat to St. Mary's, Georgia. D&M then presented a list of charges to Able Boat in the amount of $85,839.81. Taptik was never involved in any discussions of these extra costs. D&M then filed suit against Taptik and the vessel in rem asserting a maritime lien for providing necessaries to the vessel. The district court dismissed the claims against Taptik because he was not timely served, and then held that D&M was not entitled to a maritime lien against the vessel because it had not provided necessaries to the vessel on the order of the owner or person authorized by the owner. D&M appealed this ruling.

D&M initially asserted that Able Boat had represented itself as the yacht's master, but the Eleventh Circuit rejected this argument as not having been presented in the district court. The sole issue on appeal then turned on whether Able Boat was Taptik's agent and had authorized D&M's expenses. The court found that Taptik never authorized D&M to transport the vessel or provide the yacht with necessaries beyond the costs agreed upon with Able Boat. The court further agreed with the district court's finding that Taptik did not have an agent authorized to work on his behalf. Able Boat was given neither express nor implied authority to act as Taptik's agent, and D&M had no reason to believe that anyone had authority to approve the additional expenses.

Submitted by KMM

Practice and Procedure

Giganti v. Polsteam Shipping Co., 2015 U.S. App. LEXIS 172 (2d Cir. Jan. 7, 2015).

Plaintiff's negligence claim against defendant, as owner pro hac vice of a vessel, brought pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA") was dismissed by the district court as

plaintiff failed to raise a material question of fact as to whether the defendant breached its duty to intervene. Plaintiff-Appellant argued on appeal that there was a genuine issue of material fact regarding whether defendant-appellee had a duty to intervene to remedy a slippery condition caused by the mixture of sugar and water.

The appeals court noted that under Scindia, a vessel owner has a duty to intervene if it acquires actual knowledge that a condition on a vessel poses an unreasonable risk of harm. The Court further noted that certain conditions that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could work around them. Because there was no question of fact that a stevedore experienced in unloading sugar would be aware that sugar regularly falls on deck during offloading and that sugar mixed with water is slippery, the Second Circuit affirmed the holding of the district court.

Submitted by SPB

Removal

Bartel v. American Export Isbrandtsen, 2014 U.S. Dist. LEXIS 168777 (M.D. La. Nov. 6, 2014);

Harbor Docking & Towing Co., LLC v. Rolls Royce Marine N. Am., 2014 U.S. Dist. LEXIS 162102 (W.D. La. Nov. 19, 2014);

Harrold v. Liberty Ins. Underwriters, 2014 U.S. Dist. LEXIS 158320 (M.D. La. Nov. 6, 2014);

Parker v. US Environmental Svcs, LLC, 2014 U.S. Dist. LEXIS 175866 (U.S. Dist. S.D. Tex. Dec. 19, 2014);

Rutherford v. Breathwhite Marine Contractors, Ltd., 2014 U.S. Dist. LEXIS 162416 (S.D. Tex. Nov. 12, 2014);

Serigny v. Chevron U.S.A., Inc., 2014 U.S. Dist. LEXIS 170728 (W.D. La. Nov. 10, 2014); and

Yavorsky v. Felice Navigation, Inc., 2014 U.S. Dist. LEXIS 158039 (E.D. La. Nov. 7, 2014).

These cases all present the issue of whether the 2011 revisions of the removal statute, 28 U.S.C. § 1441, permitted the removal of cases to federal court where the sole basis for subject matter jurisdiction is that the cases fall with the court's admiralty jurisdiction. In other words, none of these cases presented a federal question or had parties with diverse citizenship.

Before 2011, Section 1441(b) provided that a case could be removed to federal court where there was no diversity of citizenship only if it was a civil action "founded on a claim or right under the Constitution, treaties or laws of the United States." Further, "any other such action" was removable only if none of the defendants was a citizen of the state in which the case was filed. Courts had long held that cases within a federal court's admiralty jurisdiction did not arise under the Constitution or laws of the United States and could not be removed absent an independent basis of federal subject matter jurisdiction.

The 2011 amendments deleted the references to cases arising "under the Constitution, treaties or laws of the United States" and the reference to "any other such action." Defendants began removing cases falling under a federal court's admiralty jurisdiction asserting that the deletion of this language made maritime claims removable because there was no longer any bar to removal of "any other such actions" where the defendant was a citizen of the forum state.

These courts all concluded that the actions were not removable under the long-standing rule that cases filed in state court under the savings to suitors clause were not removable absent an independent basis for federal jurisdiction. Notwithstanding the amendments to Section 1441, these courts found that removal was precluded by the savings to suitors clause in 28 U.S.C. § 1333. The courts noted generally that removal of actions under the court's admiralty jurisdiction would deprive plaintiffs of their rights to a jury trial in state court under the savings to suitors clause. These cases are some of a growing list of cases remanding actions removed based on the amendments to Section 1441.

There is a split of authority in the Fifth Circuit's district courts with some decisions holding that removal was proper, although the current trend is in favor of remand. To date, the Fifth Circuit has not opined on this issue.

Submitted by KMM

Unterberg v. ExxonMobil Corp., 2014 U.S. Dist. LEXIS 94009 (D. Haw. July 10, 2014).

The United States District Court for the District of Hawaii granted Plaintiffs' motion to remand the case back to state court.

This case was brought by the estate of a deceased mariner and his surviving spouse against Mobil Shipping and Transportation Company alleging negligence, loss of consortium, strict liability, violations of the Jones Act, and general maritime law. Plaintiffs alleged that the malignant mesothelioma and other asbestos related diseases that befell the decedent were developed as a result of his exposure to asbestos while working on ships for defendant. The case was initially filed in state court but was removed on diversity and maritime jurisdiction, under 28 U.S.C. § 1333. The instant motion was for reconsideration of the magistrate judge's grant of remand, under the argument that (despite diversity) a Jones Act claim cannot be removed.

Here, the court began by noting that under *Louis v. Louis & Clark Marine Inc.*, 531 US 438, 455 (2001), 28 U.S.C. § 1445 prevents removal of Jones Act claims filed in state court. In response, Mobil argued that removal was proper under Plaintiff's invocation of general maritime law (implicating 28 U.S.C. § 1333) and that the Jones Act claims were fraudulently pled.

First, the court rejected the argument that the 2011 amendments to section 1441(b) rendered the case removable under the original jurisdiction of the federal courts to hear maritime cases. Furthermore, it held that even though some courts have held the opposite, the question was irrelevant because the Jones Act claim is still not removable under *Louis*. See also *Freeman v. Phillips 66 Co.*, 2014 U.S. Dist. LEXIS 48357 (E.D. La. Apr. 8, 2014); *Rawles v. Phillips 66 Co.*, 2014 U.S. Dist. LEXIS 66962 (E.D. La. May 15, 2014) ("the court need not decide the issue because the court finds that the presence of a Jones Act claim in this case precludes removal.").

Second, regarding fraudulent pleading, the court noted that "a claim is fraudulently pleaded when there is no possibility that the plaintiff will be able to establish a cause of action." *Carrigan v. M/V AMC Ambassador*, 2014 U.S. Dist. LEXIS 12484 (S.D. Tex. Jan. 31, 2014). To make this determination "courts may look beyond the allegations of the pleadings and examine any proffered evidence." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 313, 318 (9th Cir. 1998). Furthermore, "the removal statutes are strictly construed, and any doubt about the right or removal requires resolution in favor of remand." *Moore-Thomas v. Alaska Airlines Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009). The court held that the complaint contained a viable Jones Act claim because it alleged that (1) plaintiff was a seaman acting within the scope of his employment and (2) employed in some manner by Mobil. The court also rejected Mobil's choice-of-law argument that the United States had an insufficient interest to warrant application of the Jones Act. See e.g., *Lauritzen v. Larson*, 345 U.S. 571 (1953). Finally, the court held that 28 U.S.C. § 1441(c) did not provide for severance of the Jones Act claim and thus granted Plaintiffs' motion to remand the case back to state court.

Submitted by JAM

Seamen

Coffin v. Blessey Marine Services, Inc., 771 F.3d 276 (5th Cir. 2014).

Plaintiffs were tankermen that were part of a crew that worked on defendant's vessels for 20-day hitches working two six-hour shifts each day. Defendant's tow boats would push tank barges to ship liquid cargo in inland and ocean waters. The crew consisted of a wheelman, a pilot, tankermen, and deckhands. The parties agreed that most of the work was considered seaman's work and that the tankermen were involved in the loading and unloading of the vessels under tow. Plaintiffs contended that the loading and unloading of the vessel was not seaman's work. They worked 84 hours per day during a 7-day period and were paid a flat daily sum with no overtime.

Plaintiffs brought suit under the Fair Labor Standards Act ("FLSA") seeking overtime pay and alleged that they were not "seamen" within the meaning of the statute because seamen are excluded from coverage under the FLSA. The plaintiffs argued that the Fifth Circuit's decision in *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001) settled their claim as a matter of law because *Owens* held that individuals involved in loading and unloading a vessel were not doing seaman's work under the FLSA. The district court agreed and denied defendant's motion for summary judgment. The defendant then sought an interlocutory appeal.

The Fifth Circuit considered whether its holding in *Owens* applied to vessel-based tankermen involved in the loading and unloading of a vessel. The court concluded that *Owens* should not be read so broadly. Repeatedly noting that the FLSA and accompany

regulations did not offer a fixed definition of "seaman," the court concluded that the employee's duties must be evaluated based on the character of the work performed and not what the work is called. The plaintiffs in *Owens* were land-based and not assigned to a particular vessel for the time period during which overtime was sought. The court further observed that *Owens* clarified that those involved in loading and unloading were not "generally speaking" seamen, but this was not a categorical rule. The court then concluded that vessel-based barge workers were seamen and exempt under the FLSA. It noted that plaintiffs ate, slept, lived, and worked aboard defendant's towboats and worked at the direction of its captain. Their work loading and unloading vessels was integrated with their other duties that furthered the navigation of the vessel. Thus, the court reversed the district court's denial of defendant's motion for summary judgment and remanded the matter for entry of judgment in defendant's favor.

Submitted by KMM

Shoemaker v. Estis Well Svcs., L.L.C., 2014 U.S. Dist. LEXIS 170332 (E.D. La. Dec. 9, 2014).

Plaintiff brought suit on behalf of her son, an alleged interdict, to recover for injuries sustained while working as a seaman on defendant's inland drill barge. Her son previously filed an action for injuries and proceeded *pro se*. He settled his action with the defendant. Thereafter, he was interdicted and declared incapable of caring for himself. Plaintiff was appointed as his curatrix. Plaintiff alleged that her son's release was invalid because he was acting without legal or medical advice and that he lacked the mental capacity necessary to enter into a settlement. Defendant moved to dismiss the lawsuit as barred by *res judicata* based on the settlement of the previous action.

The court concluded that defendant established that *res judicata* could bar the plaintiff's action because her son settled his previous claims against defendant. It then considered whether plaintiff alleged sufficient facts that the settlement was invalid and would act as a defense to a claim of *res judicata*. The court concluded that a plaintiff could file a subsequent action challenging the validity of a settlement agreement and was not required to file a Rule 60(b) motion for relief from a previous order of dismissal in the son's initially filed action. The court further concluded that, if a seaman challenged the validity of a settlement, the court should hold a hearing to determine whether the settlement was valid and that the burden was on defendant to demonstrate the settlement's validity. The court found the plaintiff in this case raised sufficient facts to challenge the validity of the settlement and denied defendant's motion to dismiss.

Submitted by KMM

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The Matthew Shardlake Mysteries, Vols. 1-6, C. J. Sansome; Paperbacks, Maps; Penguin Books USA / Random House, New York, 2003 - 2014.

By F. L. Wiswall, Jr.

These are novels of a very unusual kind. The hero and storyteller is a barrister in Tudor England; he is unhappily hunchbacked – a handicap for which he is often openly insulted, as those suffering from this debility were in those times popularly held to be progenitors of bad luck. Matthew Shardlake is a member of Lincoln's Inn and through the success of his practice chiefly in property law has bought an abutting house in Chancery Lane.[1]

Shardlake was a strong Reformist of the School of Erasmus[2] and had a close acquaintance in the course of his legal education with another Reformer, Thomas Cromwell – who became a close associate of Cardinal Wolsey and ultimately Henry VIII's chief minister known as the 'enforcer' of the Henrician Reformation.[3] Cromwell over time sent a number of legal matters to Shardlake but the first of the novels, *Dissolution*, is centered upon the closure of the Monasteries following Henry's departure from the Roman church and his establishment as *Supreme Head of the Church of England.* At Scarnsea Monastery in the south of England, the King's Commissioner over this dissolution has been murdered; Cromwell instructs Shardlake to go south and find the murderer as well as completing the task of dissolving Scarnsea. The portrait of the Monasteries at this time is remarkable and the way in which Shardlake investigates tempts us into further adventures.

The second book is *Dark Fire* and again Cromwell as the Earl of Essex at the edge of his downfall sends Shardlake to unearth the formula of a terrible weapon that Henry might use against his foreign enemies. The weapon does exist, but in finding it there are a number of murders to be investigated and Shardlake is in great danger. In the course of his inquiries, the Chancellor of the Court of Augmentations – the body disposing of the assets of the Monasteries – became a serious and lifelong enemy; this was Lord Richard Rich, better remembered for the perjured testimony he gave at the trials of Thomas More and Bishop John Fisher resulting in their deaths. In this book the descriptions of London are vivid and the final result as to the *Dark Fire* shows Shardlake as a statesman as well as a lawyer.

Next comes *Sovereign*, set in 1541 at the time of Henry VIII's "Progress to the North" – a huge parade of thousands of courtiers, soldiers and their retainers from London to York, both for the purpose of intimidating the populace who largely remained true to the Roman church and had mounted a strong rebellion until put down with great force. In the course of this Shardlake is sent by Archbishop Thomas Cranmer ostensibly to assist with the review and presentation of Petitions for Justice to the King, but secretly to oversee the safe passage of one of the rebels from York to the Tower of London. The rebel held and refused to divulge a secret against the King such that it could not be confided to Shardlake. A murder near York Minster begins to divulge what the secret may be, involving the legitimacy

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[1] That area of London is familiar to many lawyers and scholars from common law countries, as it was the former site of the Public Record Office. The old Gateway to Lincoln's Inn, now at the rear of the Royal Courts of Law, is the home of Wildy & Sons Ltd, the world's foremost seller of used and antiquarian lawbooks (www.wildy.com).

[2] Erasmus of Rotterdam (Desiderius Erasmus Roterodamus) came to Cambridge and resided at Queen's College; he was Lady Margaret's Professor of Divinity (1510-15). He remained Roman and espoused the doctrine of free will. Erasmus distanced himself from Luther and Melanchthon – particularly in their insistence on faith alone as essential to salvation – but strongly called for correction of abuses by Bishops and clergy within the Church. He greatly influenced Henry VIII, Thomas Cranmer, John Fisher and Thomas More, among other principal figures.

[3] I should confess an additional reason for reading the *Shardlake Series.* Though I never studied with him, during my academic researches at Clare College, I became a lifelong close friend of one Fellow, Sir Geoffrey Elton, Regius Professor of Modern History at Cambridge and now generally acknowledged to be the greatest English historian of the 20th Century. His most famous book is *The Tudor Revolution in Government* in which he established forcefully that Thomas Cromwell was the author of a modern, bureaucratic government that replaced the medieval, Royal household-based government. Though all did not accept his complete evaluation of Cromwell, this work has now changed the view of Henry VIII's rule. Our youngest grandson is named Geoffrey Elton Wiswall.

of the Crown.[4] Shardlake is nearly murdered himself, and through perjury procured by Richard Rich is committed to the Tower before being rescued by Cranmer.

By *Revelation* Shardlake has been appointed by Cranmer as a counsel on behalf of the indigent and infirm in the Court of Requests – essentially a court of claims. This position elevates Shardlake to the status of 'Serjeant at Law' the highest honor of the order of the bar until it was disbanded and succeeded by the status of Queen's Counsel. He swears to investigate the murder of a member of Lincoln's Inn, but this draws him – despite his determination to avoid 'political work' – to accept appointment by Archbishop Cranmer to investigate a gruesome series of murders that are critical to the still uneasy balance between Roman and Reformist sympathies, the latter being threatened in a purge being planned by Bishops Gardiner of Winchester and Bonner of London. By this time Henry VIII has had his fifth wife imprisoned pending execution and is courting Catherine Parr, a Reformist; inevitably, Shardlake becomes involved. The ardent Reformism of Shardlake's younger years has been tempered by exposure to the relentless and dangerous jousting of the religious factions, and now he begins to be plagued by unbelief.

In *Heartstone*, by 1545 Henry VIII's attempted assault on France has failed, and in mounting this war he has driven the English economy to ruin. In secret Queen Catherine is asked to investigate serious claims against a young ward of the Royal Court, which are already related to a murder. This takes Shardlake to Portsmouth, where matters of the situation of the Navy become material. An old friend and an old enemy of his now figure in the puzzle. The culmination centers upon Henry's great warship, the *Mary Rose.*

Finally in the just-published *Lamentation*, Henry VIII is in his last illness and the Reformist and Roman factions become engaged in the power struggle over Government and Church. Avowed reformists are being burned at the stake and Bishops Gardiner and Bonner concentrate their fire upon Queen Catherine, who has written a booklet in which she vehemently laments the Romanists and asserts her own bold Reformist views. This hidden work has been stolen from her, and she asks Shardlake to recover it. If the book emerges publicly many Reformists will die and probably the Queen herself will be condemned. Following a trail of murders Shardlake becomes involved once more in Court politics and discovers that his most dangerous enemies can be those whose religious views shift according to the political winds.[5]

Christopher John Sansome was born and raised in Edinburgh and is half English/half Scots. He earned a B.A. and then Ph.D. in history at the University of Birmingham, but put aside the academic life to become a solicitor. He practiced in Sussex, chiefly representing the underprivileged in legal aid; it is easy to see how this has informed the character of Matthew Shardlake. Sansome left practice to become a full-time author, and Shardlake as a barrister gives him access to the well-connected in addition to that great majority of population in Tudor England, the farmers and manual workers. In addition there were the displaced monks and civil employees from the dissolved Monasteries, many of whom became indigent. The Shardlake mysteries benefit from Sansome's unquestionable talent as a historian, and the hero with his access to all the strata of Tudor society and their troubles as to crime (chiefly murder) as well as their legal problems. When *Dissolution* was published in 2003 it attracted much critical praise and several awards, but perhaps the most telling was the strong endorsement by P. D. James, who remained a Shardlake fan for the rest of her life.

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[4] It is fact that the rumor of this secret was abroad during the life of Henry VIII, having to do with the legitimacy of later heirs of Edward III and relying in part on the efforts of a generation previous to that of Henry VII to prove the legitimacy of Richard III. Sansome wrote this novel years before the 2012 discovery of the remains of Richard III under a parking lot in Leicester; ironically, the examination of Richard III's DNA compared with known descendants of Edward III has now shown that Richard was descended from a 'male interloper' and therefore not legitimately entitled to the Crown.

[5] It is impossible to resist reference to Andrew Perne (1514-89), five times Vice-Chancellor of the University of Cambridge and Dean of Ely Cathedral. As Vice-Chancellor he had a weathervane erected on St. Peter's Church with his initials "A" and "P" on the vanes, and he changed religious identification so often during the Tudor Era that it was said the vane named him "**A** protestant" or "a **P**apist" depending upon the controlling faction. University wits, it was said, translated "*perno*" by "I turn, I rat, I change often." In 1548 the Reformist Edward VI made Perne a Royal Chaplain and Canon of Windsor, and at that time European Reformists Martin Bucer and Paul Fagius lived, taught and died at Cambridge. Under Queen Mary Tudor's counter-Reformation in 1556, Perne preached the sermon at the University Church prior to the disinterred corpses of Bucer and Fagius being publicly burnt at the stake for heresy.

Among the many reviews of the Shardlake series there is a detailed law review article examining the professional and ethical conflicts and choices that Shardlake is presented with, coming to the conclusion that our modern Canons of Ethics might not give him much assistance.[6] It is a very good reason for lawyers to read these adventures of the 16th Century, and to ponder how we might have acted ourselves in the 21st.

There is one more real reason to read Sansome's works. For years I have told my students for whom English is not their first language to read the Jack Aubrey books of Patrick O'Brien, not only because of the use of seafaring terms but principally the instruction they give in exquisite use of English. The Shardlake mysteries are an equal – it is simply beautiful writing.

*****

F. L. Wiswall, Jr., J.D. (Cornell); Ph.D.jur. (Cambridge); Fellow of the Royal Historical Society and contributor to the Oxford Encyclopedia of Maritime History; Professor at the IMO International Maritime Law Institute.

[6] *Professionalism and Matthew Shardlake*, 59 UCLA L. Rev. 86 (2011). Alex B. Long, University of Tennessee College of Law.

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